



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Suit 379 of 2006

ASSOCIATED STEEL LIMITEDPLAINTIFF

VERSUS

SCANTECH ENGINEERING CO.1ST DEFENDANT

ERIK KRISTENSEN2ND DEFENDANT

RULING

The Plaintiff is seeking summary judgement against the defendants, as prayed in the Plaintiff.

Essentially, the plaintiff holds the view that the defendants were truly indebted to it, and that the said two defendants have indeed admitted their respective liabilities to the plaintiff. Accordingly, the plaintiff submits that the Defence on record is a mere denial and a sham, which did not give rise to any triable issues.

It is the plaintiff's case that the 2nd defendant was a director of the 1st defendant. In that capacity, the 2nd defendant is said to have ordered for the supply of goods, by the Plaintiff, to the 1st defendant. In response to that request, the plaintiff says that it supplied goods worth a considerable sum. However, the defendants are said to have failed to settle the balance of the purchase price, amounting to Kshs.10,289,871/45.

It is also the plaintiff's case that the 2nd defendant asked for, and was supplied with additional goods, for his own benefit. In relation to those goods, the 2nd defendant is said to have failed to pay the sum of Kshs.921,743/40.

The two defendants are said to have admitted their respective indebtedness to the plaintiff. The admissions are said to be contained in two letters, both of which are dated 2nd December 2004.

What is more, the 1st defendant is said to have issued cheques, in consideration of the outstanding sums. However, three of the said cheques, which were for Kshs.500,000/- each, were said to have been dishonoured. Yet, following the said dishonour of the three cheques, the defendants are said to have failed to advance any good reason for having issued the cheques in the first place.

As far as the plaintiff was concerned, the question regarding the rate at which interest should accrue on the outstanding sums, did not constitute a triable issue. It is the plaintiff's case that the parties herein had agreed to the terms of the contract as between them.

Therefore, the plaintiff asserts that the court could not vary the said agreed terms of the contract

Those terms are said to be embodied in the invoices, which the plaintiff described as an integral part of the contract for the supply and delivery of goods, by the plaintiff to the defendants. Indeed, the plaintiff submitted that the invoices commenced the said contracts. For that reason, the plaintiff submits that it was not open to the defendants to now challenge the invoices, as they had failed to do so at the earliest moment, before issuing bouncing cheques.

In support of its case, the plaintiff relied on the following holding, from the case of **SHAH –VS- GUILDERS INTERNATIONAL BANK LTD. [2003] KLR 8;**

"If by their agreement the parties have fixed the rate of interest payable, then the Court has no discretion in the matter and must enforce the agreed rate unless it be shown in the usual way either that the agreed rate is illegal or unconscionable or fraudulent."

In the alternative, the plaintiff prayed that pursuant to the discretion bestowed upon the court by the virtue of the provisions of Section 26 of the Civil Procedure Act, this court should either allow interest at court rates or otherwise determine such rate as may be deemed appropriate.

In the further alternative, the plaintiff invoked the provisions of Order 35 rule 7 of the Civil Procedure Rules, and sought an order to compel the defendants to provide security before the trial could proceed.

The 1st defendant responded to the application by first conceding that the plaintiff did supply it with goods. However, as far as the said defendant is concerned, there was still a genuine issue as regards the quantum of the claim.

In particular, the 1st defendant takes issue with the claim for interest at the rate of 3% per month. The reason for that is that the plaintiff's auditors, who wrote to the 1st defendant on 2nd December 2004, did not make any demand for the payment of interest.

In view of the fact the said letter was written some two years after the plaintiff had raised invoices, the 1st defendant contends that the plaintiff cannot therefore be permitted to demand interest.

I must say that all the invoices raised by the plaintiff, to the 1st defendant, clearly bear the following words, in bold print;

"PAYMENT TERMS: 45 DAYS FROM DATE OF INVOICE INTEREST OF 3% PER MONTH ON ALL OVERDUE ACCOUNT."

