



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 438 of 1998

TELKOM KENYA LTD.....PLAINTIFF

VERSUS

WATERBUCK HOTEL LTD.....DEFENDANT

JUDGMENT

By a plaint filed on 15th October, 1998 and later amended on 24th September, 1999, the plaintiff stated that on 24th February, 1987 it entered into an agreement with the defendant whereby the plaintiff agreed to provide the defendant with telephone services on telephone numbers 21470, 211516 and 211546 at the defendant's premises within Nakuru Town. The defendant agreed to pay for the services rendered in monthly accounts plus rental charges for the telephone apparatus. The plaintiff provided to the defendant the said services over a considerable period of time and as at the time of filing the suit, it was claiming a sum of Kshs.995,658.35 plus costs and interest.

The defendant, through Lawrence Mwangi & Company Advocates filed a three paragraph statement of defence. In paragraph one of the said defence, the defendant admitted the description of the parties as stated in the plaint. In the second and third paragraphs, the defendant denied the plaintiff's claim and put it to strict proof of its averments.

The advocates for the parties framed three agreed issues as follows:-

1. Whether the plaintiff provided the defendant with telephone numbers 21470, 211516 and 211546 within Nakuru Town.
2. Whether the defendant owes the plaintiff the amount claimed in the plaint for telephone services.
3. Whether the plaintiff is entitled to the reliefs sought in the plaint.

When the suit came up for hearing, Moses Kipkorir Chebii, an Assistant Senior Accounts Officer working

for the plaintiff at Nakuru testified that the plaintiff provided the defendant with three telephone lines numbers 211516, 211470 and 22546. He produced final account bills which the plaintiff sent to the defendant. For telephone line number 211516 the bill was Kshs.5,639.80 as at July 1994. For telephone line number 211470 the bill was Kshs.433,773.90 as at December, 1993. For telephone line number 211516 the bill stood at Kshs.501,625.20 as at April 1994. For telephone line number 211546 the bill was Kshs.4,069.35 as at June 1993 and for the same line as at June 1995 the bill was Kshs.45,854.50. Certified copies of the original bills were produced as P. Exhibit 1. The witness further testified that on 25th April, 1995 the defendant wrote to the plaintiff proposing to settle the outstanding sum by monthly instalments of Kshs.40,000/- with effect from 4th May, 1995 and requested the plaintiff to allow the defendant to receive incoming calls. The plaintiff responded to the said letter and demanded full settlement of the account. The defendant wrote to the plaintiff again and proposed to settle the account by monthly instalment of Kshs.50,000/- per month. On 7th June, 1995 the defendant paid a sum of Kshs.50,000/- but since then no other payment was made. The plaintiff's witness therefore urged the court to enter judgment for the plaintiff against the defendant as claimed in the plaint.

In cross examination by the defendant's advocate, PW1 stated that the amount claimed from the defendant was an actual one based on a metre reading of the defendant's telephone usage. He added that the defendant had never stated any specific sum that it was disputing and neither had it alleged that the telephone lines in question did not belong to it.

The defendant did not adduce any evidence to rebut that of the plaintiff. Mr. Mwangi for the defendant sought an adjournment of the defence case saying that the defendant's witness who was to be called to testify for and on behalf of the defendant, a Mr. Kinyanjui, was away. He had forgotten about the hearing, despite the fact that counsel had informed him about it in good time.

The court declined to grant the adjournment as sought and gave its considered reasons for so doing.

Mr. Mwangi submitted that the plaintiff had not proved its claim against the defendant since it did not produce the agreement that it had entered into with the defendant on 24th February, 1987 as it had stated in its plaint. He further submitted that telephone line number 214170 was unknown to the defendant. He added that the amount claimed by the plaintiff was substantial and if at all it was truly due and owing, no reason was given as to why the telephone lines in question were not disconnected earlier.

Lastly, he submitted that the plaintiff's claim was time barred and urged the court to dismiss the suit altogether.

Mr. Mogeni for the plaintiff submitted that the plaintiff's suit was not time barred and added that there was no averment to that effect in the statement of defence. In any event, the defendant had admitted the plaintiff's claim against it and proceeded to make part payment of the same. He further submitted that the plaintiff's failure to produce the agreement that was executed between itself and the defendant in 1987 was of no consequence.

The plaintiff's evidence was not controverted. There is nothing to indicate that the plaintiff's claim is time barred. The amounts claimed were in respect of contractual services rendered between 1993 and 1995. The plaintiff's suit was filed in 1998. Under **Section 4(1)(a)** of the **Limitation of Actions Act**, the Limitation period for bringing actions founded on contract is six years. That period had not lapsed. The defendant did not even raise the issue of limitation of time in its defence. **Order VI rule 4** of the **Civil Procedure Rules** requires a party to plead specifically any relevant statute of limitation. That was not done. I therefore find no merit in the defendant's argument that the plaintiff's suit is time barred.

Regarding the telephone lines in respect of which the plaintiff's claim is founded on, it is apparent that the plaintiff did not provide the defendant with telephone line number 214170 as stated in the plaint. The correct line number was 211470. I believe that the plaintiff's counsel made a typographical error in stating the telephone line number as 214170 instead of 211470. That mistake is not fatal to the plaintiff's claim because it did not mislead the defendant or prejudice its defence in any way. In any event, the plaintiff produced as an exhibit a certified true copy of the telephone bill for the correct telephone line

number.

The defendant has no valid defence to the plaintiff's claim. Its denials were unfounded. It had even admitted the claim and commenced part payment of the same but stopped after making only one payment of Kshs.50,000/-. I therefore enter judgment for the plaintiff against the defendant in the sum of Kshs.995,658.35 plus costs and interest at court rates. The interest will accrue from the date of filing the suit until payment in full.

DATED, SIGNED and DELIVERED at Nakuru this 4th day of October, 2006.

D. MUSINGA

JUDGE

Judgment delivered in open court in the presence of Mr. Mbiyu holding brief for L. Mwangi for the defendant and N/A for the plaintiff.

D. MUSINGA

JUDGE