



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Case 48 of 2008

C. K. PATEL LIMITED.....PLAINTIFF

VERSUS

RECCO BUILDERS LIMITED.....1ST DEFENDANT

TEJPARTAP SINGH REHAL.....2ND DEFENDANT

JUDGMENT

The plaintiff's claim in this suit is for Kshs.5,828,086.15 being the value of goods sold and delivered by the plaintiff to the first defendant in respect of which the first defendant issued the plaintiff with cheques which were dishonoured. As against the second defendant the claim is based on his alleged written undertaking which he gave to pay that sum but has not paid.

In their joint defence the defendants have denied the claim. The first defendant has denied being supplied with any goods as alleged or at all and the second defendant has denied committing himself to pay any money due to the plaintiff from the first defendant and averred that if he signed the alleged cheques then he did so as a director of the first defendant and is therefore not personally liable

In my ruling of 22nd May 2009 I granted the plaintiff's application dated 26th May 2008, struck out the 1st defendant's defence and entered judgment in favour of the plaintiff as against the 1st defendant as prayed in the plaint. As regards the second defendant, I found that in the absence of proof that he is the one who signed the commitment annexed to the affidavit in support of the application, the case against him was not obvious. In the circumstances I dismissed the application as against him and ordered that the case against him be heard which has now been done.

Dilip Patel is a director of the plaintiff company. He testified that between 2006 and 2007 the plaintiff supplied to the 1st defendant building materials worthy Kshs.5,828,086.15. When the 1st defendant failed to pay and its cheques bounced its director the 2nd defendant undertook to pay that sum. He said the 2nd defendant went to his office and gave the commitment in writing in the presence of another director of the plaintiff company. In cross examination he was categorical that it is the 2nd defendant whom he knows very well that gave the commitment. He produced the commitment note **Ex.2**. He said after the 2nd defendant also failed to pay the plaintiff had no choice but to file this suit against both of them. He therefore prayed that judgment be entered for the 2nd defendant as well for the same amount.

The 2nd defendant opted not to testify in his defence. In his submissions his advocate contended that that notwithstanding the suit against the 2nd defendant should be dismissed because the plaintiff had failed to prove on a balance of probabilities its claim against him. As the commitment does not have the 2nd defendant's name and no demand notice having been sent to the 2nd defendant, they said the plaintiff has failed to prove that it is the 2nd defendant who signed it.

In response to these submissions counsel for the plaintiff submitted that the plaintiff has proved the case against the 2nd defendant as required by law. They said the reason why no demand notice was sent to the 2nd defendant is because of the cordial relationship that existed between the directors of the plaintiff company and those of the 1st defendant. They said the plaintiff's directors orally demanded payment several times but the 2nd defendant failed to pay. They concluded that on the uncontroverted testimony of PW1 the plaintiff has discharged the burden of proof in this case and urged me to also enter judgment against the 2nd defendant as prayed in the plaint.

I have considered these submissions and the evidence on record. The 2nd defendant did not undertake to pay the amount owed to the plaintiff by the 1st defendant as claimed in the plaint. What he undertook to pay is interest at 3% per month on the amount owed. The acknowledgment note reads:-

“I DO HEREBY ACCEPT TO PAY INTEREST AT THE RATE OF 3% (THREE PER CENT) per month on

outstanding amount of Kshs.5,828,086/15 owed to M/S C. K. PATEL LTD as on account of goods supplied to M/S RECCO BUILDERS LTD.”

That commitment was signed on 12th July 2007. PW1 was categorical that it is the 2nd defendant who signed that note in his presence and in the presence of another director of the plaintiff company. As I have said the 2nd defendant opted not to testify and assigned no reason therefor. Though I am not a handwriting expert the signature on that note appears to me to be similar to the ones on the 1st defendant's returned cheques which were said to have been signed by the 2nd defendant and the ones on the 2nd defendant's affidavts sworn on 10th December 2008 and 6th January 2009

Taking all these factors into account and the uncontroverted testimony of PW1, I find and hold that it is the 2nd defendant who signed the commitment note **Ex.2**. Consequently I enter judgment for the plaintiff against the 2nd defendant in the sum of Kshs.3,729,975.15 being 3% per month interest on the 1st defendant's debt of Kshs.5,828,086.15 from 12th July 2007 to date, 22nd April 2010. The 2nd defendant shall pay further interest on the principal sum of Kshs.5,828,086.15 at the said rate of 3% per month from today until the principal sum is paid in full and final settlement. The plaintiff shall also have the costs of this suit against the second defendant plus interest thereon at court rates from the date of taxation.

DATED and delivered this 22nd day of April, 2010

D.K. MARAGA

JUDGE.