



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CIVIL CASE NO. 194 OF 2009

ASIS HOTEL
LIMITED.....PLAINTIFF

VERSUS

THE HON. ATTORNEY
GENERAL.....DEFENDANT

RULING/ JUDGEMENT

In its plaint filed on 1.12.2009, the plaintiff seeks judgment for Kshs. 65,000,000/- against the defendant. Also claimed is interest on the said sum at the rate of 18.2 per centum per annum from 23.2.2009 until payment in full. There is also a claim for costs of the suit. The foundation of its claim is pleaded in paragraph 3 of the plaint and is that during the period ending the year 2002, the plaintiff at the request of the Government offered accommodation for delegates who were attending the Somali IGAD Peace talks in Eldoret town and upon conclusion of the services rendered, the government delayed in settling the principal payments which as a result accrued interest at the rate of 21% per annum.

On 22.3.2010, the defendant delivered his written statement of defence denying liability to the plaintiff. In paragraph 4 of the said written statement of defence, the defendant, without prejudice, avers that there is no outstanding amount owed to the plaintiff and further that if there had been expenses on behalf of the government, which was denied, the same amounts have been paid/settled by the defendant together with interest if any. In paragraph 5, any agreement or undertaking to pay outstanding amount or part thereof is denied and in paragraph 6, the defendant avers that if the plaintiff had borrowed his trading capital, then the defendant is a stranger to the same and is therefore not liable to the plaintiff.

The pleadings were in that state when the plaintiff lodged its present notice of motion dated 18.6.2010 seeking, in the main, that judgment on admission be entered in its favour against the defendant in the sum of Kshs. 65,000,000/- together with interest at 18.2 per centum per annum from 23rd February 2009 until payment in full. The grounds for the application are that by a letter dated 12.1.2003, the then Kenya Special Envoy to the Somali Peace talks undertook and committed, the payment of the plaintiff's claim by the defendant and further confirmed to the plaintiff that funds were available to settle the plaintiff's claim; that on 23.2.2009, the parties executed an agreement/undertaking where the defendant unequivocally and clearly admitted that it is indebted to the plaintiff in the said sum of Kshs. 65,000,000/- being outstanding interest owing by the Government to the plaintiff; that the defendant has not settled the

said sum and has no defence to the plaintiff's claim.

The application is supported by an affidavit sworn by one **Hassan Koskei**, the director of the plaintiff. The said affidavit is an elaboration of the above grounds. Annexed to the affidavit are several exhibits including copies of letters dated 7.1.2003, and 12.1.2003, from the then Special Envoy for Somalia and Chairman IGAD Technical Committee (**Elijah W. Mwangale**) addressed to the plaintiff, a copy of a letter dated 14/12/2003, from Ambassador **Bethwel Kiplagat** in his then capacity as Kenya's Special Envoy for Somalia and Chairman IGADI Technical Committee, copies of letters dated 4.6.2008, and 7.1.2009, from **David S.O. Nalo**, the then Permanent Secretary, Ministry of the East African Community, copies of minutes of a meeting of 3.3.2009, between the said Ministry and the proprietor of the plaintiff, a copy of an undertaking dated 23.2.2009, a copy of the Statutory notice served upon the defendant and a letter of demand addressed to the Permanent Secretary – Ministry of East African Community.

