REPBULIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMILARTY DIVISION

CIVIL CASE NO. 505 OF 2011

IMPACT COMMUNICATIONS LIMITED……..PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED ……DEFENDANT

JUDGMENT

1. The Plaintiff commenced this suit by filing a Plaint dated 14th November, 2011, seeking for orders that:-

(i) An order for the Defendants to specifically perform the Agreement dated 21st April, 2011 executed on the 19th day of May, 2011 by paying the Motor Truck and Trailer Suppliers the contract sum.

(ii) A declaration that in failing to pay to the Plaintiff suppliers the contract and undertaken sum, the Defendant has committed a breach of the Agreement dated 21st April, and signed on 19th May, 2011.

(iii) An order for the Defendant to pay to the Plaintiffs special damages of Kshs. 339,000

(iv) An order for Defendants to pay to the Plaintiffs general damages for breach of Contract to be assessed by the Court.

(v) An order for the Defendants to pay to the Plaintiffs Exemplary general damages for malicious, careless, reckless and impunious breach of contract and for blatant refusal to remedy the breach.

(vi) Interest on the special damages awarded from the date of filing suit and on general damages from the date of judgment until payment.

(vii) Costs of this case plus interest thereon.

2. The background facts of the Plaintiff's case are that, on or about 21st April, 2011; the Plaintiff approached the Defendant, at its Moi Avenue Branch, for an Asset Finance loan to assist in the purchase of a Transport Truck Prime Mover and a Trailer. The Defendant agreed to grant the loan facility of Kshs. 4,960,000, and issued the Plaintiff with a Letter of offer dated 21st April, 2011. The Plaintiff accepted and executed the letter of offer on 19th May, 2011. Consequently, a deed of Guarantee and Indemnity was executed in favour of the Defendant and registered accordingly.

3. That the contract provided that the Plaintiff would inter alia: secure registration of the motor vehicles in the joint names of the Parties, obtain the insurance cover, fit a tracking devise on the motor vehicle, pay a total of Kshs. 280,000 as deposit to M/S Transport & Lifting Limited to ensure release of the Prime Mover for fixing the third axle and pay the attendant expenses. In furtherance of the agreement.

4. On 30th May, 2011, the Defendant gave an undertaking to M/S Transport and Lifting Services Ltd and Hans Kenya Limited, the Supplier of the Prime Mover and the Trailer, respectively that they would make payment for the same.

5. As a consequence thereof, the Plaintiff paid a deposit of Kshs. 280,000 to M/S Transport and Lifting Services Ltd, secured the registration of the prime mover and trailer in the joint names of the Parties, obtained a comprehensive Insurance cover for the Prime Mover, whereupon the Prime Mover was released for fitting the extra axle, and it was fitted at a cost of Kshs. 455,000. The truck was fitted with a tracking device and an installation certificate thereof issued accordingly. The Defendant allegedly requested the Plaintiff to give them further security being the log books of the Plaintiffs Motor vehicles, Trucker registration Number, KBA 677Y and a Trailer ZC 8057. However, on 18th October 2011, the Defendant returned the log books without an explanation.

6. In the meantime, the work to the third axle was complete and on 4th November 2011, the Plaintiff requested the Defendant to effect the payment but was shocked to learn the Defendant had cancelled its undertaking to the Supplier to pay for the Prime Mover and the Trailer and Hans Kenya Ltd who fitted the third axle released the Prime Mover back to the sellers thereof, M/S Transport and Lifting Services on the 9th November 2011.

7. The Plaintiff avers that, in anticipation of the completion of the transaction, it has engaged various other parties, in negotiation to give it work to move and transport goods, therefore the collapse of the transaction with the Defendant, lead to serious direct and indirect financial loss, loss of reputation and clientele, and they were not be able to secure another motor vehicle at the same cost, due to inflation and cost elements; the prices thereof having gone up by Kshs.1,000,000, within one year.

