

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 4 OF 2015

AFRITECH GENERAL SUPPLIES LIMITED.....PLAINTIFF

VERSUS

INSTRUMENTATION ENGINEERING E.A. LIMITED.....DEFENDANT

JUDGMENT

[1] The Plaintiff herein, **Afritech General Supplies Limited**, is a limited liability company incorporated in Kenya. It is engaged in the business of supplying various industrial, steam equipment and technical hardware, boiler equipment and accessories. Its cause of action is that, in the period between **April 2012** and **May 2014**, it supplied the Defendant, at the Defendant's request, various industrial, steam equipment and technical hardware, boiler equipment and accessories on mutually agreed credit terms of payment. It was the contention of the Plaintiff that the accounts were to be settled within 30 days from the date of issuance of the subject invoice.

[2] It was the Plaintiff's case that, in the course of the Defendant settling its outstanding accounts with the Plaintiff, the Defendant issued the Plaintiff with 11 cheques for the total sum of **Kshs. 9,900,000/=**, all drawn on the Defendant's bank account number **2001000359** held at **African Banking Corporation Limited (ABC Bank)**, Industrial Area Branch, Nairobi, all of which were returned unpaid by the Defendant's bank upon presentation by the Plaintiff's bank, for the reason that the account did not have sufficient funds to satisfy the subject cheques. The particulars of the 11 cheques, which were dated between **3 November 2014** and **14 November 2014**, were provided in paragraph 4 of the Plaintiff.

[3] The Plaintiff averred that arising from the dishonour of the aforesaid cheques, the Plaintiff's bank account was duly debited with bank charges of **Kshs. 1,500/=** for each of the dishonoured cheques. It therefore instructed its Advocates, **M/s Stanley Henry Advocates**, to issue a demand notice, which was accordingly done for the sum of **Kshs. 10,891,938.36** which was due as at **25 November 2014**, including interest at 18% per annum from **9 May 2014** to the date of the date of the demand letter, of **Kshs. 976,438.36**; but that the Defendant did not oblige. Thus, the Plaintiff filed the instant suit for the aforesaid sum of **Kshs. 10,891,938.36**, interest on **Kshs. 9,916,500/=** at the rate of 18% per annum from **26 November 2014** until payment in full and costs of the suit plus interest thereon at court rates from the date of filing suit until payment in full.

[4] The Defendant denied the Plaintiff's allegations, including the particulars set out in paragraph 4 of the Plaintiff. According to the Defendant, it entered into an agreement with the Plaintiff whereupon the Plaintiff was to hold several cheques as collateral awaiting advise to deposit the same, but that, without its consent, the Defendant proceeded to bank the said cheques unilaterally. The Defendant thus prayed for the dismissal of the Plaintiff's suit with costs.

[5] When the suit came up for hearing on **18 October 2017**, there was no appearance for or by the Defendant, notwithstanding that the hearing date was taken in the presence of its Counsel. Thus, the Plaintiff adduced its evidence *ex parte* and called its Managing Director, **Sammy Kangethe Mbugua (PW1)**, who adopted his Witness Statement filed herein on **27 May 2016**. **PW1** testified that, at the Defendant's own request, the Plaintiff supplied it with various industrial, steam equipment and technical

hardware, boiler equipment and accessories between **April 2012** and **May 2014**. He stated that it was mutually agreed that the equipment and accessories would be paid for within 30 days from the date of issuance of the subject invoices; and that in the course of settling its outstanding invoices, the Defendant issued to the Plaintiff 11 cheques for the total sum of **Kshs. 9,900,000/=**; which cheques were dated between **3 November 2014** and **14 November 2014**. The cheques were all drawn on the Defendant's bank account **Number [Particulars withheld]** held at African Banking Corporation Limited, Industrial Area Branch. The cheques were however returned unpaid by the Defendant's bank upon presentation for the reason that the said account did not have sufficient funds to satisfy the cheques.

