



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL SUIT NO. 2126 OF 2000

MILDRED MACHANJA t/a LEARN IT..... PLAINTIFF

VERSUS

KILIMANI JUNIOR ACADEMY LIMITED DEFENDANT

JUDGMENT

The Plaintiff herein, Mrs. Mildred Machanja, trading as Learn IT claims against the Defendant, Kilimani Junior Academy a sum of K.Shs.3,000,000, being liquidated damages arising out of a contract dated 2nd January 2000 which according to the Plaintiff the Defendant wrongfully terminated by two letters dated 9th June 2000 and 12th June 2000.

The Agreement:

The agreement upon which the contract is based is not disputed and is stated in paragraph 3 of the Plaint as follows:

“By agreement in writing dated 2.1.2000 and made between the Plaintiff and the Defendant the Plaintiff agreed to install 12 computers, let and maintain in efficient working order at the premises of the Defendant at the school the said installations therein Described, and the Defendant agreed to pay the Plaintiffs the fee, revisable at the Plaintiff’s instance, of K.Shs. 400,000/= in each school term payable at the commencement of each term and on the 15th of the second month of the term.”

Paragraph 4 of the Plaint continues to provide that

“It was an express term of the said agreement that the same shall continue for a period of 3 years (the initial period) starting from 10.1.2000 and thereafter unless terminated by either party by way of a 12 months calendar notice in writing (the extended period) expiring on the last day of the initial period or on any day of the extended period.”

The Plaint also states that the Plaintiff would be at liberty to terminate the agreement summarily in the event that the Defendant breached its obligations as to the payment of the agreed fees.

It is not disputed that the agreement came to an end in June 2000 in circumstances that the Plaintiff considers a termination and the Defendant terms as a suspension. The issues for

determination herein as agreed and filed by the parties are as follows:

- 1. Whether the contractual sum of Shs.400,000/= per term was in consideration of the Plaintiff letting, maintaining 12 computers and providing computer, lessons to the Defendant's students.**
- 2. Whether provision of computer lessons was a fundamental term and the basis upon which the Defendant could obtain fees from students.**
- 3. Whether it was assumed that electric energy could be available and in the event of non-availability the contract could not be performed.**
- 4. Whether the contract was frustrated by non-availability of electric energy.**
- 5. Whether computer lessons could be accommodated within the regulated power rationing system and the school time-table.**
- 6. Whether the Defendant was entitled to countermand the cheque dated 15th June 2000 due to absence of consideration.**
- 7. Whether the Plaintiff collected all the computers on 4th July 2000 and if so whether the claim made is unjust enrichment.**
- 8. Whether the Plaintiff is entitled to the reliefs sought.**
- 9. Who shall pay the costs of this suit?**

The Agreement not being disputed it follows that Issue No. 1 is also not in dispute since the agreement clearly stipulated that the Company's Services were retained for the installation of 12 computers, maintenance and servicing of the same as well as running a computer department at the school through which the Company would conduct at least one lesson every week per class in accordance with the school timetable and on condition that the Defendant made computer studies a compulsory subject for each student.

As the funding of the computer department or the sourcing of funds to run the same was not an issue in the contract, I consider Issue No.2 to be a non issue in the presence of other issues as relate to performance and frustration.

The Plaintiff's Case:

It is common ground that the Plaintiff did set up the computer department as agreed by installing 12 Pentium computers, employing and assigning a tutor to run the programme and supplying all the relevant learning materials. The programme commenced on 2nd January 2000 and the Defendant paid the agreed Shs.400,000/= by two instalments to cover the first term which run from 2nd January 2000 to the last week of March. The programme resumed for the 2nd term and the Defendant paid the term's fee of Shs.400,000/= by two postdated cheques only one of which was cleared. The second cheque was not honored on presentation the same having been stopped by the Defendant who on 12th June 2000 had written to the Plaintiff as follows:

"Miss Mildred Machanja

Learn IT Ltd

Nairobi

12th June 2000

Dear Madam,

RE: Computer Classes

The present system of nationwide power rationing means that computer classes can no longer be held during school hours. This being a situation over which we have no control, the Director of the School, Mrs. J. Motion, has instructed me to inform you that regrettably we must suspend the contract made with you to supply computers and computer classes to our pupils this term. We request you to kindly arrange for the computers to be removed from this compound immediately. Please be advised that if the computers are not removed within 48 hours we will remove them into storage ourselves. The school will not be held responsible for the security of the computers nor for any damage to them after that period.

