



**Azalea Holdings Limited v Essential Brands Limited (Civil Case E078 of 2020)  
[2024] KEHC 13786 (KLR) (Commercial and Tax) (5 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13786 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E078 OF 2020  
JWW MONG'ARE, J  
NOVEMBER 5, 2024**

**BETWEEN**

**AZALEA HOLDINGS LIMITED ..... PLAINTIFF**

**AND**

**ESSENTIAL BRANDS LIMITED ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff filed this suit by way of a plaint dated 16<sup>th</sup> March 2020 claiming that on or about 6<sup>th</sup> August 2015, the parties entered into a Heads of Terms Agreement relating to the lease of retail premises known as unit shop No.C2.01,02,04,05A,05B,06 and a mezzanine at The Hub Karen (“the Heads of Terms”).
2. The Plaintiff averred that the Heads of Terms was crystallized by conduct of the parties and the implied terms that formed the basis of the Heads of Terms and that some of its terms were that the lease was to be for a period of 6 years and that the Plaintiff would construct the mezzanine of approximately 530 square metres for the Defendant.
3. The Plaintiff claimed that the Defendant was to pay the total financial cost of the mezzanine over the lease period but that the Defendant has neglected to pay the same. It now seeks a total sum of Kshs. 50,786,960.80/= from the Defendant together with interest and costs of the suit.
4. The Defendant responded to the suit through its defence dated 13<sup>th</sup> August 2020 generally denying the Petitioner’s claim. The Defendant contended that neither the Heads of Terms nor the lease agreement was executed as the Defendant could not meet the initial conditions set down by the Plaintiff thus there was no contract to be breached. The Defendant further contended that parties were at the negotiation stage with the intention to enter into a contract but the Defendant failed to meet the initial conditions to executing the contract. That if any amount was payable, it was subject to signing of the



lease agreement and as such the Defendant insisted that it was not in any manner whatsoever indebted to the Plaintiff.

5. The Defendant stated that the parties had only a common intention to enter into a contract which was not, in its view, binding upon any parties, that no contract was ever entered between the parties, that the Defendant was not indebted to the Plaintiff of any amount totalling to Kshs. 50,786,960.80/ = or any other amount whatsoever and that the Plaintiff has no cause of action against the Defendant enforceable by law. As such, the Defendant urged the court to dismiss the Plaintiff's suit.
6. At the hearing, the Plaintiff called one witness, Mr. Philippe Cauviere, who is its director and who adopted his witness statement dated 16<sup>th</sup> March 2020 and further witness statement dated 12<sup>th</sup> September 2023 (PW 1). He further produced the Plaintiff's List and Bundle of Documents dated 16<sup>th</sup> March 2020 (PExhibit 1-3) and Further List and Bundle of Documents dated 11<sup>th</sup> September 2023 (PExhibit 4-24) as the Plaintiff's evidence. The bundles consisted of the signed Heads of Terms dated 17<sup>th</sup> August 2016, various demand letters, a debt admission letter dated 21<sup>st</sup> June 2017, various letters from the Defendant's advocates, various email correspondences, an Excel sheet showing a breakdown of the construction costs and supporting documents and; an extract of the lease agreement with Carrefour
7. On its part, the Defendant called its director, Mr. Dilpun Govindji Shah as it witnesses who equally adopted his witness statement dated 23<sup>rd</sup> May 2023 (DW 1). He also produced the Defendant's list and bundle of documents dated 23<sup>rd</sup> May 2023 which included a copy of the Agreement as the Defendant's evidence (DExhibit 1). After the conclusion of the hearing, the court directed the parties to file written submissions which are on record and which together with the evidence, I shall make relevant references to in my analysis and determination below.

### **Analysis and Determination**

8. From the parties' submissions, the following are the abridged issues that arise for the court's determination:
  1. Whether there was a binding and enforceable contract between the parties.
  2. If issue 1) is answered in the affirmative, whether the Defendant was in breach of contract.
  3. Whether the Plaintiff has a cause of action against the Defendant.
4. Whether the Plaintiff is entitled to the special damages prayed for in the Plaint.  
Whether there was a valid and enforceable contract between the parties
9. The parties agree that they both executed the Heads of Terms which proposed the lease of the subject premises and provided in part at Clause 4 that "...a mezzanine of approximately 530sqm will be constructed by the Lessor to the specifications of the Lessor's Structural Engineers and construction team on the request of the Lessee...." Clause 14 thereof went on to provide in part that "The total financial cost of the mezzanine.....will be paid back by the Lessee over the initial six (6) years lease term....."
10. However, the Defendant contended that the Heads of Terms and its terms were only negotiations as it was "subject to lease" with the intention of the parties being to enter into a Lease Agreement and thus, the Defendant argued that the Heads of Terms was not legally binding or enforceable against any party. The Defendant maintained that the parties failed to finalize negotiations and they did not execute any formal lease.



