REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIRONI
MIMIMANI COMMERCIAL COURTS
CIVIL CASE NO. 1238 OF 1999

TAXTAR INVESTMENTS LIMITED ……. PLAINTIFF

VERSUS

KENYA AIRPORTS AUTHORITY …….. DEFENDANT

J U D G E M E N T

In a Plaint dated 7th Setpember 1999 and filed into the court on the same day, the Plaintiff herein Taxtar Investment Limited is claiming from the Defendant a total of K.shs 7,176,250 made up of K.shs 3,500,000 as special damages and K.shs 3,676,250 being the amount in respect of loss of earnings. It is also seeking interest on the same claim at court rates and other or such relief. The Defendant filed defence and set off in which it denied liability and pleaded a set off. The Plaintiff filed a Reply to the defence. Directions were taken and the matter proceeded to full hearing. At the hearing, one witness gave evidence for the Plaintiff whereas the Defendant called no witness but its exhibits were produced by consent of both parties.

I did not hear the case myself. It was heard by the late Honourable Justice Hewett who heard the entire case and ordered written submissions to be filed in the matter. The parties did on 3rd July 2001 by consent agree to proceed from where the late Judge had left the matter. I have therefore prepared this judgment from the recorded proceedings and written submissions only.

The Plaintiffs witness's name is not given in the proceedings but from the Plaintiff's submissions, he was called Kiprono Kittony. He is the Executive Director of the Plaintiff's Company. He told the court that the Defendant issued a public tender seeking provision of 635 passenger bagging trolleys to the Defendant at Moi International airport. The tender was issued in January 1996. In the first week of January 1996, the Plaintiff was notified that it had worn the tender. Local Purchase Order C.081226 dated 10.1.96 was issued by KAA i.f.o. Taxtar Investments at shs. 16,000 per unit which for 625 units worked to an amount of K.shs 10,000,000/-. Pursuant to the order he then made several arrangements to enable the Plaintiff meet the requirements which included obtaining Letters of Credit through Euro Bank which opened for it letter of credit facility upto 165,000 South Africa Rand for K.shs 6.5 million. The same goods were to be supplied from South Africa. He asked Defendant to assign all payments to Euro Bank and the Defendant agreed to do so. The Plaintiff went through heavy expenditure to meet the supply as per tender and these expenditure amounted to K.shs 5,961,515, excluding several charges incurred by them which are not included in this amount because of lack of details of the same charges. The trolleys were supplied as per tender and in May 1996, the Defendant paid K.shs 6,500,000. The balance i.e. K.shs 3,500,000 was held by the Defendant on grounds that an association of the witness called Anthony Wareham had failed to refund K.shs 3,500,000 paid to him in respect of a vehicle he sold to the Defendant but which was rejected by the Defendant. He denied that his company, the Plaintiff was in any way involved in that deal. After the same had been settled, the Defendant paid the same balance of K.shs 3,500,000 in September 1998 but that was after the Plaintiff had suffered damage, had discharged staff and had given up their offices to avoid distress for rent. He maintained that this balance of K.shs

3,500,000 should have been paid in March 1996. He stated further that as a result of the delay in meeting this payment by the Defendant Euro Bank filed a suit against the Plaintiff and against the Defendant.

In cross examination, the witness stated that K.shs 10,000,000 was an all inclusive figure. The Defendant was not to pay freight etc and Defendant had made no undertaking to Euro Bank. He had no problem with K.shs 6.5 million which was paid to Plaintiff directly in March 1996 adding that that is when the entire amount was to be paid. He admitted that he wrote a letter dated 11.8.98. In that letter he admitted that he asked for K.shs 3.5 million and added that he did not at that time look at the loss of properties and so forth as he did have a problem and he needed further contracts and that he wrote the same letter at lawyer's request so he could arrange payment of K.shs 3.5 million. He admitted having received letter dated 17.8.98. He also admitted writing other letters all produced as exhibits for the Defence by consent of the parties. He wrote letters dated 20.8.98, 21.8.98 and letter dated 24.8.98. The K.shs 3.5 million was paid by cheque to Taxtar on 9.9.98. He collected the cheque personally. He ended his evidence in crossexamination by saying he thought he did make a claim of interest and charges and he believed the lawyers served notices as required by law and assumed that same notices were served.

In re-examination he said when he wrote the letters Exhibits 2 and 3 he was willing to accept 3.5 million in full settlement provided it was paid within the time limit stipulated by the bank but he did not receive the money within that time. He then said he thought he received a copy of a certain notice.

