



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 420 of 2007

IKM PLACE LTDPLAINTIFF/APPLICANT

VERSUS

MIT'S ELECTRICAL COMPANY LTD...DEFENDANT/RESPONDENT

R U L I N G

By a Plaint dated 13th August, 2007, filed on the 15th August, 2007, IKM Place Limited (*herein referred to as the plaintiff*) brought this suit against MIT'S Electrical Company Limited (*herein referred to as the defendant*), seeking judgment for:

- (a) Kshs.4,104,570.40 being refund of the contract sum,
- (b) a sum of Kshs.8,549,474.60 being damages for delaying completion of the contract,
- (c) cost of the suit and interest.

The Plaintiff's claim was grounded on a sub-contract agreement entered into between the defendant and Epco Builders Limited, on behalf of the Plaintiff, for the supply of two passenger lifts pursuant to which agreement an advance payment of Kshs.4,828,318/= was made to the defendant.

In breach of the contract the defendant failed to deliver and install the lifts/elevators notwithstanding the extension of the completion period, causing the plaintiff to terminate the contract. Through a settlement deed dated 2nd July, 2007 duly executed by the parties, the defendant undertook to refund the advance payment which it received. The defendant however, failed to honour the settlement deed thereby rendering the plaintiff's suit necessary.

In his amended defence and counterclaim, filed on 8th October, 2007, the defendant admitted having entered into a sub-contract with Epco Builders Ltd for the supply, installation and commissioning of two passenger elevators, but denied the plaintiff's allegations of breach of contract. The defendant admitted having received advance payment of Kshs.4,858,318/=. It however contended that the plaintiff furnished the advance payment after a considerable delay.

The defendant further contended that the delay in the supply and delivery of the elevators was a result of *force majeure*, resulting from a *coup de tat* in the Government of Thailand, from which country the elevators were to be imported. The defendant maintained that the elevators were later manufactured and were ready for shipment, when the plaintiff prematurely terminated the contract and refused to accept the delivery.

Regarding the settlement deed, the defendant contended that the same was obtained under duress following a complaint lodged by the plaintiff with the Criminal Investigations Department.

The defendant urged the court to dismiss the plaintiff's claim contending that the termination of the sub-contract was made in bad faith. The defendant raised a counter claim of Kshs.7,214,816/= being loss arising from the termination of the contract. The defendant also counterclaimed general damages for breach of contract.

The Plaintiff has now moved this court under Order XXXV of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking summary judgment against the defendant for the sum of Kshs.4,104,570.40 together with interest and a further order that the balance of the claim do proceed to hearing.

As per the grounds stated on the body of the application, the plaintiff contends that the defendant has acknowledged its indebtedness to the Plaintiff, and has previously offered to pay the same. It is further contended that the amended defence filed by the defendant raises no triable issues and is only intended to delay the trial of the suit.

The application is further supported by an affidavit sworn by James Mburu Kamau, a director of the Plaintiff Company, to which affidavit is annexed a copy of the sub-contract agreement entered into between the defendant and Epcu Builders Ltd, a cheque for Kshs.4,828,318/= being the advance payment for the supply of the lifts, correspondences between the plaintiff and the defendant regarding the delivery of the lifts, the delay in the delivery, and promises to deliver. Also annexed is a copy of minutes of a meeting held on 26th January, 2007, constituting a variation of the contract, and a letter dated 12th March, 2007 terminating the contract.

In addition, a copy of the settlement deed dated 2nd July, 2007, signed by the defendant for refund of Kshs.4,828,318/= has also been annexed. It is deponed that pursuant to the settlement deed, the defendant did pay the plaintiff a sum of Kshs.724,247.60 and issued postdated cheques to cover the balance of Kshs.4,104,071.40. The first postdated cheque which was for Kshs.1,026,017.60 was dishonoured by the Bank upon presentation, thereby attracting Bank Charges of Kshs.500/=.

The Plaintiff therefore, maintains that the defendant is truly indebted to the Plaintiff for the sum of Kshs.4,104,570.40 being the balance of Kshs.4,104,071.40 plus the Bank Charges of Kshs.500/=. The Plaintiff maintains that the defendant has no valid defence to this claim. Regarding the counterclaim, the plaintiff contends that the same raises no triable issues in respect to the plaintiff's claim and is intended to delay the expeditious conclusion of the case.

