



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

HCCC NO. 88 OF 2010

AUTOSTEEL & TILES LIMITED.....PLAINTIFF

VERSUS

MOHAMED MOHAMOUD ABDI & KHEIRA MAALIM MOHAMED T/A

SUNRISE SHOPPING MALL.....DEFENDANTS

JUDGMENT

1. The Plaintiff's claim against the Defendants is for the sum of Kshs.4,132,601.92 on account of goods supplied and services rendered and not paid for and interest on the overdue accounts.

2. The Plaintiff, Autosteels & Tiles Limited, avers that sometimes on February 2006, it rendered tiling services for the Defendants in the construction of Sunrise Shopping Mall. The services were for the sum of Kshs.1,993,118.15. Invoices for the supplied tiles were produced in Court (P. Exhibit Page 1-31).

3. The Defendants made out three cheques for Kshs.500,000.00, Ksh.650,000.00 and Kshs.300,000.00 dated 30.10.2006, 15.5.2007 and 31.12.2008 respectively. (See P. Exhibit Pages 32, 33, and 34). It is the Plaintiff's case that these cheques were returned unpaid. However, to the credit of the Defendants is a sum of Kshs.800,000.00 made in December 2008.

4. The claim by the Plaintiff is for the unpaid monies with interest at a rate of 3% per month up to the date of the suit and interest thereafter at Court rates.

5. In a Statement of Defence dated 17th March 2010 and filed on the same day, the Defendants state that the Plaintiff offered shoddy and unsatisfactory work by providing weak and unstable tiles that got destroyed barely a week after they had been laid down. Further, that the Plaintiff failed to replace the tiles as agreed. On payments made, the Defendants aver that other than Kshs.800,000.00 paid, they also made a payment of Kshs.1,000,000.00 which the Plaintiff has failed to credit. As to the returned cheques, it was their defence that they stopped the cheques when it was apparent that the Plaintiff was not ready to replace the tiles.

6. At the hearing, Bhaumik Patel testified on behalf of the Plaintiff. He reiterated the contents of the Plaintiff. He further stated that the Defendants never complained about the quality of the goods supplied. The Defendants did not offer any evidence in defence.

7. It is common cause that the Plaintiff supplied goods to the Defendants. This is not denied. It is common cause that three cheques made out by the Defendants were returned unpaid. For this reason the only issues for determination would be:-

i Were the tiles of low quality?

ii Was there an agreement to replace them on which the Plaintiff reneged?

iii Is there a sum of Kshs.1,000,000.00 made by the Defendants and not credited by the Plaintiff?

iv Is the Plaintiff's claim for interest justified?

v What are the appropriate orders including that of costs to be made?

8. The Defendants made three assertions in their defence:-

- i The tiles were of poor quality.
- ii There was a mutual arrangement between them and the Plaintiffs to replace the tiles.
- iii A sum of Kshs.1,000,000.00 paid by them was not credited.

None of these was acceded to by the Plaintiff. Indeed, its only witness denied each of them. He who asserts must prove. The Defendants chose not to call any evidence. All the three assertions are therefore unproved and the line of defence fails. The Defendants' submission that the Plaintiff made misrepresentations in respect to the quality of the goods supplied is not supported by evidence.

9. What about the claim for interest at 3% per month? Produced as evidence in Court were invoices sent by the Plaintiff to the Defendants on delivery of the goods. At the bottom are the following words:-

“Accounts are due on demand, Goods remain our property until paid for in full. No claim regarding or measurements will be entertained after the goods have left our premises. Interest at 3% per month will be charged on all overdue accounts”.

10. The Defendants do not state that the interest charged is unconscionable or otherwise oppressive. A charge of interest on a late payment is compensation to the innocent party who has to be kept out of money because of default by a contracting party. A charge of interest is justifiable. In the matter before Court, the Defendants were notified through invoices raised that accounts were due on demand and any overdue accounts would attract interest at 3% per month. Demand was made on delivery and supposed payments made by cheques on 30th October 2006, 15th May 2007 and 31st December 2008 did not materialize because the cheques were returned unpaid. The charge of interest is therefore with a basis and merited.

11. The Plaintiff has proved its case on a balance of probabilities. Judgment is entered for the Plaintiff against the Defendants jointly and severally for Kshs.4,132,601.92. Interest sought from the date of filing suit was at Court rates. I also grant that prayer. Costs of the suit to the Plaintiff.

Dated, Signed and Delivered in Court at Nairobi this 17th Day of January 2020

F. TUIYOTT

JUDGE

PRESENT:

Opondo for Plaintiff

Busima holding brief Wangechi for Defendant

Court Assistant: Nixon