



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 3546 OF 1992

CURTAINS & COVERS LTD.....PLAINTIFF

VERSUS

DAVID K. KUNGA.....DEFENDANT

JUDGMENT

Plaintiff claims shs 401,160 being the balance of the amount due for goods sold and delivered, work done and materials supplied to the defendant during 1992.

By the defence filed on 14.12.95, defendant denies owing shs 401,160 and pleads in paragraph 4 of the defence thus:

“The defendant states that the real debtor to the plaintiff is the Saudia Airlines who was actually invoiced for payment...”

Three agreed issues were filed on 18.1.96. The three agreed issues are:

1. Is the defendant indebted to the plaintiff in the sum of Kshs 401, 160 for goods sold and delivered and work done and materials supplied?
2. did the plaintiff demand payment or give the defendant notice to sue
3. Is the real debtor Saudia Airlines?

Regarding the second issue, a demand letter dated 7.5.92 is annexed to plaintiffs application for Summary judgment dated 14.10.92.

Defendant did not in his replying affidavit sworn on 3.12.92 deny receiving that demand letter. Moreover, defendant does not in his evidence deny receiving the demand letter. Lastly, defendant’s counsel did not in his submissions pursue the issue of the demand letter. I am satisfied that plaintiff did serve defendant with the demand letter dated 7.5.92.

The first and second issue are intertwined. I will deal with both together. The claim arises from the carpets supplied and fitted in the offices of Saudia Airlines by the plaintiff.

Plaintiffs Delivery note date 5.3.92 – invoice no 10908 (Ex 4) show that the costs of the carpets supplied by plaintiff was 399,000. Plaintiffs invoice dated 5.3.992 (Ex3) show that the costs of installing

the carpets was shs 2,160 /= making a total of shs 401,160 for the job. This is the amount claimed by plaintiff. Agness Susan Wairimu (PW2) an accountant with Saudi Airlines agreed that the job of supplying and fitting carpets was done satisfactorily and paid for.

She produced the contract dated 12.2.92 (EX5) showing all the works to be done at Saudi Airlines including the supply and fitting of carpets. According to that contract, the contract price for supply and fitting of carpets was shs 408,000.

Defendant does not claim that plaintiff has been paid for the contract. Indeed, defendant does not in his defence deny that plaintiff performed the works and is entitled to payment as claimed.

The defendant's case is that he is the wrong debtor and that the correct debtor is Saudia Airlines. According to the evidence of Kuria Njuguna, (DW1), defendant he accompanied Mr. Mustafa of Saudi Airlines to the shop of the plaintiff where Mr. Mustafa selected the colour of the carpets and made the order for the carpets. He explained that he accompanied Mr. Mustafa to the shop of the plaintiff because Mr. Mustafa was ordering and buying the carpets.

According to him, it is Mustafa who made the order for carpets from plaintiff on behalf of Saudi Airlines. According to Mr. Pamarlal Patel, (PW1) it is the defendant who asked for quotation for supplying and fitting of carpets.

Further according to PW1 it is defendant who accepted the quotation and instructed PW1, to supply and fit the carpets tiles at the offices of Saudia. Arabia Airlines. PW1 testified that after the work was completed on 5.3.92 defendant instructed that the invoice be sent to Saudi Arabia Airlines but the Airline refused to pay saying that it was the defendant to pay. According to Agnes Susan Wairimu, (PW2), Saudi Airlines contracted Mr. Njuguna trading as Destini Décor to do all the work specified in the contract (EX 5) at a contract price of shs 798,200 but thereafter defendant sub-contracted plaintiff to do the part of the work of supplying and fitting of carpet tiles. She further testified that Saudi Airlines was not dealing with the sub-contractor.

Firstly, the Short Form Agreement dated 12.2.92 (EX.5) which is the contract between defendant and Saudia Airlines describes the works awarded to the defendant which includes in paragraph 8 the contract to supply and fit carpets.

That contract specifically states that all the work described in the contract was awarded to the defendant.

The contract is signed by defendant and an official of Saudia Airlines. Defendant admits signing that contract. That contract (Ex5) disproves the defendant's claim that it is Mr. Mustafa of Saudia Airlines who contracted plaintiff to supply and fit carpets. Further, that contract supports the evidence of PW1 and PW2 that it is the defendant who sub contracted the plaintiff.

Secondly, defendant testified that he wrote a letter dated 18.2.92 (Ex D) varying the terms of the contract. By that letter defendant was asking Saudia Airlines to enhance the contract price, for, inter alia, carpet supply and fitting from shs 408,000 to shs 456,000 That letter is further proof that Saudia Airlines had awarded the contract to supply and fit the carpet tiles to the defendant.

