



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)

CIVIL CASE 859 OF 2002

CORNER HOUSE X-RAY & DIAGNOSTIC CENTRE.....PLAINTIFF

VERSUS

NATIONAL INDUSTRIAL CREDIT BANK LIMITED.....DEFENDANT

JUDGEMENT

By its plaint dated 10th July 2002, and filed in this Court on the same day, the plaintiff seeks an order for specific performance and damages for breach of contract in the sum of Kshs. 2,958,500.00 being the difference between the market price and contract price of an X-ray machine which was agreed to be sold to and financed by the defendant to the plaintiff which contract, according to the plaintiff, the defendant breached. Pursuant to the said agreement the plaintiff remitted to the defendant a total sum of Kshs 300,000.00 as down-payment.

By its defence filed on 12th August 2002 the defendant herein denied the existence of an agreement to finance the purchase of the said machine. Whereas it admitted receiving cheques for a total Kshs. 300,000.00, its position is that the cheques were never deposited since they were drawn in the names of two firms of advocates – namely **M/s Wanjama & Company Advocates** and **Ramesh Manek Advocate** which bank account never existed. The receipt of loan application forms is admitted. However, the defendant contends that it never approved the said loan and was not bound to do so. However, the defendant later offered the said machine to the plaintiff on condition that the plaintiff would re-submit its bid in order to comply with internal procedural requirements, a request the plaintiff declined. A further request made to the plaintiff to collect the said machine upon payment of the purchase price of Kshs. 600,000.00 was similarly refused. The defendant therefore denied liability to the plaintiff.

In its reply to the defence, the plaintiff contends that the defendant accepted the cheques as drawn and never returned the same. The defendant having undertaken to finance the balance of the purchase price could not renege on the same. It is further pleaded that the plaintiff was not obliged to comply with the defendant's letter dated 29th July 2002 requesting for payment as the suit was already in place. The machine the plaintiff contends was meant for commercial use, a fact the defendant ought to have known.

On 28th March 2006 the following were agreed as the **issues**:

1. Did the defendant agree to finance the plaintiff in the sum of Kshs. 300,000/- to purchase the subject X-ray machine?

- 2. Upon what terms did the defendant accept from the plaintiff the cheques cited in paragraph 5 of the plaint?**
- 3. Upon what terms did the defendant issue to the plaintiff loan application forms?**
- 4. Was the defendant bound to grant the loan to the Plaintiff upon receipt of Loan Application Form from the Plaintiff?**
- 5. Did the Defendant unilaterally repudiate the contract for the sale of the subject X-ray machine and if so is the Defendant in breach of the contract?**
- 6. Did the defendant fail to deliver the said machine as agreed or at all?**
- 7. Did the Plaintiff by a letter dated 8th March 2002 call upon the Defendant to deliver the said machine. If so did the Defendant's letter dated 20th March 2002 purport to withdraw the offer?**
- 8. Is the Plaintiff entitled to damages as pleaded in paragraph 10 of the Plaint and if so what is the quantum thereof?**
- 9. Who should bear the cost of this suit?**