The defendant opposed the application and there is a replying affidavit sworn by **David Nalo**, the then Permanent Secretary - Ministry of East African Community. He avers, on advice of counsel, that as no notice to admit facts or documents was served, judgment on admission is not available to the plaintiff. He has further acknowledged that the plaintiff was indeed contracted to offer accommodation services to delegates involved in the Somalia Peace Process at an agreed rate of Kshs. 4,000/- on full board basis for each delegate which services were eventually terminated on 14.2.2003. **Mr. Nalo** has further sworn that because of large sums involved an audit was carried out which revealed that the sum actually owed to the plaintiff was 86,995,455/- and that subsequent to the audit the plaintiff and other hoteliers were requested to furnish outstanding bills. In response, the plaintiff forwarded its bills which stood at Kshs. 48,233,938/- without any claim for interest. It is further deponed that of that sum, the defendant paid Kshs. 43,640,815/- leaving a balance of Kshs. 4,396,113/- which sum the plaintiff demanded to enable it sort out its bankers. It is then deponed that the said balance was then paid to the plaintiff on 14.11.2006. **Mr. Nalo** has further sworn that notwithstanding the said payment, on 26.10.2006, the plaintiff claimed that it had understated its rates by Kshs. 500/- per day per delegate and consequently claimed a shortfall of Kshs. 9,972,000/-. It is also deponed that the basis of that claim was fraudulent and that at no time had the plaintiff claimed interest. It is also deponed that notwithstanding the fraudulent basis of the claim, the relevant secretariat decided to process payment on the understanding that no other claims would be entertained and the same was paid out in June 2007. **Mr. Nalo** then swears that notwithstanding the last payment, the plaintiff lodged another claim for Kshs. 77,462,213/- as interest on delayed payment which the Ministry of the East African Community redirected to the Ministry of Foreign Affairs. **Mr. Nalo** disputes the letter of 12.1.2003, exhibited by the plaintiff's director on the basis of internal investigations the secretariat has carried out and avers that the plaintiff's claim has been paid in full. **Mr. Nalo** then continues that sometime in early 2009, and on the insistence of the plaintiff that it was owed interest and in the spirit of finalizing all disputes between the plaintiff and the government and on the understanding that the government actually committed itself to pay interest, he invited the plaintiff's director to a negotiation forum on 13.1.2009, at which a figure of Kshs. 65,000,000/- to be paid in full and final settlement was agreed and an agreement and undertaking drafted and signed by both parties on 23.2.2009. It is then averred that five (5) days thereafter, the plaintiff disowned the said undertaking and forwarded a fresh claim of Kshs. 108,979,814/- and **Mr. Nalo**, on counsel's advice, believes that the earlier undertaking has been violated by the plaintiff's new demand. He also deposes that the interest of 18.2% also claimed by the plaintiff was not part of the undertaking and that the fresh claim raised doubts which prompted the Ministry to reconsider and investigate the claim further; that from investigations carried out, the Government did not commit itself to pay interest and that the claim is against the principles of Natural Justice since the principal figure is not disclosed. **Mr. Nalo** further avers that the plaintiff has not produced proof that it obtained a loan from any bank at the rate of 21% interest. In the premises, according to **Mr. Nalo**, the plaintiff's claim is null and void. **Mr. Nalo** further swears that on advice of counsel, the plaintiff's claim is disputed and a trial is the only option available to the plaintiff to prove its claim otherwise the plaintiff will be unjustly enriched.

The application was debated before me on 17/11/2010 by **Mr. Wagara**, learned counsel for the plaintiff and **Mr. Muiruri**, learned counsel for the defendant. Counsel reiterated the stand points taken by their clients in their respective affidavits.

I have considered the pleadings, the application, the affidavits filed, the annexures thereto and counsel's submissions. Having done so, I take the following view of the matter. The applicant seeks judgment on admission. The jurisdiction to grant judgment as sought is given in Order XII rule 6 of the Civil Procedure Rules. The applicant has indeed invoked that rule although other provisions of the law are also cited. The documents upon which admission is alleged to have been made are largely not in controversy. The primary documents accepted as having been made are in annexure HK5 annexed to the supporting affidavit. The first document is titled:

“CONFIRMATION OF THE MINUTES OF THE MEETING OF 3RD MARCH 2009 AT THE MINISTRY OF EAST AFRICAN COMMUNITY 17TH FLOOR DEPUTY SECRETARY'S OFFICE”

The sub-title reads as follows:-

“NEGOTIATIONS BETWEEN THE GOVERNMENT OF KENYA AND THE PROPRIETOR OF ASIS HOTEL LTD ELDORET”

The pertinent paragraph of the minutes are the last three which read as follows:-

“After protracted negotiations, it was agreed by both parties that the interest rate be pegged at 18.2% per annum compounded and applied on reducing balances, which translates to Kshs 65, million. It was further agreed that Rose Nyakwana, Legal Officer, Ministry of East African Community draft an undertaking between Mr. Hassan Koskei, director of Asis Hotel Limited, and the government of Kenya.

