



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

CASE NO. E348 OF 2020

KENAFRIC DIARIES MANUFACTURERS LTD.....PLAINTIFF

VERSUS

CHRISTIAN PARTNERS DEVELOPMENT AGENCY (CPDA).....DEFENDANT

JUDGMENT

BACKGROUND

The Plaintiff filed a Plaint dated **8th September 2020** seeking judgment against the Defendant for a sum of **Kshs.42, 510,000.01** plus interest until payment in full and General damages for breach of contract.

The Plaintiff in its Plaint averred that on or about **June 2015**, it was prequalified to be one of the Defendant's Suppliers by Maweni Holdings International Ltd acting on the Defendant's instructions. Having been prequalified by Maweni Holdings International Ltd acting as the Defendant's agent, the Plaintiff was asked to present its quotation on various products to wit; Pakistani Rice, Salit Cooking Oil, Bahari Cooking Oil and Jamaa Bar Soap. The Plaintiff presented its quotation which was found to be reasonable.

It was pleaded that on **31st July 2015**, the Plaintiff and the Defendant entered into a legally binding contract for procurement of supplies of food stuffs. It was a term of the said Contract that the Defendant should pay the Plaintiff in consideration of the provisions of the supplies and related services and remedying of the Contract at the times and in the manner by the Contract.

That between **12th August 2015** and **18th August 2015** the Plaintiff had supplied the Defendant products worth **Kshs.63, 210, 000.01**. and the Defendant only paid a total sum of **Kshs.20, 700, 000** and stopped making payments. The Defendant adamantly refused, neglected and/or ignored paying the balance of **Kshs.42, 510,000.01**.

The Plaintiff contended that the Defendant's actions were tantamount to breach of contract, unjust enrichment and fraud for: failing to honor and violating the terms of the Contract; refusing to pay for the goods delivered; issuing cheques knowing that their account had insufficient funds; issuing cheques that required the Defendant's express authorization and failing to give the said authorization; and exposing the Plaintiff to risk of losing profits and business.

The Defendant was served with the Plaint and Summons through Plaintiff's Advocate and filed Affidavit of Service of **23rd October 2020**. On the same date, the Plaintiff's Advocate filed in Court request for Judgment. Interlocutory judgment was entered on **30th November 2020**. Formal Proof proceedings were conducted in this Court on **24th February 2021** and **PW1** Amit Subash Patel testified. The Plaintiff filed written Submissions on **8th March 2021**.

PLAINTIFF'S SUBMISSIONS

The Plaintiff submitted that it was a term of the contract that the Defendant would pay the Plaintiff in consideration of the provisions of the supplies and related services of the Contract at the times and in the manner of the Contract. **Clause 3 (iv)** of the Contract provides as follows;

“Payment shall be made within 30 days of delivery/submission of invoice or claim by the provider.”

As evidenced by the delivery notes and invoices produced as evidence, the Defendant acknowledged receipt of the goods through Geoffrey Robert Mule who signed all the delivery notes while all the invoices bore the Defendant's official stamp acknowledging receipt.

It was the Plaintiff's submission that the Defendant's refusal to clear the Plaintiff's balance within the contractual timelines was in breach of the Contract since the Plaintiff already performed its obligation under the said Contract. The law on Sale of Goods was aptly captured by Onguto J. in the case of Isaac Mugweru Kiraba T/A Isamu Refri-electricals –versus- Net Plan East Africa Limited [2018] eKLR as follows; -

“It must be common ground that the burden of proof lies on the Plaintiff to establish on a balance of probabilities that he supplied goods to the Defendant and transferred the property in the supplied goods to the Defendant for an agreed money consideration. This is the essence of a contract for sale of goods as defined by s.3(1) of the Sale of Goods Act (Cap 31) Laws of Kenya.

The Plaintiff's obligation, once a contract is proven, was to deliver the goods and transfer the property in them. The Defendant on the other hand had the obligation to accept the goods and pay the price in exchange of the property granted.

In my judgment an action for the price of goods sold and delivered is what is left for any seller of goods once the property in the goods has been transferred to a buyer. Consequently, such an action, as in the instant case, implies that property has already passed and the seller who claims ought to succeed if he proves delivery at an agreed or reasonable price and no known defence is set up by the buyer. As was stated in the case of Ex part Gordon [1808] 15 Vs 286, the price is to be claimed after the period due for payment has lapsed and not earlier. Then, the buyer is specifically bound to perform his part of the bargain by paying for the goods.”

The Plaintiff further submitted that the Defendant never disputed the deliveries or the invoices but simply refused to pay for the goods it received from the Plaintiff. The Plaintiff is therefore entitled to the balance of **Kshs.42, 510, 000.01**. The Defendant's breach of contract has occasioned great financial loss to the Plaintiff as well as loss of profits and considerable damages should be awarded for loss of profits.

It was submitted that the Defendant had a mandatory obligation to pay the Plaintiff for goods delivered within 30 days from the date of receipt of the invoice. Therefore, the 3% interest that appears at the bottom of the invoices is part of the Contract that binds the Defendant and to which there was no objection. The Defendant was at all times aware of the 3% monthly interest of the overdue accounts and as such should pay interests.

In Savichem Africa Limited –versus- General Printers Limited [2019] eKLR Kasango J. relied on the case of Bawazir Glassworks Limited & Another –versus- Asea Brown Boveri Limited [2015] eKLR where the Court of Appeal expressed itself; -

“In our view, in the circumstances as explained above, the interest rate of 3% per month, which works out to 36% per annum cannot be said to be unconscionable. The rate had been agreed upon. The preform invoice clearly stipulated interest rate of 3% per month on any overdue account and the first appellant endorsed that rate by a letter dated 5th June 1999. In any event, the appellants did not settle even the principal sum several years after supply and installation of the equipment...”

It follows therefore that interest at the rate of 3% per month was rightly payable because the appellants' delay in settling the installation charge.”

In the absence of any appearance by the Defendant or representation despite proper service under **Order 5 CPR 2010**, a regular judgment was entered. During Formal Proof proceedings, Mr. Amith Subash Patel testified and relied on his Witness Statement and documents annexed and filed online and produced as **Exhibit 1-36**. The Plaintiff established his claim on a balance of probabilities that he delivered the food stuffs and the evidence was not controverted. In the absence of any defense and the totality of evidence on record, the Plaintiff's claim is granted as per the prayers in the Plaintiff.

DISPOSITION

- Judgment is entered for the Plaintiff against the Defendant for Kshs 42,510,000.01/- with interest at 3% & Costs.**

DELIVERED SIGNED & DATED IN OPEN COURT ON 19TH JULY 2021. (VIRTUAL CONFERENCE DUE TO COVID-19 PANDEMIC MEASURES RESTRICTING OPEN COURT OPERATIONS AS PER CHIEF JUSTICE DIRECTIONS OF 17TH APRIL 2020)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

MR. ADOLI FOR THE PLAINTIFF

COURT ASSISTANT: TUPET