



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 140 of 2003

GITHUNGURI DAIRY PLANT CO. LTD.....PLAINT

VERSUS

APV EAST AFRICA LTD.....DEFENDANT

RULING

The Plaintiff has brought this application by way of a Notice of Motion, pursuant to the provisions of Order 35 rules 1, 5 and 8 of the Civil Procedure Rules. The plaintiff has also invoked the provisions of Section 3A of the Civil Procedure Act.

Through the application, the plaintiff seeks summary judgement for either the full claim or alternatively, for the sum of KShs. 3,575,718/=, which the plaintiff deems as having been admitted by the defendant.

The basic facts of this case are that the parties herein executed a contract on 15th May 1997. The said contract was one in which the defendant was to install and commission a milk processing plant for the plaintiff.

It is common ground that the contract was to be undertaken for a consideration of the sum of Danish Kroner 5,107,803. It is also not in dispute that the plaintiff did pay to the defendant a 10% down-payment, amounting to KShs. 5,000,000/=.

However, the contract was not performed as it was supposed to be. According to the plaintiff, there was a total failure of consideration for the sum which it had paid to the defendant. Therefore, the plaintiff insists that the defendant should refund the whole sum of KShs. 5,000,000/= together with interests thereon.

However, the defendant insists that it did perform its obligations under the contract, and that the failure to do more was attributable solely to the failure by the plaintiff to play its part. For instance, the plaintiff is said to have had two sets of Directors, who were engaged in infighting, thus frustrating the contract.

The defendant asserts that it was being given conflicting instructions from the plaintiff's directors, which resulted in a stalemate. For instance, it is said that whilst one set of directors made a demand for the refund of the down payment, another group of the directors authorised the defendant to continue the said project.

Consequent upon the said actions of the plaintiff's directors, the defendant has lodged a counterclaim against the plaintiff, for breach of contract. It is alleged that the said breach had caused the defendant to suffer loss and damage. As a result, the defendant is contending that apart from being entitled to the 10% down payment of KShs. 5,000,000/=, it is also entitled to a further sum of 20% of the contract sum, as well to damages for breach of contract.

Why does the defendant insist that it is entitled to the 10% down payment? The reason cited by the defendant is that the said payment was to be utilised in project planning; project design and engineering; placing of overseas orders for equipment and machinery; purchase of an insurance bond; and to cover the costs of travelling to the site, as well as other expenses.

To support its contention that the down payment was utilised in the manner set out above, the defendant has exhibited copies of agreements which it entered into with third parties, with a view to enabling it perform its obligations under the contract with the plaintiff.

The first agreement is a "**Form of Bond**" dated 12th June 1997, which was issued by Lion of Kenya. The other document is, curiously, the Agreement dated 15th May 1997, and which is between the Plaintiff and the Defendant.

In other words, even though the defendant did contend that it had utilised the down payment in the manner set out hereinabove, there were no documents to prove that assertion save the Form of Bond issued by Lion of Kenya.

As regards the minutes of meetings held with various parties involved in the project, the defendant has made available four sets. The minutes indicate that the meetings were held on 18th February 1997; 9th May 1997; 19th May 1997 and 11th November 1997.

The dates of those meetings are significant in the face of the application herein because they all predated the plaintiff's demand to the defendant, to provide a detailed account of the down payment of KShs. 5,000,000/=. The demand letter is dated 27th March 2001.

But most significant is the defendant's letter dated 14th August 2001. First, it is noteworthy that the letter is on the subject of the termination of the contract in issue. In other words, by the time it was being written, the defendant was well aware that the contract had been terminated.

Secondly, the defendant expressly stated that it was providing the plaintiff with "**a detailed account of the deposit.**"

To my mind, if one gives a detailed account, after the termination of the contract in respect to which some money had been advanced, that would imply finality on the part of the person giving the said account.

In any event, a perusal of the contents of the letter dated 14th August 2001 reveals that it contains the following particulars.

<u>"DESCRIPTION</u>	<u>KSHS.</u>
(a) Insurance Bond	294,282.00
(b) Engineering, Design and Planning.....	690,000.00
(c) Travelling & Site Visits	90,000.00
(d) (0% Cancellation of contract order of boilers etc	<u>350,000.00</u>

1,424,282.00

Less Deposit

5,000,000.00

Balance in your favour

(3,575,718.00)

Kindly confirm your acceptance to the above in order to finalise.”

There can be no doubt that the defendant consciously charged for the various expenses incurred. Having done so, the defendant expressly stated that the balance in favour of the plaintiff was KShs. 3,575,718/=.

If it is recalled that the plaintiff had sought a detailed account, I hold the view that when the defendant provided it, there can be no question of it being a progress report. The plaintiff's own letter, dated 27th March 2001, had indicated a wish to terminate the contract. It certainly made no reference to “**a progress report**”

And when responding, the defendant asked the plaintiff to confirm acceptance of the detailed account, “**in order to finalise**”. In my considered view, the defendant must be deemed to have meant exactly what its letter stated. In other words, the detailed account provided by it, was intended to finalise the process of terminating the contract with the plaintiff.

The particulars set out in the letter dated 14th August 2001 also cover the areas which the defendant set out in paragraph 4 of its Defence.

Since it was the defendant who suggested that the balance in favour of the plaintiff, amounting to KShs. 3,575,718/= would finalise the termination of the contract between the parties, I hold the view that it was not open to the said defendant to thereafter seek to alter that position, to the prejudice of the plaintiff. The defendant has not given any reason why it could not have cited, in its detailed account, the claim for 20% of the contract sum, which would have been payable, if at all, within 90 days from the date of signing the contract.

In **GOHIL V WAMAI [1983] KLR 489**, the Court of Appeal emphasized that the burden is on the defendant to satisfy the court that he is entitled to leave to defend the suit. At page 494, the HON. KNELLER J.A., expressed himself thus;

“The respondent if he wants leave to defend may show he is entitled to it by affidavit or oral evidence or otherwise. Order XXXV rule 2. So, if the applicant has set out in his affidavit(s) in support of his motion and exhibits facts which are probably sufficient to warrant the granting of his prayer for summary judgement, the respondent must discharge the onus on him of showing his defence(s) raises triable or bona fide issues. They will be ones of law or fact. If they are of fact, then, bare denials by the respondent or his advocate in a pleading or a letter will not do because there must be a full and frank disclosure of the facts before the court which will be proper and sufficient for it to rule those issues are raised.”

Having given due consideration to the Defence as well as the affidavits filed herein, I have come to the conclusion that in relation to the claim for KShs. 3,575,718/= there arise no triable issues of fact or law; following the defendant's own intimation that that sum was due to the plaintiff. Therefore, in line with the decision in **GUPTA V CONTINENTAL BUILDERS LTD [1978] KLR 83**, I hold that the plaintiff is entitled to summary judgement for that portion of its claim.

Accordingly, there shall now be entered judgement in favour of the plaintiff for the sum of KShs.. 3,575,718/= together with interest thereon at court rates from 17th March 2003, until payment in full. The

plaintiff is also awarded the costs of the application dated 28th July 2003.

However, the rest of the plaintiff's claim and also the defendant's counterclaim shall proceed to trial.

Dated and Delivered at Nairobi, this 16th day of October 2006.

FRED A. OCHIENG

JUDGE