The hearing of this case commenced on 21st March 2011 before **Hon. Mr. Justice Njagi** when PW-1-**Samwel Maina Wanjihia** gave evidence in chief. According to the witness he was a part owner of the plaintiff together with **Dr. Andrew Kigo**, a Consultant Radiologist and **Dr. Elizabeth Munga**. When in 2001 they realized that the defendant was selling an old X-ray machine kept at Hurlingham plaza within Hurlingham Medical Hospital, they got interested. The plaintiff's core business was to do x-ray diagnostics and the machine was for that purpose. The machine was to be utilized for the purposes of obstetrics-gynecology at Corner House where the plaintiff had business. After initial negotiations the plaintiff made an offer to buy the machine at Kshs. 600,000/- which offer was accepted by the defendant. On instructions from the defendant three cheques were drawn and there was an oral agreement that the defendant was to grant the plaintiff a loan. This was, however, not done. Instead by a letter dated 28th February 2002, the defendant informed the plaintiff that whereas they were willing to go on with the sale, one of the parties had questioned the purchase price hence the need to follow the normal procedure required when a machine is repossessed from the hirer. In the same letter the defendant informed the plaintiff that they were proceeding to advertise the machine inviting buyers and the plaintiff was requested to similarly bid for the same in which case the sale would proceed if the plaintiff turned out to be the highest bidder. According to the plaintiffs this letter meant that the defendant was going back on the agreement. Hoping that the letter was an oversight the plaintiff responded vide its letters dated 5th and 19th March 2002. The defendant, however, reiterated vide its letter dated 20th March 2002 that the letter dated 28th February 2002 was not an oversight and proceeded in the same vein to withdraw the offer. All this time, the plaintiff contends the cheques were never returned. The defendant proceeded to advertise the machine in the Daily Nation of 22nd March 2002 inviting buyers for the said machine. Vide its advocate's letter dated 2nd April 2002, the plaintiff threatened legal action which letter was responded to by the defendant's advocate's letter dated 16th April 2002 informing the plaintiff's advocates that the defendant was still willing to sell the machine to the plaintiff as long as they received an offer for purchase of the same on similar terms as the letter dated 19th November 2001, save for the date which had to be after the date of the advertisement. Vide a letter dated 15th May 2002 the defendant reminded the plaintiff that they were still holding the cheques awaiting the plaintiff's response. There were, however, other correspondences even after the suit was filed and as late as 17th March 2003, the defendant requested for Kshs. 600,000/- being the purchase price upon payment of which the defendant was willing to release the machine and allow the suit to proceed on the issue of compensation. According to the witness the plaintiff was still willing to proceed with the transaction but based upon the original agreement. However, no confirmation was forthcoming from the defendant. According to the plaintiff, there was no rejection of the loan application.

The plaintiff's position is that since there was in existence an agreement between the parties they did not see the need to re-submit their bid. The plaintiff later received a proforma/quotation of a similar machine from Nairobi X-rays supplies Ltd from which it deduced that the difference in the figure from the agreed price was Kshs. 2,958,560/-. In support of its claim that it lost business as a result of the failure by the defendant to sell the said machine, the plaintiff has also exhibited financial statement and Kenya Revenue Authority receipts. The witness, however, testified that they still have the X-ray department and they went on with whatever they had.

In cross-examination by **Mr. Wanjama**, learned counsel for the defendant, the witness admitted that they did not know the age of the machine and could not consequently know how long the machine would serve them. The machine was not in use at the time of the sale and no tests were performed upon it as the plaintiff was willing to take it as it was. Since they had another machine which was operational, the witness said they did not send away any patient who required examination. Again the witness agreed that the letters from the defendant did not indicate that the defendant would finance the plaintiff and similarly their letter did not indicate that the payment they made was all they were paying and the balance would be financed by anyone else save for the letter dated 16th January 2003. The letter requesting the plaintiff to bid, according to the witness did not make sense to the plaintiff, since they were not informed when the acceptance was made that there existed other parties. According to the witness the defendant even told them how to forward the cheques. Whereas the witness admitted that the bank gave in to the plaintiff's demand and requested another bid for the same price, he contends that new conditions were introduced with respect a fresh offer and fresh dates and yet there was no guarantee that the new offer would be accepted. The witness admitted that the proforma was in respect of a new machine but he was not in a position to state whether the machine the subject of this suit would perform the same work. He further testified that although the cheques were in the names of the two firms they were instructed to deliver the same to the defendant. The said cheques were, save for the one for Kshs. 150,000.00 personal and company cheques and they were sent on 18th January 2002. He, however, admitted that the equipment was repossessed and was being sold at "brilliant offer". Although the bank indicated its willingness to go on with the instructions, the witness contended that new conditions were imposed.

On 10th November 2011, the hearing resumed before me with the re-examination of PW-1. He said that he had seen the machine they were buying and the intention of buying the same was to open another branch or expand the existing capacity. He said the names of the drawee to the cheques were given by the defendant. He reiterated that the plaintiff did not agree to the terms of the defendant since they already had a contract.

