



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 210 OF 2013 (FAST TRACK)

H. YOUNG & COMPANY (EA) LIMITED ::::::::::::::: PLAINTIFF

VERSUS

SOUTH SHORE INTERNATIONAL LIMITED ::::::::::::::: DEFENDANT

J U D G E M E N T

I N T R O D U C T I O N

1. The suit herein was filed vide a **Plaint** dated **24th May 2013**. The claim is based on the strength of an unwritten agreement entered into between the Plaintiff and the Defendant in February 2012, under which the Defendant agreed to supply bitumen to the Plaintiff's job site at Kendu Bay. It was part of the agreement that the amounts due to the Defendant on account of the bitumen would be paid, but as surety for due performance of it payment the Plaintiff took out a Performance Guarantee number MD121320009C with the Kenya Commercial Bank Limited under which the bank irrevocably, unconditionally and on demand undertook to pay the Defendant the sum not exceeding USD 250,000 upon receipt of demand by the Defendant in the event that the Plaintiff was in breach of any of the terms of the contract. It is the Plaintiff's case that they conducted the business with the Defendant as a result of which the Defendant raised 8 invoices amounting to a total of Kshs.20,264,010/=, the entire amount of which the Plaintiff states to have paid leaving no debt outstanding. It is the Plaintiff's case that despite the full settlement, the Defendant has presented the said Guarantee to the said bank, who has paid the Defendant a total of Kshs.1,064,178.34 allegedly being interests on account of late payments by the Plaintiff of the sums due under the contract. It is this money which the Plaintiff now seeks to recover from the Defendant on the grounds that the said contract had no clause for interest on the amount of interest payable. The Plaintiff's prayers (a) and (b) has been overtaken by events except prayer in (b) in the alternative, (c) and (d) which remain.
2. The suit is opposed by the Defendant, who admits of the existence of the said oral contract, but insists that as part of the said oral contract there was an oral clause on the issue of interest. The Defendant's case is that payment for the bitumen supplied and delivered to the Plaintiff by the Defendant had to be made within 30 days of such supply and delivery and any default would attract interest at the rate of 25% per annum on the amount outstanding. The Defendant's case is that the Plaintiff, in breach of the contract failed to make payment within the said 30 days causing the Defendant to suffer huge loss in terms of interest as they had to borrow money from a bank to finance the supply of bitumen. The Defendant states that as a result of the Plaintiff's breach, the