11. It is indeed correct that ordinarily, the phrase “subject to lease” or “subject to contract” is not binding upon the parties until the same is concretized by a subsequent formal contract and that where a person accepts an offer subject to contract, it means that the matter remains in negotiation until a formal contract is settled and the formal contracts are exchanged (see the dicta of Gicheru JA., and Kwach JA., in *East African Fine Spinners Limited (in receivership) & 3 others v Bedi Investments Limited* [1994] KECA 96 (KLR)).
12. However, as per the Law of Contract (Chapter 23 of the Laws of Kenya), a contract is formed and is enforceable if a party is able to demonstrate that there has been an offer, an acceptance, consideration and an intention to create legal relations. To this respect I am in agreement and find myself persuaded by the holding of Mabeya J., in the matter of *Eldo City Limited v Corn Products Kenya Limited & Equip Agencies Limited* [2013] KEHC 5916 (KLR), relied upon by the Plaintiff, that it is the Court’s duty to give effect to the intention of the parties and that this intention is discernible from the documents and conduct of the parties. I am in further persuaded by the holding of Tuiyott J., (as he was then) in the case of *Park Plaza Limited v Afro Asian Bank Limited* [2016] KEHC 2632 (KLR), a case that was also relied upon again by the Plaintiff, that, “The need to discern the intention of the parties is not diminished merely because the phrase ‘subject to contract’ is used during contract negotiations.”
13. DW 1 admitted in his testimony that even though the parties never executed the lease agreement, he acquiesced to and was aware of the construction of the mezzanine as evidenced by the email correspondences of 17<sup>th</sup> March 2016 (pg. 83 of PExhibit 4-24) and 29<sup>th</sup> November 2016 (pg. 92 of PExhibit 4-24). He further agreed that the Defendant was ready and willing to defray the mezzanine construction costs by paying Kshs. 10,000,000.00/= and on a “gentlemen’s agreement” but that this was not done due to the Defendant’s dire financial straits. From the aforementioned evidence, it is my finding that the parties entered into an agreement by conduct for the construction of the mezzanine and that the Defendant agreed to pay for the construction of the same. I therefore hold that there was a valid and enforceable contract by conduct between the parties for the construction of the mezzanine and that the Defendant agreed to pay for the same.

#### **Whether the Defendant breached the contract**

14. Having found that there was a valid contract between the parties, the next issue for determination is whether the Defendant was in breach of the same. I have already found that DW 1 admitted that the Defendant admitted to the construction costs and was ready to pay for the same but argued that the Defendant was not doing well financially to be able to fulfil its repayment obligations. Since the Defendant has still not paid for the constructed mezzanine as agreed, it remains that the Defendant is in breach of contract.

#### **Whether the Plaintiff has a cause of action against the Defendant**

15. A cause of action is an act on the part of the defendant, which gives the plaintiff his cause of complaint (see Waki JA., in *Attorney General & Ministry of State for Immigration & Registrar of Persons v Andrew Maina Githinji & Zachary Mugo Kamunjiga* [2016] KECA 817 (KLR)). As the Defendant is yet to settle the amount owed to the Plaintiff for the construction of the mezzanine, this is reason enough for the Plaintiff to complain and seek an appropriate remedy from the court. It is therefore my finding that the Plaintiff has a cause of action against the Defendant.

Whether the Plaintiff is entitled to the special damages prayed for in the Plaintiff



16. Both parties agree that the outstanding sum sought by the Plaintiff are in the nature of special damages and that special damages must be both specifically pleaded and strictly proved, before they can be awarded by the Court. A party claiming special damages must demonstrate that they actually made the payments or suffered the specific injury before compensation is permitted.
17. A natural corollary of this has been that the courts have insisted that a party must present actual receipts of payments made to substantiate loss or economic injury. In this regard, our courts have held that only a receipt or invoices endorsed with the word "Paid" meets the test (See *Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited v Janevams Limited* [2015] KECA 822 (KLR))
18. The Plaintiff produced a payment certificate dated 26<sup>th</sup> June 2015 (pg. 102 of PExhibit 4-24). Whereas the Defendant submits that it produced a bank transfer for the payment indicated in the said certificate, there is no such bank transfer on record as the "pages 136-137" are non-existent. In any event, the Defendant in its letter dated 21<sup>st</sup> August 2017 (pg 63 of PExhibit 4-24) admitted to the Kshs. 47,561,065.84/= along with the accrued interest sought by the Plaintiff in its letter of 15<sup>th</sup> August 2017 (pg 64 of Exhibit 4-24). In the letter, the Defendant seeks the indulgence of the Plaintiff to pay the said amount and proposes a payment plan for the same. I therefore find that the claimed Kshs. 50,786,960.80/= is admitted and the same is payable by the Defendant to the Plaintiff. The Plaintiff has thus proved the special damages claimed.

### **Conclusion and Disposition**

19. In the upshot, it is my finding that the Plaintiff's suit as set out in the Plaint dated 16<sup>th</sup> March 2020 has been proved to the required legal standard on a balance of probabilities. The court makes the following dispositive orders:
  - a. Judgment be and is hereby entered for the Plaintiff against the Defendant for the sum of Kshs. 50,786,960.80/=
  - b. The Plaintiff is awarded costs of the suit together with interest at court rates from the date of judgment herein until payment in full.

**DATED, SIGNED AND DELIVERED VIRTUALLY at NAIROBI this 5<sup>TH</sup> DAY OF NOVEMBER 2024**

.....  
**J.W.W. MONG'ARE**

**JUDGE**

In the Presence of:-

Ms. Gakure holding brief for Mr. Wairoto for the Plaintiff.

Mrs. Njagi for the Defendant.

Amos - Court Assistant

