REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 304 of 2006

TAUHID (KENYA) LIMITED……...APPELLANT

VERSUS

SIGINON FREIGHT LIMITED……..RESPONDENT

(Being an appeal from the judgment of the Principal Magistrate at Milimani, Nairobi, Mrs. Ongeri delivered on 13th April, 2006)

J U D G M E N T

1. This appeal arises from a suit which was filed in the Chief Magistrate's court at Nairobi by Tauhid (Kenya) Limited (hereinafter referred to as the appellant). The suit was brought against Siginon Freight Limited (hereinafter referred to as the respondent). The appellant's claim against the respondent was for Kshs.501.708/55 being interest due to the appellant in respect of delayed payments arising out of carpeting assignment given by the respondent to the appellant.

2. The respondent filed a defence and counterclaim to the appellant's claim in which the respondent denied any contractual relationship with the appellant. The respondent maintained that the appellant was a sub-contractor to the main contractor who was undertaking construction of the respondent's project. The respondent stated that it was agreed between the respondent and the main contractor that the amounts due to the sub-contractors would be paid directly to the sub-contractors once the amount due was certified by the architect. The respondent contended that the appellant agreed to give the respondent a donation of works done amounting to Kshs.160,000/=. The respondent maintained that the final account due to the appellant by the main contractor was Kshs.886,066/25, whilst the respondent had paid to the appellant a total sum of Kshs.1,037,750/=. The respondent therefore denied owing the sum of Kshs.501,708/55. To the contrary, the respondent counterclaimed a sum of Kshs.151,683/75 from the appellant. The counterclaim arose from amount overpaid by the respondent as a result of the quantity surveyor failing to deduct work worth the sum of Kshs.160,600/=, which was donated by the appellant to the respondent. The respondent also claimed interest at the rate of 25% per annum with effect from 12th October, 2000 until the date of payment.

3. During the hearing of the suit which proceeded before the Ag. Principal Magistrate, the appellant testified through its managing director Oduor Hawi Ambala. The witness testified that the appellant's company won a tender to provide carpets for Siginon Freight Ltd at their new offices along Mombasa Road. In accordance with the letter of offer, the appellant entered into a sub-contract agreement with China Jiangsu International (hereinafter referred to as the main contractor). The appellant were paid a deposit of Kshs.584,532/= and they continued to do the work as directed. Payment was done after certification by the quantity surveyor. The witness referred to a certificate issued on 21st June, 2000 by

Boma consultants Architects and Urban Designers (hereinafter referred to as the lead consultants). The certificate gave the amount due to the appellant as Kshs.564,591/25. The witness explained that only a sum of Kshs.453,218/= was paid to the appellant. The witness explained that in accordance with the contract, interest was due on any amount certified as due and not paid within 30 days.

4. Referring to a letter dated 13th August, 2001, addressed to the lead consultants by the appellant, the witness contended that the amount due to the appellant after taking into account the interest, as at that date was Kshs.647,898/65. The witness also referred to a letter dated 23rd October, 2001 addressed to the lead consultants by Costcare Consultants who were the consulting quantity surveyors to the respondent's project. In the letter, Costcare Consultants reacting to the appellant's letter dated 13th August, 2001, analyzed the appellant's claim and confirmed that there was an amount of Kshs.390,335/33 due in respect of interest arising out of delayed payments, as well as a further sum of Kshs.111,373/25 in respect of certified payment due.

5. The witness also produced a letter dated 14th November, 2001, written by the lead consultants to the appellant, informing the appellants that they had no mandate to act on the final account which had been closed and therefore the appellants should deal directly with the respondent. The witness testified that the appellant tried to follow up the matter with the respondent but the respondent failed to pay and the appellant therefore filed a suit.

6. With regard to the counterclaim, the appellant's witness explained that during the course of the appellant performing the contract, additional work was given to the appellant by the respondent, in return for which the appellant gave discount on the work done. Before the additional work was done half way, the respondent cancelled the work. As a result, the appellant could not cover costs of the additional work. The appellant therefore claimed that the discount was not applicable following the cancellation. The witness explained that, that was why the quantity surveyor, who was the agent of the respondent, did not take the discount into account. The appellant's witness further maintained that the respondent did not make any demand for the alleged overpayment.

7. Under cross-examination, the witness conceded that the respondent did not sign the sub-contract between the appellant and the main contractor. He conceded further, that the contract between the respondent and the main contractor provided that the respondent was not liable for any sub-contractor's payment. The witness maintained that there was a sum of Kshs.501,708/58 due to the appellant in respect of amounts certified as due and not paid and interest payable on the delayed payments.