The plaintiff called a second witness who was **Andrew Kiuhi Kigo** as PW-2. According to the witness he is a medical doctor specializing in diagnostic radiology with a Bachelor of Medicine and Surgery from the University of Nairobi and a Masters from the same University. In 2001 while he was working for the plaintiff he chanced upon an x-ray machine at Hurlingham Plaza and on enquiry was informed the same was owned by the defendant. On approaching the defendant, he was informed to make an offer, which offer the plaintiff did make in the sum of Kshs. 600,000.00 and was accepted by the defendant. By a letter dated 18th January 2002 the plaintiff remitted Kshs. 300,000.00 leaving the balance to be financed by the defendant as per the agreement. However, the defendant later informed them that the sale could not proceed and informed them to make a fresh bid. On refusing to do so the defendant withdrew the offer and advertised the same. According to the witness they intended to use the machine to expand their business. The witness confirmed that the specifications received from Nairobi X-ray Supplies Ltd were the same as for the machine they were intending to purchase from the defendant save for Aloka Ultra sound Scanner which was valued at Kshs. 1,100,000.00. According to the witness as a result of non-delivery of the machine they were unable to expand their business.

In cross examination by **Mr. Wanjama**, PW-2 stated that he spotted the machine at the premises occupied by Nairobi Women's Hospital at Hurlingham Plaza. Whereas the machine was serviced, it was not in use according to the witness. He, however, did not conduct any tests on it but simply looked at it at face value. He admitted that he is not trained to repair the machine and did not ask when it was last used and whether there were any defects. However, with minimal repairs, the witness contends, it would be able to work. This, he confirmed from a technician who, however, neither put anything in writing nor

checked and switched the machine on. Whereas the witness is aware that the selling of such machines is not the core business of the defendant, he stated that they can co-hire and co-own. He, however, is not aware whether the defendants possess technical know-how about the machine. The instructions to draw the cheques in the names of the two firms emanated verbally from the defendant according to the witness. The cheques totaled Kshs. 300,000.00 with the balance being financed from a loan obtained from the defendant. The witness further said that whereas they filed in the application forms, the same were not acknowledged. Since the first contract was not based on a bid, the witness said they could not agree to the new conditions imposed by the defendant. He admitted that whereas the machine in the proforma was not exactly the same the specifications were the same save for the Aloka Ultra Sound. The quotation, he admitted was for a new machine while the machine they were buying from the defendant was an old one whose age they were not sure of. However, the witness says the machine would perform the same work. Without a guarantee one would, however, be taking risks, hence the lower figure quoted. Whereas the witness said that he did a feasibility study he did not have the projections. Whereas he did not properly understand the tax document, the witness admitted that in the year 2005 their declared profit was Kshs. 199,288/- although they expected to expand.

In re-examination, the witness stated that what matters is the specification and not the description of the machine.

In its defence, the defendants called **Lilian Sogo**, a legal officer with the defendant. In her evidence the witness stated that the defendant bank was willing to proceed with transaction but only required the plaintiff to allow the defendant go through the process of advertising and valuation and re-bid for the same. There was no intention of denying the plaintiff a chance to purchase the machine. According to the witness the defendant had never dealt with that kind of machine before and has since not dealt with any. Although the machine was advertised there were no bids. Despite that the defendant was still willing to sell the machine to the plaintiff at the said sum of Kshs. 600,000.00 the only condition being the making of a fresh offer. However, this was unacceptable to the plaintiff. It was this witness's evidence that the defendant never received the Kshs. 300,000.00 since the cheques were never banked and were in fact returned to the plaintiff. The witness, however, could not tell what became of the machine but was sure the bank never received the value of the machine from the loanee. The defendant, through this witness prayed that the suit be dismissed with costs since the plaintiff refused to accept the offer and never made any payments.

In cross-examination by **Mrs. Githae**, the witness admitted that the transaction took place before she joined the defendant although the person who dealt with the matter a **Mr. Makau** had left. She admitted that there was an offer and an acceptance and that the price was Kshs. 600,000.00. She admitted that the cheques were received by the defendant save that they could not be banked. She however was not aware why the cheques were to be drawn in the names of the firms of advocates which, according to her, was unusual. The same, however, could not be banked in the absence of an existing account in the said name. She, however, was not aware of the role of **Ramek Manesh** in the transaction. The loanee, she confirmed had defaulted to repay the loan whose amount was Kshs. 3,500,000.00. Whereas the defendant finances motor vehicles this was the first time it was financing such machine. The witness admitted that the defence admits receipt of the application forms and that the defendant was to finance the balance. She stated that although she had no valuation report the machine was valued and that the defendant was willing to proceed with the sale. She however stated that she did not know how the third party knew that they were selling the machine. By the time the defendant wrote the letter dated 29th July 2002, the witness confirmed this suit had already been filed.

