



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

COMM. CASE NO. 126 OF 2019

BETWEEN

TOYOTA KENYA LIMITED.....PLAINTIFF

AND

VEHICLE & EQUIPMENT LEASING LIMITED.....DEFENDANT

JUDGMENT

Introduction and Background

1. The parties entered into an agreement where the Plaintiff sold to the Defendant about 1200 vehicles which were then leased to the Government of Kenya under the National Police Service Lease Scheme. The transaction was in several phases. This case concerns *Phase I* and *Phase III*.
2. The Plaintiff's case against the Defendant set out in the Plaint dated 23rd March 2019 is for KES. 438,694,856.88 on account of interest on delayed payment on respective invoices calculated at 3% per month arising from the sale of vehicles under the Scheme on diverse dates between February 2014 to January 2017 together with interest thereon and costs of the suit.
3. The Defendant filed a Statement of Defence dated 21st June 2019 denying the claim while the Plaintiff filed a Reply to the Defence dated 12th July 2019. The suit was disposed by oral testimony supported by documentary evidence. The Plaintiff called Alice Munene (PW 1), a retired employee, and its General Manager Corporate, Peter Wanjala (PW 2). The Defendant called Wang'ombe Gathundu (DW 1). At the close of the hearing, the advocates filed written submissions.

The Plaintiff's Case

4. PW 1 explained to the court that the sale arrangement in *Phase I* was made of the Local Purchase Order ("LPO") issued by the Defendant to the Plaintiff for the number of vehicles it required and their specifications and the invoices issued by the Plaintiff to the Defendant for payment of the purchase price upon delivery. She explained that upon delivery of the vehicles, a delivery note was signed by the Defendant acknowledging receipt of the vehicles and it is at the same time that the invoices for payment were issued to the Defendant. PW 1 stated that each vehicle had its individual invoice which was a full double sided documents with terms and conditions of sale, delivery and payment of the purchase side on the reverse side of each invoice. According to PW 1, Condition No. 1 of the invoice provided that the amounts due was payable within 30 days from invoice date while Condition No. 3 thereof provided for 3% interest per month on overdue payment.
5. PW 1 recalled that the Quotations issued by the Plaintiff did not constitute part of the sale agreement as they expressly stated as such that they did not constitute a contract. She confirmed that despite the Defendant's denial that the LPO and invoice constituted the contracting documents in *Phase I*, the Defendant acknowledged that the contracting documents of the transaction were the LPO and invoice as per its letter dated 12th September 2018 to the General Manager of the Plaintiff. PW1 further testified that the Master Sale Agreement dated 29th August 2016 ("Master Agreement") formalized the sale transaction for *Phase III*. Clause 1.6 of the Master Agreement provided that late payments shall attract interest at the rate of 3% per month and interest would be recovered as a debt from the Defendant.
6. PW2 reiterated the testimony of PW 1. He confirmed that the amount of KES. 383,193,356.90 claimed from the Defendant arises out of the supply of vehicles under *Phase I* and *Phase III*. He also confirmed that the Master Agreement related to 20 vehicles under *Phase III*. He

explained that the Plaintiff is claiming the amount in relation to two contracts for the 480 vehicles and 20 vehicles in accordance with the invoices. He maintained that payments were due 30 days from the invoice date and failure to do that attracted interest.

7. The Plaintiff submits that it is not in dispute that there was a contract for sale of vehicles between the parties. It relies on the case of **Stancom Sacco Society Limited v Alliance One Tobacco Limited MGR Civil Case No. 10 of 2015 [2018] eKLR** to guide the court in interpreting the terms of the agreement. In that case, the court reiterated the essential elements of a valid contract, that is, an offer, acceptance of the offer, consideration and intention to create legal relations.

8. The Plaintiff submits that the elements of offer, acceptance and consideration could be found in the Defendant's LPO which contained terms and conditions that the Plaintiff fulfilled and the Plaintiff's invoice which contained terms, some of which were fulfilled and others unfulfilled by the Defendant. It submits that since the Defendant failed to fulfil the terms of the invoice which contained terms of the contract, the Plaintiff was entitled to bring the claim for breach of contract.