The said invoices range from January upto October 2002. Therefore, it would appear that by making a demand for interest at 3% per month from December 2002, the plaintiff was complying with the terms of the invoices.

But the 1st defendant avers that the plaintiff had forfeited the accrual of interest. By that assertion, I understand the 1st defendant to first be conceding that it was a term of the contract that interest be payable at the rate of 3% per month on all overdue accounts. In effect, the only defence, as I understand it, is that the plaintiff had forfeited its right to claim interest.

To what do the defendants peg their contention of forfeiture? It is on the letters written by the plaintiff's auditors, M/s Vipul Shah & Company, on 2nd December 2004.

On the letter addressed to the 1st defendant, the auditors asked them to confirm that the balance receivable from the 1st defendant, as at 30th September 2004, was Kshs.10,289,871/45. Whilst the 2nd defendant was asked to acknowledge that the sum receivable from him was Kshs.921,743/40, as at 30th September 2004.

The 1st defendant did confirm the sums, as did the 2nd defendant. Accordingly, I hold the considered view that neither of the defendants has any triable issue in relation to the principal sums claimed from them.

However, as regards the issue of interest, I find that there arises a triable issue. I say so because although the invoices did expressly provide for interest to become payable at 3% per month on accounts that were not settled within 45 days of the date of the invoice, the plaintiff's auditors thereafter excluded the calculation of interest from the sums which they indicated to be receivable from the defendants. The said exclusion of the interest from the calculations by the auditor, does appear to lend credence to the defendants' assertion that the plaintiff had chosen to forfeit interest. I also find the defendants' explanation for the plaintiff's said decision to be plausible, as it appears to be in the line with both the auditor's exclusion of interest, as well as with the assertion that the plaintiff chose to do so because it was well aware of the financial situation of the defendants.

In the circumstances, I do find, on a prima facie basis, that the defendants have tendered a reasonable explanation for issuing the three cheques for Kshs.500,000/- each, which when presented for payment, were dishonoured. I say so because the plaintiff has not denied the defendants' contention that it was informed by the 1st defendant not to bank the said cheques, but that it proceeded to bank them, in total disregard of the said information.

To my mind, that does not constitute a mere denial of the claim on interest.

Also there is the question as to whether or not the 1st and 2nd defendants could be jointly liable to the plaintiff for the sum of Kshs.10,289,871/45.

To my mind, the fact that the 2nd defendant is a director of the 1st defendant, cannot by itself make him personally liable for the debts of the company.

Also, the fact that the 2nd defendant may have been the mouthpiece of the 1st defendant when the latter was placing orders for the supply of goods by the plaintiff, cannot by itself render him personally liable for the debts of the company.

That the said 2nd defendant may have executed the letter dated 2nd December 2004, in his capacity as a director of the 1st defendant, would not by itself render him jointly liable for the debts of the company.

But, by executing the letter addressed to himself, confirming that the sum of Kshs.921,743/40 was receivable from him, in the books of the plaintiff, would render the 2nd defendant liable for that sum, on the face of it.

Accordingly, I find that the defendants have raised two triable issues, namely;

(a) Is the plaintiff entitled to judgement for interest at the rate of 3% per month as claimed, or to any other rate as now sought by the plaintiff?

(b) Is the 2nd defendant jointly liable with the 1st defendant for the sum of Kshs.10,289,871/45, as claimed?

Being of that persuasion, I do not then have the discretion to grant conditional leave to defend. Accordingly, I do hereby grant to the defendants unconditional leave to defend the suit. Therefore, the application dated 22nd September 2006 is dismissed. However, the costs thereof shall remain in the cause, as it would appear that the plaintiff has a high probability of success on the issue of the principal sums claimed.

Dated and Delivered at Nairobi this 29th day of January 2007

FRED A. OCHIENG

JUDGE