



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT 43 OF 2014

FAHIM H. AMIR T/A FAHIM H. AMIR TRANSPORTERS.....PLAINTIFF

VERSUS

TUMAINI TRANSPORT SERVICES COMPANY LIMITED.....DEFENDANT

RULING

Introduction and outline of Pleadings

1. The Plaintiff sued the defendant seeking to recover from the said defendant the sum of Kshs.26,819,950 on account of transport services rendered by the plaintiff to the defendant during the period between April 2012 to December 2013 and for further period during the months of January, February and March 2014.
2. Together with the plaint was filed a witness statement made by the plaintiff detailing the breakdown of the sum as well as a list of documents. The list of documents included the agreement for transport services between the parties dated 10/4/2012 and correspondence between the parties including a letter by the defendants dated 24/1/2013 in what the defendant unequivocally admitted owing to the plaintiff the sum of Kshs.26,485,950 as at December 2013 and a payment agreement dated 27/1/2014 covenanting to an instalment payment in some ten (10) varied instalments between 5th February 2014 and 15th October 2014. There was a supplementary witness statement by the plaintiff whose purpose, from my reading was to set it as evidence in chief referring to and explaining the documents filed. Those witness statements were at trial adopted as evidence in Chief and documents referred in it produced by consent.
3. The claim was resisted by the defendant by a statement of defence and counterclaim. In that pleading the defendant contend that between 1.1.2013 and March 2014, it did pay to the plaintiff a sum in excess of Kshs.37 million and gave the details of such payments and it was then pleaded that the plaintiff did breach the agreement by unilaterally withdrawing the entire fleet to the defendant and then demanded the full payment which the defendant then became unable to pay. According to the defendant the contract between the parties obligated them to terminate the agreement by issuing a 3 months' notice which the plaintiff is accused of having not observed wherefore the defendant has counterclaimed for damages for breach of contract. That defence was supported by a witness statement by one Bernard Mwilu, the managing director of the defendant/counterclaimant together with a list of documents. The totality of the witness statement is that the payment by the defendant to the plaintiff was dependant upon payment to the defendant by one Tata Chemicals Magadi Ltd who was the employer of the defendant for purposes of haulage of containers between the Port of Mombasa and their Magadi plant.
4. It is further averred that in breach of the contract between the parties the plaintiff did not only unilaterally withdraw the trucks but also presented to the defendants backers copies of the pleadings herein with the sole objectively to negativity portray, the defendant in the eyes of its financiers who had accorded to the defendant financial accommodation in respect of various hire purchase agreements with the hope that the defendant would be crippled financially to pave way for the plaintiff to procure for himself the contract from the said Tata Chemicals Magadi Limited.
5. The list of document included the contract between the defendant and Tata Chemicals Magadi Sodas Ltd, correspondence between the parties in the suit and their advocates, copies of letters of offer between the defendant and its financiers and bank statements to show sums paid for the plaintiff by the defendant.
6. To the defence and counterclaim the plaintiff filed a Reply to defence and defence to counterclaim in which it is contended that due and adequate notice was served, that the breach does not disentitle him to the accrued and vested rights and that the defence and counter-claim were scandalous and dishonestly put up to delay the trial and finalization of the plaintiffs suit. Subsequently, the plaint was, with the leave of the court amended, principally to plead that some of the payments tendered by cheques did not materialize into payments as the first 3 cheques were dishonored and the rest were thus never presented.
7. On the 23/11/2016 at a case Conference, it was directed that the matter would proceed on the basis of documents and witness statements

filed as at that date. Come the hearing date, and in terms of the case conference directions, the plaintiff adopted his two witness statements as evidence in chief and produced the documents filed as exhibits 1A – (1-9), and the bundled filed with plaint 1B – (1-40) bundle filed with amended plaint.

8. Needless to add that those documents included the agreements, correspondences between the parties and evidence of payment and dishonoured cheques as explained in the supplementary witness statement. In a very brief cross examination, the witness told the court that the contract between the parties was oral and was only reduced into writing after the cheques bounced. He admitted that cheques totalling Kshs. five million (Kshs.5,000,000) were honoured but the rest were dishonoured.

