



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 443 OF 2009

DECASE CHEMICALS TRADING FZE LTD PLAINTIFF

V E R S U S

CABLES & PLASTICS LIMITED DEFENDANT

RULING

1. Plaintiff by its plaint prays for judgment for USD 92,164.40 being money owed to it by Defendant in respect of goods sold to Defendant. By that plaint Plaintiff particularized its claim as follows-
 - i. **Value of goods USD 67,480**
 - ii. **Agreed interest @ 3%:-**
 - **On invoice dated 27th September 2007 = USD 5,100.40**
 - **On invoice dated 31st October 2008 = USD 19,584.00**
- Total interest USD 24,684.40**
2. Defendant filed a Defence to that claim and seeking the dismissal of the Plaintiff's case.
 3. Plaintiff filed a Notice of Motion dated 10th April 2012 seeking that judgment be entered as prayed in the plaint. The application was not opposed by the Defendant and also although the Defendant was served at its last known address it failed to attend the hearing of the application.
 4. The Plaintiff Director's affidavit supported the application. He deponed that the Plaintiff sold and supplied goods to the Defendant in the years 2007 and 2008. In that regard he attached two invoices. One was for USD 55,080 and the other was for USD 54,400. Further that the Defendant made payments of USD 42,480 and USD 22,406.32.
 5. The Plaintiff in its claim has added 3% interest to the amount outstanding and owed to it by Defendant. Plaintiff seems to base the claim for interest from a statement contained in the invoices forwarded to Defendant which reads-

“Delay in payment will incur an interest rate of 3% per month from the due date.”

The Defendant does not seem to have signed the invoices to acknowledge the charging of that interest. Indeed I have noted that it is only the Plaintiff's representative who signed the invoices. I would therefore state that there was no contractual interest rate agreed between Plaintiff and

Defendant. A document only signed by one party cannot in my view bind the other party. It is for that reason that Plaintiff's claim for application of 3% interest rate will be declined. It will further be declined because to enforce it the Court may be re-writing the parties contract, which is not permissible. This was what was stated in the case CHRISTOPHER NDOLO MUTUKU & ANOTHER –Vs- CFC STANBIC BANK LIMITED (2013)eKLR when the Court stated-

“I cannot re-write the agreement or the contract between the parties. I have to give effect to its letter and spirit even if it causes hardship to either of them. The parties executed the same willingly and they are therefore bound by it. This is what the Court of Appeal seems to have said in the case of Shah v Guilders International Bank Ltd (2003)KLR 8.” (underlining mine)

6. I do find that this is a suitable case for the entry of summary judgment and it does meet the principles that guide the Court when entertaining such an application. Those principles were set out in the case: HARIT SHETH T/A HARIT SHETH ADVOCATES –Vs- SHAMAS CHARANIA (2014)eKLR-

“The principles which guide our courts in determining applications for summary judgment are not in dispute. In INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION –Vs- DABER ENTERPRISES LTD (2000)1 EA 75 this Court stated that the purpose of the proceedings in an application for summary judgment is to enable a Plaintiff to obtain a quick judgment where there is plainly no defence to the claims. To justify summary judgment, the matter must be plain and obvious and where it is not plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where, if necessary, there has been discovery and oral evidence subject to cross-examination. (See also CONTINENTAL BUTCHERY LTD – Vs- NDHIWA (1989)KLR 573).”

7. In entering judgment for the Plaintiff I will not consider the interest prayed for by Plaintiff. Accordingly I do enter judgment for the Plaintiff as follows-

- a. Amount owed USD 109,480

Less paid USD 64,886

USD 44,594

- b. The amount of USD 44,594 shall attract interest at Court rate from the date of this suit until payment in full.
- c. Plaintiff is awarded costs of the suit and costs of Notice of Motion dated 10th April, 2012.

DATED and DELIVERED at MOMBASA this 19TH day of JUNE, 2014.

MARY KASANGO

JUDGE