- Defendant was entitled to recover interest on the amount outstanding, which accrued interest stood at Kshs.1,064,178.34 as at 23rd May 2013 and which amount was duly settled by the Kenya Commercial Bank in accordance with the guarantee issued by themselves to the Defendant.
3. Parties complied with pre-trial directions, and the matter came up for hearing on 10th February 2015, and on 2nd June 2015.
 4. The Plaintiff's sole witness was **Gopalkrishnan Balakumar** – PW 1 who adopted his witness statement filed in court on 19th February 2014. He also relied on the Plaintiff's bundle and list of documents filed on 27th May 2013. PW1 testified that he is the Financial Controller at the Plaintiff Company. In February, 2012, the Plaintiff made a purchase order to the Defendant for the supply of bitumen. The Defendant agreed to supply bitumen to the Plaintiff's Kendu-Bay site. The purchase order provided that the amount due to the Defendant on account of the bitumen would be paid within a prescribed time. However, the purchase order did not make any provision for interest on overdue accounts or for penalty on delayed payments. The Plaintiff took out a performance guarantee Number MD1213200009 with Kenya Commercial Bank as a surety for due performance of their payment obligation under the Purchase Order. The Performance Guarantee provided that, Kenya Commercial Bank would irrevocably, unconditionally and on demand pay the Defendant the sum of not exceeding USD 250,000 upon receipt of written demand by the Defendant in the event that the Plaintiff defaulted in payment. The transaction took place and the Defendant raised 8 invoices amounting to the total sum of Ksh.20,264,010/- which were all fully settled by the Company. Despite the full settlement of all the invoices by the company and several written requests the Defendant refused and neglected to release the original guarantee for cancellation, alleging that it is owed interest of the sum of Ksh.819,137.03 as at 26th July, 2012. PW1 testified that the Defendant's allegations are in breach of the terms of the purchase orders and the invoices forwarded to the Plaintiff. PW 1 testified that the Defendant sent an electronic mail to the Plaintiff on the 31st August 2012 threatening to present the guarantee to the bank for the payment of the amounts allegedly due on account of interest. The Plaintiff subsequently instructed their Advocates to demand for the surrender of the original guarantee No. MD 121320009C from the Defendant. The Advocate then issued the demand via a letter dated 5th September, 2012 which also gave a notice of intention to sue. On the 28th of May, 2013 the Defendant returned the original guarantee number MD 121320009C of the sum of USD 250,000 that was issued in favour of them with a claim of Ksh.1,064,178.34. In the meantime, Kenya Commercial Bank furnished the Plaintiff with a letter dated 28th May, 2013, which informed the Plaintiff that they had debited the Plaintiff's account number 1108470173 with the sum of Ksh.1,064,178.35 and paid the said sum into the Defendant's account at CFC Stanbic Account Number 0100000592255. The bank also confirmed the cancellation of the guarantee through the same letter. PW 1 testified that the Defendant's presentation of the Performance guarantee to the bank for the settlement of their alleged claim gravely prejudiced the Plaintiff. The Plaintiff's case is that the purchase order, the invoices made by the Defendant and the discussions held by the parties did not make any provisions for interest on overdue accounts, and so the Defendant's Demand/Claim for interest was unconscionable and the settlement of the Defendant's claim was unjust. PW1 made case for the recovery of the monies paid to the Defendant by the bank, cost of the suit and interest thereon.
 5. On their part, the Defendant also called one witness **Simon Muchene** - DW 1, who adopted his witness statement filed in court on 4th April 2014. DW 1 testified that he is a Director of the Defendant and is conversant with the facts of this case. The witness agreed that there was an unwritten agreement between the parties, but denied the Plaintiff's claim that there was no clause on interest on outstanding dues. The witness testified that payment for the bitumen supplied and delivered to the Plaintiff by the Defendant was to be made within 30 days of such supply and delivery and any default would attract interest at the rate of 25% per annum on the amount outstanding. DW1 testified that the Defendant indeed supplied bitumen to the Plaintiff and the Plaintiff paid for the same, however, the Plaintiff in fundamental breach of the payment terms, completed payment for the subject in the month of August, 2012, five months after payment for the same was due. As a result of the Plaintiff's breach, the Defendant was entitled to recover interest on the amounts outstanding, which accrued interest and which amount was duly settled by Kenya Commercial Bank in accordance with the guarantee issued by themselves to the Defendant. DW1 testified that the Defendant had called up the guarantee subject hereto in the month of

