



REPUBLIC OF KENYA



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Bahari Forwarders Limited v Abyssinia Group of Industries & 3 others (Civil Case E024 of 2021) [2024] KEHC 16896 (KLR) (19 January 2024) (Judgment)

Neutral citation: [2024] KEHC 16896 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE E024 OF 2021
F WANGARI, J
JANUARY 19, 2024**

BETWEEN

BAHARI FORWARDERS LIMITED PLAINTIFF

AND

ABYSSINIA GROUP OF INDUSTRIES 1ST DEFENDANT

ABYSSINIA IRON & STEEL LIMITED 2ND DEFENDANT

WESTERN STEEL MILLS LIMITED 3RD DEFENDANT

PRIME STEEL MILLS LIMITED 4TH DEFENDANT

JUDGMENT

1. In the Plaint dated 8th March, 2021, the Plaintiff pleaded among others that 1st Defendant which was the holding company for 2nd, 3rd and 4th Defendants, contracted the Plaintiff to carry out clearing and transport goods to various destinations for the 2nd to 4th Defendants. The services were accepted and from January 2019 to November 2020, the said services were delivered.
2. As at 10th February, 2021, the Defendants had accrued outstanding amounts on account of clearing and forwarding services provided. The debt continues to accrue and despite the various demands to settle the same by the Plaintiff, the Defendants neglected, refused and/ or failed to pay the said debt due to the Plaintiff.
3. The Plaintiff thus prayed for the following reliefs
 - a. Kshs. 20,492,884.00
 - b. Compound interest on (a) above at 1.5% per month from 10th February 2021 to the date of payment in full.
 - c. Costs of the suit.



- d. Interest on (c)above at court rates from the date of filing suit until payment in full.
 - e. Any other relief which this Honourable Court deems just to grant.
4. The Defendants filed their Defence dated 1st April 2021 in which they denied the allegations by the Plaintiff and stated inter alia that there was a contract existing between the Plaintiff and the Defendants. They also denied that they were indebted the Plaintiff stating that the Plaintiff is not entitled to any of the reliefs sought for.
 5. At the hearing the Plaintiff called Meetal Parmar (PW1), who is the Chief Accountant of the Plaintiff's Company. He relied on his witness statement and the bundle of documents both filed on 8/3/2021 to support the Plaintiff's case. It was his case that there existed a contract between the Plaintiff and the Defendants where the Plaintiff was to clear and transport Defendants' goods.
 6. On the period between March 2019 and November 2020, the 1st Defendant as the holding company contracted the Plaintiff to clear and transport 2nd Defendants goods and the 2nd Defendant accepted the services. For the 3rd Defendant, the services were delivered and accepted between October 2019 to November 2020 and for the 4th Defendant, the services were delivered and accepted between January 2019 to November 2020.
 7. As at 10/2/2021, the 2nd Defendant had accrued a debt of Kshs. 11,062,389 inclusive of Kshs. 1,239,023 interest, the 3rd Defendant had a debt of Kshs. 2,183,109 inclusive of Kshs. 485,467 interest and the 4th Defendant had a debt of Kshs. 5,958,503 inclusive of interest of Kshs. 803,426, all amounting to Kshs. 20,492,884 inclusive of Kshs. 2,527,916.
 8. On cross examination, he stated that the contract was entered between the Plaintiff on one part and the 1st Defendant on behalf of the 2nd, 3rd and 4th Defendant on the other part. He said there was an offer by the Plaintiff and acceptance by the Defendants. He relied on the documents produced as exhibits in support of the Plaintiff's case.
 9. The Defendants closed their case without calling a witness. This was as a result of the court's ruling delivered on 18/10/2023 as read together with the proceedings of 22/5/2023, 31/7/2023 and 17/10/2023.
 10. I note that there is a Notice of Appeal by the Defendants, dated 25/10/2023 and filed on 30/10/2023, in respect to the ruling delivered on 18/10/2023. There are no Court Orders staying these proceedings, if in deed an appeal was filed as per the Notice of Appeal. I shall therefore proceed to write and deliver this judgment.
 11. Even though the Defendants did not call any witnesses, I have considered their Statement of Defence dated 1/4/2021, and the undated defence witness statement with was filed on 20/5/2022. I have confirmed from both the physical court file and the e-filing platform that the Defendants did not file any documents in support of their case.
 12. Directions were given to have both parties file their written submissions. Only the Plaintiff complied with the directions by filing their written submissions dated 21/12/2023.
 13. I have considered the pleadings, evidence on record and the submissions and authorities filed by the Plaintiff, and identify the following issues for determination;
 - a. Whether there existed a contract between the Plaintiff and the Defendants
 - b. If the above is to the affirmative, whether the Defendants were in breach of the said contract



- c. Whether the Plaintiff ought to be granted the orders sought

Analysis

14. Whereas the Defendant failed to call witnesses, the burden of proof still remains with the Plaintiff. The Court of Appeal in the case Charterhouse Bank Limited (under Statutory Management v Frank N. Kamau (2016) eKLR had occasion to consider the burden of proof of the plaintiff where the defendant failed to adduce evidence. The court stated in that case: -

“We would therefore venture to suggest that before the trial court can conclude that the plaintiff’s case is not controverted or is proved on a balance of probabilities by reason of the defendant’s failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. Where the defendant has subjected the plaintiff or his witnesses to cross-examination and the evidence adduced by the plaintiff is thereby thoroughly discredited, judgment cannot be entered for the plaintiff merely because the defendant has not testified. The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgment merely because the defendant has not testified.”