8. The respondent did not call any witnesses. Written submissions were however filed by each party, each urging the trial magistrate to find in favour of his client. For the appellant, it was reiterated that the architect and the quantity surveyors who were agents of the respondent certified the sum of Kshs.501,708/58 as due to the appellant. It was contended that the appellant's evidence was unchallenged as the respondent did not offer any evidence. It was further submitted that the respondent did not submit any evidence in support of his counterclaim and therefore the same should be dismissed with costs.

9. With regard to Clause 27(f) of the agreement between the respondent and the main contractor providing that a sub-contractor had no capacity to demand money directly from the respondent, it was submitted that the respondent flouted this clause by circumventing the main contractor and dealing directly with the sub-contractors. Reference was made to a letter dated 21st June, 2000 written by the respondent's lead consultants, which showed that the respondent was paying both the main contractors and the sub-contractors directly. The court was therefore urged to find the appellant's claim proved and give judgment in his favour.

10. For the respondent, it was submitted that the appellant's claim was not proved. Firstly, it was maintained that there was lack of privity of contract between the appellant and the respondent. It was pointed out that as per the evidence of the appellant's witness, the appellant entered into a sub-contract with the respondent's main

contractor, and as such no contract existed between the appellant and the respondent which could give the appellant the right to sue. It was further contended that the sub-contract between the appellant and the main contractor was not produced in evidence.

11. As regards the contract between the respondent and the main contractor, it was contended that the appellant could not rely on this contract, as he was not party to the contract, and therefore had no *locus standi* to sue the respondent for breach of that contract. Moreover, Clause 27(f) of that contract provided that nothing contained in the contract "*shall make the respondent liable to any sub-contractor*". Further, it was contended that there was lack of proof of the existence of the contract between the appellant and the main contractor. This was because the appellant failed to produce a copy of the alleged contract. The terms and conditions upon which such sub-contract was entered into, was not established. There was therefore no basis upon which any contractual relationship between the appellant and the respondent could be anchored. In particular, it was submitted that the basis for the appellant's claim for interest at 30% was not established.

12. It was also argued that the appellant's evidence was inconsistence with the pleadings. In this regard, it was noted that the appellant's witness talked of a contract which was being executed in December and not February, 1996 as pleaded in the plaint. It was also pointed out that in his evidence, the appellant's witness produced an interim certificate No.21 dated 21st June, 2000. This was inconsistent with the plaint wherein a final certificate No.21 dated 7th June, 2000, was pleaded.

13. In her judgment the trial magistrate found that there was nothing to show that the appellant was party to the contract between the respondent and the main contractor. The trial magistrate held that it was upon the appellant to show that the respondent was liable to it. The trial magistrate concluded that the appellant had failed to prove that it entered into any contract with the respondent. The trial magistrate therefore dismissed the appellant's claim.

14. Being aggrieved by that judgment, the appellant has lodged this appeal citing 5 grounds as follows:

(i)The Honourable magistrate erred in law and fact by holding that the plaintiff did not proof the existence of a sub-contract in his case against the weight of both oral and documentary evidence tendered during the hearing.

(ii) The honourable magistrate erred in law and fact by placing an onerous burden of proof on the plaintiff.

(iii) The honourable magistrate erred in law and fact by failing to hold that from the circumstances demonstrated through both oral and documentary evidence, the defendant indeed owed the plaintiff the amount claimed in the suit before court.

(iv) The honourable magistrate erred in law and fact by failing to appreciate that indeed a debt existed as a result of services rendered by the plaintiff to the defendant which services were not fully paid for.

(v) The honourable magistrate erred in law and fact by her failure to find in favour of the plaintiff and award him damages and costs in the circumstances of the case and the evidence led.

15. In support of the appeal, the appellant filed written submissions in which it was submitted that the existence of the sub-contract between the appellant and the respondent was alluded to by the appellant's witness in his evidence. It was pointed out that the witness produced exhibits which included letters from the respondent's agents asking the appellant to enter into a sub-contract with the main contractor and further giving a breakdown of certified amounts payable to sub-contractors including the appellant for work done. It was further pointed out that in paragraph 3 and 5 of its defence, the respondent had admitted that the appellant was a sub-contractor to the main contractor. It was therefore argued that the trial magistrate was wrong in finding that the appellant did not prove the existence of a sub-contract between itself and the main contractor, which could bind the respondent. It was maintained that the appellant's

suit did not raise issues regarding interpretation of the sub-contract or the main contract, but was a claim for settlement of admitted sums, owing and emanating from work done in an admitted sub-contractual relationship between the parties.