8. That frantic efforts to follow the Defendant Company to resolve the impasse have not yielded fruits, as the Defendant has remained evasive and completely indecisive, hence, the prayers herein for inter alia, that, an order for the Defendant to pay Kshs. 339,000,000 as special damages, general damages for breach of contract, for malicious, careless, reckless and impunious breach of contract and for blatant refusal to remedy the breach, interest on any awarded sum and costs of the suit.

9. The Defendant filed a statement of Defense dated 31st July 2013 and denied all the claims by the Plaintiff. However, it joined issues with the Plaintiff on the issuance of the letter of offer dated 21st April, 2011, and advance of Kshs. 4,960,000 for the purchase of a truck and a trailer. The Defendant conceded that it issued a letter of undertaking to the Plaintiff's Suppliers of the Prime Mover and Trailer; M/S Transport and Lifting Services Limited and Hans (K) Limited and guaranteed that they will make payment for the goods supplied. However the guarantee was based on fulfillment of the conditions that were in the Letter of offer.

10. That subsequently, when the Plaintiff was requested to provide supplementary collateral to the Loans facility by providing a log book to its Motor vehicle registration number KBA 677Y and a Trailer ZC 8057, the Plaintiff failed to do so, informing the Defendant, that the log book was not available. That further, the Plaintiff breached the agreement by failing to provide a valid insurance policy acceptable to the Defendant, as the policy provided was worth Kshs. 3,400,000, while the subject matter was valued at Kshs. 3,560,000. Also the Plaintiff failed to transfer its accounts in Equity Bank Limited and operate the said accounts within the authorized limits at all times.

11. The Defendant averred that the Plaintiff belatedly submitted statements from Equity Bank Limited and Consolidated Bank Limited which allegedly demonstrated adverse material change in its financial position which clearly showed that, the Plaintiffs had depleted its funds below the minimum monthly

installments repayable on the facility. The Defendant argued that it was an express term of the loan facility Agreement that, the Defendant would terminate the facility without any notice to the Plaintiff in the event of the continuous breach of the terms. As such, the claim by the Plaintiff is incompetent and lacks merit and should be dismissed.

12. I have considered the pleadings herein and the evidence adduced in support thereof. I have also considered the submissions filed by the respective parties. I find the following issues have arisen for consideration:-

(i) What were the terms of the letter of offer issued to the Plaintiff dated 21st April 2011;

(ii) Did the Plaintiff accept the terms of the letter of offer as stipulated;

(iii) Did the Plaintiff breach any of the terms therein;

(iv) Was the Defendant entitled to terminate the Agreement as it did? and;

(v) Is the Plaintiff entitled to the orders sought for herein?

13. I have carefully considered the Letter of offer herein dated 21st April 2011, and I find that it is not in dispute the amount advanced was Kshs. 4,960,000 and for the purchase of one Mercedez Benz Axor truck & 3 axle semi trailer, from Transport & Lifting Services Ltd & Elite Trailers Limited respectively. The terms of and repayment of the facility provided repayment of Kshs.175,607, per months for 36 months. Interest was chargeable at bank's base rates from time to time stated and stood as; "currently at 13.5% p.a. plus 3% per annum.

14. The main conditions however are stipulated under the following clauses:-

i) clause 6.2 provided the Plaintiffs bank accounts at Equity Bank to be transferred to Kenya Commercial Bank;

ii) clause 6.3 the facility was not to be available until the securities were finalized; and

iii) clause 12.1 the assets the subject of the contract were to be comprehensively insured for the full value.

15. The question that arises is whether the Plaintiff fulfilled all these conditions. I note from the letter dated 30th May, 2011, written by the Defendant to the Sales Manager, of Transport & Lifting Services Limited, P. O. Box 74093-00200 Nairobi stated as follows;-,

"We have approved an Asset Finance Facility to enable our above named customer, (Impact Communications (K) Ltd) to purchase one used 1840 LS 4x2 Mercedes Benz Axor Sleeper Cabed and one unit 3 axle skeleton trailer with 13 pcs tubeless Chinese types from Hans (K) Limited".

