



**IN THE REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO. 3950 OF 1993**

**HALL EQUITORIAL LIMITED.....PLAINTIFF**

**V E R S U S**

**ESKAY BUTCHERY LIMITED.....DEFENDANT**

**JUDGEMENT**

This is a claim for balance of payment due from the Plaintiff company to the Defendant. The Plaintiff installed a refrigeration equipment and insulation of the rooms for cold storage for the Defendant who was engaged in a butchery business in Nakuru. By a Plaint dated 10.8.93, the Plaintiff stated his claim as follows: -

“The Plaintiff’s claim against the Defendant is for Kshs.344,100/- being the balance of the agreed and or reasonable amount due for goods sold and delivered to the Defendant, work done for and on behalf of the Defendant and materials supplied to the Defendant by the Plaintiff at the request of the Defendant at Nakuru during 1992 as per particulars already rendered and known to the Defendant.”

PW1 SIVATHANUPILLA SIVARAJ a mechanical engineer and service and installation manager of the Plaintiff company said that Defendant had sought to have installed in premises a refrigeration equipment and a deep freezer. After negotiations including agreed quotations, work started on 3.3.1992 and got completed and was handed over to the Defendant on 27.5.92.

It was agreed that there was to be 12 months of guarantee from date of completion and that the date of completion was 25.5.92. He said the contract sum was agreed at Kshs.720,000/- less Kshs.420,000/- advance already paid as deposit leaving a balance of Kshs.300,000/-. The value of evaporator of Kshs.31,500/- and extractor for Kshs.12,600/- was to be added on that amount making a sub-total of KShs.344,100/-. The Plaintiff’s technician checked the unit periodically once in three months. Initially, there were breakdowns, first was a burnt fan motor caused by faulty electrical wiring done by the Defendant. Sound caused by missing one phase supply leaving 2 phase supply, instead of 3 phase supply. All these were corrected and the freezer worked attaining –20 degrees Celsius instead of –10 degrees Celsius which had originally been agreed. He said his workmanship was proper and that the fittings used and equipments came from reputed refrigeration companies in Europe, but inspite of all this Defendant refused to pay.

In cross-examination, he agreed that the company had asked for a balance of Kshs.69,100/- but he said that it was a mistake in accounts as he was not aware that a credit had been given of Kshs.275,000/-. He said work commenced on 3.3.92 and got finished on 26.5.92. He agreed that they delayed to complete the work but that the delay was because the site was not cleared in time by the Defendant. He also agreed that the amount of work for which he charged Kshs.44,100/- was agreed to verbally and was not in writing.

PW2 PETER MUKIRIA NGUGI the Plaintiff’s accountant showed that the entry suggesting that credit was given to Defendant was actually reversed as it was a mistake and that the Defendant ought to have

known about it.

The Defendant called DW1 MOHAMED SADIQ KHAN who said he was director of the Defendant Eskay Butchery at that time in 1992 stating that he has counterclaimed for Kshs.2,415,734.00. He confirmed the contract price to be Kshs.720,000/- and that Kshs.420,000/- had been paid leaving a balance to be paid on completion, but he said work was not done properly. He said he complained about the fan and the Plaintiffs put a fan although the Defendant did not ask for it. He said the work was not done in 20 days as was agreed. It was delayed. He said the freezer room worked but chiller room only partly because its refrigeration was not provided by the Plaintiff. He said the Plaintiffs from the blues and of their own accord credited.

DW1 said: - "I took it that Kshs.275,000/- credit was the price of the un-provided refrigeration and because of that he owes no money to the Plaintiff. He said the installed refrigeration broke down so often forcing him to close down"

He, therefore claims

(i) Kshs.415,734/- from Plaintiff being loss of business

(ii) Rent of Kshs.12,000/- p.m.

(iii) Wages of 8 workers @ Kshs.18,500/- p.m. for 2 months

In cross-examination, he admitted he complained about the late completion date by letter dated 23.4.92 in which he said they were incurring losses. He received completed work on 27.5.92 when it was handed over to him. He signed for the delivery/handing over.

He said: -

*"I did not state that anything was missing then because I only signed and acknowledged what was provided."* He said the handover was in respect of both chiller room and freezer room.

The Defendant claimed that although he signed for the handover, still the work was not completed and that there was no agreed completion date. That was the evidence given in this Court.

The issues in this case are issues of fact namely whether the Defendant is to pay Kshs.344,100/- and the other is really the claim in that counterclaim.

There are matters that were not in dispute. First that letter of 6.2.92 formed the contract, that the commissioning date was 27.5.92 and on that day, the handing over of both the freezer and the cooler room was done and the Defendant signed for it. That it was a term of the contract that the balance of the price being Kshs.300,000/- would be paid on completion to the Plaintiffs. That there was a guarantee given by Plaintiff after the completion to cover the operation of the installations for a period.

Having considered the evidence, I think it is proved to the required standards that after 27.5.92, the equipment were working and were used by the Defendant. I also find that the parts or equipment worth Kshs.44,100/- was in fact installed. If the machine broke down after installation, the problem could be compensated for by availability of the guarantee terms.

I agree with the Plaintiff that the guarantee was subject to full payment by the Defendant and as Defendant had not paid the Kshs.300,000/- balance, the guarantee became exempted or rendered inapplicable.

BENJAMIN'S SALE OF GOODS 5TH EDITION PP 697 states that guarantee can take effect only where consideration is rendered in return otherwise the buyer cannot sue on it.

I, therefore, in the light of these, give judgement for the Plaintiff in the amount claimed of Kshs.410,000/-. As concerns the counterclaim, there is itemized claims for special damages under paragraph 9(iii) ((i) –(vii). These are in form of special damages and ought to have been proved as pleaded which is not so in this case and I therefore, reject same.

As for general damages, normally the law is that a reasonable remuneration is payable for work done when there is no contract, but it is also the law that no general damages may be awarded for a breach of contract.

The Court of Appeal has held so in DHARANISHI V KARSAN 1974 EA 41 and in CIVIL APPEAL APPEAL NO. 179 OF 1995 PROVINCIAL INSURANCE COMPANY E.A. LTD. vs. MORDEKAI MWANGA NANDWA.

For these reasons, the counterclaim and the set off are dismissed with costs.

There will be judgement for the Plaintiff as stated above with costs. The counterclaim and set off are dismissed with costs.

DELIVERED this 4th day of July 2003.

**A.I. HAYANGA**

**JUDGE**

Read to -

Miss Alela for Plaintiff

No appearance for Defendant