



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 2863 OF 1996

PAUL G. NDARUAPLAINTIFF

VERSUS

KENYA POST & TELECOMMUNICATIONS.....DEFENDANT

RULING

By an amended plaint dated 9th April, 2001, and filed in court on 10th April, 2001 the plaintiff Paul Gachanga Ndarua, prayed for Judgment against the defendant (Kenya Posts and Telecommunications Corporation), for

“for the unpaid out-standing amount as per the invoices @ 30% p.a. together with interest amounting to Kshs.53,068,872.45/= as stated in para 12 hereinfoe from the date of each invoice to date of Judgment and payment in full”.

The plaintiff also prayed for “punitive and exemplary damages for late payment as this Hon. Court shall determine”

c. There was a prayer for costs of the suit,

d. and further interest at @ 30% per annum from 20th June 1998 to date of full payment.

e. (a) Alternatively and without prejudice, interest on the principle sum owed from the date of each invoice to date of full payment at commercial rates prevailing throughout the period the debt was owing and not at court rates.”

Paragraph 12 of the amended plaint gave a table of **“interest due on principal sums at 30% from date of each invoice to payment In full”.**

The plaintiff’s cause of action appears on paragraphs 4,5,6, and 7 of the amended plaint.

The defence to amended plaint was dated 18th June 2001. In paragraph 12 thereof, the defendant said in part

“- - - the particulars of interest is alleged to have arisen more than one year before the suit is filed. All the alleged claims of the plaintiff arose at the latest by November, 1993. The suit not having been filed within one year from the date of all claims are barred by sec. 109(b) of the Kenya Posts and Telecommunications Act (Cap 411)”.

The plaintiff then moved the court by a chamber summons application, dated 29th June, 2001. The plaintiff prayed the court for orders that:-

1. The defendant's amended defence dated 18th June, 2001 be struck out for being frivolous, vexatious and an abuse of the court process".
2. That Judgment on admission be entered in favour of the plaintiff against the defendant."
3. That costs of the application be provided for."

The grounds on which the application was based were, inter alia, that ***"the defendant has admitted and paid in full the principal amount claimed of Kshs.44,261,519/50, shortly after filing the suit."***

The affidavit in reply to this application was sworn by the defendant's counsel, Mr. Peter Le Pelley. He averred that

"The negotiations between the parties were without prejudice as is shown by the letter of 22 nd August, 1997. There was accordingly no admission".

"No admission has been shown with regard to interest. Interest is always at the court's discretion, and unless contractual not subj ect to striking out."

Arguing the application on behalf of the Plaintiff, Mr. Kilonzo submitted that the plaintiff seeks an order to strike out the amended defence filed because the same is "frivoluous, vexacious and an abuse of the court process, and is meant to delay the finalization of the suit."

He re-called that the plaintiff's suit was filed on 19th November, 1996, and the defence to the suit was filed on 9th January, 1997. It denied the plaintiff's claim, however during the month of August, particularly August 22nd and 27th 1997, the parties negotiated and came to an agreement as far as the principal sum of Kshs.44,261,519/50 was concerned. The defendant agreed to pay the said sum on various dates i.e. by installments. The first payment was made on 31st October, 1997 and the last on 20th January, 1998. The entire principal sum of Kshs.44,261,519/50 was paid.

The plaintiff had asked for payment of interest on the delayed payment of the principal sum in the suit he filed, and he continued asking for the interest, because the debt had accrued and remained unpaid since 12th October, 1993, a period of five years. It is for this reason that Mr. Kilonzo submitted that on the principle of equity, the plaintiff is entitled to payment of interest.

The plaintiff obtained the court's leave on 6th June, 2001, to enable him to amend the plaint for the purpose of specifying and itemizing the exact interest claimed.

Mr. Kilonzo referred the court to an annexure to the affidavit of the plaintiff, a letter dated 22nd August, 1997 written by the Defendant during the negotiations for payment of the principal sum.

He said that the amended defence denied that any money was owed to the plaintiff, yet the letter shows the defendant's willingness to settle the claim.

