



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**(MILIMANI COMMERCIAL COURTS)**

**CIVIL SUIT 1237 OF 2002**

**FURSYS KENYA LIMITED.....PLAINTIFF**

**-VERSUS-**

**SYSTEMS INTEGRATED LTD t/a SYMPHONY.....DEFENDANT**

**J U D G E M E N T**

1.The Plaintiff is a limited liability Company incorporated under the Companies Act (Cap 486 Laws of Kenya) which engages in the business of supplying furniture and office equipment.

2.The Defendant is a limited liability company duly incorporated under the Companies Act (Cap 486 Laws of Kenya) and trading in the name of “Symphony”.

3.The Plaintiff instituted the suit herein by way of a Plaint dated **10<sup>th</sup> December 2002**. The Plaintiff prays for judgment against the Defendant for:-

- a) **The sum of US \$ 85,000 together with interest thereon at 23% per annum from 17.01.2001 until payment in full.**
- b) **Costs of this suit.**
- c) **Interest on (b) above at Court rates from the date of judgment until payment in full.**
- d) **Any other relief as this Honourable court may deem fit and just to grant in the circumstances of the case.**

4. According to the Plaint, by an agreement dated **10.08.2000** (hereinafter referred to as the “Agreement”), the Plaintiff undertook to supply and install furniture and equipment for the Defendant (hereinafter referred to as the ‘goods’). By a further agreement dated **23.11.2000** the Defendant undertook to do the following:

- a) **Pay the Plaintiff US\$ 82,800 on 23.11.2000 which funds were to be utilized specifically and only for the removal of all the goods from the port of Mombasa and transportation of the same to symphony place, Westlands Nairobi.**
- b) **Pay the Plaintiff US\$ 80,000 within two working days from the date of delivery of all the goods at the Symphony place.**

**c)Pay a further US\$ 50,000 on 17.1.2001.**

**d)Pay a further US\$ 24,500 on 17.2.2001**

**e)Make a further and final payment of US\$ 10,500 at 125 days from the date of Certificate of acceptance & installation signed by the parties.**

5.The Plaintiff avers that it supplied and delivered the goods to the Defendant in fulfilment of its obligation under the agreement. However, in breach of the terms of the said agreement, the Defendant failed and/or neglected to make the requisite payments. It is the Plaintiff's claim that the Defendant continues to owe them US\$ 85,000 and interest thereon from the date of default at the rate of 23% per annum.

6.In controverting the Plaintiff's claim, the defendant filed a Defence on 6<sup>th</sup> May, 2004 and pleaded the right to a set off and Counterclaim against the Plaintiff. It is the Defendant's case that the payments stated in the Plaint, to wit, US\$85,000, were subject to the plaintiff performing its part of the contract and the parties executing the Certificate of acceptance and installation as provided for in the aforesaid contracts.

7.The Defendant avers that the Plaintiff delivered and installed some goods for which the Plaintiff has been paid in full. It is further averred by the Defendant that some of the goods delivered by the Plaintiff were faulty and not fit for the purpose for which they had been ordered. For that reason, it is the Defendants contention that they suffered loss and damage to the tune of **US\$ 120,000** for which it claims from the Plaintiff a set off and counterclaim.

8.This matter was part heard before the Honourable **Judge Njagi**. The hearing commenced on **13<sup>th</sup> May 2010** with **Mr. Byung Tae Kim**, PW1, adducing evidence on behalf of the Plaintiff. There was a further hearing on **2<sup>nd</sup> June 2010**. Mr. Byung stated that he supplied office furniture through the Plaintiff Company. He confirmed that the parties herein entered into a contract on **10.08.2000** for the sum of **US \$247,800**. He referred to page 5 of the Defendant's bundle of documents to show the quotation detailing the aforesaid amount and the terms of payment.

