



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Suit 100 of 2005

BUSHSTOCK ENTERTAINMENT COMPANY LIMITED.....PLAINTIFF

VERSUS

EAST AFRICAN BREWERIES LIMITED.....DEFENDANT

R U L I N G

The defendant contracted the plaintiff to organize and manage the defendant's promotions called Smirnoff Experience 2003. This constituted of 32 weeks mini "activation" and 2 major carnival "activations" in Nairobi and Mombasa.

The plaintiff's claim is that the contractual price was kshs 23, 156, 558. That the contract provided that each party could terminate the contract by giving other 3 calendar months notice in writing. That on 6th May 2004, the defendant in breach of that contract terminated that contract without notice to the plaintiff. The plaintiff therefore claims damages of kshs 7, 839, 580/- as the unpaid amount under that contract.

The defendant denied indebtedness to the plaintiff and pleaded that at the time of termination only 9 out of 32 contracted mini events and 1 out of the two major carnival had been undertaken by the plaintiff. The defendant denied being in breach of the said contract and stated that the plaintiff had been adequately paid for the ten events that had been held as per contractual terms.

The plaintiff filed, by way of Notice of Motion brought under order 35 Rule 1, 8 and 9 of the Civil Procedure Rules an application for summary judgment for the amount of kshs 7, 839, 580/-. That application is based on the grounds that: -

- Ø The defendant contracted the plaintiff to organize and manage 32-week mini activations and 2 major carnival activation at a consideration price of kshs 23, 156, 558;
- Ø The defendant terminated the contract summarily/prematurely and without notice;
- Ø The plaintiff has thereby suffered loss of revenue and damage;
- Ø That it is in the interest of justice that this suit be adjudicated summarily.

Plaintiff's counsel in submissions stated that the defence filed on behalf of the defendant does not show any triable issues. He enumerated the facts that are not disputed by the defendant as follows:

- Ø The plaintiff was contracted at the defendant's instances;
- Ø That there was a valid contract between the plaintiff and the defendant;

Ø The contract obliged the plaintiff to manage the defendant's promotion known as Smirnoff experience;

Ø That the defendant cancelled the contract before completion.

Plaintiff counsel put two issues for the court's consideration. Firstly whether the cancellation of the contract was lawful, and secondly, if not lawful, what damages were payable to the plaintiff.

Plaintiff counsel submitted that the cancellation was unlawful and contrary to contract. That accordingly the measure of damages is on the basis of the loss to the plaintiff, that is the market value of the benefit that the plaintiff was deprived as result of the that breach. Plaintiff counsel stated that the value can be ascertained in construction of the contract.

Defence counsel in opposition stated that the court needed to notice how many activations had been undertaken by the plaintiff, that the plaintiff had been guilty of delay in performing the contract. That some of the payment being claimed by the plaintiff were payments that were due to third parties.

When the court is faced with an applciaiton such as this one for summary judgment it is clear that it is only in the plain and obvious cases that judgment will be entered summarily.

The basis of the plaintiff's case is the contract. The plaintiff has claimed an amount of kshs 7, 839, 580/- being the unpaid balance of the contract. The total payment shown as payable in the contract was the amount captured, in a letter dated 11th July 2003, as amended in the Appendix 1, to the contract.

The appendix I provided that the total contract amount was kshs 19, 962, 550. The plaint however claims that the total contract amount was kshs 23, 156, 558/-. That discrepancy is not clear to the court.

The defendant also raised a valid point that some of the payment were payable to third parties, the plaintiff failed to prove that such payments were made to those third parties.

The defendant did also raise the issue of delay by the plaintiff in performing the contract. That, I find, is an issue that can only be determined by oral evidence.

In the case UAP PROVINCIAL INSURANCE LTD – V – LENNY M KIVULI Civil Appeal NO. 216 of 1996 the court of appeal stated: -

“In an application for summary judgment even one triable issue if bona fide: would entitle the defendant to have unconditional leave to defend.”

In response to the defendant's claim of delay to perform the contract, the plaintiff stated, **“that the promotional events were to be performed in such manner as the defendant was to direct and the defendant cannot be heard to say that all the events were not or could not be performed.”**

When the court looks at the contract the only clause that evidently mentioned the period of performance of the contract provided:

“The contractor shall.....organize and manage by their personnel and resources the Smirnoff Experience 2003 for the period, which was stated in the brief.”

One would accept that is not very conclusive in determining the period of the contract. Since it does not the court finds that that issue, amongst others ought to go for full trial.

The order of this court is that the plaintiff's application dated 28th June 2005 is hereby dismissed with costs to the defendant.

MARY KASANGO

JUDGE

Dated and delivered this 27th March 2006.

MARY KASANGO

JUDGE