The plaintiff also annexed another letter to his affidavit in support of this application. This was the letter of 27th August, 1997. Again the letter was written by the defendant to the plaintiff.

Paragraph one of the letter thanks the plaintiff ***"for accepting payment for the outstanding principal as tabulated***", and paragraph two states ,

"We also inform you that it is our wish that we clear your payments within the shortest time. However, it is not possible to pay you all the amount within 30 (t hirty) days as proposed due to other financial commitments. We propose to pay you in ten (10) equal installments of

Kshs.4,426,151.95/= per week with effect from the date of acceptance of our proposal .”

Attached to the above letter was an “Acceptance Declaration” which was sent to the plaintiff to sign. It reads,

“I P. G. Ndarua hereby accept to be paid the out - standing payment in 10 (ten) equal installments of Kshs.4,426,151.95/= per week totalling Kshs.44,261.159/50 in full and final settlement of my claim in HCCC No.2863 of 1996.”

The plaintiff declined to sign the above acceptance declaration, and instead prepared a different one and signed it and sent it to the Defendant with his letter dated 29th August, 2001. The new “Acceptance Declaration” reads,

“I, P. G. Ndarua hereby accept to be paid the outstanding principal payments in 10 (ten) equal weekly installments of Kshs.4,426,151/95 per week totalling kshs.44,261,519/50 in full and final settlement of the total principal amount which I am claiming in HCCC No.2863 of 1996.”

Mr. Kilonzo submitted that the Plaintiff was prepared to accept payment of the principal sum in ten (10) equal installments, and this would be full and final **only** in respect of the principal sum but **not** the interest. This therefore left the issue of interest open and subject to litigation in court as the suit was already pending in court.

According to Mr. Kilonzo, the “Acceptance Declaration” by the Plaintiff dated 29th August, 1997 accepting payment of the **principal sum only** by ten weekly installments, which Declaration was received by the Defendant, accepted and acted upon amounted to admission of liability. He referred to Section 23 of the Limitation of Actions Act, Cap.22 Laws of Kenya, in submitting that such an acknowledgement of the debt was within the Limitation of Actions Act, as the defendant in making payment did not consider whether the claim was time barred or not. The matter of the claim being time barred was not an issue as far as the Defendant was concerned.

Mr. Kilonzo once more referred to the Plaintiff’s letter of 29th August, 1997. This is a letter the Plaintiff wrote to the Defendant corporation in reply to their letter of 27th August, 1997, asking to sign an acceptance declaration to be paid the principle sum only by installments in full and final settlement.

As I have shown, the Plaintiff declined the proposal and wrote the letter of 27th August, 1997 stating in paragraph two (2),

“I note that your co -operation is admitting liability for the principal amount but you are still disputing liability for the interest payable. The spirit of give and take as stated by you was clearly demonstrated by my letter of 30 th July, 1997, when I had informed you that I am prepared to give you a rebate of Kshs.12,132,5 05/90 out of the total claim of Kshs.47,818,695/50. The case can then go on for trial on the issue of interest.”

Paragraph 3 of the letter is also relevant. It reads,

“I am now convinced that your corporation is not serious on an out of court settleme nt. Accordingly, I have consulted my lawyer who has advised me to apply for summary judgement for the admitted principal amount of Kshs.44,261,519/50. The case can then go for trial on the issue of interest.”

On the contents of the two paragraphs quoted above, Mr. Kilonzo submitted that the negotiations between the two parties had broken down and the minute this happens especially between parties who were negotiating on **“without prejudice basis ,”** a new agreement comes into place and a new cause of action arises and the **“without prejudice negotiations is extinguished .”** This means that documents exchanged on “without prejudice basis” become admissible in evidence.

He submitted that the court has to determine whether interest is payable or not. He prayed for judgement in favour of his client for the principal sum which was paid and the unpaid interest amounting to Kshs.53,068,872/45.