9.PW 1 reiterated that they were claiming the amount of **US\$ 85,000**. The said amount comprises of US\$ 50,000 which was to be paid on 17.1.2001, US\$ 24,500 to be paid on 17.2.2001 and the sum of US\$ 10,500 which was to be paid after 125 days from the date of Certificate of acceptance. He testified that since the filing of the suit, the Defendant had paid a sum of **US \$41,471.86** by way of a consent recorded in Court on **27.1.2010**. It was his testimony that he did not know how the Defendant arrived at the said sum.

10.It was also his testimony that the Defendant informed the Plaintiff that some furniture were defective. He stated that the cracked chairs were offset against the price. It was also his testimony that the Defendant said 54 chairs were defective but they returned only three chairs. He concluded by stating that the Defendant had never complained to them that they were in breach of the agreement and that their only complaint was about the chairs

11.On cross-examination, PW 1 testified that the last payment of **US\$10,500** in accordance with the second agreement was to be made 125 days from the date of certificate of acceptance and installation signed by the parties. It was his testimony that he did not produce the said certificate in evidence because it was not received by the Plaintiff from the consultants. He further testified that reconciliation was done between what was ordered and what was installed. He stated that he could not produce the delivery notes as the person who had them had passed on.

12.The defence case commenced on **7<sup>th</sup> May 2012**. Mr. Gachoka, Counsel for the Defendant, made an opening statement to the effect that the defence case was aimed at proving that they had already paid what they genuinely owed the Plaintiff. He submitted that the Plaintiff did not supply the furniture as per the agreement. Further hearing of the defence case was conducted on **3<sup>rd</sup> July 2012** with **Mr. Teotonio Fernandes, DW1**, adducing evidence on behalf of the Defendant.

13.DW 1 stated that he was employed as an operations manager by the Defendant before he left in 2005. He confirmed that the contract sum was **US\$ 247,800**. He testified that there was an amendment to the original agreement on **23<sup>rd</sup> November 2000**. The new contract provided for a warranty period of six (6) months after installation and signing of the Certificate of acceptance. It was DW 1's testimony that there was no certificate signed.

14.DW 1 testified that the dispute between the parties started soon after the Plaintiff delivered the goods to the Defendant and the Defendant kept the same and fitted them. The Defendant wanted a reconciliation of all the items to confirm that all items as per the floor plan were delivered. It was DW 1's testimony that the Plaintiff, on several occasions, failed to show up for the reconciliation. At that time the Defendant had already paid a sum of US \$ 162,800.

15.It was also DW 1's testimony that 100 chairs were supplied but 54 broke immediately while others broke thereafter. The Plaintiff was notified of the anomaly and the Defendant returned three damaged chairs. DW 1 testified that there was a letter from the Plaintiff to the Defendant where the Plaintiff admitted responsibility for the 54 damaged chairs. He referred to page 62 of the Defendant's bundle of documents.

16.It was further DW 1's testimony that the Defendant had paid to the Plaintiff a sum of US \$ 162,800 at delivery in the year 2000 and a further US \$ 41,471.86 on 27.01.2010 pursuant to a Court order. According to him the Defendant had paid the amount due and owing after reconciliation. He went ahead and stated that the Plaintiff had in fact, been overpaid by a sum of **US\$ 10,500** for which the Defendant was now pleading a counter claim.

17.On cross examination, DW 1 clarified that the Defendant had withdrawn the counterclaim for the amount of US \$ 120,000 as stated in the Defence and was now claiming US \$ 10,500. He confirmed that the first payment made to the Plaintiff was US\$ 162,800 paid in 23<sup>rd</sup> November 2000 when the agreement was amended. The other payments of US\$ 50,000 and US\$ 24,500 were due on 17<sup>th</sup> January 2001 and 17<sup>th</sup> February 2001 respectively. However, the said payments were not made. The last payment of US\$ 10,500 was to be made 125 days from the date of certification. It was DW 1's testimony that they paid the said amount erroneously.

18.DW 1 also admitted that he did not have any document to contradict the assertion by the Plaintiff that they delivered all the goods. He further testified that the Defendant returned the 51 chairs but the Plaintiff declined delivery and the said chairs are currently at the defendant's premises.

