



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 811 OF 1996

COMHARD LIMITED.....PLAINTIFF

VERSUS

NZOIA SUGAR COMPANY LIMITED.....DEFENDANT

DONNIE ESHITEM.....THIRD PARTY

PARTIAL JUDGMENT

1. The claim by Comhard Limited (Comhard or the Plaintiff) is for recovery of money in respect of goods allegedly sold, supplied and delivered to Nzoia Sugar Company (Nzoia or the defendant) but which remains unpaid. As will be apparent shortly the more vexing question may turn out to be whether the commercial rate of interest claimed by Comhard is payable.

2. Counsel for the parties herein agreed that, because a substantial portion of the dispute involves the taking of accounts, that aspect shall be submitted to an accountant who would have the requisite skill and knowledge to determine the accounts. The task of the Court is to resolve the legal aspects that have emerged.

3. The Plaintiff's claim is comprised in the Amended Plaint dated 29th April 2010 and filed on the same day. Comhard seeks a principal sum of 2,216,609.10 together with interest of 7,771,537.94 on the unpaid balance as at 31st March 1996 at a rate of 3% per month compounded. Comhard stakes for further interest on the aggregate sum at the same rate of 3% per month compounded from the date of filing suit until full payment.

4. Nzoia which had filed a Statement of Defence on 7th May 1996 also filed a Defence to Amended Plaint on 11th May 2010. Nzoia takes both to constitute its pleadings, and I agree. Indeed, in framing the issues for this Court's determination, Comhard itself recognized issues raised in both pleadings.

5. In a sum, the Defence to the claim is that the goods whose payment is sought were not supplied. Second, the suit was barred by the provisions of the Limitation of Actions Act. Further, that the agreement for the supply of goods and charge of interest was illegal, null and void for breach of the Articles of Association of Nzoia and the State Corporations Act (Chapter 446 of the Laws of Kenya). That in any event the price and/or interest is exaggerated and unconscionable.

6. The questions of law arising for determination are:-

(a) Is this suit time barred?

(b) Was there an agreement to charge interest and if so, is the agreement legal and enforceable?

Is suit time barred?

7. The claim against Nzoia is one in contract and in that regard section 4(1) of the Limitation of Actions Act (Chapter 22 Laws of Kenya) prescribes the period of limitation as follows:-

“Actions of contract and tort and certain other actions

(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—

(a) actions founded on contract;

(b) actions to enforce a recognizance;

(c) actions to enforce an award;

(d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;

(e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.

8. This suit was filed on 1st April 1996 and is in respect of goods allegedly supplied after 31st March 1993. The suit was filed just over 3 years after the cause of action could possibly have accrued. That period is well within the 6 years limit prescribed by Section 4(1) of the Limitation of Actions Act. This suit is not barred by limitation.

An agreement on interest?

9. The Plaintiff's charge on interest is premised upon an agreement said to have been entered by the parties on 3rd March 1993 which reads:-

The Managing Director, 3rd March, 1993

Nzoia Sugar Company Limited,

P. O. Box 285,

BUNGOMA.

Dear Sir,

Ref: CREDIT FACILITIES FOR MATERIAL FOR MAINTENANCE

We refer to the discussions held between you and the under signed whereby we have agreed to give you goods on credit to the tune of Kenya Shillings twelve million only (12,000,000). The payment for this amount must be made in the following manner. Monthly payments of Kenya Shillings One Million five hundred thousand (1,500,000) per month to be payable from the 30th of June, 1993 until paid in full. We will allow you a maximum default grace period of Fifteen days (15 days) from the end of each month. In case of any default in any of the payments not meeting with the above said terms of payment we will charge you Three percent (3%) Interest per month until such time that the account is settled in full.

We trust that the above mention terms are acceptable to you and we would be grateful if you will please sign the copy of the attached letter for confirmation of the same.

Thanking you for your co-operation.

We remain

Yours faithfully, Terms accepted

COMHARD LIMITED NZOIA SUGAR COMPANY LIMITED

(HIREN PATEL) (MR. DONNIE ESETEMI)

MANAGING DIRECTOR MANAGING DIRECTOR

10. Nzoia faults this agreement as being an affront to its Articles of Association and as a contravention of Section 11 of the State Corporations Act. In respect to the contention that the contract was entered contrary to the Articles of Association of the Company, no evidence was led at all. I take it that this line defence was abandoned altogether.