As I have stated above, the Defendant did not call any witness but by consent of the parties Defendant exhibits were produced as Exhibits 1, 2, 3, 4, 5, 6 and 7. The above were therefore the brief summary of the evidence adduced in this case.

From the submissions before me and the cross examination, it is not in dispute that the amount that was originally to be paid to Plaintiff was K.shs 10,000,000/-. It is further not in dispute that the Defendant paid the total original contractual amount of K.shs. 10,000,000/-. This was paid in two instalments with the first payment of K.shs 6.5 million having been paid in March 1996 which was according to the Plaintiff the correct time when the entire amount was to be paid. However, the second instalment was paid late in September 1998 and hence the suit as the Plaintiff is claiming that as a result of the late payment he suffered loss of earnings and special damages. The Defendant's position as can be seen in the Amended Defence and in the submissions is that the amount that was paid though paid late was paid in full and final settlement of the claim, that the Plaintiff's suit offends Section 33(1) of Chapter 395 Laws of Kenya, that the Plaintiffs claim, if any, is time barred and lastly that the Plaintiff has not proved loss and or damage. There were other allegations raised by the Defendant such as that the prerequisite notice was not given as required by Section 34(a) of the Kenya Airports Authority Act Chapter 395, Laws of Kenya; that the suit was res judicata as there was another suit HCCC No. 2346 of 1997 but these two last issues were not taken up by the Defendant in its submissions and rightly too because even in its own submission the Defendant admits that statutory notice (Plaintiff's exhibit No. 24) was indeed issued and was clearly issued under Section 34(a) of the Kenya Airports Authority Act, Chapter 395 Laws of Kenya and the case HCCC 2346 of 1997 was between different parties. I will say no more on these two issues. The matter cannot have been time barred because although payment was due on March 1996 and in that month part of the debt was paid, and the balance was paid over two years later, on 9.9.98, none the less this action was filed on 7th September 1999 within one year after the last payment. The action is seeking damages and special damages arising from the late payment of K.shs 3,500,000 and that late payment was on 9.9.98 so that the cause of action, to my mind must have arisen on 9.9.98 and filing this suit before one year expired from that date cannot make the case to be time barred as this action was commenced within twelve months after the act complained of namely payment of damages and loss of profits arising from late payment. I do agree with the Plaintiff's counsel that the suit is not time barred.

The next issue I am to consider is whether this suit offends Section 33(1) of Chapter 395. That Section states as follows:

> "33. In the exercise of the powers conferred by Section 12, 14, 15 and 16, the Authority shall do as little damage as possible; and, where any person suffers damage no action or suit shall lie but he shall be entitled to such compensation therefore as may be agreed between him and the Authority,

or in default of agreement, as may be determined by a single arbitrator appointed by the Chief Justice."

Section 12 gives the Defendant power to do various things and Section 12(3) (i) empowers it to:

"enter into agreements with any person, agency or Ministry (i) for the supply, maintenance or repairs of any propert necessary or desirable for the purpose of the authority."

The Defendant maintains that in awarding tender for the supply of trolleys, the subject matter of this suit, it was exercising its powers under Section 12(3) (i) of the Kenya Airport Authority Act. This position does not seem to have been challenged by the Plaintiff. The Defendant contends further that that being the case, the Plaintiff should not have proceeded to file this suit as Section 33(1) is applicable in this case. Its learned counsel has referred me to the case of Narok County Council –vs- Transmara County Council, Court of Appeal Civil Appeal No. 25 of 2000. To this the Plaintiff says that under the Constitution of Kenya, the court's jurisdiction cannot be ousted and further that in any event the Defendant had taken part in the case, having filed Defence and having cross-examined the witness and made submissions. It cannot now be seen to benefit from this provision. I have considered the submissions made both by the Plaintiff and by the Defendant. In my humble opinion, Section 33(1) of Kenya Airports Authority Act does not seek to oust the powers of the court, although I do agree that if it were to seek to oust the powers of the court then the provisions of the constitution which bestows the High Court with unlimited jurisdiction to enquire and determine all civil and criminal matters in the country, would prevail over the provisions of Section 33(1) of the Act. However here all that the act says is that in case of any person who suffers damage as a result of the activities of the Authority in exercise of its powers under sections 12, 14, 15, and 16, then such a person would have to first seek arbitration proceedings to determine such a matter. It does not state that such determination by a single arbitrator shall be final. I do feel after such a determination, if any party including the original complainant is aggrieved, he would still have a recourse to the court. In short, Section 33(1) merely provides a first step in such a situation but does not provide a final step. I do feel that this suit was therefore prematurely brought into the court before all avenues provided in the relevant Act, namely, Kenya Airport Authority were fully exhausted. However, the Defendant cannot benefit from this as it fully took part in the proceedings. It should have raised this issue at the very beginning of this case by way of a Preliminary Objection and should have only proceeded in the proceedings after a court's order rejecting his objection.