The undertaking was signed on behalf of the Government by Mr. Moses Maina, Deputy Secretary, Ministry of East African Community. Mr. Hassan Koskei signed on behalf of Asis Hotel Limited Eldoret.

After minor corrections, the minutes were found to be a true representation of what had transpired. There being no other business, the meeting ended at 1.30 p.m.”

Signed

CHAIRMAN

DATE: 3/3/2009

Moses Maina

Signed

Ag. SECRETARY

DATE: 3/3/2009

Joseph O. Ongera

The second annexure **“HK5”** is on the Letterhead of the Ministry of the East African Community and is headed **“UNDERTAKING”** The undertaking reads as follows:-

“This undertaking made this 23rd day of February of 2009 between Hassan K. Koskei ID No. 1448700 being the Director of Asis Hotel Limited, Po Box 6184, Eldoret hereinafter referred to as the Creditor/his assigns on the one part and the Government of the Republic of Kenya/Ministry of East African Community, Po Box 8864 – 00200, Nairobi on the other part

being the debtor.

That Mr. Hassan Koskei, the Director of Asis Hotel Limited undertakes to accept Kshs Sixty Five Million (65,000,000) being the outstanding interest owing from the government of the Republic of Kenya as full and final payment of the said interest.

That the creditor Director and Asis Hotel aforementioned shall not make any further claims from the Government of the Republic of Kenya at all.”

Signed by the said

MR. HASSAN KOSKEI

MR. MOSES MAINA

Deputy Secretary/ADM.

FOR THE GOVERNMENT OF KENYA

In the presence of

ADVOCATE.

The defendant, through **Mr. David Nalo**, admits that the meeting of 23/2/2009 indeed took place and that the above undertaking was duly given as stated above. What led to the minutes and the resultant undertaking may have been frizzled with controversy or misgivings. But the parties had a meeting of minds when the undertaking was signed on 23/2/2009. The undertaking, in my view, was an admission of the plaintiff’s claim of 65 million by the defendant. The admission was obvious, plain, clear, unambiguous and unequivocal. As was stated in **Choitram–v- Nazari [1984] KLR 327 at page 333**, the admission left

“no room for doubt that the parties passed out of the stage of negotiations into a definite contract.”

What does the defendant state in his defence? At paragraph 7, he denies any meetings and/or consultations on the issue of interest and at paragraph 6, avers that if the plaintiffs had borrowed his trading capital, then the defendant is a stranger to the same and is not liable as he was not privy to the borrowing. The defendant’s averments in the said paragraphs clearly contradict the minutes of 3/3/2009, and the undertaking given by the Government/Ministry of East African Community referred to above.

To my mind, the filed statement of defence is not an answer to the plaintiff’s claim for Kshs 65 million given the said undertaking. When faced with this application, what did the defendant do? He filed a replying affidavit through the Permanent Secretary, Ministry of East African community, **David Nalo**. He now seems to set up a defence that subsequent investigation has shown that the defendant was fully paid and that there was no agreement to pay interest. He also seems to set up an alternative defence, namely that even if the said undertaking was given by the Government, it is no longer binding because the plaintiff is in breach of the same because he served a fresh demand for Kshs 108,979,814.00.

