



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CIVIL SUIT NO. 3 OF 2020

SICHUAN HUASHI ENTERPRISES

CORPORATION (EAST AFRICA) LIMITED.....PLAINTIFF

VERSUS

CAPITAL REALTY LIMITED.....DEFENDANT

JACINTA MUTHONI MACHUA.....1ST INTERESTED PARTY

AGNES WANGECHI.....2ND INTERESTED PARTY

RULING

1. By a plaint dated 27th January, 2020, the Plaintiff herein seeks judgement against the Defendant for Kshs 82,902.31 with agreed interest at the rate of 18.5% per annum amounting to Kshs 75,406,824.44 for the period up to 31st January, 2020 and additional interest at the rate of 18.5% per annum up to the date of judgement, costs and interests on the first three items above at court rate.
2. According to the Plaintiff, it entered into an agreement with the Defendant in which the Plaintiff was to construct 76 Maisonettes at the agreed cost of Kshs 378,000,000.00 in Mavoko, within Machakos County. Upon the completion of the said construction the parties executed an "Accord and Satisfaction Agreement" dated 6th May, 2015 whose purpose was to declare the final accounts and modalities of payment of the amounts outstanding under the earlier contract and as per the contract dated 6th May, 2015 the parties agreed that the amount owed to the Contractor was Kshs 82,902,601.31 plus additional interest at the rate of 18.5% per annum from 1st March, 2015 till payment in full. As security for the payment of the agreed sum, the Plaintiff was to continue holding possession of 8 of the houses and the particulars of the retained units were set out in the plaint. According to the Plaintiff, in the event of default in paying the sum owed, the Plaintiff was entitled to have the retained units transferred to itself.
3. By a Variation Agreement dated 28th March, 2016, the parties agreed to replace one of the said units and relying on the said agreements, the Defendant having defaulted in its obligations to pay the amounts owed to the Plaintiff, the Plaintiff exercised its legal right to have legal title over the retained units and entered into legal relations with other parties in form of sale and lease in respect of the retained units, particulars of which were stated. However, it came to the Plaintiff's knowledge that the Defendant's title over the property was encumbered by a charge registered in favour of Housing Finance Company of Kenya Limited, a facility which the Defendant defaulted in repaying and the process of exercising statutory power of sale was initiated by the said HFCK which process include the retained units.
4. The Defendant was therefore accused of fraudulent misrepresentation that it had legal rights to pledge and transfer the retained units to the Plaintiff. According to the Plaintiff, the Defendant breached the Accord and Settlement Agreement dated 6th May, 2015 hence the claim herein.
5. Based on an affidavit of service dated 28th February, 2020 and filed herein on 3rd March, 2010 the Plaintiff by Request for Judgement dated 3rd March, 2020 expressed to be brought pursuant to Order 10 rule 4 *Civil Procedure Rules*, sought for entry of interlocutory judgement for Kshs 158, 309,425.75 with interest at court rates and costs.
6. However, on 18th February, 2010 and 10h March, 2020, the Interested Parties and the Defendant entered appearance in this suit.
7. According to the Plaintiff the Deputy Registrar however declined the request aforesaid and advised the Plaintiff to set the suit down for formal proof. The Plaintiff challenged that directive opining that since its claim was liquidated, the request for judgement ought to have been allowed.

8. In its submissions the Plaintiff relied on the case of Cimbria East Africa Limited vs. Kenya Power & Lighting Company Ltd [2017] eKLR.

Determination

9. I have considered the issues raised herein.

10. Entry of default judgements is provided for under Order 10 rules 4, 5, 6 and 7 of the *Civil Procedure Rules* as hereunder:

4. (1) Where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.

(2) Where the plaintiff makes a liquidated demand together with some other claim, and the defendant fails, or all the defendants fail, to appear as aforesaid, the Court shall, on request in Form No. 13 of Appendix A, enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim.

5. Where the plaintiff makes a liquidated demand with or without some other claim, and there are several defendants of whom one or more appear and any other fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against any defendant failing to appear in accordance with rule 4, and execution may issue upon such judgment and decree without prejudice to the plaintiff's right to proceed with the action against such as have appeared.

6. Where the plaintiff is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be.

7. Where the plaintiff is drawn as mentioned in rule 6 and there are several defendants of whom one or more appear and any other fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against the defendant failing to appear, and the damages or the value of the goods and the damages, as the case may be, shall be assessed at the same time as the hearing of the suit against the other defendants, unless the court otherwise orders.