9. With that evidence, the plaintiff case was closed, and the defendant opted to close its case without calling any evidence after an application for adjournment was declined by the court. Parties were then ordered to file respective submissions to be highlighted in Court but come the date set for such highlighting only the plaintiff had filed and attended but not the defendant who was shown to have been duly served.

Submissions by the Plaintiff

10. In his submissions, the plaintiff isolated some eight (8) issues and sought to submit on all. The hallmark of these submissions is that there was the agreement between the parties as shown in the written document and correspondence exchanged; that the defendant has raised no tenable defence to the claim as no evidence was led to prove the pleadings which remained bare allegations and that the plaintiff has proved his case of the liquidated claim and is entitled to judgment for the sum together with interest at the rate of 24% per annum calculated in a compounded manner. The plaintiff cited to court various decisions for the annunciation that the award of interest and rate thereof is at the discretion of the court and that where fairness concerns dictate, interest can be calculated on compound basis to recompense the plaintiff for lost opportunity to invest the money due to the wrongdoing by the defendant^[1].

Issues, Analysis and determination

11. This suit is a straight forward and must be seen to be what it is, a liquidated claim with interest. The only issues I can discern to merit judicial consideration are:

- **Has the plaintiff proved being owed to by the defendant in the sum claimed?**
- **What order should be made on interests and rate thereof?**

Is the Plaintiff owed by the defendant in the sum claimed?

12. The correspondence exchanged between the parties and resting with that dated 5/2/2014 say it all:-

“RE: PAYMENT AGREEMENT DATED 27/1/2014

OUR CLIENTS: TUMAINI TRANSPORT SERVICES CO. LIMITED

YOUR CLIENTS: FAHIM HADI AMIR TRANSPORTERS

The above matter refers:

Our client seeks to review the captioned agreement as follows,

i. The postdated cheques be issued as follows:-

1. Kshs.4,995,000.00.....	5th February 2014
2. Kshs.2,500,000.00.....	4th March, 2014
3. Kshs.2,500,000.00.....	4th April 2014
4. Kshs.2,500,000.00.....	5th May 2014
5. Kshs.2,500,000.00.....	5th June 2014
6. Kshs.2,500,000.00.....	4th July 2014
7. Kshs.2,500,000.00.....	5th August 2014
8. Kshs.2,500,000.00.....	3rd October 2014
9. Kshs.2,500,000.00.....	3rd November 2014

ii. That your client to seek approval from our client before depositing the post-cheques for payment.

That our client has had to seek a review due to financial commitments with banks, the decreasing business prospects and also the need to make a realistic payment commitment.

Kindly let us have your response soonest”.

13. And the agreement dated 27/1/2014 referred to in the above later itself reads:-

“PAYMENT AGREEMENT

This agreement is made this 27th January 2014 between TUMAINI TRANSPORT SERVICES CO. LTD of P.O. Box 2350 – 80100, Mombasa and FAHIM HADI AMIR TRANSPORTERS of P.O. Box 1916-80100 Mombasa.

TUMAINI TRANSPORT SERVICES CO. LTD (Contractor) and have now mutually agreed that he will repay FAHIM HADI AMIR TRANSPORTERS (Sub Contractor) Kshs.26,495,000.00. (Being settlement of the outstanding balance till the month of December 2013).

Tumaini shall upon the signing of this agreement issue postdated chequest of each succeeding month in payment as follows:-

1. Kshs.4,995,000.00..... 5th February 2014
2. Kshs.2,500,000.00..... 4th March, 2014
3. Kshs.2,500,000.00.....4th April 2014
4. Kshs.2,500,000.00.....5th May 2014
5. Kshs.2,500,000.00.....5th June 2014
6. Kshs.2,500,000.00.....4th July 2014
7. Kshs.2,500,000.00.....5th August 2014
8. Kshs.2,997,000.00.....5th September 2014
9. Kshs.2,997,000.00.....3rd October 2014
10. Kshs. 207,000.00.....15th October 2014

In witness thereof the parties have signed the agreement in acknowledgment this 27th January 2014.