16. The understanding thereof would be that all the preliminary requirements for the approval of the loan facility had been dealt with, by the time the Defendant gave an undertaking to pay the suppliers, an amount of Kshs. 2,720,000 and Kshs. 2,240,000 respectively as quoted in the proforma invoice, less the Applicable Value Added Tax, and upon fulfillment of the conditions set therein. It is noteworthy that these conditions were to be observed by the Sales Manager of Transport & Lifting Services Ltd, and not the Plaintiff so if none were complied with the Plaintiff is not to blame.

17. The vehicles purchased were subsequently registered in the joint names of the Parties. The prime mover was released and an additional axle fitted and as per the letter from CIC Insurance Group of Companies the Mercedes Axor Prime Mover was comprehensively insured against risks at a value of Kshs. 3,400,000.

18. However, despite all these events, on 18th October 2011, when the Defendant's Manager, for Business Banking wrote to the Plaintiff the letter stated as follows;

> *"We regret to advise that your request for waiver of conditions highlighting on your letter of offer dated 21st April 2011 was not successful. As a result, we hereby return to you the following documents which had been submitted to us to facilitate the processing of your request.*
>
> *i) original log book for trailer registration No. ZC 8057;*
>
> *ii) original transfer of ownership of Trailer; and*
>
> *iii) copy of Certificate of Incorporation for Consolidated Bank copy of Kenya Revenue Authority(KRA) PIN for Consolidated Bank*

19. I note that in the above letter, the Defendant did not complain of the issues of "inadequate insurance cover" nor the non-transfer of bank accounts to KCB as alleged, neither did the issue of depleted account balances raised at all. The defendant did not even address the issue of the undertaking given to the Suppliers of the goods for payment.

20. On the 5th November 2011, when the Plaintiff wrote to the Defendant over the alleged termination of the Contract, the Defendant did not respond to this letter. Are the Defendant therefore sincere to raise all these issues of non compliance with the conditions herein at this stage.

21. The other issue raised by the Defendant is non availability of additional security of the log books of the motor vehicles once received from Kenya Revenue Authority (KRA). However, I note that on 20th September 2011, M/s Grace Misyili, a Credit Administration Manager wrote to the Product Administration Manager, Asset Based Finance, KCB Bank, undertaking to forward the log book of the said vehicles, once received from Kenya Revenue Authority (KRA). The Consolidated Bank confirmed that there was no loan secured by the vehicles. Thus it seems to me that, the log books were available subject to receipt thereof from Kenya Revenue Authority (KRA). It was therefore an issue of securing the same. The Defendant cannot argue that the log books were totally unavailable.

22. The question that arises is: Did any of the Parties breach the contract? The Plaintiff maintains that, it's the Defendant who breached the contract by failing to release the funds to the Suppliers as per its undertaking. The Defendant on its part maintains that, it is the Plaintiff who failed to honour its obligations under the Contract.

23. Before I address that issue, I wish to address other issues that arose from the submissions of the Parties. First and foremost, I note that at paragraph 14.3 of the letter of offer dated 21st April 2011, it is stated;

> ***"Kindly signify your acceptance of the offer contained in this letter by signing and returning to us its duplicate, un-amended, <u>within (30) days</u> from the date of this letter".(emphasis mine),***

24. This letter was therefore valid for acceptance with effect from 21st April 2011 to 21st May 2011. The Plaintiff signed it on 19th May 2011, within the stipulated period of 30 days period. Generally speaking, therefore upon acceptance of the letter of offer, a valid contract existed between the Parties.

25. Secondly, when the Defendant issued a letter of undertaking dated 30th May, 2011, the Defendant clearly stated as follows:-

> *"……and advise that we have **<u>approved</u>** an **<u>Asset Finance Facility</u>** to enable our client … (emphasis mine).*

26. The key words are "**<u>approved</u>**" and "**<u>Asset Finance Facility</u>**". In my undertaking, the Defendant are

expected to have perfected the security and made a decision to finance the purchase of the subject vehicle hence the words "**approved**". It's not normal practice, in commercial transaction that, a Bank would give an undertaking to pay a third party for goods purchased by its customer, when there are no funds available in the customer's account to reimburse itself, unless there is an express agreement to pay against un-cleared effect or there is an overdraft facility. There what was the basis of the undertaking herein?