Please advise us urgently of the arrangements you intend to make. We thank you for the services rendered to date and trust that we shall resume them when full power services are restored.

Yours faithfully

Mrs. E. Wilding

Headmistress

The Plaintiff told the Court that the above letter was handed to her tutor when she was abroad. She telephoned the school director Mrs. Motion

“to find out if the decision could be reversed.”

The Plaintiff offered other alternative sources of electrical power namely a generator, a solar system and (an) inverter(s) at her own cost but the director declined the said offers. The Plaintiff testified further that she also made a proposal to alter the times for computer lessons to coincide with the power rationing schedule which the Kenya Power & Lighting had announced through the media. This too was turned down.

Apart from the letter of 12th June 2000, the Defendant had written to the Plaintiff previously on 8th June 2000 requesting that the Plaintiff return their cheque in respect of the second instalment for 2nd term and expressing their view that the contract was “not binding” in view of the persistent failure in electric power supply. They also intimated that a new agreement would have to be drawn up once the supply normalized.

The Plaintiff's offers for alternative power sourcing and rescheduling of the computers having been rejected the Plaintiff served a notice of intention to invoke the provisions of the Agreement as to termination

“In the event that (the Defendant) insist(ed) on terminating the contract.”

The Defendant does not dispute that it declined to offer for alternative sourcing of power on the basis of noise (in the case of the generator) inconvenience and expense involved in the installation of solar panels. The reason for declining the Plaintiff's offer to install inverters has not been disclosed. The Plaintiff's rescheduling of the computer lessons was declined on the grounds that it would disrupt other lessons if the computer lessons were made to coincide with the Kenya Power & Lighting Supply Schedule. It was submitted in evidence and not rebutted by

both the Plaintiff and her witness PW2 that the headmistress had accepted the revised schedule offered to them, but the school owner (Mrs. Motion) was opposed to the same.

The Defence/Defendant's Case

The Defendants herein pleads the defence of frustration of the contract on the ground that the computer programme could not have proceeded in the absence of electricity. They also claim not to have terminated the contract, and blaming the Plaintiff for so doing, on the ground that all they proposed was a suspension of the same. The Plaintiff on the other hand submits that the doctrine of frustration does not come into play since the availability of electric power cannot be said, in the absence of its being provided for in the agreement, to have been a fundamental term of the agreement. I do agree with this proposition since the agreement does not even contain a force majeure clause. The Defendants' contention that the signing of the agreement was on the assumption that electricity would be available throughout the term cannot hold since the agreement did not restrict sourcing of electric power to the Kenya Power & Lighting Company. That the Plaintiff offered alternative sources of electric power, which the Defendant declined shows clearly that the Defendant did not consider the availability of power to be a fundamental term of the contract.

The Law on Frustration

The law is clear that where there are options, then a party cannot be heard to cite frustration. Indeed it is accepted law as contained in Halsbury's Laws of England 4th Edition paragraph 904 as quoted by Counsel for the Plaintiff that:

“Whatever the alleged source of frustration, a contract is not discharged under the doctrine of subsequent impossibility and frustration merely because it turns out to be difficult to perform or onerous. Thus the parties will not generally be released from their bargain on account of ordinary risks of business, such as rises or falls in prices, depreciations of currency or unexpected obstacles to the execution of the contract....Further where the change of circumstances is insufficiently serious to frustrate a contract, the party unsuccessfully claiming frustration remains liable to perform his promises.”

The authority of TSA KIROGLOU & CO. –vs- NOBLEE AND THORL GMBH [1962] A.C. is quite demonstrative of this. The Defendant in this case contracted to sell to the Plaintiff Sudanese groundnuts with the intention that the same would be shipped from Africa across the Suez Canal to Hamburg Germany. In circumstances that were obviously beyond the control of the Defendants the Suez Canal was closed and the shipment could therefore not pass that route. The Defendant's attempts to plead frustration were refused by the Court since an alternative route existed via the Cape of Good Hope. That the voyage would take four weeks longer and cost the Defendant more was not enough ground to sustain a plea of frustration as no date had been fixed for delivery and no particular route had been agreed in the contract. The Plaintiff were bound to choose what was most practicable in the circumstances.

