



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA Civil Suit 1 of 2010

BOMINFLOT LIMITED.....PLAINTIFF

-VERSUS-

KENYA MARINE CONTRACTORS (EPZ) LIMITED.....DEFENDANT

RULING

The plaintiff moved the Court by Notice of Motion dated 11th February, 2010, brought under Order *XXXV*, rule 1 and Order *XII*, rule 6 of the Civil Procedure Rules.

The main prayer was that judgment be entered for the plaintiff against the defendant in the amount admitted and/or as prayed in the plaint.

The managing director of the plaintiff company, *Henny de Goede*, depones in the supporting affidavit that the defendant had requested the plaintiff to supply marine fuel for the defendant's Motor Vessel "Innes" in Cape Town, South Africa, and upon the defendant's confirmation of the order, the plaintiff supplied marine fuel totalling 130.17 metric tonnes; and this delivery was under the plaintiff's General Terms and Conditions (2006) to which the defendant had expressly or impliedly agreed. The said General Terms and Conditions provided that "any delayed payments would attract an interest of 2% per month".

The deponent deposed that following the delivery of marine fuel to the defendant as aforesaid, the plaintiff sent three invoices, two of which were settled by the defendant after some delay; but that the third invoice for *US dollars 68,383.05* which was due on **18th November, 2009** has not been settled to-date. The deponent deposed that several reminders and a demand letter have been sent by the plaintiff and the plaintiff's advocates, but the defendant has taken no action.

The deponent states that the defendant is truly indebted to the plaintiff for the

amount of money claimed, together with the interest claimed under the General Terms and Conditions – and that the said indebtedness was outstanding at the commencement of the suit.

The deponent believes to be true the advice from the plaintiff's counsel, "that as the defendant has admitted the plaintiff's principal sum claimed....., judgment can be entered forthwith in that amount".

The deponent believes to be true the advice received from the plaintiff's advocates, that the defendant had agreed to the application, in relation to the marine fuel contract, of the General Terms and Conditions; and in this behalf the defendant had confirmed the order for the supply of marine fuel and indeed, had already paid up on two of the three invoices which the plaintiff had issued; the defendant had raised no objection to the interest rate payable upon delayed payment.

Simon Phillips, a director of the defendant, depones that the defendant was the charterer, but not the owner of motor vessel "Innes". The deponent further deposes that the relevant "Bunker delivery receipt" made no reference to General Conditions of sale, or to the penal interest rate of 2% per month on delayed payments; and that the defendant appended its signature nowhere approving the said interest rate. But the deponent further depones that he read clause 9 of General Conditions of Sale and Delivery 2006 which he found to specify that "overdue payments are subject to an interest charge of 2% per 30 days calendar period or the maximum rate permitted under applicable law". The deponent deposes that "The maximum rate permissible under the Civil Procedure Act.....is simple interest at 12% per year as opposed to the compound interest at 2% per 30 days"; and he then asserts that "The plaintiff is a foreign company that cannot come to Kenya and claim interest at a rate far much higher than that charged by commercial banks."

The deponent depones that the defendant had, prior to the filing of suit, forwarded to the plaintiff's advocates post-dated cheques, payable respectively on (a) 1st January, 2010; (b) 1st February, 2010; (c) 1st March, 2010 and (d) 1st April, 2010.

The deponent deposes that the several post-dated cheques sent to the plaintiff's fell short of the demanded amount of U.S.\$ 68,383.05 and only totalled U.S. \$ 67,550.56 – the reason being that the defendant was unwilling to pay interest as expected by the plaintiff; and that the plaintiff's advocates rejected the said cheques. The deponent attributes blame to the plaintiff for rejecting the post-dated cheques because, "had the cheques been

accepted, only the April, 2010 instalment would be outstanding now.”

The deponent depones that the defendant in its statement of defence dated **1st February, 2010** to the plaintiff’s plaint dated **24th December, 2009**, conceded indebtedness in the principal sum, expressed readiness to pay the same in three consecutive monthly instalments beginning February, 2010 but denied indebtedness in respect of the rate of interest intended by the plaintiff.

The deponent attributed to the suit filed on 24th December, 2009 the motivation of extracting costs and interest; rejected the rate of interest indicated by the plaintiff; offered to pay interest at the rate of 12% per annum “in accordance with Kenyan law”; and proposed payment to the plaintiff of the principal amount of U.S. \$ 67,550.56 in three equal and consecutive monthly instalments, the first commencing on 31st March, 2010. The deponent expressed his belief that the formula of rendering payment to the plaintiff which he proposed was the only reasonable one and the suit had been filed without good cause and hence, this Court should condemn the plaintiff to pay the costs of the suit.

