



OPKA Limited v Kenyatta Hospital Association (KHA) t/a Nairobi Hospital (Civil Case E648 of 2021) [2021] KEHC 282 (KLR) (Commercial and Tax) (18 November 2021) (Judgment)

Neutral citation: [2021] KEHC 282 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E648 OF 2021
WA OKWANY, J
NOVEMBER 18, 2021**

BETWEEN

OPKA LIMITED PLAINTIFF

AND

**KENYATTA HOSPITAL ASSOCIATION (KHA) T/A NAIROBI
HOSPITAL DEFENDANT**

JUDGMENT

1. The plaintiff herein, OPKA LIMITED, instituted this suit against the defendant through the plaint dated 17th June 2021 seeking the following orders; -
 - a. Payment of the outstanding balance of purchase price in the sum of Kshs 1,180,800
 - b. An order of specific performance do issue during the subsistence of the contract herein requiring the defendant to requisition for the balance of the 4000 PPE kits from the plaintiff and pay for the same upon delivery as per the contract terms.
 - c. In the alternative to prayer (b) above, an order do issue for the compensation of the plaintiff in the sum of Kenya Shillings Thirty-Two Million Eight Hundred Thousand (Kshs. 32,800,000) being interest on the loss suffered by it in consequence of the defendant's breach of contract.
 - d. Interest on (a) and (c) above.
 - e. Any other relief that the Honourable Court may deem just and expedient in the circumstances.
2. The plaintiff's case is that it entered into an agreement wherein it agreed to import and sell 6000 coveralls (PPE kits) to the defendant. It was an express term of the agreement that the price of the coveralls was Kshs. 49,200,000 and that payment would be staggered in 3 phases of 2000 kits each.



3. The plaintiff states that it delivered the first batch of 2000 kits which was received by the defendant who paid the sum of Kshs 15,291,200 and thereby leaving an outstanding balance of Kshs. 1,180,800. The plaintiff contends that the defendant breached the terms of their contract by failing to requisition for the balance for the coveralls.
4. The defendant did not file a defence in the matter despite proper service. The matter was the listed for formal proof on 16th September 2021 when the plaintiff presented the evidence of its General Manager Mr. Abraham Choti, who adopted the witness statement and bundle of documents dated 17th June 2021 as his evidence before the court. The plaintiff sought the payment of the outstanding balance of the purchase price of Kshs 1,280,800 and an order for specific performance of the terms of the contract. He made an alternative prayer for compensation in the sum of Kshs 32,800,000 which was the cumulative sum of the PPE kits as per the Local Purchase Order.
5. The defendant's counsel did not cross examine the plaintiff's witness. At the close of the case, the plaintiff submitted that it had proved its claim for the sum of Kshs 1, 180, 8000 on a balance of probabilities. With respect to the prayer for specific performance, it was submitted that the plaintiff's case meets the prerequisites for the grant of the remedy as there was a valid contract between the parties that remained in force.
6. The plaintiff maintained that it had fulfilled its obligations under the contract. Counsel submitted that as an alternative to specific performance, the court be pleased to award it the balance of the contractual sum being the damages that it was likely to suffer in the event the defendant refused to collect the PPE kits.
7. I have considered the plaintiff's pleadings and the submissions. I note that the main issue for determination is whether the plaintiff has made out a case for the granting of the prayers sought in the plaint. As I have already noted in this judgment, the defendant did not oppose the plaintiff's claim even though it was duly represented by an advocate.
8. The plaintiff seeks the payment of the outstanding balance of the purchase price in the sum of Kshs 1,180,000. I have perused the plaintiff's bundle of documents and it is clear that the plaintiff delivered 2000 PPE's for which it was paid the sum of Kshs 15,291,200 thereby leaving the balance of Kshs 1180,800. I find that the plaintiff's claim was proved to the required standards.
9. On the prayer for specific performance, the plaintiff submitted that it had a valid contract with the defendant and that it had fulfilled its obligations under the said contract. In *Gharib Suleman Gharib v Abdulrahman Mohamed Agil LLR No. 750 (CAK) Civil Appeal No. 112 of 1998* the Court held that: -

“The jurisdiction to order specific performance is based on the existence of a valid and enforceable contract and being an equitable relief, such relief is more often than not granted where the party seeking it cannot obtain sufficient remedy by an award of damages the focus being whether or not specific performance will do more perfect and complete justice than an award of damages.”
10. In *Gurder Singh Birdi & Marinder Singh Ghatora vs. Abubakar Madhubuti, Civil Appeal No. 165 of 1996*, it was held that the underlying principle in granting the equitable relief of specific performance is that, “the Plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action.”



11. Further, in *Thrift Homes Ltd vs. Kenya Investment Ltd 2015 eKLR*, the court stated that: -

“specific performance like any other equitable remedy is discretionary and will be granted on well settled principles. The jurisdiction of specific performance is based on the existence of a valid enforceable contract and will not be ordered if the contract suffers from some defects or mistake or illegality. Even where a contract is valid and enforceable, specific performance will not be ordered where there is an adequate alternative remedy. The court then posed the question as to whether the Plaintiff who was seeking specific performance in that case had shown that he was ready and able to complete the transaction”.

12. An order for specific performance is an equitable remedy which, like all equitable remedies, is available at the court’s discretion. It is an order that is however rarely granted unless the plaintiff is able to show that damages would not be an adequate remedy. In the present case, the plaintiff established through evidence that it performed his part of the bargain, albeit in part, by delivering the first batch of the consignment of the coveralls for which it was paid the sum of Kshs. Kshs 15,291,200 thereby leaving a balance of Kshs. 1,180,800. The plaintiff seeks orders for specific performance for the delivery of the remaining batch of 4000 kits.

13. My finding is that the court cannot compel the defendant to requisition for the balance of the 4000 PPE kits from the plaintiff and to pay for the same upon delivery according to the contract terms as it is clear that the defendant is no longer interested in continuing with the contract.

14. I find that the plaintiff is not entitled to the equitable remedy of specific performance as it is yet to deliver the 4000 kits and is therefore only entitled to the payment for the outstanding balance for the kits that it has so far delivered.

15. Consequently, I enter judgment for the plaintiff against the defendant in the following terms; -

a. The payment for the outstanding balance of the purchase price being Kshs 1,180,000 together with costs at court rates from the date of filing this suit till payment in full.

b. Costs of the suit.

Dated, signed and delivered via Microsoft Teams at Nairobi this 18th day of November 2021 in view of the declaration of measures restricting court operations due to Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of: -

Mr. Nyandieka for the Plaintiff.

No appearance for the Defendant.

Court Assistant: Margaret