He noted that the defendant has never disputed the rate of interest claimed, the rate which, was applicable during the five (5) years when the money was unpaid. He submitted further that payment of interest at this rate is at the discretion of the court. He quoted the provisions of Section 23 of the Evidence Act and also Section 23 (3) of the Limitation of Actions Act Cap.22, Laws of Kenya, and submitted that the plaintiff is relying both on the acknowledgement by the defendant and the payment of the principal sum.

Mr. Kilonzo submitted that the defendant's act of paying the principle sum satisfied the provision of Section 23 (3) and Section 24 of the Limitation of Actions Act.

Reading the provisions of Section 109 of the Kenya Posts and Telecommunication Corporation, Mr. Kilonzo submitted that the section cannot apply here because by the time the defendant acknowledged the debt by his letter of 27th August, 1999 and paid it, the defendant was aware of the provisions of Section 109 (b) of the Kenya Post and Telecommunications Act, and its lawyer had pleaded the same in the defence.

Relying on the authority of WALKER v. WILSHER (1889) 23 QBD 335 on the matter of correspondence exchanged between the parties on "without prejudice basis", Mr. Kilonzo submitted that in this case, a new relationship was established between the parties in that the terms of settlement of the debt by the defendant on a "without prejudice" basis was not accepted by the plaintiff and a new relationship was established where only payment of principal sum was agreed and payment of principal sum made and accepted in full and final settlement leaving out the interest for argument.

Another authority relied on by the plaintiff's counsel was RUSH and TOMKINSONS LTD v. GREATER LONDON COUNCIL & ANOTHER, where it was held, inter alia,

"The privilege attaching to communications written without prejudice and with a view to settling a dispute ended if the negotiations succeeded and a settlement was concluded, since the protection accorded by the privilege had served its purpose, namely facilitating a settlement"

In the case before me, it was submitted that as a settlement had been reached on the payment of the principal sum, the parties were entitled to discovery of the relevant correspondence on "without prejudice basis" having passed between them for the settlement of the rest of the claim.

Mr. Kilonzo relied on extracts from the 3rd Edition, volume 27 of Halsbury's Laws of England on the point of when interest is payable. In this case he submitted that interest is payable from the date when the cause of action arose, i.e. in 1993. He submitted further that the discretion of the court to order payment of interest would normally be exercised whether pleaded or not as long as the court is satisfied that there was improper delay. He conceded that the contract did not provide for automatic right of interest, but he urged court to order the payment of interest. The plaintiff claimed it and pleaded it, in Paragraph 12 of the amended plaint.

He prayed the court to enter judgment for the plaintiff, make an order for the payment of interest and also grant other prayers in the amended plaint.

Mr. Gichuhi for the defendant submitted that none of the invoices referred in paragraph 12 of the amended plaint supporting the principal sum have been exhibited. In addition, he criticized the plaintiff for not exhibiting the contract between him and the cooperation.

According to Mr. Gichuhi, it was not clear which invoices were paid and for what work. This he said forms a defence. He submitted further that "It is crucial to show what contract was there and over what project and what did the payments relate to?"

He submitted further that for Plaintiff to succeed in an action under Cap.411 (KPTC Act), he must show that he gave Notice before the institution of the suit.

Secondly, the plaintiff must also prove that his claim against the defendant is not time barred as the cause of action occurred in November, 1993. On this point, Mr. Gachuhi relied on the case of JOEL KIPRONO LANGAT v. KPTC, CIVIL APPEAL NO.144 of 1999 where no notice was given by a plaintiff alleging wrongful dismissal by the defendant who denied the claim and contended that the suit was incompetent for failure to comply with the provisions of Section 109 (a) and (b) of Cap.411.

I was referred to page four (4) of the Judgement where the Court of Appeal said, inter alia,

“The only way the appellant could prove that he had served the notice under section 109 (a) of the Act, was by tendering a copy of such notice in evidence.”