11. Turning to the other, Section 11 of the State Corporations Act reads:-

“Annual estimates;

(1) Every state corporation shall cause to be prepared and shall, not later than the end of February in every year, submit to the Minister and to the Treasury for approval, estimates of the state corporation's revenue and expenditure for the following financial year accompanied by proposals for funding all projects to be undertaken by the state corporation, or the implementation of which

will continue during the financial year to which those estimates relate.

(2) No annual estimates and proposals for funding projects shall be implemented until they have been approved by the Minister with the concurrence of the Treasury.”

12. The person who signed the contract on behalf of Nzoia was one Donnie Esetemi. In the agreement he is named as the Managing Director of Nzoia. The submission by Nzoia is that no evidence was produced to show that Esetemi obtained the ministerial approval for the credit he sought from the Comhard. That at any rate the agreement must have been illegal or a private arrangement given that it was in fact on the letterhead of Nzoia.

13. No doubt, Nzoia is a state corporation and public funds would be at stake. It incumbent upon all, and no less the Court, to protect public funds against plunder. In this regard Statute sometimes places responsibility on a party intending to contract with a state corporation to play its role in ensuring compliance with the law. For example, Section 27 of the repealed Public Procurement and Disposals Act 2005, in mandatory fashion, required contractors, suppliers and consultants to comply with the provisions of that statute in much the same way as the procuring entity.

14. Where the law places such duty on a third party, then the third party cannot benefit from a contract if the law has been flouted in the process leading to the contract in circumstances which it knew or ought to have known of the breach. In this regard, this Court has, in **Royal Media Services v Independent Electoral & Boundaries Commission & 3 others** [2019]eKLR, observed;

45. This Court very much doubts that a Contractor can, in all circumstances, benefit from such a proposition when it comes to public procurement matters. In this regard the force of Section 27 of the Act is not to be taken lightly. It provides;-

“(1) A public entity shall ensure that this Act, the regulations and any directions of the Authority are complied with respect to each of its procurements.

(2) The accounting officer of a public entity shall be primarily responsible for ensuring that the public entity fulfils its obligations under subsection (1).

(3) Each employee of a public entity and each member of a board or committee of the public entity shall ensure, within the areas of responsibility of the employee or member, that this Act, the regulations and any directions of the Authority are complied with.

(4) Contractors, suppliers and consultants shall comply with all the provisions of this Act and the regulations.

(5) The accounting officer may use the procurement unit and tender committee of another procuring entity which shall carry out the procurement in accordance with this Act and the regulations.

(6) The Authority shall have power to transfer the procuring responsibility of a procuring entity to another procuring entity or procuring agent in the event of delay or in such other instances as may be prescribed”.

(my emphasis)

It is the duty of the Contractor as it is of the procuring entity to observe the provisions of Statute and the Regulations thereunder. Section 27 imposes an unequivocal responsibility on any contractor, supplier or consultant intending to supply goods or services to a public entity to comply with all the provisions of the Act and the Regulations. This duty, in my view, extends to the Contractor making due enquiries as to whether the procuring entity has complied with its side of the law and declining to enter into a contract which is procured in apparent disregard of the law. For that reason a contractor or supplier cannot find refuge in the argument that compliance was an internal matter of the public entity when s[he] has not done enough to enquire about compliance or s[he] is herself or himself guilty of infringement.

15. This Court has given regard to the provisions of Section 11 of the State Corporation Act and is unable to see any obligation placed on a third party such as the Plaintiff to satisfy itself that a person who was undoubtedly the Managing Director of Nzoia had the ministerial sanction to enter into the credit arrangement.

16. That notwithstanding, the Agreement on interest faces another challenge. The Agreement of 3rd March, 1993 imposes a charge of interest at 3% per month in the event of default. The interest therefore works to a charge of 36% per annum. Nzoia asserts that the rate is unconscionable. On the other hand, Hiren R. Patel who gave testimony on behalf Comhard stated that the interest rate charged was in unison with commercial rates charged by Banks at the material time.

17. It is trite that the business of the Court is not to rewrite contracts freely entered by parties. For that reason a Court will ordinarily enforce a contract as entered by the contracting parties even where one has to suffer for taking up a bad bargain. That said, Courts have a duty to interfere with and to refuse to enforce contracts which are unconscionable or oppressive. Of this duty, the Court of Appeal in **Margaret Njeri Muiruri –vs- Bank of Baroda (2014) eKLR** stated:-

“Nevertheless, courts have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to the a procedural abuse during formation of the contract, or due to contract terms that are unreasonably

favourable to one party and would preclude meaningful choice for the other party. An unconscionable contract is one that is extremely unfair. Substantive unconscionability is that which results from actual contract terms that are unduly harsh, commercially unreasonable, and grossly unfair given the existing circumstances of the case (See Black's Law Dictionary, 9th Edition, Gardner, Ed.)”.