9. Counsel for the Plaintiff reiterated that in as much as the quotation might, in general terms and application, constitute a contract as far as the principle of offer, the express terms of the quotation that stated that the quotation does not constitute a contract disqualify the quotation from forming part of the documents to be relied on in making the agreement for sale between the parties thus leaving the LPO and invoice as the contracting documents.

10. The Plaintiff submits that the sustainability of the arrangement between the parties solely relied on performance of each party's obligations. The Defendant had to issue an LPO to confirm its order for the vehicles and upon delivery, the Plaintiff had to give the Defendant an invoice to claim for the purchase price of the vehicles. The Plaintiff submits that in interpreting a contract, courts ought to be guided by the intention of the parties and the freedom of contract. It cites **John Njoroge Michuki v Shell Limited Civil Appeal No. 227 of 1999 (UR)** where the Court of Appeal held that a court should not frustrate the clearly expressed intention of the parties to a contract and should instead enforce the contract to give effect to that intention. The Plaintiff thus contends that it cannot be denied that the terms and conditions in the Master Sale Agreement are majorly a reflection of the terms and conditions in the invoice issued by the Plaintiff and which are applicable in *Phase I* as well.

11. On the issue of compensation for breach of contract, the Plaintiff called in aid **Clause 74** of the **Indian Contract Act of 1872** which provides that, "*When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.*"

12. The Plaintiff urged the court to allow the claim. Counsel for the Plaintiff cited **Bid Insurance Brokers Limited v British United Provident Fund NRB HCCC No. 4 of 2015 [2016] eKLR** to support the position that the implied terms are necessary to give effect to the parties' intention and that in this case the arrangement between the parties in both *Phase I* and *III* confirm that it was the parties intention that interest should be paid on late payment. In conclusion, the Plaintiff submits that this court should consider the facts and evidence which will show that the Plaintiff is entitled to the claim.

The Defendant's Response

13. The Defendant's defence is based on the fact that the contract between the parties was concluded and evidenced by the Plaintiff's Quotations and the Defendant's LPOs and that no other terms were agreed upon or implied in the contract. The Defendant attacks the Plaintiff's claim by stating that the claim for interest calculated at 3% per month was not an agreed term of the contract between the parties and has not been proved.

14. DW 1 testified that under the agreements the Plaintiff would supply vehicles as per the Quotations and the LPOs issue to its and in that regard the Plaintiff supplied 480 vehicles under *Phase I* and 20 vehicles under *Phase III*. He denied that there was any agreement to pay interest to the Plaintiff and asserted that the claim for interest arose in 2019. DW 1 stated agreement between the parties was sealed by delivery of the vehicles.

15. DW 1 also testified that payment was done by the financiers after the delivery of the vehicles and after the invoices were issued by the Plaintiff and that the amounts paid were based on the invoiced amounts and quotation. DW 1 stated that although it was possible for payments to be done without invoices, this never happened. DW 1 maintained that the invoice was not a document agreed upon between the parties.

16. The Defendant submits that there was no agreement between the parties that the invoiced amounts would be paid within 30 days from the invoice date. It points out that PW 1 and PW 2 confirmed that there was no written contract for the sale of the 480 vehicles. The Defendant further submits that the Master Agreement is a different agreement representing a different transaction, is irrelevant to the proceedings and should be disregarded by the court.