27. Thirdly, I note that, it took the Bank up to four months, from 21st April, 2011 to 18th October, 2011, to communicate the termination of the Contract. Unfortunately, the offer had already been accepted and the contract partly performed by the Plaintiff. The Bank was already a party to a valid contract, upon which it had made a commitment to the third party; the suppliers to pay for goods sold.

28. The law of contracts is clear. A Contract is a result of an agreement between the Parties, although for a contract to be enforceable there must be an intention to create legal relations. In commercial or business agreements, it is generally presumed by the Courts that there is an intention to create legal relations, unless the Parties insert a clause that their agreement shall not be binding in law but shall be binding in honour only. (see the cases of ***Jones vs Verrions Pools Ltd 1938, and Rose Franck vs Crompton, 1925)***.

29. As regard acceptance of an offer, the offeror may attach any conditions to the offer. In commercial agreement, this rule is importance where the terms of the offer are of a complex nature and usually in the form of an exemption clause. Thus, acceptance of the offer means acceptance of the conditions thereto. However, where the offer is accepted, and the offeror, by conduct does any act to imply the acceptance is complete, then the offeror, is bound to honour the contractual terms and will be estopped from denying that there was no valid contract between the Parties.

30. In the instant case, when the Defendant gave an undertaking to pay for goods purchased, the Defendant committed itself to honour the payment. When the Defendant wrote to the Plaintiff that "request for waiver of conditions highlighting on "your" letter of offer dated 21st April 2011 was not successful", it was too late. Even then the reference to **"your letter of offer"** is not quite clear. It is the Defendant who issued the letter of offer. It was not the Plaintiff; unless it is a typo error. That though is not material.

31. Be that as it were, before I revert to the question of breach of Contract, I note with great concern that the ruling delivered by the Court on 28th December 2011 on a Notice of Motion dated 14th November, 2011, the Court dealt greatly on the issue of breach of contact.

32. For in depth understanding thereof, and as background facts, the Plaintiff filed the Notice of Motion Application dated 14th November 2011, seeking inter alia for orders that the Defendant be compelled to perform the contract dated 21st April, 2011, pay the Suppliers of the subject goods or in the alternative, deposit the contractual sum in Court or issue a guarantee for the payment of the same in favour of the Supplier.

33. Upon hearing the Parties, the Court delivered its ruling and stated at page 7, paragraph 3 thereof as follows;

> ***"clearly, the Applicant has fallen fault of some of the terms and conditions under Clause 6, and 8, these included;***
>
> ***(i) Joint registration of vehicles with the Bank;***
>
> ***(ii) A valid insurance Policy acceptable to the Bank;***
>
> ***(iii) Transfer of the account at Equity Bank to the Defendant Bank;***
>
> ***(iv) Channeling all business income through the accounts to be opened with the Bank; and***

(v) Security being perfected before draw down

34. At page 9, paragraph 2, the ruling further states;-

> ***"Arising from the foregoing, it is clear to me that the Plaintiff is in some breach of the Contract. It is also clear to me that the Plaintiff is to blame in this matter than the Defendant. If that is so, on what grounds would this Court then penalize the Defendant by compelling the Defendant to perform a contract which in which the main party in breach is the Applicant? That would be equity acting in reverse, and this Court cannot allow that. In this regard the Court declines to grant prayer number 2 which asked this court to compel the Defendant to specifically perform the contract dated 21st April 2011 by paying the Contract sum to M/S Transport Lifting Services Limited and Hans (K) Limited".***

35. In relation to prayer 3 of the said application, the Court stated:-

> **"this court simply cannot compel the Defendant to do any act in furtherance of a contract in which it *has lost faith or interest arising from factors which are not of its own making".***

36. In my considered opinion and with utmost respect these findings are quite definite and conclusive. However, when the ruling was delivered the matter was at an interlocutory stage and the Court had not heard the evidence of the Parties. This Court has now heard the Parties on oral evidence and documents produced and therefore has the benefit thereof. The decision herein will be guided by the evidence in total accordingly. I however take cognize of the fact that the plaintiff did not appeal against that ruling.