Mr. Munyu who appeared for the plaintiff, maintained that the deed of settlement was properly executed by the defendant who had benefit of a counsel, and that there was also part performance of that settlement. He relied on **HCCC No.444 of 2004 (Milimani) Shamsher Kenya Ltd vs. Body and Soul Ltd** in which the court stated that summary judgment is to be resorted to in respect of liquidated demands, only where it is plain and obvious that the defendant is truly and justly indebted to the plaintiff, and there are no bona fide triable issues raised in the defence.

Mr. Munyu also relied on **HCCC No.177 of 2002 (Nairobi) Diamond Trust Bank Kenya Ltd. vs. Peter Mailanyi & 2 Others** where the court applying **Gupta vs. Continental Ltd (1989) KLR 73**, ruled that if no prima facie triable issue is put forward to the claim of the plaintiff, it is the duty of the court forthwith to enter summary judgment for it is as much against natural justice to shut out without proper cause a litigant from defending himself as it is to keep a plaintiff out of his dues in a proper case.

Finally Mr. Munyu relied on **Corporate Insurance Co. Ltd. vs. Nyali Beach Hotel Limited (1995 – 1988) 1EA 7**, wherein it was held inter alia that the purpose for an application for summary judgment was to enable the plaintiff, if he could prove his claim clearly, and the defendant was unable to set up a bona fide defence or raise an issue against the claim to be tried, to obtain a quick judgment.

Mr. Munyu submitted that the replying affidavit only refers to steps in performing the contract which were not in dispute. He further maintained that the complaint to the Police which was made in March, 2007, could not vitiate the letters written by the defendant in August, 2007 pleading for time to pay.

The defendant responded to the motion through a replying affidavit sworn by Satya Gandhi who is the Managing Director of the defendant Company. The deponent explained that the lifts were to be delivered and installed within thirty (30) weeks from receipt of payment by their suppliers. He explained that there was a delay which was explained to the plaintiff. Gandhi maintained that the defendant had purchased all the equipments and materials required to be in place at the site in preparation for the installation of the lifts. However, as a result of a *coup de tat* in Thailand, there was a parts shortage that hindered the completion of the manufacture of the lifts and this was brought to the attention of the plaintiff.

The manufacturing of the lift was completed one month later, and while the defendant was making arrangements to have the lifts air freighted, the defendant received a notice from the plaintiff of intention to terminate the contract.

Subsequently, a meeting was held and it was agreed that the defendant would commence installing the lifts on 27th February, 2007. The defendant made arrangement with the suppliers and informed the plaintiff of the arrangements and the progress. However, on 28th February, 2007, Gandhi received information that the plaintiff had made a complaint to the police. Shortly thereafter on 12th March, 2007, the main contractor terminated the contract.

The defendant's managing director maintained that between the months of February and April, 2007, he was repeatedly called harassed and intimidated by the police, as a result of which the defendant executed the settlement deed. The defendant maintained that the amended defence raises triable issues and should be allowed to proceed to trial.

Mr. Kega who appeared for the defendant, submitted that the defendant operated within the agreed programme of thirty (30) weeks, and later made arrangements to comply with the new schedule but was harassed by the Criminal Investigations Department officers as a result of which the defendant asked the supplier to hold on to the goods. The defendant maintained that there was duress and undue pressure exerted on it to execute the deed of settlement and that duress and undue pressure having been pleaded it was a matter for the trial.

Mr. Kega referred to the case of *Corporate Insurance Co. Ltd. vs. Nyali Beach Hotel Ltd.* (Suppra), wherein it was held that once a bona fide defence had been identified, a court was obliged to refrain from resolving the suit on affidavit evidence.

From the pleadings, the affidavits in support of the application, and the affidavits in reply, together with the annexures thereto, it is clear that there was a sub-contract agreement between the plaintiff and the defendant for the supply and installation of two (2) lifts. It is not disputed that pursuant to this agreement, the defendant received an advance payment of Kshs.4,828,318/=. It is further not disputed that to date, no lifts have been delivered to the plaintiffs.

In paragraph 9 of his defence, the defendant says that the delay in the supply, delivery and installation of the lifts was caused by a *coup de tat* against the Government of Thailand. In paragraph 10 the defendant further states that the lifts/elevators were duly manufactured and were ready for shipment, but the plaintiff refused to take delivery, and wrongfully and prematurely, terminated the contract.

A look at the correspondences exchanged between the defendant and the plaintiff's consultant as well as the plaintiff, show that the delay in delivery of the lifts commenced well before the alleged *force majeure*. For instance, in its letter dated 27th July, 2006 (annexture J.M.K 3d to the affidavit of James Mburu Kamau) the defendant's managing director wrote as follows:

"Therefore, we inform you that the manufacturing is progressing since 21st April, 2006 when

payment was remitted to Mitsubishi Electrical Corporation. There was a delay in the assembly and the factory is catching up on the lost time. We have requested for shipping details and the factory requires a minimum of fourteen (14) days to make such reports. We will advise you of the shipment details and when we will move our technical personnel to site to carry out the pre-installation works. We do appreciate the concern and we are doing everything possible to advance delivery.”