17. The Defendant states that given that it is an undisputed fact that there was no written agreement between the parties, the legal and binding agreement for the sale of the vehicles arose out of the Plaintiff's Quotation and the Defendant's LPO, which constituted the offer and acceptance respectively while consideration for the same was in the form payment of the purchase price once the vehicles were delivered. The Defendant submits that the transaction between the parties satisfied all essential elements of a valid contract being offer, acceptance and consideration and as was held in **Charles Mwirigi Miriti v Thananga Tea Growers Sacco Ltd & Another NYR CA Civil Appeal No. 158 of 2001 [2014] eKLR** and in accordance with **section 3(1)** of the **Sale of Good Act** ("the SGA") which 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.*"

18. The Defendant submits the Plaintiff's Quotation, which sets out the terms of the sales and in particular the validity of the offer, mode of

payment and terms of the warranty, constitutes a valid offer to the Defendant which according to **Black's Law Dictionary (9th Ed.)** means a, "display of willingness to enter into a contract on specified terms, made in a way that would lead a reasonable person to understand that an acceptance, having been sought, will result in a binding contract." While the LPO's issued by the Defendant constitute a valid acceptance as they demonstrated the Defendant's express assent to the terms of the Plaintiff's offer through the quotations so that a binding contract is formed in accordance with **section 36** of the **SGA** which states that, "a buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them...". Finally, the consideration was paid to the Plaintiff for the sale of the motor vehicles.

19. Considering the aforesaid, the Defendant submits that the Plaintiff's contention that payment was to be made within 30 days from the date of the invoice was not agreed upon by the parties as it was not included as part of the Quotations and the LPOs which constitute the contract for the sale of the vehicles. It maintains that both terms fall outside the contract between the parties and are not binding upon the Defendant.

20. The Defendant rejects the Plaintiff's submission that the invoices raised constitute part of the contract for sale of the vehicles. It submits that an invoice is merely an instrument to demand payment and does not form part of a contract nor can it vary, amend or introduce contractual terms unless the variation is made in compliance with the same formal requirements as the original contract as was held by the court in **Kenya Breweries Limited v Kiambu General Transport Agency Limited NRB CA Civil Appeal No. 9 of 2000 [2000] eKLR**. The Defendant submits that the invoices do not have any contractual force as it consistently rejected the terms therein and are unenforceable as they are not supported by fresh consideration.

21. The Defendant submits that the Plaintiff is not entitled to KES 383,193,356.90 on the basis that it has not established that there was an agreement for interest at 3% on delayed payments. It adds that the Plaintiff has failed to adduce any documentary proof of actual delivery dates and/or the actual invoices issued to the Plaintiff hence the suit should be dismissed for lack of proof.

Analysis and Determination

22. The parties agreed on the following issues for determination:

1. Whether it was agreed between the parties that invoiced amount would be payable within 30 days from the date of the invoice.
2. Whether the interest claimed by the Plaintiff and calculated at the rate of 3% per month is founded on an agreed term of the contract between the Plaintiff and the Defendant.
3. Whether the Plaintiff is entitled to the sum of KES. 438,694,856.88 (amended to KES. 383,193,356.90) as claimed or any other sum at all.
4. Who shall bear the costs of this suit.

23. The resolution of these issues turns on the nature of the agreement between the parties. It is common ground that the parties entered into an agreement for the sale and purchase of vehicles in two phases; *Phase I* for 480 vehicles and *Phase III* for 20 vehicles. In their respective submissions, the parties concur that the agreement must meet the essential requirements of a contract that is an offer, acceptance and consideration coupled with an intention to create legal relations (see **Charles Mwirigi Miriti v Thananga Tea Growers Sacco Ltd & Another (Supra)** and **Stancam Sacco Society Limited v Alliance One Tobacco Limited (Supra)**).

24. The parties agree that under *Phase I*, they did not enter into a single agreement rather their relationship was evidenced by the following documents; the Quotation, LPO, Delivery Notes and Invoices. The Plaintiff contends that the Quotation, LPO, Delivery Notes and Invoices constituted the agreement while the Defendant's case it that only the Quotation and the LPO constitute the agreement. It is to resolving this question that I now turn.