16. It was noted that the appellant adduced evidence which showed that the project quantity surveyor, who were the respondent's agents, had certified the amounts claimed as due to the appellant, and that the lead consultants the project architect who was also the respondent's agent, advised the appellant to pursue the amount directly with the respondent. It was noted that the respondent did not offer any evidence to controvert the appellant's evidence.

17. Relying on ***Civil Appeal No.302 of 2002, Mwania Nzaumi vs Kenya Bus Services***, counsel submitted that the non-calling of the witnesses by the respondent, meant that the appellant's case was unchallenged, and that the appellant had proved its case on a balance of probability. Relying also on ***Civil Appeal No.78 of 2000 Geometra East Africa Ltd Vs Roadseal Link Ltd***, counsel submitted that the documents and correspondences produced by the appellant were sufficient to prove the indebtedness of the respondent to the appellant without having to go into the sub-contract documents.

18. On the issue of interest it was pointed out that the interest which was charged at 25%, was in line with the quantity surveyor's letter which was produced in evidence. The court was urged to find that the amount claimed by the appellant was payable together with interest at the rate of 30% as the claim of interest was not controverted by the respondent. The court was therefore urged to allow the appeal and give judgment in favour of the appellant on the main claim, and dismiss the respondent's counterclaim with costs.

19. For the respondent it was submitted that the appeal had no merit. It was maintained that the appellant failed to discharge the burden of proof. It was contended that the appellant had to prove:

(i) That there was a contract in force executed on the 11th December, 1996 between the appellant and the respondent, creating a privity of contract between the parties.

(ii) That under the said contract the appellant was to pay interest on any outstanding sum at the rate of 30% per annum

(iii) That the respondent defaulted in its observance of the terms of the said contract.

20. It was noted that the letter of offer dated 11th December, 1996 created a contractual relationship between the main contractor, and the appellant. The execution of the sub-contract agreement was required to determine the boundaries of that relationship. It was contended that the document which was produced in evidence which was signed between the respondent and the main contractor was of no significance since the appellant was not a party to that contract. Therefore it was maintained there was no privity of contract between the appellant and the respondent. The case of ***Agricultural Finance Corporation vs Lengetia Ltd [1985] KLR 765*** was relied upon. It was reiterated that the sub-contract agreement not having been exhibited in evidence, the appellant's claim was unproved as the basis of the calculation of the interest was not demonstrated nor was there any legal or factual basis for the claim of interest.

21. It was submitted that none of the documents produced in evidence by the appellant established any reasonable basis for the prayers in the suit. The letter dated 21st June, 2000 from the lead Consultants addressed to the respondent, was identified as containing a figure that was at variance with the claim in the plaint, and which manifested a departure from the pleadings. It could not therefore form the basis of any judgment in favour of the appellant. The letter dated 13th August, 2001, from the appellant addressed to the lead Consultants was also submitted to be at variance with the plaint. It was also pointed out that the letter referred to interest on uncertified sums, the basis of the interest not being clear. With regard to the letter dated 23rd October, 2001, from Costcare Consultants addressed to the Consultants. It was noted that the amount of Kshs.390,335/33 indicated on the letter was a marked deviation from the sum of Kshs.501,708/55 claimed in the plaint. The letter dated 14th October, 2001, from the lead Consultants to the appellant was also criticized as having two figures without disclosing the certificate upon which the figure was based.

22. It was submitted that although the respondent called no evidence at the trial, the burden still remained on the appellant to prove its case. In this regard, the case of ***Karugi & another vs Kabiya & 3 others [1987] KLR 347,*** was relied upon. It was contended that there was no basis for the award of interest claimed. The cases of ***Kabansora Millers Ltd vs New Salama Wholesalers and 2 others [2002] 1 KLR 451*** and ***Barclays Bank of Kenya vs Jandy [2004] 1 EA 8,*** were cited in support of the proposition that interest for the late payment could not be awarded without evidence being adduced in support of the same. The court was urged to dismiss the appellant's appeal, and uphold the judgment of the lower court.