In another letter dated 31st August, 2006 (annexture J.M.K 3f) the defendant’s managing director stated as follows:

“We do realize our contractual obligations, however, we request you to grant us an extension of the completion date since some occurrence has arisen, making it impossible to achieve the intended completion date It has become apparent that the progress of the lifts will be delayed and we shall be giving you reasons for the delay and request you to grant us an extension to allow us to complete the works within the programme which was sent to you earlier. Delay was caused by a lock-out in the factory making it impossible for the manufacture to take place in accordance with the schedule..... We will shortly forward the shipping details as we have requested this from the factory.”

It is evident from these letters, that as at that stage, the delay had nothing to do with the alleged **force majeure**. After the alleged **force majeure**, the defendant in his letter dated 2nd November, 2006 (Annexture JMK 3g), requested for extension of time for the shipment to be completed stating that they would require at least one (1) month for the handing over. In the letter dated 9th November, 2006 (annexture JMK-5) the defendant’s director giving a progress report on the supply, delivery and installation of the two (2) lifts stated as follows:

“(i) Accordingly, they will be ready for dispatch by air freight 100% of the lifts equipment for both the lifts on 15th September, 2006, for which we have agreed to bear the costs.

(ii) Both lifts will therefore be handed over by 31st December, 2006 as we will be engaging two shifts to work on installation of the two lifts at the same time. We have contracted two Mitsubishi specialist engineers with our locals to complete the installation and hand over the two (No.) lifts by 31st December, 2006. We are positive that this date can be achieved since the pre-installation works will be completed when the lifts have been delivered on site.”

It is not surprising that in view of the previous unfulfilled promises made by the defendant, the plaintiff’s main contractor by a letter dated 6th December, 2006 (Annexture JMK 4a), served the defendant with a fourteen (14) days’ notice of its intention to terminate the contract due to the defendant’s failure to among other things provide specified materials and equipments. The notice gave the defendant fourteen (14) days to perform the contract.

As of 9th January, 2007, however, the equipment had not been supplied and the defendant was making yet other promises by its letter dated 9th January, 2007 (annexture JMK 4b). Finally, the sub-contract was terminated on 12th March, 2007 by a letter annexed as JMK 6. This was more than four (4) months after the alleged **force majeure** and yet no delivery of the lifts had been made.

In the light of the above, it is clear that paragraph 9 and 10 of the defence does not raise any triable issues in so far as the defendant’s liability to refund the advance payment of Kshs.4,828,318/= is concerned, as there was total failure of consideration.

Regarding the settlement deed, dated 2nd July, 2007, which was duly signed by the defendant acknowledging the debt to the plaintiff (annexture JMK 7). The defendant has not denied signing the documents but contends that the same was executed under duress following a complaint made by the plaintiff to the police and harassment of the defendant by the police. As per paragraph 11 of the defence and counterclaim, it is alleged that the complaint to the police was made on the 26th January, 2007.

Annexures SG.10A and 10B are letters of protest regarding the police harassment, written on the defendant's instruction by an advocate, during the month of March, 2007.

It is interesting to note that, notwithstanding those letters, the settlement deed was signed several months later on the 2nd July, 2007. Of significance is a letter dated 13th July, 2007 (annexture JMK 8B) from the defendant's advocate to the plaintiff's advocate, in which the defendant's advocate was requesting for the duly executed settlement deed. The advocate did not raise any issue at all regarding the alleged duress or coercion.

I am satisfied that the settlement deed was voluntarily signed by the defendant and it is a clear acknowledgement of the debt owed by the defendant to the plaintiff. Indeed, the defendant made payment of Kshs.724,247.60 and forwarded postdated cheques for payment of the balance of Kshs.4,104,070.40.

I come to the conclusion that the defence filed by the defendant does not raise any triable issues or provide any reasonable defence to the plaintiff's claim with regard to the sum of Kshs.4,104,570.40. There is no justification in denying the plaintiff judgment for this part of its claim.

Accordingly, I grant the plaintiff's motion for summary judgment and grant orders as prayed in the motion.

Orders accordingly.

Dated, signed and delivered on this 26th day of February, 2008.

H. M. OKWENGU

JUDGE