25. As the agreement between the parties is one for sale of goods, the Plaintiff is the seller in possession of the vehicles it wishes to sell. It proposed the terms of sale in the Quotation. The Quotation gives a description and specification, quantity and price of the vehicles, terms of payment and warranty. I therefore hold that the Quotation by the Plaintiff as seller constitutes the offer to the Defendant, as buyer, to accept the vehicles on the terms contained in the Quotation. This is consistent with the definition of the term offer in **Black's Law Dictionary (9th Ed.)**, meaning a, "display of willingness to enter into a contract on specified terms, made in a way that would lead a reasonable person to understand that an acceptance, having been sought, will result in a binding contract."

26. It follows therefore that the LPO, which accepted the terms set out in the Quotation, constituted the acceptance. **Black's Law Dictionary (9th Ed.)** defines a, "Local Purchase Order" as, "A document that has been generated by the buyer in order to purchase products or property. This document allows a transaction to occur and when accepted by the seller becomes a legal binding contract of sale." That the LPO constitutes the acceptance by the buyer is buttressed by the fact that it is upon the issuance of the LPO that the seller delivers the vehicle irrespective of the time of payment. Further, on its face, the Quotation states, "This quotation validity is to be confirmed at the time of placing order." I therefore find and hold that once the Defendant issued the LPO, the agreement for sale of the vehicles was consummated on the terms set out in the Quotation.

27. While the Quotation specifies the price of the vehicles and provides the terms of payment, it does not provide that late payment would attract a 3% interest. The Plaintiff introduced the issue of interest when it presented invoices to the Defendant for payment. In order for the interest clause in the invoice to be effective, both parties had to concur to it as it constituted a variation of the original contract.

28. At this juncture I would point out that an invoice is simply a demand for payment on terms agreed (see **Great Lakes Transport Co. (U) Ltd V Kenya Revenue Authority MSA CA Civil Appeal No. 106 of 2006 [2009] eKLR**). This is so in this case where the agreement had been consummated by the offer and acceptance and what remained was payment of the price agreed as consideration. The Plaintiff's

argument that the invoice constitutes part of the contract is discounted by the fact that it was issued and presentation on or after delivery of the vehicles implying that terms of the agreement had already been agreed in the previous documents, that is the Quotation and LPO. It is these documents, taken together, and the delivery of the vehicles that constitute the contract. The fact that either the Quotation or the LPO state that each document individually does not constitute a contract on its own does not change the nature of the relationship between the parties.

29. In other cases, the invoice or the LPO may itself constitute the agreement for sale and may contain all the terms of the agreement. For example, in ***Fuelex Kenya Limited v Seed Group Limited* ML HCCC No. 713 of 1999 [2000] eKLR** the Court observed that, “*In the end, I find that the transaction commenced by the issuance of the proforma invoice No... and supported by subsequent loading instructions and the relevant ex-warehouse export forms clearly establishes a valid contract for the supply of petroleum product at an agreed price of U.S. Dollar.*” As the end of the day, whether there is a contract and the terms thereof depends of the facts of each case.

30. In this case, I find that the Plaintiff, by issuing an invoice containing different and additional terms as to interest, unilaterally introduced terms which constituted a variation on the terms of the agreement. The position regarding variation of an agreement was explained succinctly by Gicheru JA., in ***Kenya Breweries v Kiambu General Transport Agency Limited (Supra)*** as follows:

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...”

31. 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 (see ***Gimalu Estates Ltd & 4 Others v International Finance Corporation & Another Civil Suit 606 of 2003, [2006] eKLR, Housing Finance Co. of Kenya Limited v Gilbert Kibe Njuguna NRB HCCC No. 1601 of 1999 (UR)*** and ***County Government of Migori v Hope Self Help Group MIGORI HCCA No. 141 of 2019 [2020] eKLR***).

32. Going back to the evidence, DW 1 admitted that the Defendant paid the price for the vehicles upon delivery and presentation of the invoices. Both PW 1 and PW 2 accepted that the Defendant paid the agreed price under the agreement but did not pay the interest for late payment hence this claim. The Defendant paid the price in accordance with the agreement and at no point did it make any payment for interest on late payment demanded by the Plaintiff.