On the point that the plaintiff’s claim being time barred, Mr. Gichuhi relied on the authority of NJOKA TANNERS LTD v. OCEAN FREIGHT (EA) LTD AND ANOTHER HCCC NO.607 of 1998, a decision of the late Hon. Justice Hewitt where at page 5 of the Judgement, he quoted and relied on the decision of an English case RONEX PROPERTIES LTD vs. JOHN LAING CONSTRUCTION AND OTHERS [1982] AII ER 961 where the court held that where a defendant considers that he has a good limitation defence his proper course is either to plead the defence and seek trial of that defence as a preliminary issue or in a very clear case to apply to strike out the claim on the ground that it is frivolous vexacious and an abuse of the process of the Court.

Considering the case at hand, Mr. Gichuhi referred to paragraph 12 of the defence to amended plaint to the effect that the suit is time barred as it was not filed within one year of November, 1993. It contravened the provisions of Section 109 (b) of Cap.411, and the plaintiff’s claim was therefore extinguished. This issue of limitation he said was not replied to.

On the issue of Notice of the institution of this suit not having been given, Mr. Kilonzo replied that a Notice was served, but it was not exhibited because it was not considered important as it was not pleaded in the defence. He referred to paragraph 12 of the defence to amended plaint which pleads section 109 (b) of Cap.411 (KPTC) but does not plead Section 109 (a) which deals with notice,

Mr. Kilonzo referred to paragraph 11 of the amended defence which denies “any contract” yet the defendant paid the principal sum owing on the said contracts.

Still on the issue of notice he referred to paragraph 11 of the amended plaint which refers to the statutory notice under Section 109 (a) of Cap.411 which the plaintiff served on the defendant through his authorized agent. The defendant’s defence to amended plaint did not deny the contents of this paragraph. Mr. Kilonzo submitted that under the laws of pleadings the matter of Notice was admitted by the defence. It cannot therefore be agitated at this late stage.

Mr. Gichuhi in further reply to Mr. Kilonzo’s submissions referred to paragraph 8 of the defence to amended plaint where the defendant asserted that various projects supposed to be undertaken by the plaintiff were actually not undertaken and as such payment was not due. He also submitted that some of the projects were undertaken when the plaintiff was supposed to be an employee of the defendant, so there was no principle/agent relationship, and the plaintiff was therefore not entitled to any payment.

Mr. Kilonzo’s response to this was that as the principal sum was paid whilst the suit was pending in court, and the contracts pleaded in paragraphs 4, 5 and 6 of the amended plain are admitted in paragraphs 3, 4 and 5 of the defence to amended plaint, there was no need to exhibit the contracts. Besides, the defendant too has the contracts in its possession and could have exhibited them, he said.

On the submission by Mr. Gichuhi that the plaintiff’s claim was time barred, Mr. Kilonzo referred to his earlier submission on this point, and said that the defendant’s acknowledgement of the debt of the principal sum, and its payment of it satisfied the provisions of Section 23 (3) of the Limitation of Actions

Act, Cap.22, Laws of Kenya. He said that the Plaintiff's claim is not time barred because the defendant was fully aware of the provisions of Section 109 (b) of the KPTC Act when it paid the principal sum in full. Besides, Mr. Kilonzo submitted that the defendant has not filed a counter claim to the principal sum it paid. Again, the defendant has not claimed restitution of the principal sum it paid the plaintiff. This payment was made, as already stated, when the suit was pending in court. This satisfied the provisions of Section 23 (3) of the Limitation of Actions Act, Cap.22 Laws of Kenya.

According to Mr. Gichuhi, the defence to amended plaint has triable issues which should go to full trial. These are such issues as "without prejudice" documents being used by the plaintiff in this application whilst such documents were inadmissible. He relied on extracts from two text books, to argue this point.

The second triable issue, according to Mr. Gichuhi, was the matter of limitation, and the effect of acknowledgements made outside the period of limitation.

On this point, he relied on an extract from a text, ***"The Law and Practice of Compromise ."***

He submitted further that the acknowledgement of the "without prejudice" correspondence was in respect of past liability which effectively ended in 1994, as such the suit is time barred and is incompetent in law; and cannot therefore revive a cause of action. He referred to the case of ALIBHAI DARIMAL KARA v. THE ADMINISTRATOR GENERAL; a case from the HIGH COURT OF TANZANIA.