On the basis of the pleadings in the suit and the depositions on the application, learned counsel, **Mr. Khanna** urged that the question for resolution was in respect of **costs** and **interest**. Counsel submitted, on the basis of the evidence, that there had been delay in paying monies due to the plaintiff and on this account, interest was attracted at the rate of 2% per month; and as this point was the outstanding dispute in the main cause, it be referred to a Subordinate Court to try it and resolve it, before the matter came back for disposal of the question of costs.

On costs, learned counsel urged the general principle, that costs follow the event: and as the defendant had already conceded the plaintiff’s claim, the defendant should also pay the costs. **Mr. Khanna** urged that the defendant had failed to pay timeously for marine fuel supplied to it, and a payment due in October 2009 was only paid on 18th November, 2009, and the third invoice still remains unpaid – and that this amounts to failure to pay within reasonable time. Although the plaintiff had sent reminders to the defendant, these had not been honoured – and thus the defendant remains indebted to the plaintiff.

Counsel urged that the defendant’s failure to comply with the marine-fuel-delivery agreement had occasioned costs; the plaintiff has had to engage advocates who sent out

letters of demand in vain, and ultimately, on 4th January, 2010, filed suit.

Mr. Khanna contended that the defendant had been in breach of the terms of the marine-fuel delivery agreement by (i) not paying up the Principal Sum at the right time; (ii) not paying the interest that was due on the delayed payments; (iii) imposing new terms of payment outside the original agreement – by unilaterally sending post-dated cheques to the plaintiff; (iv) occasioning the taking of legal measures by the plaintiff, including instructing advocates, and having suit filed. Counsel urged that the plaintiff has exercised its legal right to institute proceedings for an amount not yet paid, and that, not only is the plaintiff entitled to judgment (which is not contested by the defendant), but to costs also.

The plaintiff's case was contested by learned counsel **Mr. Kinyua** who submitted that the suit was opposed only on interest and costs. Counsel restated the content of paragraph 4 of the statement of defence dated 1st February, 2010:

“The defendant reiterates the averments at paragraph 3 above and denies that it at any time, whether expressly or impliedly agreed to pay 2% interest or any interest at all to the plaintiff”.

Counsel urged that the claim of interests and costs be dismissed with costs; and that the rate of interest demanded was unlawful. As regards the interest rate demanded, **Mr. Kinyua** noted that the relevant prayer in the plaint (prayer (b)) was for –

“Interest at 2% per month on (a) above with effect from 1st December, 2009 or alternatively at Court rates until payment in full”.

Counsel was clearly attempting to bring out the duplicity in the prayer set out above: a 2% interest claim per month would amount to about 25% per annum, whereas interest at Court rate would amount to only 12% per annum. This important point, however, was not addressed by learned counsel **Mr. Khanna**.

Mr. Kinyua submitted that since **interest rate** was the reason for the dispute and for the filing of suit, when this matter is resolved, the burden of costs should not fall upon the defendant. Counsel urged that the plaintiff, by rejecting the defendant's post-dated cheques, had nullified a practical solution by which, by the time the ruling herein is delivered, the total payment due to the plaintiff could have been effected – and that on this account the costs burden should fall upon the plaintiff.

Learned counsel still made a case for payment by instalments, citing Order XX, rule II of the Civil Procedure Rules which provides:

“Where and in so far as a decree is for the payment of money, the court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable.”

Counsel applied that the decretal amount be made payable in three equal monthly instalments, the first starting on 31st March, 2010; and he stated that he had already made this proposal to the plaintiff’s advocates. **Mr. Kinyua** did not mind, however, even if the number of instalments was reduced to two, the first falling due on 15th April, 2010 and the second on 15th May, 2010.

