



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND TAX DIVISION
CIVIL SUIT NO. 209 OF 2017

GOLDROCK CAPITAL LIMITED.....PLAINTIFF

VERSUS

THE CABINET SECRETARY TREASURY.....1ST DEFENDANT

THE ATTORNEY GENERAL.....2ND DEFENDANT

SAFARICOM LIMITED.....3RD DEFENDANT

WEBMASTERS AFRICA LIMITED.....4TH DEFENDANT

WEBMASTERS KENYA LIMITED.....5TH DEFENDANT

RULING

1. On 31st August 2017 the learned Deputy Registrar of the High Court entered judgement against the 3rd, 4th and 5th Defendants on account of their failure to file their respective Defences.
2. The plaintiff had, by a Request for Judgement, dated 2nd August 2017, sought interlocutory Judgement against the 3 defendants.
3. Each of the said defendants has brought an application to set aside the *ex-parte* judgement. Each of the applicants contends that the judgement was irregular.
4. The basis of that argument was that the claim against the defendants was not a liquidated claim.
5. Pursuant to Order 10 Rule 4 (2);

“Where the plaintiff makes 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 judgement for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgement upon such other claim”.

6. In this case the *ex-parte* judgement was entered in the sum of;

“Kshs. 127,850, 950.00 plus costs of the suit and interest”.

7. As far as the plaintiff was concerned the sum of Kshs. 127,850,950/- was a liquidated claim, because it was ascertainable in space and time.
8. In my considered view, the first issue to be determined is whether or not the plaintiff contained a liquidated claim.
9. **BLACK’S LAW DICTIONARY, 19TH Edition** 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 the law or by the terms of the parties agreement.

2. A claim that has been determined in a judicial proceedings; also termed liquidated demand”.

10. According to the plaintiff, the claim in respect to which judgement was entered, was ascertainable in space and time. Their position is that the said sum was outstanding as at 20th April 2017.

11. First, it is well settled that the ability of the plaintiff to calculate the quantum of the compensation payable to him is not determinant of whether or not the sums claimed can be termed a liquidated claim.

12. In terms of the definition in Black’s Law Dictionary a claim is deemed to be liquidated if it had been agreed upon previously or if it is a sum which can be determined with precision, by operation of the law or by the terms of the agreement between the parties.

13. Effectively, therefore, the starting point in determining if a claim was liquidated, is the terms of the contract that was governing the contractual relationship between the parties.

14. It therefore follows that unless there was a contract, pursuant to which the plaintiff pegged his claim, the claim would probably remain of a subjective nature, rather than one of an objective nature.

15. When I talk about a claim of a subjective nature I mean a claim in respect to which the basis for quantification of compensation is dependant upon the view of the person making the claim. For example, a person whose contract for employment was terminated, would feel much more traumatized if he had not expected the termination.

16. If the termination took place when the person had major family obligations, the impact on him would be severe.

17. And if the termination took place at a time when the economy was performing poorly, his chances of getting an alternative source of income would be much less than if the termination happened at a time when the economy was performing well.

18. Ordinarily, the contract of employment has a provision for termination on Notice.

19. And ordinarily, the labour laws have provision for compensation for wrongful, or unlawful or unfair termination of employment.

20. The compensation calculated in accordance with the terms of the contract and also in line with the statutory provisions, would be deemed liquidated.

21. However, the compensation in respect to the trauma, the impact on family, and the difficulty in securing alternative sources of income would be unliquidated. Therefore, even if the plaintiff was able to prove that he only got alternative sources of income after one year, and even though he could quantify his alleged loss of income during the said one year, the claim would remain unliquidated.

22. In comparison, the plaintiff has stated that a “Convenience Fee” amounting to Kshs. 127,850,950/- was outstanding.

23. However, the plaintiff did not specify the particular defendant or defendants who owed it the money which was allegedly outstanding.

24. That is an important factor as it is clear that there does not exist any one contract, to which the plaintiff and all the five Defendants were parties. If such a contract were to be identified, it would form the basis for determining the party who was liable to meet the plaintiff’s demands, by a perusal of the contract.

25. In this case, the plaintiff asserted that on 22nd July 2013 the **INTERNATIONAL FINANCE CORPORATION (IFC)** had contracted the 5th defendant, **WEBMASTERS KENYA LIMITED** to design a Digital Payments Pilot Portal.

26. The plaintiff’s further case was that in July 2014 the 4th Defendants, **WEBMASTERS AFRICA LIMITED;**

“...engaged the plaintiff to offer end to end integrated mobile financial solution on the portal which the plaintiff rolled out on 20th November 2014...”

27. It was the understanding of the plaintiff that when the 4th defendant was engaging it, the said 4th defendant was acting for and on behalf of the 5th defendant.

28. However, a look at the Agreement dated 3rd June 2015, which the plaintiff described as constituting the formalization of its engagement by the 4th defendant, on behalf of the 5th defendant, does not expressly state the nexus between the 4th and 5th defendants.

