



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL CASE NO.108 OF 2010

TEXPLAST INDUSTRIES LIMITEDPLAINTIFF

VERSUS

CHEMILIL SUGAR COMPANY LIMITED.....DEFENDANT

J U D G M E N T

1. The plaintiff filed this suit against the defendant claiming:

(a) The sum of Kshs.8,731,288.85/=

(b) Interest on (c) at 3% per month from the 31st December, 2009 until payment in full

(c) Costs of the suit.

2. Vide the ruling of the court dated 28.1.2013 the defendant settled the principal amount leaving the question of interest to be settled by way of adduction of evidence.

3. In that regard the plaintiff called one **ALFREY K MUZEE** who testified that the plaintiff did supply goods on credit to the defendant. The said goods were received by the defendant but unfortunately it failed to pay rendering the defendant to issue a demand notice. Despite this the defendant still failed to settle prompting the plaintiff to file the current suit. He produced as pieces of evidence the invoices, the delivery notices as well as correspondence between the parties herein.

4. On the question of interest the plaintiff averred that all the invoices clearly indicated that a 3% interest per month would be charged on all overdue accounts. The said witness further stated that having settled the principal sum it was incumbent upon the defendant to pay the interest as it defaulted in paying the same.

5. On its part the defendant called one **ROBERT OCHONGA NYAKUNDI**, its Procurement Manager to testify on its behalf. He told the court that indeed the plaintiff did supply goods to the defendant and that there was a delay. However the principal sum has been settled and all that was outstanding was the question of interest. He however denied that the plaintiff was entitled to interest as it did not form part of the contract between the parties. He also relied on the correspondences between the plaintiff and the defendant.

6. At the close of the proceedings, both parties did file their respective written submissions which I have had the time to peruse.

7. The only question that is well captured by the parties and what is indeed the issue for determination is

whether interest ought to be paid to the plaintiff and if so, at what percentage.

8. The invoices produced by the plaintiff state on the lower side as follows:

“We have lieu over goods supplied until they are fully paid for. Interest of 3% per month will be charged on all overdue accounts Declaration: We declare that this invoice shows the actual price of goods described and that all particulars are true and correct.”

9. On 1.12.2009 the plaintiff wrote to the defendant a demand letter giving it 7 days to pay or

“we will be forced to seek legal redress for recovery of the same with interest/costs.”

10. The defendant on 3.2.2010 replied to the said letter thus:

“we refer to your letter dated 1st December, 2009 regarding the above and wish to apologies most sincerely for not settling our account with you in time.”

11. It then went ahead to promise to settle in 3 installments which of course it failed to do. In all these correspondences the defendant did not query the issue of interest earlier raised by the plaintiff.

12. From what the parties presented there was no formal signed contract between the parties and all that was there was delivery of goods on credit and thereafter there would follow the payments. All that bound the parties were the delivery notes as well as the invoices. As quoted above the invoices contained a declaration. The defendant did not dispute any of the invoices and that is the reason it paid the principal sum.

13. In light of this it would have been expected that if the defendant had any issue with the invoices especially the 3% interest per month, there was nothing difficult for it to have raised any objection. A look at all the bundles of invoices shows the 3% per month clause well captured.

14. The defendant has not disputed this neither did its witness argue otherwise. In the absence of any express or implied denial, the defendant in my respectful view has to settle the same. Clearly it enjoyed the goods for a time before it paid. How then would the plaintiff be compensated if indeed it gave goods on credit and the same not paid for. I take it that the 3% per month interest was to cushion the plaintiff in the event of any default.

15. Further the defendant at no time wrote to the plaintiff requesting for a discussion on the 3% interest. In fact its letter of 3.2.2010 apologising for the overdue accounts sufficiently buttresses my above findings.

16. Section 26(1) of the Civil Procedure Act Cap 21 Laws of Kenya provides as follows on this question of interest:

“Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.”

17. The Court of Appeal in **SHAH VRS GUILDERS INTERNATIONAL BANK LIMITED 2003 KLR** expounded on this by stating that:

“This Section in our understanding confers upon the court the discretion to award and fix the rate of interest to cover three stages namely:

(1) The period before the suit is filed;

(2) The period from the date the suit is filed to the date when the court gives its judgment; and

(3) From the date of judgment to the date of payment of the sum adjudged due, or such earlier date as the court may, in its discretion, fix.”

18. The court went further to state:

“We further understand these provisions to be applicable only where the parties to a dispute have not, by their agreement, fixed the rate of interest payable. If by their agreement the 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 be shown in the usual way either that the agreed rate is illegal or unconscionable or fraudulent.”

19. In this case the 3% interest per month was well laid down in the invoices. At no time did the defendant when receiving the goods over a period of long time protest at its inclusion. Neither did it protest in subsequent correspondences before the suit was filed. It cannot therefore be said that the 3% per month interest was **“illegal, unconscionable or fraudulent.”**

20. The parties are bound by their documents. Although there was no express contract, impliedly by receiving the goods in the manner it did from the plaintiff the defendant was in an unwritten contract, contrary to its witness's assertion. The upshot of my finding is that the defendant ought to pay the interest for the value of the goods it received from the plaintiff. The interest payable should however be from the date of filing the suit namely 8.7.2010 calculated per month till 28.1.2013 or the day the plaintiff received its final payment of Kshs.8,720,338.90/=. Parties shall be at liberty to compute the said interest before the Deputy Registrar of this court in the event that they fail to agree. The plaintiff shall equally have the cost of this suit.

Orders Accordingly.

Dated, signed and delivered this 18th day of May 2016.

H. K. CHEMITEI

J U D G E