- September, 2012 following the Plaintiff's default and or failure to settle the accrued interest, however, the enforcement of the guarantee to recover the accrued interest was held in abeyance following court orders issued on 11th September 2012 in Nairobi CMCC No 5241 of 2012 (H Young & Co. EA Limited V South Shore International Limited) which suit was determined by the Honourable Court on 23rd May, 2013 whereupon the Defendant enforced the guarantee.
6. With the leave of court parties filed submissions which I have considered. Parties also filed separate issues. After going through the submissions and the said issues, the following are the issues which in my opinion need to be determined:-
 - a. ***Was there a breach of contract on payment terms by the Plaintiff?***
 - b. ***Was there an implied term to the contract concerning payment of interest on overdue payments, and if so, what was the applicable rate of interest.***
 - c. ***Was the Defendant entitled to call for the subject guarantee.***
 - d. ***Is the Defendant liable to the Plaintiff in the sum of Kshs.1,064,178.34.***
 7. To address the first issue, both parties agreed that there was the oral contract under which the business was conducted. Under the said contract, PW 1 gave evidence that payments were to be made to the Defendant within 30 days of the supply and delivery of the bitumen. The Plaintiff's witness agreed that there was delay in payment. The Plaintiff has also submitted at paragraph 1.6 and 1.7 of its submissions that there were delays in payment, with the payment of the 4 invoices being made five months late. The Plaintiff, however, attributes this delay to factors beyond the control of the Plaintiff. That notwithstanding since delay in payment was admitted by the Plaintiff, it also follows without any controversy that the Plaintiff was in breach of the contract at least in as far as the payment term is concerned. So the answer to issue number one is in the affirmative.
 8. To address issue number two, as to whether there was implied term to the contract that interest would be payable on outstanding due, we must note that the contract under consideration was unwritten, and therefore parties would only admit what they feel would aid their cause. However, for this court, what is to be noted is that the particular contract was a commercial contract. It is also to be noted that there was a bank guarantee. When we talk of bank guarantee or indeed of any borrowing, interest must of necessity be an issue. In any event, the Plaintiff does not deny that payment was to be made within 30 days of supply and delivery of bitumen. The question which a reasonable commercial minded person must ask is this – what happens after the said 30 days? Why was there need to give a time period if interests were not to apply? According to the pleadings, the Plaintiff states that payment was to be effected within a reasonable period. This reasonable period is not defined. The question still remains, what was to be done after the reasonable period was exhausted?
 9. Still, even if we agree that interest was discussed to be payable, then how come parties did not agree on the rate of interest. Is it possible that the failure to agree on the rate of interest also means that no interest was indeed applicable?
 10. It is not the duty of the court to write a contract for the parties, and therefore this court would be reluctant to read into the oral contract any terms which may appear contradictory to the terms of the said oral contract. However, it is the duty of this court to give efficacy to the intention of the parties to a contract without re-writing the contract. In my opinion, for the parties to approve a period within which payments had to be made carries with it the implied term that if payment was not made within the prescribed period, some penalties would ensue, and in terms of a commercial transaction such as this, such penalty for late payment can only ensue in terms of interest. That there was no agreed rate of interest stated does not lessen the impact of that position. Where parties have not agreed on applicable interest, the court has a wide discretion. In any event, to use the Plaintiff's own phrase "payment within a reasonable period" the interest payable can also be such reasonable rates that the parties probably had in mind but did not verbalise, and which the court can infer.
 11. The Plaintiff submits that the question of interest arose only in the demand letter dated 26th July, 2012. However, communications between the parties show that the Plaintiff was well aware delayed payments were attracting interest and penalties. Reference is had to page 24 of the Defendant's Statement of Defence bundle where the Defendant's witness Mr. Muchene, writes to the Plaintiff's witness Mr. Balukumar thus, ***as you will find attached our bankers have been writing to us for not fulfilling this obligation and as such we are incurring heavy interest***

penalties.” Mr. Balakumar admitted in Court to having received this correspondence, and in the entirety of the correspondence between the parties, the Plaintiff did not deny the issue of interest and penalties. When the Defendant made a formal demand for the outstanding balance and interest on 26th July, 2012, the Plaintiff neither responded to the demand or disputed the issue of interest. The Plaintiff did not dispute that their breach of contract attracted interest and bank charges, only that according to them, these had been factored in the price. If, as is now the case, the contract in question was an oral contract, the question of why the Defendant did not introduce interest in the contract documents therefore does not arise. In the finding of this court, therefore, interest was payable on account of delayed payments. However, the Defendant did not have the sole mandate to determine the rate of that interest. In the judgement of this court, that rate shall be at court rates.

12. The remaining issues are by dint of the foregoing paragraphs of this Judgment answered in the affirmative, that is, that the Defendant was entitled to call the subject grantee and that the Defendant is not liable to the Plaintiff in the sum of Kshs.1,064,178.34, but is liable to the Plaintiff in a lesser sum calculated at the rate of interest of 12% per annum and not at the rate adopted by the Defendant of 25% per annum.
13. In the upshot, Judgement is entered for the Plaintiff against the Defendant as follows:-
- a. ***A refund of all monies had and received by the Defendant from Kenya Commercial Bank Limited pursuant to and under Performance Guarantee number MD1213200009C issued by the said Kenya Commercial Bank Limited in favour of the Defendant subject to the aforesaid interest rate of 12% per annum.***
 - b. ***Parties to bear own costs of the suit.***

That is the Judgement of the court.

READ, DELIVERED AND DATED AT NAIROBI

THIS 12TH DAY OF NOVEMBER 2015

E. K. O. OGOLA

JUDGE

PRESENT:

M/s Muriu for the Plaintiff

No appearance for the Defendant

Teresia – Court Clerk