33. In light of the foregoing, I find and hold that the upon payment for the vehicles, the agreement between the Plaintiff and the Defendant contained in the Quotation and the LPO, was duly performed. The terms regarding time of payment and interest on late payment constituted an offer of fresh terms hence a variation of the contract. There is no evidence that the Defendant accepted those terms or committed to making payment when the Plaintiff issued demand letters to it. In the circumstances, I hold that the Plaintiff is not entitled to claim nor has it established the claim for interest on late payments from the Defendant.

34. I now turn to consider the Master Agreement between the parties. The Master Agreement is dated 29th August 2016 and according to its terms it is for the sale of 20 HINO trucks on terms agreed thereunder. Clause 1.6 thereof provided that, “*Payment of the Purchase Price shall be made by the Purchaser to the Supplier within fourteen (14) days of delivery..... Late payments shall attract interest at 3% pm and such interest shall be recoverable as a debt from the purchaser.*”

35. In so far as the Master Agreement does not refer to 480 vehicles, it does not relate to *Phase I* hence the clause on interest is not applicable and its terms cannot be implied to previous or subsequent agreements or dealings between the parties contrary to the Plaintiff’s submissions. If anything, the Master Agreement discounts the assertion that the earlier dealings contemplated interest on late payments.

36. The Plaintiff introduced the Master Agreement as part of its Plaintiff’s Further Supplementary List of Documents dated 13th March 2020. PW 1 testified that the Master Agreement formalizes the sale transaction for *Phase III*. The Defendant’s position is that the Master Agreement does not relate to the transaction subject of the suit and should be disregarded.

37. The first port of call in resolving whether or not the Master Agreement applied to *Phase III* must be the pleadings. It is settled law that parties are bound by their pleadings and issues in controversy must arise from the parties’ pleadings (see ***Independent Electoral and Boundaries Commission and Another v Stephen Mutinda Mule and 3 Others NRB CA Civil Appeal No. 219 of 2013 [2014] eKLR***). Equally, pleadings give the parties fair notice of the case to be met by either side so that parties direct their respective evidence to the issues that are disclosed (see ***Kenya Meat Commission v Richard Ambogo Raden MSA CA Civil Appeal No. 40 of 1989 [1990] eKLR***).

38. The Plaintiff did not plead the Master Agreement as a basis for its claim for interest for late payment under *Phase III*. The Plaintiff’s case, as pleaded in the plaint, is based on the fact that invoices, containing the terms of the payment and interest for late payment, was part of the contract. In response to the Defendant’s defence denying the claim, the Plaintiff filed the Reply to Defence dated 12th July 2019. It did not refer to the Master Agreement or the terms thereof as a basis for its claim for interest for late payments. On the contrary, the Plaintiff reiterated that, “[3] *The Plaintiff has annexed copies of the Local Purchase Orders and Invoices which contain the terms and conditions of sale of the Vehicles.....*”

39. Based on the pleadings, I find and hold that the Master Agreement is not applicable to the transaction between the parties nor the subject of the claim by the Plaintiff. If the Master Agreement was the basis of its case, nothing would have been easier than for the Plaintiff to so plead.

Conclusion and Disposition

40. From the foregoing, I answer all the issues framed for determination in the negative. The parties concluded the agreement when the Defendant issued the LPO in response to the Quotation and the Plaintiff delivered the vehicles which the Defendant paid for. The invoice was a demand for payment in accordance with the agreed terms in the Quotation and LPO. The conditions contained in the invoices including those on interest for late payment were not part of the agreement. The Plaintiff cannot therefore claim interest on that basis of the invoices.

41. Since the Plaintiff has failed to prove its case, it is now dismissed. The Plaintiff shall also bear the costs of the suit.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF MAY 2021.

JOHN M. MATIVO

JUDGE

Court Assistant: Mr M. Onyango

Ms Nawigaba with Ms Akello instructed by A. Muia and Company Advocates for the Plaintiff.

Mr Nyaanga instructed by Nyaanga and Mugisha Advocates for the Defendant.