11. From the foregoing it is clear that a final judgement can be entered where the suit is for a liquidated demand only. In Charles Mwalia vs. The Kenya Bureau of Standards [2001] 1 EA 151, Ringera, J (as he then was) held that:

“A liquidated demand is in the nature of a debt, a specific sum of money due and payable under or by virtue of a contract. Its amount must either be ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money, even though it be specific or named as a definite figure requires investigation beyond mere calculations, then the sum is not a “debt or liquidated demand”, but constitutes “damages”...The words “debt or liquidated demand” do not extend to unliquidated damages, whether in tort or contract, even though the amount of such damages be named as a definite figure.”

12. In J C Eksteen vs. Kutusi S/O Bukua [1951] LRK 90 it was held that:

“For an action to constitute a liquidated demand it is sufficient that it should state the amount demanded and give sufficient particulars of the contract to disclose its nature.”

13. In this case, the Plaintiff claims that following the performance of its part of the Construction Agreement, it entered into an “Accord and Satisfaction Agreement” dated 6th May, 2015 in which the parties agreed that the amount owed to the Plaintiff was Kshs 82,902,601.31 plus additional interest at the rate of 18.5% per annum from 1st March, 2015 till payment in full. In this case what is being claimed is Kshs 82,902.31 with agreed interest at the rate of 18.5% per annum which according to the Plaintiff amounts to Kshs 75,406,824.44 for the period up to 31st January, 2020 and additional interest at the rate of 18.5% per annum up to the date of judgement, costs and interests on the first three items above at court rate.

14. In Cimbria East Africa Limited vs. Kenya Power & Lighting Company Ltd [2017] eKLR, Ochieng, J stated as follows:

“Black’s Law Dictionary defines Liquidated Claim thus;

‘1.A claim for an amount previously agreed upon by the parties or that can be precisely determined by operation of Law or by the terms of the parties agreement.

2.A claim that was determined in a judicial proceeding’.

25. Meanwhile, Halsbury’s Laws of England, 4th Edition Vol. 12, at paragraph 1109 says;

‘...In every case where the court has to quantify or assess the damages or loss, whether pecuniary or non-pecuniary the damages are unliquidated’.

Nonetheless, it is to be noted that;

‘A claim does not become a liquidated demand simply because it has been quantified. To qualify as liquidated demand, the amount must be shown to be either already ascertained or capable of being ascertained as a mere matter of arithmetic.’

I adopt the following definition of a debt or liquidated demand from THE SUPREME COURT PRACTICE (1985) VOLUME 1, at page 33;

‘A liquidated demand is in the nature of a debt, i.e a specific sum of money due and payable under or by virtue of a contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation beyond mere calculation, then the sum is not a ‘debt or liquidated demand’ but constitutes ‘damages’...’

The words ‘debt’ or ‘liquidated demand’ do not extend to unliquidated damages, whether in tort or in contract, even though the amount of such damages be named at a definite figure. Per Ringera J. (as he then was) in TRUST BANK LIMITED Vs ANGLO AFRICAN PROPERTY HOLDINGS LIMITED & 2 OTHERS HCCC No. 2118 of 2000.’

15. To my mind the Plaintiff’s claim against the Defendant is in the nature of a debt, a specific sum of money due and payable under or by virtue of a contract and the amount claimed is either ascertained or capable of being ascertained as a mere matter of arithmetic. It is a specific sum of money which does not require any further step to be taken in order to ascertain the sum due save for the calculation. In my view what is before the court is a liquidated demand and final judgement can be entered in default of appearance or defence. In fact, in that event the entry of interlocutory judgement would be erroneous. That was the position in **Coach Safaris Ltd. vs. Gusii Deluxe Ltd. Civil Appeal No. 117 of 1996** where the Court of Appeal held that formal proof is unnecessary in liquidated claims where ex-parte judgement has been entered and the formal proof, if carried out, is a nullity.

16. Accordingly, I direct that judgement be entered for the Plaintiff against the Defendant in the sum of Kshs 82,902,601.31 plus additional interest at the rate of 18.5% per annum from 1st March, 2015 till payment in full. The said sum will also accrue interest at court rate from the date of filing this suit till payment in full. The costs are awarded to the Plaintiff against the Defendant.

17. It is so ordered.

Read, signed and delivered in open Court at Machakos this 19th day of November, 2020

G V ODUNGA

JUDGE

Delivered the presence of:

Mr Carrey Francis for the Plaintiff/Applicant

CA Geoffrey