In re-examination, the witness testified that at the time of filing the defence the cheques were already stale and could not be banked. Kshs. 600,000.00 was the original offer and that the bank had not reached the stage where the application for the loan could be approved by the time the plaintiff rejected the offer. She stated that it is not always that applications for loans are approved by the bank.

With the end of the re-examination also came the close of the defence case. Thereafter, the parties filed written submissions.

According to the plaintiff, the fact of the sale of the suit machine is admitted in the defence. The defence also admits that there was an oral agreement between the parties for the financing of the balance of the purchase price amounting to Kshs. 300,000.00. However, the defendant did not inform the plaintiff of the non-approval of the loan to enable the plaintiff seek alternative source of funding. It is the plaintiff's submission that following an offer made by the plaintiff followed by an acceptance by the defendant, the plaintiff fulfilled its part of the contract by remitting cheques in the total sum of Kshs. 300,000.00 which cheques were not returned until 18th October 2002 when already stale. Neither of the two advocates were called to testify and shed light on the two cheques. It is further submitted on behalf of the plaintiff that all the elements constituting a valid contract under the Sale of Goods Act were fulfilled and therefore the letter dated 28th February 2002 constituted a variation of the terms of the agreement. Without a mutual agreement, it is submitted a mere unilateral notification by one party to the other cannot constitute a variation and reliance is placed on **Covey vs. Liberian Operations Ltd [1966] 2 Lloyds's Rep 45**. Since variation must be accompanied with a consideration, the variation herein constituted a counter-offer. The imposition of the new terms after the demand letter, according to the plaintiff, was a furtherance of the breach.

It is submitted that the machine though used was not scrap metal but one which on reasonable examination of a qualified radiologist was in a usable state. From the evidence adduced, it is submitted that the plaintiff company suffered business loss from the repudiation of the said contract as its directors had made projections for the additional income that would result from the purchase of the said machine. The plaintiff's claim is therefore for the difference of the market value of a new machine and contract price and the market value is evidenced by the proforma invoice dated 27th March 2002 from Nairobi X-ray Supplies Ltd to the plaintiff quoting the value of a new Shimadzu X-ray Machine as 3,558,000.00. Since the contract price was Kshs. 600,000.00 the difference would be Kshs. 2,958,500.00 and support for this claim is traced to section 51 of the Sale of Goods Act. Since the plaintiff is no longer interested in purchasing the machine the prayer for specific performance was abandoned. The plaintiff further relied on **Chitty on Contracts, 29th Edn., Dobson: Sale of Goods and Consumer Credit 5th Edn., Sweet and Maxwell, Pagnan vs. Corbisa [1970] CA, Omega Enterprises (K) Ltd vs. Eldoret Sirikwa Hotels and Two Others HCCC No. 50 of 1999.**

The plaintiff therefore claims the said sum of Kshs. 2,958,500.00 with interest at commercial lending rates and costs of the suit and interest.

On its part, the defendant submitted that since the Kshs. 300,000.00 was never banked and was returned to the plaintiff there was no consideration. It is further submitted that as the subject matter of the alleged contract no longer exists due to having gotten lost and the defendant does not ordinarily engage in the business of selling X-ray machines, specific performance is not available. However, even if the plaintiff was to succeed in proving liability against the defendant, it is the defendant's submission that the plaintiff would not be entitled to damages due to the plaintiff's conduct in refusing to make a fresh offer; the fact that the machine was to be used in expanding the business without losing existing business; the state of the machine that was being bought was unknown while the comparable machine was a new equipment; the statement of accounts produced were not explained and therefore their evidential value was nil. It is therefore submitted that as the plaintiff has not proved that there was indeed a contract of sale that the defendant breached and that it is entitled to any damages whatsoever, there is no loss suffered hence the suit ought to be dismissed with costs. With regard to costs it is the defendant's submission that the plaintiff should be condemned in costs for having not instituted these proceedings in or transferred them to the subordinate court and also obstinacy in settling the matter.

Having considered the pleadings, the evidence and the submissions I now wish to determine the issues raised herein.