23. I have carefully reconsidered and evaluated all the evidence adduced before the trial magistrate. I have also considered the pleadings and the submissions made before the trial magistrate and before me, as well as the authorities cited. I find that although the plaint is not clear on the issue of the sub-contract, it was not disputed that the appellant was a sub-contractor to the main contractor who was undertaking construction of the respondent's project. This fact was pleaded by the respondent in paragraph 3 of the defence and counterclaim. The appellant's witness also testified to the same facts in his evidence. What was in issue was whether there was a contractual relationship between the appellant and the respondent upon which the appellant's liability to pay the sum of Kshs.501,708/55 could be anchored, and if so, whether the appellant was entitled to interest at the rate claimed on any outstanding amount. It is apparent that the letter of offer leading to the sub-contract agreement between the appellant and the main contractor was written by the lead Consultants on behalf of the respondent. According to the letter of offer, the sub-contract was to be for a period of 2 weeks commencing from 11th December, 1996.

24. In its plaint filed on 4th July, 2003, the appellant claimed that the carpeting works in respect of which it was originally sub-contracted could not commence because the respondent had not completed construction of the complex. Instead, the respondent gave the appellant alternative carpeting assignments between 1997 and 1998. Therefore, according to the appellant, the appellant's claim was not based on the original sub-contract agreement, but was a claim arising from the alternative carpeting assignments given to the appellant by the respondent. The respondent in its defence denied that there were any alternative carpeting assignments given to the appellant, but maintained that the alleged alternative carpeting assignments were actually variations of the sub-contract agreement. Thus, it is evident that the appellant performed some carpeting assignments either as alternative assignment to the sub-contract agreement, or as variations of the sub-contract agreement.

25. Neither the appellant nor the respondent produced any direct communication between the appellant and the respondent or the main contractor regarding the alternative assignments or variation of the sub-contract. However, the appellant's witness testified and produced correspondences exchanged between the respondent, the appellant and the respondent's lead consultants. The letters which were all in respect to the respondent's complex at JKIA Nairobi, concerned payments to various sub-contractors for works concerning the complex. Among the letter produced, were letters dated 23rd October, 2001 and 13th November, 2001, (produced as Exhibit 6 & 7), which were written by the respondent's agents, showing that the respondent owed the appellant a sum of Kshs.501,708/55 as at 23rd October, 2001 in respect to amount outstanding and interest due on the amount outstanding.

26. The letters dated 21st June, 2000 and 14th December, 2001, (also produced in evidence), which were letters addressed to the respondent and the appellant respectively by the lead consultants for the respondent's project, stated that the monies due to the sub-contractors were to be paid directly to the appellant by the respondent. Therefore, although there was a clause in the agreement between the respondent and the main contractor, (Clause 27(f)), which limited the liability of the respondent to the sub-contractors, payment in this instance was required to be made by the respondent directly to the sub-contractors. Moreover, Clause 27(f) limited the liability of the respondent with regard to sub-contractors as between the respondent and the main contractors. That clause could not limit the liability of the

respondent to a sub-contractor who was not party to the agreement signed between by the respondent and the main contractor.

27. I find that there was ample evidence before the trial magistrate which showed that there was money due to the appellant from the respondent, and that this was admitted by the respondent's agent. Although it is not clear whether that claim arises from a different assignment, or variation of the sub-contract, that is immaterial as it is clear that the respondent was liable to pay the amount claimed. As regards the payment of interest on the amount due and outstanding, the respondent's agent calculated the amount and arrived at the figure claimed by the appellant. The agent used the rate of 25%. Since the respondent opted not to call any evidence, it must be taken to have admitted that the letters were written by its agent on its authority and it is therefore bound by the same.

28. Further, it is evident that the respondent did not call any evidence in support of its counterclaim or the alleged overpayment made to the appellant. Therefore, the respondent's counterclaim ought to have been dismissed. The upshot of the above is that I find that the trial magistrate was wrong in dismissing the appellant's suit since there was clear evidence that the appellant performed works for the respondent for which payment was due to him from the respondents. Accordingly, I allow this appeal, set aside the judgment of the trial magistrate and substitute it with the judgment in favour of the appellant for the sum of Kshs.501,708/55 together with interest at court rates. I dismiss the respondent's counterclaim with costs to the appellant. I further award costs of this appeal to the appellant. Those shall be the orders of this court.

Dated and delivered this 27th day of April, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Miss Kirui H/B for Maluki for the appellant

Kuyo H/b for Masika for the respondent

Eric - Court clerk