



**Spinners and Spinners Limited v Kimilili Wholesalers (K) Limited (Civil Case 7 of 2020) [2023] KEHC 980 (KLR) (10 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 980 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL CASE 7 OF 2020  
RN NYAKUNDI, J  
FEBRUARY 10, 2023**

**BETWEEN**

**SPINNERS AND SPINNERS LIMITED ..... PLAINTIFF**

**AND**

**KIMILILI WHOLESALERS (K) LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The plaintiff instituted this suit vide a plaint dated 21<sup>st</sup> August 2022 seeking judgment against the defendant for;
  - a. Kshs, 22,806,508/-
  - b. Bank Charges Kshs. 4,400
  - c. Interest on (a) above at 2% per month from 28<sup>th</sup> February 2019 till payment in full.
  - d. Interest on (b) above at court rates from the date of filing the suit until payment in full.
  - e. Costs of the suit.
  - f. Any other relief that this court may deem fit or to grant
2. The plaintiff claims that it entered into a sale of goods contract where there were agreed terms and conditions as follows;
  - a. The defendant would purchase various goods on credit limit by placing orders.
  - b. The accounts are due on demand
  - c. Interest of 2% per month is charged on all overdue accounts.
  - d. Any claim and/or complaint should be lodged with the plaintiff within seven days of delivery.



3. The plaintiff claims that the defendant failed to settle the overdue accounts of Kshs. 22,806,508/- which has continued to accrue interest at the rate of 2% per month. The plaintiff proceeded to file the present suit in order to recover the sums due.

#### **Plaintiff's Case**

4. The plaintiff's case is that the defendant has failed to settle overdue accounts for goods supplied to the tune of Kshs. 22,806,508/-. Further, that the defendant has duly admitted indebtedness by attempting to settle part of the sum owing through some cheques which have been either dishonoured or unbanked. The plaintiff also sought payment for bank charges incurred over the dishonoured cheques.
5. The plaintiff denied that the terms of the agreement were that payment would be effected once the goods were sold. Further, it denied that the post-dated cheques were security for the goods supplied and reiterated that the express terms of the invoices were that the accounts were due on demand.

#### **Defendant's Case**

6. The defendant denied the terms and conditions of the sale of goods contract as stated by the plaintiff. It stated that it was a term of the contract that the defendant would give the plaintiff post dated cheques that acted as security and the cheques were to be banked upon the supplied goods being sold. Contrary to the terms of the agreement, the plaintiff banked the cheques before the goods were sold knowing that the goods were on the defendant's shelf.
7. The defendant contended that it made payments to the plaintiff, some of which were acknowledged while others were not.

#### **Analysis and Determination**

8. In the analysis the court will speak briefly on the scope of the freedom of contract. Roscoe Pound, Liberty of Contract, 18 YALE L.J 454 (1909) Willston, supra emphasised thus: "This notion that the exercise of freedom of contract contributes to both individual and community welfare continues to influence contemporary legal thinking. Bargains are widely believed to be beneficial to the community in the provision of opportunities for freedom of individual action and exercise of judgment and as a means by which productive energy and product are apportioned in the economy. The enforcement of bargains rests in part on the common belief that enforcement enhances that utility"
9. With my mind the courts of law must always look at the intension of the parties to be construed from the instruments or agreement entered freely by the parties. This in the sense is what the classic statement of freedom of contract is found in printing and numerical Registering Co. v Sampson, 19 L R EQ 462, 465 (MR 1975). " It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when freely and voluntarily entered into shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider - that you are not to lightly interfere with this freedom of contract"
10. In this case the rights of the parties to the impugned contract shall be looked at the legal rents of the overriding standards of commercial reasonableness, honesty- in – fact, conscionability and yes decency as the ultimate principles which may not be overcome in any application of the provisions of the Sale of Goods Act.



11. Upon considering the pleadings and the evidence of the parties, the following issues arise for determination;
  1. Whether the accounts were due on demand at interest rates of 2%
  2. Whether the defendant is in default of the accounts due
  3. Whether the orders sought should be granted

**Whether the accounts are due on demand and at interest rates of 2%**

12. I note that the transaction herein arose from a sale of goods contract and the dispute is with regard to the terms of said contract, specifically on payment.
13. Section 3(1) of the *Sale of Goods Act* (“the SGA”) states that,

A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price.”
14. I have perused the pleadings and the documents produced by the parties and the said contract was not produced as evidence. However, the plaintiff claimed that the defendant was issued with invoices for the goods on various occasions and supplied the same in its documents. The defendants’ contention was that the terms claimed by the plaintiff are not the terms that were agreed upon. The learned Author Fredrick Kessler, *contracts of Adhesion- some though about Freedom of contract*, 43 Colum L. Rev. 629, 629 (1943) stated that “Rational behaviour within the context of our culture is only possible if agreements are respect Contract - the language of the cases tells us - is a private affair and not a social institution. The judicial system . . . cannot make contracts for the parties.... Either party is supposed to look out for his own interests and for his own protection. Oppressive bargains can be avoided by careful shopping around.... Since a contract is the result of free bargaining of parties who are brought together by the play of the market and who meet each other on a footing of social and approximate economic equality, there is no danger that freedom of contract will be a threat to the social order as a whole”
15. The intension of the parties as a basis of the contract was conclusive and they contacted themselves on bringing the terms into fruition. It is evident from the invoices produced and the post-dated cheques that there existed a relationship between the parties. It is also undisputed that there was a principal amount owed to the plaintiffs. What is unclear is the terms under which payment was to be effected and the interest that was to be charged on default. The defendant contends that there are payments it made to the plaintiff that have not been acknowledged. I have considered the documentary evidence and the respondent did not produce any documents to substantiate this allegation.
16. The plaintiff sought to rely on the invoice terms as evidence of the terms of the contract. However, it is imperative that I state that an invoice is not a contract, it is a demand for payment. In the event that the terms of an invoice are not at par with the terms of a contract, the same would amount to the variation of an existing contract. This issue was discussed in *Kenya Breweries Limited v Kiambu General Transport Agency Limited* NRB CA Civil Appeal No. 9 of 2000 [2000] eKLR as follows:
17. A variation of an existing contract involves an alteration as a matter of contract of the contractual relations between the parties; hence the agreement for variation must itself possess the characteristics of a valid contract. To effect a variation therefore, the parties must be ad idem in the same sense as for the formation of a contract and the agreement for the variation must be supported by consideration. If the agreement for the variation is mere nudum pactum it would give no cause of action for breach particularly if its effect was to give a voluntary indulgence to the other party to the agreement...”