37. Be that as it may, based on the materials placed before the Court and oral evidence adduced, I find that as regards the issue of inadequate insurance, the Plaintiff stated that the cover issued was in respect to the Prime Mover and they were to take a cover for the Trailer. The Defendant argued that, the value of the Prime Mover was Kshs. 3,560,000 as per the valuation report and the cover provided was for Kshs. 3,400,000. I have indeed noted that, the cover was for Prime mover Registration No. KBP 913Q Mercedes Axor. Therefore it did not cover the Trailer. It was valid from 13th July, 2011 to 12th July, 2012. The Technical Valuation report for the Prime Mover produced by the Defendant for the Mercedes Benz Mover is not quite legible, but I can see a figure of Kshs. 3,560,000, if that is the correct figure, then value of the risk covered was less by Kshs 160,000. The Defendants argument that it was inadequate is in order. However, what would have been the best thing to do in the circumstances? Is it to terminate the contract unilaterally, or seek for another adequate cover? Even, then, the cover was issued in the month of July 2011, and the termination came 18th October 2011. Why did the Defendant take so long to dispute the cover and why didn't the Defendants seek for another adequate cover bearing in mind that the Plaintiff had already registered the vehicles in joint names?

38. The Other ground raised by the Defendant is failure by the Plaintiff to operate the accounts held within the operational limits. The Plaintiff testified that the account was to be transferred after the commencement of operations. I have carefully considered clause 6, of the letter of offer, and note that the condition there under stipulates that the Plaintiff's bank accounts were to be operated within the authorized limits at all times. Taking into account that the disbursement of the loan funds was not effected, this condition was overtaken by events.

39. I shall now deal with specific prayers in the Plaint. The first prayer is seeking for an order that the Defendants specifically perform the contract dated 21st April, 2011, executed on 19th May, 2011. Two questions arise, taking into account the period that has lapsed since 21st April, 2011 todate, is the performance sought possible and viable? This is informed by the fact that the motor vehicles, might have depreciated with effluxion of time. The evidence adduced did not reveal whether these vehicles are still available and useful or not. This prayer should have been dealt with by ruling on the Notice of Motion Application which was heard and determined. The Plaintiff should have pursued the matter as the said prayer was subject to lapse of time. Even, then, the sellers cannot have sat back six years down the line, leaving the vehicles in the yard to depreciate. I expect they might have disposed them off to mitigate on

the loss. The defendant had not paid for them, therefore the title had not passed. To order the Defendant to pay for the vehicles at this time, would not serve any useful purpose. The Plaintiff appreciates the same and states in their submissions that the grant of this prayer may be "undesirable after 6 years". I am inclined to agree with the Plaintiff and decline to grant that prayer.

40. Prayer (ii) seeks that an order be issued declaring that the Defendant in failing to pay the Plaintiff's suppliers, the Defendants have committed a breach of Agreement dated 21st April, 2011 and executed on 19th May, 2011. First and foremost, I find that, the obligation to pay was towards the Suppliers not the Plaintiff. These Suppliers were not a Party to the Contract dated 21st April, 2011. If the Defendants failed to pay the Suppliers, it is only the Suppliers who could sue the Defendants for failure to honour the undertaking to pay. Clause 6 of the letter of offer, provided that, the Defendant would pay the Suppliers directly. Therefore to declare that, the Contract was breached for non-payment of the sum undertaken, without the suppliers seeking to enforce the undertaking will not be just. I therefore decline to grant prayer (ii) in the Plaint.