19.On re-examination, DW 1 clarified that the floor plans were part of the agreement. He stated that the agreement required the Plaintiff to supply goods of good quality and that the Defendant would remedy any defects. He further stated that the Defendant was still holding the defective chairs and that even the three chairs that were returned and accepted had never been replaced by the Plaintiff. It was testified on behalf of the Defendant that the Plaintiff had not proved what they had supplied.

20.The Plaintiff filed its written submissions on 17<sup>th</sup> September 2012 while the Defendant filed its reply on 20<sup>th</sup> September 2012. 21.It is submitted for the Plaintiff that the Defendant reneged on its undertaking to pay the Plaintiff a balance of US\$ 85,000 as set out in the agreement dated 23<sup>rd</sup> November 2000. As a result the Plaintiff filed the current suit seeking prayers as set out in the Plaintiff's submissions that pursuant to filing the suit, the Defendant subsequently paid a sum of **US \$ 41,471.86** being the sum admitted as owing to the Plaintiff. This was paid pursuant to a consent recorded in Court on **27<sup>th</sup> January 2010**.

22.As for the Defendant, it is submitted that through many letters they requested the Plaintiff for a meeting to reconcile accounts. The Plaintiff failed to co-operate and the parties did not hold any meeting for reconciliation of accounts. It is further submitted that the said reconciliation was important as the Plaintiff failed to deliver goods as stipulated in the agreement. The defendant did its own reconciliation and paid the plaintiff **US\$ 41,471.86**. It is the Defendant's case that save for that amount, the Plaintiff is

not entitled to any further payment and to the contrary, the Defendant is entitled to payment of **US\$10,500**.

**23.**It is further the Defendant's case that the Plaintiff has failed to demonstrate that it supplied the goods as stipulated in the agreement dated **10.08.2000**. The Plaintiff has not produced the invoices, delivery notes, and the Certificate of acceptance and installation signed by the parties, if any. It is also the Defendant's case that the burden of proof to show the Court that the Plaintiff complied with the contract lies on the Plaintiff.

**24.**The Parties filed a Statement of agreed issues containing ten issues for determination on **29<sup>th</sup> November 2006**. It is not in dispute that the parties herein entered into an agreement dated 10<sup>th</sup> August 2000 for the supply and installation of furniture, which agreement was amended on 23<sup>rd</sup> November 2000. Therefore, from the said Statement of Agreed issues, this Court has narrowed down the issues for determination as follows:-

- a) Whether the Plaintiff performed its obligations under the contracts with the Defendant.**
- b) Whether the Plaintiff is entitled to the balance of US \$ 43, 528.14.**
- c) Whether the defendant is entitled to any of the reliefs sought in the set off, defence and counterclaim.**

**25.**As to whether the Plaintiff performed its obligations under the Contract with the Defendant, it is the Plaintiff's contention that they delivered the goods as per the agreement. The Defendant disputes the same and states that some furniture was not merchantable, which includes the 54 broken chairs. The Defendant also states that they returned 3 chairs that were broken.

**26.**From the evidence on record, it is apparent that the Defendant is not disputing the fact that the Plaintiff supplied the furniture. The point of contention is the quality of the said furniture. The Defendant avers that the same was not of good quality as stipulated in the agreement and therefore the Plaintiff was in breach of the agreement.

**27.**It seems that the Plaintiff accepted responsibility for the said 54 faulty chairs. In a letter dated **24<sup>th</sup> September 2002 (page 62 of the Defendant's bundle of documents)**, the Plaintiff acknowledged that they had received three samples of the 54 chairs that were damaged. The letter also gave the Defendant a go ahead to deduct the amount of all 54 chairs and the leather ones which the Plaintiff would take back. It is the Court's assumption that the amount was to be deducted from the contract price.

**28.**From the foregoing, the Plaintiff cannot be heard to say that they performed their obligations under the Contract. They have not disputed the fact that there were some faulty chairs and there is no evidence on Court record that the Plaintiff remedied the same.