The first issue is whether the defendant agreed to finance the plaintiff in the sum of Kshs. 300,000/- to purchase the subject X-ray machine. The issue of the agreement to finance the said machine is contained in paragraph 4 of the plaint. According to the plaintiff, this averment is admitted by the defendant in paragraph 6 of the defence. With due respect, nothing could be further from the truth. The defendant in paragraph 4 of the defence specifically denied the contents of paragraph 4 in the plaint. What is admitted

in paragraph 6 of the defence is the receipt of the application forms while the approval thereof is denied. Apart from the letter dated 16th January 2003 after the alleged breach, there are no correspondences emanating either from the defendant or the plaintiff mentioning the issue of the alleged finance. The application for loan was admittedly received by the defendant. However, the defendant's position is that it was never approved and it was not bound to approve the same. The plaintiff contends that the defendant did not express its rejection of the said application. I am however not convinced that the mere fact that bank does not expressly reject a loan application amounts to an acceptance of the same unless the conditions are such that estoppel can be invoked. In this case estoppel was not even pleaded. In the premises the answer to issue no. 1 is in the negative.

The next issue is upon what terms the defendant accepted from the plaintiff the cheques cited in paragraph 5 of the plaint. The plaintiff's case is that the instructions to draw the cheques in the name of the two firms of advocates emanated from the defendant. The defendant, however, denies this and states that it did not hold an account in the names of the said firms hence was unable to bank the said cheques. The said cheques were, however, remitted on 18th January 2002. They were, however, not returned until 18th October 2002 by which time they had become stale. The issue of inability to bank the cheques was never raised by the defendant for the whole period. One would have expected the defendant to have returned the said cheques immediately on receipt thereof. Therefore the conduct of the defendant in retaining the said cheques for such a long period of time as well as the plaintiff's oral evidence that the defendant gave verbal instructions that the cheques be drawn in the names of the two firms taken together with the fact that DW-1 was not present at the time of the transaction leads to only one conclusion that the cheques were drawn pursuant to the agreement between the parties. I am however unable to make adverse inference on the failure by the advocates mentioned to be called to testify in this case as invited by the plaintiff since the plaintiff upon whom an obligation rested to prove its case on a balance of probability was under a duty to call any one of the advocates concerned including the defendant's advocate.

The next issue for determination is the terms under which the defendant issued to the plaintiff loan application forms. In my view this issue has been dealt with under the first issue. If there is anything undetermined, the court cannot be expected to determine the terms of the loan application form when the said forms themselves do not form part of the record.

Whether the defendant was bound to grant the loan to the Plaintiff upon receipt of Loan Application Form from the Plaintiff is an issue which I have already dealt with under issue no. 1. For avoidance of doubt that issue is answered in the negative.

The next issue for determination is whether the Defendant unilaterally repudiated the contract for the sale of the subject X-ray machine and if so whether the Defendant breached the contract. By a letter dated 19th November 2001 the plaintiff offered to buy Shimadzu X-ray and Hope Processor at Hurlingham Hospital at the cost of Kshs. 600,000.00. In that letter the parties were clearly defined since the letter emanated from Corner House X-ray & Diagnostic Centre and it was addressed to NIC. The subject equipment was likewise clearly described as well as its location. The purchase price was similarly quoted. In my view the letter dated 19th November 2001 contained all the necessary ingredients of an offer under the law of contract. By a letter dated 16th January 2002 from the defendant to the plaintiff referring to the letter dated 19th November 2001 aforesaid, and various conversations, the defendant unequivocally accepted the said offer. Accordingly, there was an acceptance. The next issue therefore is whether there was consideration. It is not disputed that three cheques in the total sum of Kshs. 300,000.00 were drawn and remitted to the defendant pursuant to the said agreement. I have already found that the same were drawn in accordance with the terms of the agreement. I have, however, found that there was no agreement that the balance was to be financed by the defendant. In the absence of evidence of payment of the full purchase price, I am unable to find that there was consideration without which there is no legally binding contract. The answer to this issue must therefore be in the negative.

As to whether the defendant failed to deliver the said machine as agreed or at all, from the evidence on record it is clear that there is no dispute at all that the machine was never delivered. The issue is affirmatively answered.