41. The third prayer is for special damages of Kshs. 339,000 as detailed under paragraph 13 of the Plaint. The same is made up of Kshs.280,000 alleged to have been paid as deposit to M/S Transport and Lifting Services to enable them release the Prime Mover and Kshs. 59,000 being the costs of fitting a tracking device. The law is clear, special damages must be specifically pleaded and proved. I have gone through all the documents produced by the Plaintiff per the lists of documents dated 14th October, 2011 and 2nd September 2015, I have not found a single receipt evidencing payment of the sums sought. In that regard, I find no evidence to support that claim and I disallow it.

42. I shall deal with prayers (iv) and (v) together. The same are seeking for general damages for breach of Contract, for malicious, careless, reckless and impunious breach and for blatant, refusal to remedy the breach. I have addressed the terms of letter of offer executed by the Parties at length in this Judgment. I shall not revisit them, save to note that, the Plaintiff's obligations were detailed out under paragraph 6 and 8 of the said letter. The Plaintiff was to fulfill the same and be eligible for the loan. Some of those conditions were to be fulfilled before disbursement and others after.

43. From the analysis of the evidence, I find that, the only issue the Plaintiffs did not fully address was the Provision of adequate comprehensive insurance policy for the Prime Mover and the Trailer and provide additional security in form of log books. Both of these were however, evidently within reach and could have been availed had the Defendant been patient. The termination of the Contract, purely on non-performance of these two issues was harsh, inconsiderate and without a human face. The Plaintiff had gone at length to register the vehicles in joint names and even did adjustment thereto. The whole transaction had taken too long and the Defendants simply walked off. That is not a prudent way of doing business. It smacks of abuse and selfish conduct. There was no correspondence to the Plaintiff to make good what was missing before the Defendant's termination of the Contract.

44. In my opinion, the Plaintiff is entitled to be refunded the full expenses incurred in the alteration and registration of the motor vehicle and/or securing of the necessary licenses and approvals.

45. Unfortunately, the pleadings as drafted do not help in that regard. Under paragraph 13 of the Plaint, the Plaintiff tabulates the monetary expenses incurred but does not indicate the sums incurred in relation to these claims. The cost of the insurance, registration is not even indicated though referred to. The law as aforesaid is clear that special damages must be specifically pleaded and proved. Had the Plaintiff pleaded and proved the same, the Court would have awarded the same and the Plaintiff would have at least recovered some of the money expended. As already stated, the Plaintiff did not observe all the terms and conditions of the Letter of offer, therefore holding that there is breach of the Contract will not suffice in view of non-compliance.

46. Again the award of general damages is based on the financial, physical, emotional and even psychological loss. The Plaintiff has submitted that it suffered loss as stated below:-

(i) Loss of reputation as they could not meet expected obligations to third parties

(ii) Damages in terms of definite increment in the price of a similar motor truck and trailer if the Plaintiffs had to re-engage in a fresh acquisition process owing to the rise in inflation and general upward growth in motor vehicle prices

(iii) Loss and damage in terms of the Human Resource expended for close to one year in fervent pursuit of the fulfillment of the agreement terms.

(iv) Psychological trauma and stress on the part of the Plaintiff Company Directorship.

(v) Other expenses in time and resources expended towards obtaining insurance, registration and attendant engagements.

47. However, no evidence was led to support the same. The Defendant may have behaved "badly professionally" but that perse is not proof of loss suffered by the Plaintiff. In that case, I regret to disallow prayers (iv) and (v) of the Plaint.

48. Finally, as regards the prayers for interest on special damages as no special damages are granted, the same does not arise.

49. On the issue of costs, the law is clear, costs follow the cause. I find that, the plaintiff having failed to prove its case on the required standard, the Plaintiff's case is dismissed with costs to the Defendants.

50. Ordered accordingly.

Dated, delivered and signed on this 18th day of September, 2017.

G. L. NZIOKA

JUDGE

<u>In open Court in the presence of :</u>

Mr. Mulaku for Namada for the Plaintiff

Mr. Akhulia for the Defendants

Teresia: Court Assistant.