The next matter I will now consider is whether the sum of K.shs 3,500,000/- was paid by the Defendant on 9th September 1998 in full and final settlement of the Plaintiff's claim. The Plaintiff's submission on this is as follows:

"The Defendant alleged that the Plaintiff had accepted the 3,500,000 in full and final settlement. Indeed the Plaintiff adduced both oral and documentary evidence to the contrary and as such this allegation fails".

I think to decide on this issue, I need to address myself to the surrounding circumstances and to the evidence before me. The only witness called by the Plaintiff stated as follows concerning this issue.

"Question:

Did you receive a letter dated 17.8.98. Answer: Yes, I did. I ask for the shs. 3.5 million. I did not, at that time, look at the loss of property and so forth.

MFI III, IV 13.8.98 Martha Koome to Taxtar; letter 20.8.98. I wrote it. At that time, Euro Bank had judgment against Taxtar. I had personally been there. In my interest to clear the amount. At that time, I was working to count the losses so long as I received payment as per bank letter dated 13.8.98 i.e. by 20.8.98.

MFI V, I note 21.8.98. I had got extension from Eurobank. Must receive the shs. 3.5m by 29.8.98. MFI VII I wrote 24.8.98, I cannot recall whether I spoke with KAA. The shs. 3.5

million was paid to Taxtar by cheque 9.9.98. Cheque was in the name of Taxtar. I collected it personally. I know it was after the period stipulated by the Bank. It was in September, 1998. I took it immediately to the bank".

In re-examination he said as follows on this issue.

> "I look at MFI II and III. I wrote back. At that time, bank was willing to release my personal 77 if payment was made within time. I was willing to accept the 3.5 million in full settlement provided it was paid within the time limit stipulated by the bank. I did not receive the money within that time. It is safe to say I did not receiver the money in full and final settlement. This was the last straw after all the disappointment".

As I have stated herein above, the same letters were by consent of parties admitted as exhibits and I am now duty bound to peruse and consider them. The first letter was dated 11th August 1998, it was addressed to the Defendant's Finance & Administration Manager by the Director of the Plaintiff Company. It stated in part as follows:

> "In view of the recent development whereby Mr. Warenham has accepted responsibility for his various transactions, we request you to release our long outstanding payment of K.shs 3.5 million.
>
> Anticipating your favourable consideration.
>
> Your faithfully,
>
> KIPRONO KITTONY.
>
> DIRECTOR"

That letter was not written on a without prejudice basis. It was plain letter of request or demand. On 17th August 1998, the Defendant wrote to the Plaintiff on a without prejudice basis and stated as follows:

> "PAYMENT OF PASSENGER BAGGAGE TROLLEYS The Authority intends to pay you the balance of K.shs 3.5 million arising from the supply of the above trolleys vide L.P.O. C081226, as full and final settlement.
>
> Kindly confirm your acceptance of our proposal to enable us settle this matter.
>
> Yours Sincerely,
>
> J. ONG'ERA (Miss)
>
> CORPORATION SECRETARY
>
> For MANAGING DIRECTOR"

The response to that letter was fast and clear. It was in a letter dated 20th August 1998 from Plaintiff to Defendant. It stated:

> "This is to acknowledge receipt of your letter KAA/LGL/69 of 17th August 1998, and confirm that we accept K.shs 3.5 million as a full and final agreement in resepct to trolleys supplied vide L.P.O. C081226 provided this falls within the period stipulated by M/S Eurobank as per letter attached.
>
> Anticipating your prompt action.
>
> Yours faithfully,

KIPRONO KITTONY

MANAGING DIRECTOR".

The letter attached was apparently a letter from Martha Koome & Co advocates of Eurobank which was dated 13th August 1998 and which gave only 7days from 13th August 1998 for payment to be made to the bank. That www.kenyalawreports.or.ke 12 date was apparently extended and the Plaintiffs wrote another letter to Defendant dated 21st August 1998 stating as follows:

"PAYMENT OF PASSENGER BAGGAGE TROLLEYS. Reference is made to the above subject matter and our letter to you dated 20th April 1998. We have been able to negotiate an extension from M/S Eurobank (copy enclosed). We confirm that we accept 3.5 million as full and final settlement in line with the same. This letter therefore supercedes the previous one of 20th August, 1998.