The defendant's letter dated 18.2.92 (Ex D1) does not vary the award of the entire contract to the defendant. There is no documentary evidence that Saudia Airlines revoked the Short Form Agreement awarding the entire contract to the defendant. There are no documents to show that Saudia Airlines made a fresh contract with plaintiff for the supply and fitting of carpet tiles.

Thirdly, defendant agrees that the delivery note dated 11.2.92 – No 1615 was received and signed by him. The defendant's signature on that Delivery note is an acknowledgement of the receipt of the carpet tiles by the defendant. Defendant produced the original delivery note dated 5.3.92 no. 1675 (EXD2) Plaintiff produced the duplicate delivery note dated 5.3.92 no 1675 which has the defendant's signature

(EX 4). Defendant does not specifically deny that the signature is his. All he says is that the signature appears to be his but does not remember signing it.

The signature is similar to the signature in Delivery note dated 11.2.92 no 1615 which defendant admitted to have signed.

Fourthly, defendant admits that he was paid about shs 400,000 by Saudia Airlines but he says that the payment was for his work of partitioning and refurbishing the office. Agnes Susan Wairimu (PW2), on the other hand says that the payment was for all works satisfactorily completed including the supply and fitting of the carpets. PW2 testified that Saudi Airlines did not pay for the works which was not satisfactorily completed and that defendant made a demand for payment of the balance. She produced a letter dated 1.11.92 (Ex6) from defendant's advocate to Saudia Airlines demanding shs 398,000 being the balance due and owing. As defendant had admitted receipt of shs 400,000 the total he was demanding was thereof shs 798,000 which is nearly the same as the entire contract price of shs 798,200. Defendant's evidence that the shs 400,000 paid was for the job he personally performed of partitioning and refurbishing the office is not credible because the contract, Ex 5, shows that the contract price for partitioning the office was shs 200,000.

Defendant explained that the demand for shs 398,000 was made in error. He says that it is his wife who gave instructions to the lawyer in defendant's absence.

The document speaks for itself. It was the defendant who was demanding the money and not his wife and it is inconceivable that the lawyer would have made the demand without the instructions of his client – that is the defendant. The above evidence shows that, defendant was asking for payment for the entire contract.

Lastly, defendant has made a tacit admission that he supervised the performance of the entire contract. He admitted that he is the one who facilitated all the works done in the office of Saudia Airlines as Saudia Airlines had not moved to the office.

He also admitted that he is the one who supervised all the work done at Saudia Airlines office. He agrees that he is the one who gave a revised quotation for the wall to wall carpeting.

All the above evidence show on a balance of probabilities that the entire contract was awarded by Saudia Airlines to the defendant and that it is the defendant who subcontracted the plaintiff for one of the jobs in the contract of supplying and fitting carpet tiles. The real debtor is the defendant and defendant is liable to pay plaintiff the shs 401,160 as claimed.

Lastly, it has been submitted by defendant's counsel that the suit is invalid ab initio for it was filed without the authority of the company or of the directors. Mr. Kamarlal Patel (PWN admitted in the proceedings of 13.11.96 before another Judge that the Board of Directors had not been constituted by the time the suit was filed on 1.7.92 and that he does not recall getting authority.

Plaintiff's counsel has annexed to his submissions a resolution of the Board of Directors made on 3.5.2002 ratifying the appointment of the advocates to continue this suit.

I do not find it necessary to deal with this issue at this stage because it was not an issue raised either in the pleadings or by agreement or by implication during trial for determination by the court.

That issue should have been pleaded in the Defence as provided by order VI Rule 4 Civil Procedure Rules. By order VI Rule 6(1) defendant is not procedurally allowed to raise any new ground of claim inconsistent with his Defence. The issue now raised at the stage of submissions was not pleaded nor framed as an issue when the issues for trial were settled. The objection is raised too late in the proceedings. The defendant should have raised the issue as preliminary matter and should not have allowed the trial to proceed to conclusion.

In the above circumstances, the defendant has waived his right to object to the competence of the suit.

For the foregoing reasons, I allow the plaintiffs suit and enter judgment for plaintiff against defendant for shs 401,160 with costs and interest at Court rates.

E. M. Githinji

JUDGE

17.12.2002

Miss Bor for plaintiff present

Mr. Nugi for Defendant present

Order: Execution stayed for 14 days as prayed

E. M. Githinji

Judge