[6] It was the evidence of **PW1** that, arising from the dishonour of the cheques, the Plaintiff's bank account was debited with a total of **Kshs. 16,500/=** being bank charges for the 11 returned cheques, at **Kshs. 1,500/=** per cheque. Thus, he prayed for Judgment in the Plaintiff's favour as follows:

[a]	Value of the Unpaid Cheques	-	Kshs. 9,900,000.00
[b]	Interest at 18% per annum from		
	09.05.2014 to 25.11.2014	-	<u>Kshs. 975,438.36</u>
	Sub-total	-	Kshs. 10,876,438.36
[c]	Add Bank Charges on dishonoured		
	Cheques	-	<u>Kshs. 16,500</u>
	Balance owing as at 25.11.2014	-	<u>Kshs. 10,891,938.36</u>

[7] **PW1** further urged the Court to find that interest is due on the principal amount and the bank charges on dishonoured cheques in the sum of **Kshs. 9,916,500/=**; and that such interest continues to accrue and is due at the rate of 18% per annum from **26 November 2014** until payment in full. It was therefore urged that judgment be entered in the Plaintiff's favour accordingly.

[8] Having perused and considered the pleadings and the documents filed herein in support of the pleadings as well as the evidence adduced by the Plaintiff, there appears to be no dispute that there existed a business relationship between the Plaintiff and the Defendant whereby the Plaintiff would, at the instance of the Defendant, supply the Defendant with goods on 30 days' credit terms. There is further no dispute that between **April 2012** and **May 2014**, the Defendant ordered for and obtained a supply of equipment and accessories from the Plaintiff, which the Plaintiff was required to pay for within 30 days of the issuance of the respective invoices for the equipment and accessories.

[9] It was the uncontroverted evidence of **PW1** that the Defendant issued the Plaintiff with 11 cheques, in the normal course of settling its outstanding invoices. The particulars of the cheques were as hereunder:

No.	Date	Cheque Number	Amount (Kshs.)
1.	03.11.2014	001495	900,000.00
2.	04.11.2014	001493	900,000.00
3.	05.11.2014	001496	900,000.00
4.	06.11.2014	001497	900,000.00

5.	07.11.2014	001498	900,000.00
6.	08.11.2014	001500	900,000.00
7.	10.11.2014	001501	900,000.00
8.	11.11.2014	001502	900,000.00
9.	12.11.2014	001503	900,000.00
10.	13.11.2014	001504	900,000.00
11.	14.11.2014	001505	900,000.00
	Total		9,900,000.00

[10] The Plaintiff has further adduced uncontroverted evidence to show that all the aforementioned cheques were dishonoured on presentation. Copies of the Return Cheque Advice and images of the 11 cheques were exhibited at pages 21 to 31 of the Plaintiff's Bundle of Documents. Those documents bear the cheque numbers, date, amount, paying bank, account number and the reason for the return. They confirm, therefore, that the cheques were issued by the Defendant to the Plaintiff in the sums afore stated and that they were returned with the remarks "**Refer to Drawer**".

[11] It is noteworthy that in the Witness Statement made by **Noel Johnson**, which was filed herein on **24 February 2015**, it was expressly conceded that the Defendant issued the aforementioned cheques to the Plaintiff; and that they were returned unpaid because there were no sufficient funds in the account to cover the amounts drawn on the cheques. The Defendant however contended that the cheques were issued with the understanding that the same would only be banked on the instructions of **Noel Johnson**, but that he was taken ill in the last week of **October 2014** and had to travel to India for treatment; and that the Plaintiff, on learning that **Noel Johnson** had left the country, deposited the cheques without the requisite consent, and even after being advised that there were no sufficient funds to cover the cheques.