It is clear from existing authorities that the law expects a contracting party to take own precautions as to circumstances which may frustrate the contract and exempt oneself (expressly in the contract) from liability in the event that they do occur. In HOWARD & COMPANY AFRICA LTD –vs- BURTON 1969 E.A. 540, the Respondent, a caterer, contracted with the Appellants to supply hot lunches to the Applicants workforce comprising of Africans and Europeans. The Appellants deducted a portion of the employee's wages towards the cost of the lunches. The Africans in the workforce were unhappy with the deductions, went on strike and insisted that the payments should be for meals taken. They then opted out of the programme altogether. The appellants refused to pay for the meals as per the contract and were sued. Their plea of frustration was refused with the Court holding that

“(i) The basis of the tender (for meals was the express understanding between the parties that meals would be supplied throughout the contract period according to the number of men employed in the site.

(ii) The appellants had a duty to the Respondents to attempt such reasonable solutions of the labour dispute as would retain the Respondent benefit of his contract with them.

In his judgment Crabbe J.A. had this to say.

“...it is true that the event which happened defeated the main object of the contract but in my judgment, that was the risk of the defendants who undertook to provide compulsory meals; and to imply a term, as suggested by them would be to commit the Plaintiff to consequences which are dependent on facts which were the sole concern of the defendants.”

Findings & Conclusion:

I find that the above authority supports the Plaintiff’s case on all fours. The Plaintiff’s obligations under the agreement was to

“install twelve (12) Pentium II 333 Y2K computers and one (1) Hewlett Packard Deskjet 695C Colour Printer, maintain and service the computers at the school’s business premises...as well as (ran) run the Computer department at the school”

Pursuant thereto, the Plaintiff was to provide in addition to the computers a consultant, repair and maintenance services, teaching staff, materials and other services of like nature that may be required for the establishment and running of the computer department.

The above terms were clear and explicit and left no room for implications. The supply of electric power for running the computers cannot be said to be of “like nature”. As the premises at which the lessons were conducted belonged to the Defendants the correct assumption would be that the Defendants remained solely responsible for the electricity supply. Had they wanted to exempt themselves from liability they ought to have done so specifically and by express provision in the contract.

I do not agree with the Defendants’ Counsel’s submission that it was no longer possible to fulfill the original and common design of the parties once electricity became scarce particularly because under clause 11 of the Agreement the Company was only required to conduct at least one lesson per week per class in accordance with the school’s timetable. Again it was incumbent upon the Defendant to adjust the timetable to accommodate the computer training which they were expected to make compulsory in any event. It is not correct for Counsel for the Defendant to submit that

**“It is common ground that each class was
to have one computer lesson each day...”**

which Counsel submits to have been rendered impossible. As earlier stated Clause 11 of the agreement mandated the Plaintiff to provide at least one lesson a week. Clearly this could have been accommodated in the rationing schedule without much difficulty but the Defendant refused to try it out.

With the above in mind I find that contract was not frustrated by non-availability of electric energy and that the Defendant could have accommodated the computer lessons in the

regulated power rationing system and the school time table. It would follow therefore that the Defendant was not entitled to countermand the cheque dated 15th June 2000. It is not in dispute that the Plaintiff did offer to finance the installation of a solar system or a generator which I have already found could have been accepted if the Defendant was serious about the computer training programme. I find the Plaintiff's evidence that she was able willing and ready to continue with the performance of her contractual obligations quite convincing.

Having found that power shortage did not frustrate the contract I find it necessary to consider and determine who, as between the Plaintiff and the Defendant can be said to have been responsible for the eventual termination of the contract. I consider this important notwithstanding that the same was not framed as an issue in the Statement of Agreed Issues filed on 27th March 2003. As stated by Lord Wright in the case of DENNY, MOTT & DICKSON – vs- FRASER & CO. LTD [1944] AC. 265,

“where....one party claims there has been no frustration and the other party contests it, the Court decides the issue and decides ex post facto on the actual circumstances of the case, taking into consideration, on the one hand, the terms and conditions of the contract, read in the light of the existing circumstances and on the other hand the events which have occurred. It is the Court which has to decide what is the position between the parties.” A determination along these lines is crucial if I am to make a determination on the issue of liability.

The determination of the contract between the Plaintiff and the Defendant hinges upon the correspondence exchanged between the two parties as follows:

- 1) Letter from the Defendant to the Plaintiff dated 8th June 2000**
- 2) Letter from the Defendant to the Plaintiff dated 12th June 2000**
- 3) Letter from the Plaintiff to the Defendant dated 20th June 2000.**

In her letter of 8th June 2000, the proprietor of the school Mrs. Motion demanded the return of the 2nd installment for term 2 and intimated that by reason of “a national disaster” (referring to the prevalent power cuts) the contract was not binding. She further stated that

“when things get back to normal (they) would have to draw up a new agreement.”