Mr. Gichuhi contended that the acknowledgment by the defendant was made after the period of limitation, so the plaintiff's cause of action cannot survive as his plaint is time barred.

He submitted further that this is not an obvious case for striking out defence, and entering judgement. He recalled further that the plaintiff claimed interest at 30% without explaining how he arrived at that figure. Mr. Gichuhi urged the court to decide whether there is any competent suit before it before considering to award interest.

If I understood Mr. Gichuhi's argument, he was urging the court to first determine the validity of the plaintiff's suit against the defendant, a suit for which the defendant has already paid the entire principal sum, and is today not claiming that money back. The principal sum was paid after a period of five (5) years of the debt having become due and payable and the suit filed by the plaintiff was pending in court. A letter by the defendant to the plaintiff dated 22nd August, 1997 and another one dated 27th August, 1987 formed part of the negotiations between the parties towards reaching a settlement on payment of the principal sum. As has been submitted, it was the letter of 22nd August, 1997 which specifically used the words

"as the parties are still negotiating on a without prejudice basis, the correspondence exchanged between the parties shall not be used in the matter pending in court."

As evidence shows, the parties eventually reached a settlement on the principal sum and the plaintiff was paid that amount in full and final settlement, of the principal claim only.

I find from the evidence on record that the protection accorded by the "without prejudice" letter or letters was extinguished once the plaintiff and the defendant reached the agreement as they did for payment of the principal sum. This means that, the plaintiff was at liberty to use the letter in his claim against interest. In fact the letter of 22nd August, 1987, concerned the principal claim only, not the interest.

The plaintiff gave notice of the institution of the suit as the amended plaint shows, and the issue of limitation pleaded by the defendant in paragraph 12 of the defence to the amended plaint, and indeed the original defence, was overtaken by events when the defendant and the plaintiff negotiated a settlement and the defendant paid the entire principal sum, with no reference to the limitation it had pleaded in the defence. The authority of RONEX PROPERTIES LTD cited by the defendant's counsel cannot aid the defendant in these circumstances because the defendant does not have "a good limitation defence."

I find that the defendant's payment of the principal sum in full, took the matter outside Cap.411 as far as limitation is concerned, and the only relevant period of limitation to be considered is that under Sec.23 (3) of Cap.22.

The records show that Sec.109 (b) of Cap.411 was not an issue as the principal sum was being paid to the plaintiff. Any reference to it at this stage is in my view, an after thought.

The plaintiff gave details of the projects, dates the invoices were raised, the amount outstanding on the invoices, the dates when the invoices were paid, the number of days the payment was late by, and the interest chargeable on delayed payments. All this is given in the amended plaint. The defendant answered this by its paragraph 12 of defence to amended plaint, relying on Sec.109 (b) of Cap.411.

Having paid the principal sum without bothering about this provision, the defendant cannot now rely on the same provision in pleading limitation as far as the plaintiff's claim for interest is concerned, which claim flows from the delayed payment of the principal sum.

I find that when the defendant paid the principal sum in full, it must have been satisfied that the same was due and owing as outlined in the plaint filed against it in court. The defendant must have been satisfied that the plaintiff's claim was valid, before paying the principal sum.

From the points I have considered in detail, I do not find any triable issues in the defence to amended plaint, and I proceed to strike it out as it is no defence to the plaintiff's claim for interest. The defendant payment of the principal sum amounted to admission of liability over the principal sum. Interest was claimed for delayed payment of the principal sum, and I am satisfied from evidence on record that the plaintiff should be paid such interest as tabulated. I therefore proceed to enter judgement on admission on the principal sum already paid and order the defendant to pay the plaintiff interest claimed on all the invoices amounting to Kshs.53,068,872/45.

Finally, I award costs of the application dated 29th June, 2001, to the plaintiff.

Dated at Nairobi this 11th day of October, 2001.

JOYCE ALUOCH

HIGH COURT JUDGE