29. Nonetheless the plaintiff asserts, (*at paragraph 19 of the plaint*) that there was a contract between the plaintiff and the 4th and 5th defendants.

30. It does appear that the foundation of the plaintiff's claim against the 4th and 5th defendants is one **JAMES AYUGI OTIENO**, who the plaintiff described as the principal shareholder and Chief Executive Officer of both the 4th and 5th defendants.

31. As to whether or not the relationship between the said James Ayugi Otieno and the 4th and 5th defendants would, (*if proved*), be sufficient to demonstrate a legal nexus between the two companies, is a matter which I think will need to be shown by the plaintiff.

32. Meanwhile, the plaintiff stated that;

“19. It was a term of the agreement between the plaintiff and the 4th and 5th Defendant that:-

a) The plaintiff would settle the Convenience Fee earned by or on account of the 4th and 5th Defendant on a weekly basis.

b) Ensure that there is reconciliation and closure of all settlement issues and queries relating to both government revenue or charges and Convenience Fees at the end of every month”.

33. A literal reading of paragraph 19 (a) suggests that the person who was to settle the Convenience fee, was the plaintiff.

34. And pursuant to paragraph 19 (b) of the plaintiff, it would appear that reconciliation and closure was to be done by the plaintiff at the end of every month.

35. Thirdly, there is an acknowledgement by the plaintiff that issues could arise relating to both Government Revenue and Charges.

36. In the circumstances, from the plaintiff's own assertions, it is not clear why any of the defendants should then be liable to pay the plaintiff, as the plaintiff has said that it is the party who should settle the Convenience Fee earned by or on account of the 4th and 5th defendants.

37. And if the plaintiff had an obligation to carry out reconciliation and closure of all settlement issues by the end of every month, it may be necessary for the plaintiff to explain why that was not done. On the other hand if reconciliation was done, and so also closure of all settlement issues, the question would arise about why the plaintiff would still be laying claim to the substantial sums of money.

38. It is clear to the plaintiff that some of the settlement issues and queries could relate to both government Revenue or government Charges.

39. That therefore brings into focus, the question regarding the legality of the plaintiff's role in the collection of revenue for the government.

40. These matters which the defendants have raised, show that if they were accorded an opportunity to respond to the Plaintiff, the defendants have legitimate concerns. In effect, the lines of their proposed defences were not mere denials. They gave rise to genuinely triable issues.

41. But I must now revert to the question as to whether or not there was a liquidated claim in the plaintiff.

42. My answer is in the negative. I so find, because it has not, so far, been possible to identify any provision (s) in the Agreements between the plaintiff and the defendants, which can be deemed to be the foundation for an objective assessment of the compensation to which the plaintiff was entitled, as of right.

43. In the result, the judgement is set aside against the 3rd, 4th and 5th defendants; on the ground that the same is irregular.

44. I further find that the plaintiff acted in excess of what is permissible under Order 10 Rule 4 (2) of the Civil Procedure Rules. I so find because the said sub-rule makes it abundantly clear that the court can only enter judgement in default of a defence, in respect to a liquidated demand and interest.

45. The sub-rule expressly provides that the award of costs shall await judgement on the part of the claim which was not a part of the liquidated demand.

46. The plaintiff was not content to get judgement for the liquidated demand. It also demanded interest and costs. That was wrong.

47. And thereafter, the learned Deputy Registrar granted judgement in the terms sought by the plaintiff: that too was an error.

48. But if the judgement had been regular, I would still have set it aside because the defences proposed by the defendants give rise to triable issues.

49. Although the 3rd defendant has not filed a draft Defence, that does not bar the Court from giving consideration to the material before it, for the purposes of ascertaining whether or not they give rise to an arguable defence. Indeed, the court which is called upon to set aside an *ex-parte* judgement is duty bound to give due consideration to the material placed before it, so that the Court can determine whether or not the justice of the case demands that the defendant be accorded an opportunity to defend himself.

50. Although costs usually follow the event, I find that the defendants have failed to persuade me that the plaintiff should be condemned to pay the costs of the application.

51. I so find because the defendants ought to have filed their respective defences within the time allowed by the Rules. The plaintiff may have exceeded the scope of the ex-parte judgement as provided for by Order 10 Rule 4 (2) of the Civil Procedure Rules, but it was not, in principle, wrong for them to seek judgement in default of defence.

52. In the circumstances, I order that the costs of the applications by each of the 3 defendants, shall be in the cause.

DATED, SIGNED and DELIVERED at NAIROBI this 14th day of March 2018.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Simiyu Marambii for the Plaintiff

Miss Prisca Wambui for the 1st Defendant

Miss Prisca Wambui for the 2nd Defendant

John Ohaga for the 3rd Defendant

Miss Kamau for Wandabwa for the 4th Defendant

Miss Mweu for Kiptiness for the 5th Defendant.