As to whether the Plaintiff by a letter dated 8th March 2002 called upon the Defendant to deliver the said machine, there is no letter on record dated 8th March 2002. I, however take it that the letter meant was the one dated 5th March 2002. If that be the case then the first limb of this issue is obviously in the affirmative. The second limb deals with the issue whether the Defendant's letter dated 20th March 2002 purported to withdraw the offer. In the letter dated 20th March 2002, the defendant clearly indicated in the last paragraph that they were withdrawing the offer. This, however, was a layman's "offer" since legally the offer was made by the plaintiff. The defendant could not therefore purport to withdraw the offer. By introducing the new issue of the need for valuation and advertisement of the machine in the papers and requesting the plaintiff to bid afresh, the defendant were in effect repudiating or withdrawing in the acceptance. It was not a counter-offer since the same was done after the acceptance. Had all the other elements of a validly binding contract been fulfilled, that act would have amounted to a breach of contract. Accordingly the second limb of the issue is answered in the affirmative. The said letter as correctly framed in the issue **purported** to withdraw the offer.

In light of the foregoing the issue whether the Plaintiff is entitled to damages as pleaded in paragraph 10 of the Plaint no longer falls for determination. For completeness of the record, I however propose to deal with the efficacy of that claim. From the record, there is no evidence that the plaintiff actually purchased the machine whose proforma invoice was given. Again from the evidence it is clear that the machine was required to expand the plaintiff's evidence and from the plaintiff's own evidence, no patient went unattended due to lack of the machine. In effect the loss if any that the plaintiff could have incurred was loss of future earnings or future earning capacity. That claim was obviously in the nature of special damages and as was held in **Firozali Noormohamed Lalji vs. Elias Kapombe Toka & 3 Others [1981] KLR 325** plaintiffs must understand that, if they bring actions for damages, it is for them to prove their damage; it is not enough to write down particulars and so to speak, throw them at the head of the Court, saying "This is what I have lost, I ask you to give me these damages". They have to prove it.

In this case apart from producing financial statements and records submitted to the Kenya Revenue Authority, records which the plaintiff's witnesses themselves could not explain, there is nothing upon which the court could base its findings on the loss sustained by the plaintiff by the failure to be supplied with the said machine. That machine, it is not in dispute was second hand. Nobody could vouch-safe its condition and its lifespan. Everything was a risk as stated by the plaintiff and that was the reason it was being sold at what the plaintiff describe as a "brilliant offer". It was unknown how long, if at all, the machine would operate. Further, the plaintiff's ability to purchase the said machine was dependent upon the funds from the defendant. If that were so it would obviously mean that some interest would accrue therefrom with the result that the Kshs. 600,000.00 pegged as the purchase price would not necessarily be the ultimate price. In effect the exact amount which the plaintiff expected to spend had the contract fallen through cannot be determined on the evidence on record. In the **Omega Case** relied upon by the plaintiff it was the same property that was in issue. In the present case the machines in issue were not the same since one was a new machine while the other one was a second hand machine. The plaintiff cannot therefore claim to have lost the difference in price of both machines since there was no evidence that their performance would be the same. In any case the evidence on record shows that the machine to be purchased did not have Aloka Ultra Sound Scanner valued at Kshs. 1,100,000.00.

It is important to note that the plaintiff in its submissions abandoned the claim for specific performance.

With respect to costs I agree with the defendant that had the plaintiff succeeded the plaintiff would have been entitled to costs at the subordinate court scale since the claim herein fell within the jurisdiction of the subordinate court. See **Purshottam Kurji vs. Opa Laboratories Limited [1957] EA 299**. I however, would not have taken the alleged conduct of the plaintiff as a factor in the award of costs since the defendant's so called willingness to see the contract through was not without some bottlenecks.

Where, however, a plaintiff files a suit in the High Court which should have been filed in the subordinate court and fails to prove his case, costs are payable in accordance with the High Court scale since a defendant has no option when it comes to a choice of court in which it should defend itself. Whereas the defendant may apply for transfer of a case, he is not obliged to do so.

In the result the plaintiff's suit against the defendant fails and is dismissed with costs to the defendant.

Judgment read, signed and delivered in court this 25th day of April 2012

G.V. ODUNGA

JUDGE

In the presence of:

Mr. Wandabwa for Mrs. Githae for the Plaintiff

Mr. Wanjama for the Defendant