**29.**The second issue is whether the Plaintiff is entitled to the balance of US \$ 43, 528.14. It has been established that the Defendant paid to the Plaintiff a sum of **US \$ 162,800** at delivery in the year 2000 and a further **US\$ 41,471.86** on **27.01.2010** pursuant to a Court order. Therefore, the Defendant has made a total payment of **US \$ 204,271.86** so far out of the contract sum of **US\$ 247,800**. In that case, the outstanding balance should be **US \$ 43, 528.14**, which the Plaintiff is claiming.

**30.**However, this Court has already established that the Plaintiff did not fully perform its obligations under the Contract. There was breach on the Plaintiff's part for supplying some chairs of unmerchantable quality. It is therefore evident that the Plaintiff is not entitled to the total contract price of **US\$ 247,800**. The Plaintiff is not entitled to payment for the 54 faulty chairs, an amount which constitutes the Contract price.

**31.**It is also the Defendant's case that they did not approve the list of items referred to at **pages 6-12** of

its bundle of documents at the time of delivery/installation of goods since the same did not match the furniture plan with the contract and deliveries. The furniture was received 'in knocked down form' and kept in storage containers. The Plaintiff did not controvert the said allegations yet the same determine whether it performed its obligations under the contract and are entitled to the whole contract sum.

**32.** Furthermore, from the evidence on record, it is clear that no Certificate of acceptance was signed by the parties as contemplated. This was admitted by the Plaintiff's witness, Mr. Byung Tae Kim. It therefore follows that the sum of **US\$ 10,500** as set out in clause (g) of the supplementary agreement is not payable. It is the Defendant's claim that they paid the said amount erroneously.

**33.** Mr. Fernandes, DW 1, prepared a breakdown of items and their cost in his Witness Statement to show that the Plaintiff was to issue the Defendant with a credit note of **US\$ 43,528.14**. This would in essence offset the amount the Plaintiff is claiming from the Defendant. That notwithstanding, this Court cannot rely on the said breakdown as it was not done by an independent party. In that case it would be difficult to ascertain whether the said breakdown is the true and objective position.

**34.** Having made the above findings, it is plain that the Plaintiff is not entitled to the whole balance sum of **US \$ 43,528.14**. It is not apparent from the Court record what amount was to be deducted or not to be paid subject to the Plaintiff's failure to perform its obligations.

**35.** The third and last issue is whether the Defendant is entitled to any of the reliefs sought in the set off, defence and counterclaim. In his testimony, DW 1 clarified that the Defendant had withdrawn the counterclaim for the amount of **US \$ 120,000** as stated in the Defence and was now claiming **US \$ 10,500**.

**36.** It is not in dispute that the amount of **US \$ 10,500** was to be paid at 125 days from the date of Certificate of acceptance and installation signed by the parties. It is also not disputed that the said Certificate was not signed by the Parties and therefore the said amount of **US \$ 10,500** was not due and payable. The Defendant's case is that the same was erroneously paid. However, it has been established that the Defendant has paid the Plaintiff a sum of **US\$ 204,271.86** so far leaving a balance of **US \$ 43,528.14**. It is only logical that the said amount of **US \$ 10,500** is part of this balance. In that case the Defendant cannot counterclaim for the same. In summary, the Plaintiff has not discharged its case on a balance of probabilities and has not adduced evidence to show how the sum of **US\$ 43,528.14**, which they claim is still due and owing, has been arrived at in view of the admitted unmerchantability of some of the suit products.

**37.** I have a strong feeling that if the Plaintiff were to be more diligent in this case, and had gone into the details of unmerchantable chairs and quantified the same, the Plaintiff may have proved some of the alleged outstanding balance of the said **US \$ 43,528.14**. They have failed to do this. Neither has the Defendant proved its Counter-Claim.

**38** I accordingly dismiss the Plaintiff's suit but direct that each party shall bear their own costs of the suit.

**DATED, READ AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF MARCH 2013**

**E.K.O OGOLA**  
**JUDGE**

**Present**

M/s Mungai for the Plaintiff

M/s Mungatwa for the Defendant

Teresia – court clerk