15. The Defendants shall not suffer any prejudice as this court shall consider the Plaintiff’s case on merits and shall also consider the Defendants’ statement of defence and witness statement.

16. The dispute revolves around an alleged contract between the Plaintiff and the 1st Defendant on behalf on the 2nd, 3rd and 4th Defendants. From the pleadings filed, the Defendants on the other hand denies that there was a contract between the parties. They however admit the description of the Defendants which includes that the 1st Defendant was a holding company for the other Defendants.

17. For there to be a contract, there must be an offer, acceptance and consideration. In the case of Pius Kimaiyo Langat v the Kenya Commercial Bank of Kenya Ltd [2017] eKLR the Court of Appeal restated its decision in William Muthee Muthami v Bank of Baroda [2014] eKLR to the effect that:

“In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the in breach.”

18. The Court proceeded to state:

“Lord Clarke, in RTS Flexible Systems Ltd v Molkerei Aloï Muller GM BH [2010] I WLR 753 at [45], [2010] UK SC 14 put it this way:

“The general principles are not in doubt. Whether there was binding contract between the parties and if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of



such terms to be a precondition to a concluded and legally binding agreement.”(emphasis added)

19. Furthermore, the elements of a contract are set out in Halsbury’s Laws of England 4th (ed.) Re-Issue Vol. 9(1) paragraph 603 at page 340 as follows:

“To constitute a valid contract (1) there must be two or more separate and definite parties to the contract; (2) those parties must be in agreement, that is, there must be consensus on specific matters (often referred to in the older authorities as ‘consensus ad idem’); (3) those parties must intend to create legal relations in the sense that the promises of each side are to be enforceable simply because they are contractual promises; (4) the promises of each party must be supported by consideration or by some other factor which the law considers sufficient. Generally speaking, the law does not enforce a bare promise.”

20. It must be noted that there was no written contract between the parties. The Plaintiff relied on the emails between the Plaintiff and the 1st Defendant (pg. 12 to 46) and more specifically Pg. 12 to 14. I have perused through the contents of the email dated 30/8/2018 from the Plaintiff to 1st Defendant, being an offer for clearing and forwarding services, terms and conditions.
21. From the emails dated 1/9/2018 sent by the Plaintiff to the 1st Defendants at 11:13am and 12:31pm implies that there was a discussion between the parties over the offer of clearing and transport services, and a settlement on charges reached.
22. From the emails, there is proof that the Plaintiff was demanding payments from the Defendants and the Defendants committed themselves to pay the outstanding amount. For example, emails dated 22/7/2020 and 24/7/2020 between Meetal Parmar for the Plaintiff company and Mr. Ravi Gada for 1st Defendant company confirms that the Defendants owed the Plaintiff money and they promised to pay.
23. Further, the Consignment Notes and Tax Invoices-Import Demurrage filed as Plaintiff’s exhibits is proof that clearing and transport services were rendered to the 2nd, 3rd and 4th Defendants by the Plaintiff. From the above, it is proof that there was an implied contract of services between the Plaintiff and the Defendants. The Defendants did not discharge the plaintiff’s evidence even by way of the filed pleadings and find the defence as a mere denial.
24. In the case of Margaret Njeri Mbugua v Kirk Mweya Nyaga (2016) eKLR the court stated as follows on defence of mere denial;

“A mere denial is not a sufficient defence and a defendant has to show either by affidavit, oral evidence, or otherwise, that there is a good defence...

.....When a party in any pleading denied an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum, or any part thereof, or else set out how much he received. And so, when a matter of fact is alleged with diverse circumstances, it shall be sufficient to deny it as alleged along those circumstances, but fair and substantial answer must be given...”

25. On whether the Defendants were in breach of the contract by failing to pay the outstanding amount, as stated herein above, from the invoices sent to the Defendants, the emails doing a reminder of payment of outstanding amount and the acknowledgement by the defendant of the money owing giving an undertaking of payment, is proof that indeed the Defendants are owing money as claimed by the



Plaintiff. Save for mere denial, the Defendants did not challenge the evidence adduced by the Plaintiff. I find that the Defendants owe the Plaintiff the outstanding amounts as claimed.

26. The Plaintiff in addition to the outstanding amount of Kshs. 20,492,884 as at 10/2/2021, there was a claim of compound interest on the outstanding amount from 10/2/2021 until payment in full. Upon perusal of the Plaintiff's documents, the email on the offer of services clearly indicates that 1.5% interest per month is chargeable on any amount overdue. (pg. 12-13). This was not challenged. I find that the Plaintiff is entitled to the interest as prayed.
27. The Plaintiff also sought for costs and interest from date of filing suit. On the issue of costs, it is settled that the same follows the event. That is the import of section 27 of the Civil Procedure Act. The court reserves its discretion on whether to award costs to either party. This was well enunciated by the Supreme Court in the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others [2013] eKLR.
28. In the present circumstances, I see no reason why I should deny the Plaintiff costs of the suit. However, the prayer for interest of the costs from time of filing suit is hereby denied.
29. The upshot is that this court makes the following orders: -
 - i. The Defendants shall pay Kshs. 20,492,884 to the Plaintiff being the outstanding balance under the contract.
 - ii. The Amount shall attract interest at a rate of 1.5% per month from 10/2/2021 until payment in full.
 - iii. The Plaintiff shall have the Costs of the suit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 19TH DAY OF JANUARY, 2024.

.....
F. WANGARI

JUDGE

In the presence of: -

Oluta Advocate for the Plaintiff

N/A by the Defendant

Barile, Court Assistant