18. As observed earlier the effect of the agreement on interest entered between Nzoia and Comhard was that Nzoia would pay interest at the rate of 36% per annum in the event of default. Although Nzoia attempted to peg that rate at interest rates supposedly charged by Banks at that material time, it did not lead any evidence to support that assertion. The question that begs is whether that rate of interest can be said to be conscionable in the circumstances of this case having regard to the fact that Nzoia was and is a public body. Put differently, can it be said that the Kenya public received a fair bargain by being charged a default interest of 36% per annum.

19. In the decision of **MARGARET NJERI MUIRURI (Supra)** the court of Appeal drew from comparative jurisdictions on the question of unconscionability and in respect to the doctrine of special disadvantage. The Court of Appeal approved the observation of an New Zealand author as follows:-

“Rick Bigwood in his case note *Curbing Unconscionability: Berbatis in the High Court of Australia which appears in Volume 28 of the Melbourne University Law Review, explains the threshold of special advantage, and the attendant action as follows:*

“The threshold criterion of ‘special disadvantage’, for instance, is concerned with the question of determining when it becomes ‘unfair’, ‘wrong’, or ‘inappropriate’ for the other bargaining party to play for advantage by the ordinary rules of free competitive bargaining. In this situation, the rules need to be qualified, adjusted or suspended in favour of the specially disadvantaged bargaining party.”

20. A lesson from this passage is that where it is unconscionable for one party to take advantage of the ordinary rules of free bargaining, there is justification for free competitive bargaining to be qualified, adjusted or tempered in favour of a party that suffers special disadvantage. In the matter before Court there was a history between Comhard and Nzoia. It is common cause that even at the time that the two entered the contract that constitutes the agreement on interest, Nzoia was already in default of payment of goods previously delivered to it by Comhard. Indeed the default was so grave that it had ended up in litigation being **Nairobi civil case no. 4236 of 1996 Comhard and another v Nzoia Sugar Company Limited** and judgment had been entered against Nzoia.

21. Comhard was already aware that Nzoia was struggling to meet its obligations. Comhard would also be aware that Nzoia was a State Corporation and was dealing with the officers who would not be defending a personal position. Can it now be said that in bargaining for a default interest of 36% per annum Comhard did not seek to take advantage of Nzoia? The evidence by the witness from Comhard was that Nzoia was desperate to continue getting certain supplies notwithstanding the challenges it faced in meeting its past obligation. Nzoia was therefore bargaining from a position of weakness.

22. There is no doubt that the purpose of imposing interest on late payment for goods or services supplied is to compensate the supplier for being kept out of payment for the period of delay. In that way default interest for rate payment is justifiable(See the decision in Highway Furniture Mart Limited –vs- Permanent Secretary & another (2006) 2 E. A 94.) However, the rate imposed must not be usury. The Supreme Court of Philippines in a case quoted in *Margaret Muiruri* held that an interest rate of 3% per month was excessive, unconscionable and exorbitant. On the part of this Court it is clear that a charge of 3% per month such as that imposed by Comhard on a Public Corporation is unconscionable. While I cast no aspersions on Comhard, it is not lost to the Court that the history of this Country is replete with incidents where commercial contracts have been used to hemorrhage public funds. I have no hesitation in agreeing with Nzoia that in the circumstances of this case the interest agreed is unconscionable. It is in fact against public interest to enforce such a contract.

23. Being of that view this Court is not persuaded by the forceful arguments made by counsel for Comhard that not only is the rate of interest justifiable but that it should be compounded.

24. Nevertheless, granted that a charge of default interest on late payment is not by itself unconscionable, this Court will uphold the arrangement entered by the parties that such interest be payable. However, the rate of interest that will be applicable is at court rates from the date of default until payment in full. To this extent the Comhard is deserving of interest antecedent to the filing of the suit

24. Having made that finding the Parties can proceed to appoint an accountant for purposes of taking accounts. Either party is at liberty to apply in the event there is a disagreement on the manner of appointment and or remuneration of the accountant.

Dated, Signed and Delivered in Court at Nairobi this 7th Day of August 2019

F. TUIYOTT

JUDGE

PRESENT;

.....For Plaintiff

.....For Defendant

Nixon: Court Assistant