[12] Since no evidence was called by the Defendant, the allegations in the Statement of Defence and the Witness Statement remain mere allegations. It is also significant that the Defendant did indicate herein that it would not be relying on any documents. Thus, on the basis of the uncontroverted evidence adduced herein by the Plaintiff, it is manifest, on a balance of probabilities, that the Plaintiff received the 11 cheques from the Defendant for valuable consideration, and that the cheques were all dishonoured on presentation for lack of funds. In any event, by dint of **Section 30** of the **Bills of Exchange Act, Chapter 27** of the **Laws of Kenya**, there is a presumption of value and good faith. The provision states that:

"(1) Every party whose signature appears on a bill is prima facie deemed to have become a party thereto for value.

(2) Every holder of a bill is prima facie deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue or subsequent negotiation of the bill is affected with fraud, duress or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill."

[13] In the case of ***Hassanah Issa & Co –vs-Jeraj Produce Store [1967] EA 55***, the President of the Court of Appeal for Eastern Africa, while interpreting the provisions of **Section 30** of the Tanzanian **Bills of Exchange Act** which is in *pari materia* with Section 30(2) of our Bills of Exchange Act, explained that:

"...in as much as the suit was upon a cheque and inasmuch as the cheque was admittedly given, the onus was then on the defendant to show some good reason why the plaintiff was not entitled to have judgment upon the cheque admittedly given for the figure set out in that cheque. This position stems from Section 30 of the Bill of Exchange Act (Ch 215); which provides that the holder of a bill is prima facie deemed to be a holder in due course; but if an action on the bill is admitted or proved that the issue is affected with duress or illegality, then the burden of proof is shifted unless certain events, which are irrelevant for this purpose, take place. The position is therefore that where there is a suit on a cheque and the cheque was admittedly been given the onus is on the defendant to show circumstances which disentitle the plaintiff to a judgment to which otherwise he would be entitled."

[14] Similarly, in the Court of Appeal in the case of Paresh Bhimsi Bhatia –vs- Mrs Nita Jayesh Pattni CA Civil Appeal No. 199 of 2003 (Nairobi) (unreported) held that:

"A cheque is a bill of exchange drawn on a bank payable on demand (see Section 73(1) of the Bill of Exchange Act, Cap 27). By Section 55(1) the drawer of a bill by drawing it, engages, inter alia, that on due presentation, it shall be presented and paid according to its tenor and that if it is dishonoured, he will compensate the holder or a subsequent endorser who is compelled to pay it so long as the requisite proceedings for dishonour be duly taken."

[15] Similarly, the Plaintiff's prayer for interest at the commercial rate of 18% is unrebutted. In its written submissions dated 7 November 2017, the Plaintiff relied on the cases of Feroz Nuralji Hirji vs. Housing Finance Company of Kenya Ltd & Another [2015] eKLR in which interest was awarded at the rate of 26% per annum and Patmose Technical Services (K) Ltd vs. Rural Electrification Authority [2014] eKLR in which Ogola, J. awarded interest at 18% per annum as had been prayed for, noting that had the Plaintiff invested the money it would have earned interest well above that rate of 18% per annum. I would agree that the claim for interest herein at 18% from 9 May 2014 is justified. Indeed, in the case of Shah vs. Guilders International Bank Limited [2003] KLR 8 it was held thus by the Court of Appeal:

"...If by their agreement parties have fixed the rate of interest payable, then the court has no discretion in the matter and must enforce the agreed rate unless it is shown in the usual way either that the agreed rate is illegal or unconscionable or fraudulent..."

[16] In the premises, it is my considered finding that the Plaintiff has made out a good case against the Defendant and that it is entitled to Judgment as prayed in the Plaintiff. Thus, Judgment is hereby entered in the Plaintiff's favour against the Defendant as hereunder:

[a] Kshs. 9,900,000.00 being the value of the dishonoured cheques;

[b] Kshs. 975,438.36 being interest at 18% per annum from 9 May 2014 to 25 November 2014;

[c] Kshs. 16,500/= being Bank Charges paid by the Plaintiff on the dishonoured cheques;

[d] Interest on the principal amount and the bank charges on dishonoured cheques at the rate of 18% per annum from 26 November 2014 until payment in full;

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF DECEMBER, 2017

OLGA SEWE

JUDGE