The documents annexed to the application, the authenticity of which has not been in issue, show certain things: (i) there was a confirmation of order by the plaintiff, the customer being the defendant herein (dated 7th October, 2009); and it was stated that the transaction was “governed by Seller’s General Conditions of Sale and Delivery”; (ii) the particulars of goods delivery, in three batches, are shown on a “Bunker Delivery Receipt” bearing the date **19th October 2009**; (iii) the governing document known as “General Conditions of Sale and Delivery effective from January 1, 2006” is shown; (iv) the terms of payment are set out in the invoice sent by the plaintiff to the defendant, dated **21st October, 2009**, namely: ***“Payment to be received in full by our bank without any deductions, bank charges to buyer’s account; interest will be charged at 2% per month in case of late payments”***; the sum of **U.S. \$ 68,383.05** was required to be paid by the defendant “within 30 days” (***due by 18th November, 2009***) (v) the next invoice was dated 17th November, 2009, for the sum of US \$ 759.80 and was payable within 10 days (due by 18th November, 2009); (vi) and the last invoice dated 2nd December, 2009 was for U.S \$ 729.42 payable within 30 days (***due by 18th November, 2009***); (vii) there was subsequently a reminder bearing the heading: “Friendly reminder to Kenya Marine Contractors Ltd”, and it indicated that the following sums were “overdue for payment”: US \$ 68,383.05 – due on 18th November, 2009; US \$ 759.80 – due on 18th November,

2009, and U.S \$ 832.49; and the reminder-note stated:

“For good order’s sake we draw your attention to the clause in our General Terms and Conditions which refer to late payment. If for any reason your payment reaches us after the due date, Bominflot has the right to charge an interest penalty of 2% per month or part thereof. By paying late you accept the fact that consequently you will be charged accordingly”.

(Viii) The “General Conditions of Sale and Delivery effective from January 1, 2006” provided in paragraph 9.4 as follows:

“Overdue payments shall be subject to an interest charge of 2% per thirty (30) calendar-day period compounded, or the maximum rate permitted under applicable law, running from the due date of payment”.

The foregoing documents form the background to the letter of demand from the plaintiff’s lawyers to the defendant, dated 4th December, 2009 and which states:

“We accordingly demand from yourselves a total amount of USD 69,039.78 made up as under –

- **Amount due in respect of invoice dated 21st October, 2009 being invoice No. 112759.....USD 68,383.05**
- **Late payment interest under Invoice No. 112912..... USD 759.80**
- **Late payment due on invoice No. 113003.....USD 729.42**
- **Total.....USD 69,872.27**
- **Less credit on accountUSD 832.49**
- **Total due.....USD 69,0039.78**

“Please note that the late payment interest, at 2% per month is due on the outstanding amount of USD 68,383.05.”

The accuracy of the foregoing documents has not been the subject of doubt. The

plaintiff duly made the delivery of marine fuel to the defendant, and on the terms stated in the said documents. The marine fuel was consumed by Motor Vessel “Innes” which the defendant had chartered: therefore there was no failure of consideration – a fact fully acknowledged by the defendant in conceding the main cause.

Is the defendant bound by the interest-rate provision of the contract or not?

Although the defendant holds the view that the interest rate was “illegal”, and so it had the right to refuse payment on the invoices where they incorporated the interest rate in question, this point has been made only transitorily and has not been argued with authority, in such a manner as would carry judicial significance. Indeed learned counsel **Mr. Khanna**, for the plaintiff, has argued that the sanctity of contract is a basic law of Kenya and would place a clear obligation on the plaintiff to pay the interest rate which formed part of the contract of supply of marine fuel.

On this point, this Court would be inclined to uphold the plaintiff’s position: but for the specific prayer contained in clause (b) on the last page of the plaint. As this pleading is the very basis of the suit, this Court takes the position that the plaintiff is asking for **either** 2% interest per month on delayed payment, or the applicable interest at Court rate. Court rate of interest is a familiar concept which this Court will readily apply; and in this, the Court, besides, sees merit as a restraint against unchecked proliferations of monetary claims by parties.

It is clear that the defendant is at this moment indebted to the plaintiff; and the **explanation** for the delays in payment, even in spite of repeated reminders from the plaintiff and its lawyers, has not been ventilated before this Court. This fact prevents the Court from exercising its discretion under Order **XX**, rule 11 to order instalmental payment.

This review of the application and the response, the evidence and the submissions, leads this Court to make orders as follows:

- 1. The plaintiff’s prayer for U.S. \$ 69,039.78 against the defendant is allowed.**
- 2. Interest shall be paid by the defendant at Court rate, as from 1st December, 2009 until payment in full.**
- 3. The defendant shall bear the costs of the Notice of Motion**

application of 11th February, 2010

- 4. *The defendant shall pay the costs of the suit filed on 24th December, 2009.***

DATED and DELIVERED at MOMBASA this 26th day of March, 2010.

J. B. OJWANG

JUDGE

Coram: ***Ojwang, J.***

Court Clerk: ***Ibrahim***

For the Plaintiff/Applicant: ***Mr. Khanna***

For the Defendant /Respondent: ***Mr. Kinyua***