Signed on Behalf

Signed on Behalf

Tumaini Transport Services Co. Ltd

Fahim Hadi Amir Transporters

Bernard Mwilu

Fahim Hadi Amir

Managing Director

Managing Director”

14. The letter forwarding that agreement done on the letter heads of the defendant was even more clear. It reads:-

“Attn: Mr. Fahim H. Amir,

RE: OUTSTANDING BALANCE AS OF DECEMBER 2013

This is to confirm to you that the outstanding balance is amount Kshs.26,485,950/- (Twenty Six Million Four Hundred Eighty Five Thousand Nine Hundred and Fifty only) as at December 2013. We shall be settling this amount from any remittance payment from Magadi. (emphasis provided)

We are grateful for the good relationship and continuous support we have with you and may God bless you.

We look forward working together for greater success and mutual benefits for both of us. May GOD BLESS US. AMINI, AMIN, AMIN.

Yours faithfully,

Tumaini Transport Services Co. Ltd.

Bernard Mwilu

Managing Director”.

15. The aggregate of the letters are unequivocal that as at December 2013 the plaintiff was owned by the defendant the sum of Kshs.26,485,950 out of that sum, it is pleaded at paragraphs 6 & 7 of the amended plaint, that the sum of Kshs.4,995,000 was paid leaving a balance of Kshs.21,490,950 to which the plaintiff continued to provide the service during the months of January, February and March 2014 and accumulated a further sum of Kshs.5,329,000 (paragraph 7), making a final balance of Kshs.26,819,950 claimed in the suit.

16. I do find that the claim as supported by the evidence offered has not been displaced or controverted by the defendant who failed to offer any evidence at trial. I find that the evidence offered by the plaintiff is credible and cogent and has proved the claim on a balance of probabilities. In law a pleading, before it gets supported by evidence, is just but bare allegation upon which the court has no basis to find for the pleader.^[2] I therefore enter Judgment for the plaintiff against the defendant in the sum of Kshs.26,819,950.00

What orders should be made on interest?

17. The trite law is that interests and the rate thereof is at the discretion of the court pursuant to section 26(1) of the Civil Procedure Act. In *Ajay Indravadan Shah vs Guilders International Bank Ltd* ^[3], the Court of Appeal said:-

“The only law on the point is section 26(1) of the Civil Procedure Act and that section as we pointed out at the beginning leaves the question of the rate of interest at the discretion of the court. In fixing interest rate at 35% per annum, Mr. Commissioner Ransley was clearly exercising his discretion”.

18. In this matter, Mr. Taib Advocate for the plaintiff did plead interest at 24% p.a and offered submissions that the defendant in holding back the money due to the plaintiff has occasioned to the plaintiff financial suffering in his business and relationship with suppliers and that compounded interest is awardable as a restitutionary remedy. It is noteworthy that in the defence filed the claim for interest at 24% p.a has not been specifically traversed or denied by the defendant. It is in law deemed admitted under the provisions of Order 2 Rule 11(3). That Rule provides:-

“Subject to subrule(4), every allegation of fact made in a plaint or counterclaim which the party on whom it is served does not intend to admit shall be specifically traversed by him in his defence or defence to counterclaim; and a general denial of such allegations, or a general statement of non-admission of them, shall not be a sufficient traverse of them”.

19. I do find that the plaintiffs payer for interest at 24% is merited on the facts of the case as the defendant having repeatedly admitted the debt failed to pay in time and as promised and therefore kept from the plaintiff what was due to him wrongfully and the only way to retribute to the plaintiff his dues in full is to award interest at the rate pleaded which in any event has not been disputed.

Should the interest be computed on a compounded basis?

20. The decision is *Valeo (K) Ltd vs Barclays Bank of Kenya Ltd* ^[4] has been cited to court and I find the pronouncement by the Judge grounded on pronouncement and findings by prominent commonwealth judges and courts to be the just and fair way to consider whether to award interest calculated simply or in a compounded basis. I therefore award to the plaintiff at 24% p.a and Order that interest be calculated on compounded basis.

21. It is so ordered.

Dated at **Mombasa** this **30th** day of **November 2017**.

P.J.O. OTIENO

JUDGE

^[1] *Sempra Metals Ltd vs Inland Revenue Commissioners* [2007] UKHL 34; *Bank of America Canada vs Mutual Trust Company* [2002] 2 SCR 601; *Valeo (k) Ltd vs Barclays of Kenya Ltd* [2013] eKLR.

^[2] *D.T. Dobie & Co. (K) Ltd vs Wanyonyi Wafula Chebukati* [2014] eKLR

^[3] [2003] eKLR