18. There has been no evidence tabled by the plaintiff that the defendant agreed to the terms of payment as stated in the invoice. In fact, these terms are the subject of the contention between the parties. It follows that the claim that the interest rate was 2% on the payments has not been established. Further, I cannot consider the invoices as the source of the terms of the agreement as it does not possess the characteristics of a valid contract. In *Toyota Kenya Limited v Vehicle & Equipment Leasing Limited* [2021] eKLR the court held that
19. By presenting an invoice with fresh terms as to time of payment and interest on late payment, the Plaintiff was in effect making a fresh offer. In order for it to be effective, there had to be a meeting of minds which is an essential component for the formation of an enforceable contract. In addition, the variation ought to have been supported by fresh consideration
20. Guided by precedent, and in my wisdom, I find that the 2% interest rate and the requirement that payment be made on demand was not established by the plaintiff.

### **Whether the defendant is in default of the accounts due**

21. I have considered the evidence tendered and I find it quite peculiar that two parties seeking to enforce the terms of an agreement that is in dispute would both fail to produce the said agreement. This then leaves the court groping in the dark when seeking to determine which of the parties' position on the dispute is merited. However, given that this was a sale of goods contract, the Sale of Goods Act has provisions on the formalities of a contract for sale of goods. Section 5 of the Act provides;

Subject to the provisions of this Act and of any Act in that behalf, a contract of sale may be made in writing (either with or without seal) or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties:

22. Section 6(1) gives the following requirement;

A contract for the sale of any goods of the value of two hundred shillings or upwards shall not be enforceable by action unless the buyer accepts part of the goods so sold, and actually receives them, or gives something in earnest to bind the contract or in part payment, or unless some note or memorandum in writing of the contract is made and signed by the party to be charged or his agent in that behalf.

Provided that nothing in this section shall affect the law relating to corporations.

23. It is therefore implied from the documentary evidence and the submissions and pleadings that there existed a relationship of a commercial nature between the parties.
24. It is not in dispute that there is a sum owed to the plaintiff, what is in dispute is the actual value of the sum owed to the plaintiff. As I have already established that the interest rate of 2% as a term of payment has not been established, the next issue in determining the arrears is establishing what is owed for the goods supplied.
25. I have perused the documentary evidence and the periodic customer statement with a print date of 21<sup>st</sup> June 2019 indicates the balance owed by the defendant as Kshs. 20,485,968.00/-. However, the plaintiff pleaded a sum of Kshs. 22,806,508/- as the monies due. Upon considering the invoices that were issued from the date of 1<sup>st</sup> December 2018 to 17<sup>th</sup> January 2019, it is evident that the same were for the latter amount and not the former. The stamps on the invoices confirm that the defendant received the goods on the various dates thus it cannot claim not to have received the same. The defendant also conceded that there were goods delivered but the payment was to be made upon selling the goods



rather than on demand. It follows that the plaintiff owes the defendant KShs. 22,806,508/- in the circumstances.

**Whether the orders sought should be granted**

26. In the premises I am obliged to find that the prayer for the defendant to pay the respondent KShs. 22,806,508/- is merited. The defendant contended that it had made some payments but it is trite law that he who alleges must prove. As there was no evidence tabled to substantiate this defence, it is dead on arrival. I however decline to grant the order for the interest rate sought to be charged as it is trite law that a court of law cannot rewrite a contract between parties. further, as it was not established whether payment was to be on demand or upon the selling of the goods supplied, the court cannot determine if the bank charges incurred for the dishonoured cheques are as a result of the defendants' failure to honour said alleged term of the contract. As the parties failed to produce the agreement that is the sub stratum of the dispute on terms of payment, the courts' hands are tied in that regard. On the whole one must agree that the contract in question is brought out strikingly in the quotations and instruments of payments. The court therefore acts with certainty on the balance of probabilities to arrive at a general conclusion in the terms used in the Sale Goods Act to enforce on the contract, for those reasons, I grant substantially the Plaintiff's claim to the extent that the sum of KShs Twenty Two Million Eight Hundred and Six Thousand Five Hundred and Eight (22,806,508) is due and owing from the defendant. Similarly, the plaintiff shall be entitled to interest from the date of default until payment in full together with costs of this suit. It is so declared.

It is so ordered.

**DATED, DELIVERED AND SIGNED AT ELDORET ON THIS 10<sup>TH</sup> DAY OF FEBRUARY 2023**

.....

**R. NYAKUNDI**

**JUDGE**