She then demanded that the Plaintiff removes the computers from the academy without any further delay. In the intervening period between this letter and the one of 12th June 2000, the Plaintiff sent a telefax to Mrs Motion from Dubai in an attempt to convince the academy to accept proposals put forthwith and thereby salvage the situation. In it the Plaintiff noted that while she agreed that the power rationing was a disaster the decision to terminate the computer classes was drastic and not beneficial. She emphasized that the proposed revised timetable already submitted with the headmistress was workable within the revised power rationing program. The response she received in the form of the letter of 12th June 2000 was a emphatic demand that the Plaintiff removes her computers within 48 hours. In the said letter Mrs. Wilding said that the contract must be suspended with the hope that the same would be resumed when full power is restored.

The Defendant has argued that the said letters were not intended to terminate the contract but to suspend its operation. A suspension of a contract, if at all there is such a thing, cannot be taken unilaterally at the instance of one party since the same has the effect to varying the terms. I am not persuaded that the intention of the Defendants was to suspend and not to terminate the computer training programme. If indeed this was the intention the Defendant would have agreed to meet with the Plaintiff and discuss the same and arrive at a mutual agreement to that

end. There would also have been no need to draw up a new agreement as proposed in the letter of 8th June 2000. Having noted the Defendant's adamant position the Plaintiff wrote to Mrs. Motion the letter of 20th June 2000 reminding her that the termination of the contract was governed under Clause 2 of the agreement which required a 12 months notice or the payment of Kshs.1,200,000/= in lieu of such notice. The Plaintiff intimated also that she was still ready to discuss the matter. The Defendant having refused to budge the Plaintiff finally removed her computers from the school and in December 2000 filed this suit on the ground that the Defendant had repudiated the contract. It is clear to me that it is the Defendant, not the Plaintiff who terminated the contract. Given the circumstances of this case it is clear also that the Plaintiff, having made all attempts to "renegotiate" a review of the contract in order to address the change in circumstances brought about by the power shortage, and the Defendant flatly refusing to do so was no doubt entitled to treat the contract as repudiated. There is no guarantee from the Defendant that in the event that power supply resumed to normal, the Defendants, having asked the Plaintiffs to remove their computers and leave would have recruited the Plaintiffs' services for the resumption of the computer training program as promised to parents in correspondence produced herein. I am of the view that the Plaintiff having lost the benefit of the contract by reason of breach by the Defendants is entitled to the whole of the contract sum which she could have earned had the contract not been repudiated. Her removal of her computers from the Defendants premises as ordered does not affect her entitlement and does not in my view render her claim one in pursuit of unjust enrichment. To suggest, as has been suggested under Issue No.6 that there was want of consideration on the part of the Plaintiff is not supported by Evidence. On the contrary the facts of the case show that the Plaintiff did fulfill her obligations under the agreement and was always ready to perform her bargain to the end, scarcity of electricity power notwithstanding.

Before concluding I must comment on the submission appearing on page 6 of the submissions filed on behalf of the Plaintiff concerning my refusal to allow the extraction of evidence relating to the financial difficulties of the Defendant and my refusal to record Counsel's protest thereto. I must first of all reiterate that the Court did state that the evidence would not be allowed having been found to be irrelevant and of no added value to the Plaintiff's case or the proceedings generally. I maintain the same position.

Secondly, the Court cannot be forced, and Counsel and litigants must not attempt to force it, to record evidence. As officers of the Court Counsel must always remember that attempts to armtwist a judge into doing certain things goes outside the expected standards of respect and decorum with which they are mandated to accord judges under the existing principles of professional ethics and etiquette. Disrespect for the Court and failure to abide by a judge's directions is contemptuous and parties persisting in doing so risk being punished accordingly. A Court has the absolute right to stop litigants and/or Counsel from wasting the Court's time where they have been found to have lost their mark. It must be appreciated that a judge conducting a trial sees and thinks further ahead of litigants and their Counsel, a factor which is vital for the maintenance of control of the proceedings.

Having said this, and pursuant to my findings on the various issues as contained in the body of this judgment I find that on the balance of probabilities the Plaintiff has proved her case against the Defendant and her suit succeeds. In the premises I hereby enter judgment against the Defendant as prayed in the Plaint.

Dated and Delivered at Nairobi this 27th day of May, 2005

M.G. Mugo

Judge

Judgment delivered in the presence of

Miss Onyango: for the Plaintiff

Miss Mbole: for the Defendant