The defendant does not deny that a meeting took place on 3/3/2009 at the Ministry of East African Community on the 17th floor in the Deputy Secretary’s Office at which the plaintiff’s claim was discussed. The then Deputy Secretary, **Mr. Moses Maina** chaired the meeting. There was no ambiguity about the terms of reference. The only issue **“for discussion then was the rate of interest”**. Paragraph 2 of the terms of reference was in the following terms:

“The meeting began with the chairman welcoming Mr. Koskei, Director of Asis Hotel Limited and informing him that this was a negotiation forum to reach a consensus between him and

the government on a fair rate of interest to be applied on the interest accruing from delayed payment of principal sum that emanated from accommodation of Somali Delegates during the Somali Peace Negotiations”

A part from **Mr. Koskei**, all the participants at the forum were government officers. They included an Accountant and a Legal Officer. In those premises, how can any Court view the averments of **Mr. David Nalo** that there was no letter committing the Government to pay interest and that the letter dated 12th January 2003 was not an authentic document that can commit the Government to pay interest. Does **Mr. Nalo** suggest that his own Deputy, an Accountant and a Legal Officer who were present during the negotiations were busy bodies endorsing a phantom claim? He says the letter dated 12th January 2003 is not authentic. Who has made that determination? The statement of defence save for merely denying the existence of the undertaking makes no allegation of fraud, mistake, misrepresentation or undue influence against any one.

With regard to the alternative averment put forth by the defendant that the said undertaking does not bind the defendant because the plaintiff has disowned the same by making a claim for a different higher amount, I have found as follows:

The undertaking was made on 23/2/2009. The plaintiff then made a demand for payment in terms of the undertaking in its letter dated 28/2/2009. In the penultimate paragraph thereof the plaintiff stated as follows:-

**“We wish you will heed our plea otherwise we will disregard the negotiated agreement and continue insisting on payment based on the prevailing status at the time you settle the payment. This will be beneficial to us but costly to the Government in the final end as this will involve lengthy Court processes and more damage to our hotel investments. We implore that we avoid this route and arrange to finalize the issue for the sake of the business relationship.
.....”**

The letter had annexed to it a statement of account which showed that as at the date of that said letter, the balance was Kshs 108,797,814/= if a 21% interest rate was applied. The body of the letter did not have a demand for the said sum of Kshs 108,979,814/=. The message in the letter was otherwise plain. It was: pay as agreed otherwise it would claim at the former rate. The defendant reads more than is in the letter. In the premises, I do not find the letter as evidence of disowning the undertaking by the plaintiff.

The upshot of my consideration of the plaintiff’s application is that the same is allowed to the extend that there will be judgment for the plaintiff against the defendant in the sum of Kshs 65,000,000/=.

With regard to the prayer for interest on the said sum at the rate of 18.2% per annum from 23rd February 2009, until payment in full, I am of the considered opinion that the interest was not agreed. It must be remembered that the plaintiff’s entire claim is for interest and interest on interest. The plaintiff is bound by the undertaking. His application is based on admission and there is no admission on the further interest. The plaintiff undertook the following:

“That Mr. Koskei, the Director of Asis Hotel undertakes to accept Kshs sixty five million (65,000,000/=) being the outstanding interest owing from the Government of the Republic of Kenya as full and final payment of the said interest. That the creditor, Director and/or Asis Hotel aforesaid shall not make any further claims from the Government of the Republic of Kenya at all.”

The language of the undertaking is plain. The plaintiff in this application for judgment on admission cannot get more than was admitted.

The sum decreed shall therefore not carry any interest at all. The said sum should be paid within sixty (60) days failing which it will attract interest at Court rates from the date of default until payment in full. The plaintiff is at liberty to pursue its claim for additional interest.

I give each party liberty to apply. Costs to the plaintiff.

Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 2ND DAY OF DECEMBER 2010.

F. AZANGALALA

JUDGE

Read in the presence of:

Mr. Wagara for the plaintiff and **Mr. Ngumbi** for the defendant.

F. AZANGALALA

JUDGE

2/12/2010