Yours faithfully,

KIPRONO KITTONY

DIRECTOR".

The letter that was enclosed and in line with which terms the payment of 3.5 million was accepted as full and final settlement was dated 21st August 1998 and stated categorically that the payment was to be made not later than 29.8.1998. Thereafter the only other communication on record is a letter dated 24th August 1998 from the Plaintiff to the Defendant seeking to know whether the payment would be made before 29.8.1998.

It is clear to me from the letters I have referred to and which were produced as defence exhibits that the Plaintiff was consistently stating that it would accept K.shs 3.5 million only so long as it was paid within the time allowed by the Eurobank and to this effect the Plaintiff did enclose first a letter from Eurobank's Advocates (Martha Koome & Company), dated 13th August 1998 which required payment within seven days from 13th August, 1998. When the same period was extended to 29th August 1998, the Plaintiff again enclosed a letter from EuroBank on the same. It made this condition of their acceptance clear in its letter dated 20th August 1998 which clearly stated that they would accept it as full and final payment provided the payment was made within the period in the letter from EuroBank and in their letter of 21st August 1998 again they made it clear that if the payment was made within the extended period then they would accept it as full and final payment and not otherwise.

I do agree that in law without prejudice offer if accepted constitutes fresh contract. However here it was accepted on condition the which condition was not honoured i.e. payment in respect of the first acceptance was not made as required in the letter of Martha Koome & Company Advocates and in the second acceptance, again it was not made by 29.8.1998 so that in both instances no fresh contract was constituted as the payment was made much later on 9th September 1998. I do not think that by its action of taking the cheque and by delaying to take action thereafter, one would find that it implied it accepted the cheque as full and final payment, unless it did more than that such as signing the payment voucher and stating therein that he was accepting the cheque as full and final payment or unless the Defendant gave evidence as to the further conditions of its acceptance. This was lacking. I therefore find that the payment of K.shs 3.5 million was not a full and final payment of the claim.

On the issue of damages, I do agree that the alleged losses are in the nature of special damages and needed in law to be proved strictly and I do agree that the authority cited by the Defendant reflect the correct legal position and are applicable to this case. However, on the question of the bank charges, it is clear from the statement that these were indeed incurred as a direct result of the delay to pay this amount. The Plaintiff was not cross-examined on this aspect and notwithstanding that the letter of 2nd February 1996 from the Bank spelt out the conditions under which the Bank was to extend credit facility to the Plaintiff was availed together with bank statements showing the charges. I would accept this claim. As to

claim for loss of profit, the Plaintiff relied on Exh. 13, 14, 15, 16, 17 and 18. Exhibit 13 is payment to Customs & Exercise Department made on 11th March 1996, Exhibit 14 is not there. A note in the Exhibits list states “Cheque Bank to follow” and apparently it was not availed and is not available for me to see and assess its probative value. Exh.15 is payment to Kenya Posts Authority and it is not stated what the payment was for as in evidence the Plaintiff merely says they paid Kenya Revenue Authority that amount of K.shs 27,816. K.shs 100,000 was for clearance. Exh.17, was for accommodation at Mombassa and Exh.18 was for car hire. My own addition of these expenses amounts to K.shs 167,165/20 and they were expenses that the Plaintiff had to incur in any event in securing and delivering the trolleys. The Plaintiff has not in my mind given a satisfactory account as to how he suffered loss of earnings amounting to the amount he is claiming in the Plaint. It should have produced a proper statement of accounts backed by solid evidence to show what he would have earned had he been paid in time i.e. in March 1996 and how much he ended up earning as a result of the late payment allowing for the fact that a bigger percentage of the agreed amount namely K.shs 6.5 million out of 10,000,000 was paid in time. I am not satisfied that this claim is proved within the standards required. I will not grant it.

The sum total of the above is that the Plaintiff’s claim relating to Bank’s charges succeeds. Judgment is hereby entered for the Plaintiff against the Defendant in the sum of K.shs 3,500,000/- and interest on the same at court rates. Costs to the Plaintiff. This is the judgment of the court.

Dated at Nairobi this 23rd day of October 2001.

ONYANGO OTIENO

JUDGE