



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

Civil Case 87 Of 2017

SAVICHEM AFRICA LIMITED.....PLAINTIFF

VERSUS

GENERAL PRINTERS LIMITED.....DEFENDANT

J U D G M E N T

1. The Plaintiff Savichem Africa Limited is a Company incorporated under the Companies Act. It is an importer of various polymer grades, BOPP and polyester films, adhesive and other industrial chemicals.

2. The Defendant General Printers Limited is a Company incorporated under the companies act. It carries out printing business. It is not denied that the Defendant imported various raw materials through the Plaintiff. There are exhibited before this Court proforma invoices, invoices and delivery notes evidencing that trading between the parties.

3. In a nutshell the Plaintiff's case is that it obtained from time to time orders for raw material from the Defendant. Parties would then engage in negotiations and once the price was agreed the Plaintiff forwarded the proforma invoice to the Defendant. The Plaintiff and the Defendant signed the proforma invoice. Provided in that proforma invoice is the following clauses:

- *Invoice to be paid in USD only.*
- *Above mentioned amount is excluding import duty, VAT as applicable, clearing + transport charges and other charges which will be charged while raising the final invoice.*
- *All overdue account will be charged interest at 3% per month until full payment is received.*

4. The Plaintiff on receiving from the Defendant an executed proforma invoice it would then proceeded to import the goods from various countries which include Saudi Arabia, India and France. When the goods arrived at the port of Mombasa the Plaintiff cleared them by paying all the duties and taxes. The goods would then be delivered to the Defendant and that delivery would be signified by the signed delivery note.

5. It is the Plaintiff's case that it supplied the Defendant with goods as ordered and raised several invoices for payment in terms of the agreement. That despite allowing the Defendant 90 days to make payment for goods supplied the Defendant, in breach of their contract, delayed payment beyond the agreed date. It was then that the Plaintiff raised invoices for the delayed payments charges as per the term specified on the proforma invoice of 3% interest per month. That interest is what is claimed by the Plaintiff in this case. The principal amount was paid by the Defendant.

6. The trading between the parties was in the years 2015-2016. It is the Plaintiff's case and it is admitted by the Defendant that although the amount due for goods imported for the Defendant was paid in full by the Defendant there were delays in making those payments.

7. Indeed the Defendant's witness, Nirav Nathwani, confirmed in evidence that the Defendant delayed payments to the Plaintiff. This is evidenced in his testimony when he stated:

“We paid from time to time... There were delayed payments.”

8. The Plaintiff's claim in regard to the interest of those delayed payments is:

a) Kshs. 3,249,072.39

b) USD 613,818.39

c) Euro 313.53

9. The Plaintiff's witness, Ritu Bhattessa, presented before Court tables of workings showing the interest claimed in the Plaintiff. The tables show proforma invoice number, invoice number, invoice date, bill of lading number and date, invoice amount, due date, date when payment was received and the last column shows the working of interest due.

10. At the commencement of the hearing parties submitted four issues for determination by this Court. Those issues are:

a) Was there an agreement to charge interest for delayed payments?

b) If yes, at what rate?

c) Is the 3% interest charged by the Plaintiff on the delayed payment excessive?

d) Who should bear the costs of the suit?

11. I will begin by considering those issues:

Was there an agreement to charge interest for delayed payments?

12. The Defendant's main thrust of its defence is that there was no agreement on interest.

13. The Plaintiff by evidence of its witness stated that the parties engaged in negotiations in respect to the orders made by the Defendant and it only after an agreement was reached, on the price, that the Plaintiff raised a proforma invoice for approval and execution. As correctly submitted by the Plaintiff's Learned Advocate that proforma invoice had details on the description of the goods, the products specification and price, CFR value, and a statement that all overdue accounts would be charged interest at 3% per month until payment in full. All the proforma invoices before Court, the subject of this case, were executed by the Plaintiff and the Defendant.

14. The Plaintiff's case is that the Defendant delayed in its payment for the goods supplied, and although all the payments were eventually made there was interest due and payable by the Defendant.

15. A valid contract requires an offer, acceptance and consideration. In this case there was offer and acceptance signified by the parties execution of the proforma invoice. In this finding I get support from the case **FUELEX KENYA LIMITED V SEED GROUP LIMITED (2000) eKLR** where the Court stated:

"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."

16. Similarly in this case the Plaintiff offered to supply the goods ordered by the Defendant by presenting an executed proforma invoice to the Defendant. The Defendant accepted the offer by executing the same. The Plaintiff supplied the goods as per Defendant's order.

17. There is no basis in this case for the Defendant to allege that there was no agreement. There were, in the proforma invoice all the essential terms of the contract, and it is therefore an enforceable contract. The execution by both parties of that contract signifies the parties' intent to be bound by that contract.

18. One of the terms of the parties contract (proforma invoice) is that interest at 3% per month would be charged until payment in full of the invoice. The Defendant, as stated above, admitted that it delayed in making payments of the Plaintiff's invoices from time to time.

19. In answer to the first issue I find and hold that there was an enforceable agreement to charge 3% interest per month on late payment of invoices.

20. I will deal with issue (b) and (c) together.

What was the rate of interest and is 3% interest excessive?

21. The rate of interest is 3% per month until payment in full of the invoice. That is clearly set out in the proforma invoice.

22. The parties, as stated before, agreed to be bound by the terms of their agreement. Courts endeavor to uphold valid contracts freely entered by the parties. Indeed as stated by the Court of appeal in the case **NATIONAL BANK OF KENYA LTD V PIPEPLASTIC SAMKOLIT (K) LTD & ANOTHER (2001) eKLR** Courts cannot re-write parties contracts. The Court in that case held:

“Parties are bound by the terms of their contract, unless coercion, fraud or undue influence in regard to the terms of the charge.”

23. The Court of appeal in above case went on to state:

“As was stated by Shah JA in the case of Fina Bank Limited Vs SPARE & INDUSTRIES LIMITED...

It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity’s function to allow a party escape from a bad bargain.”

24. In yet another case of the Court of appeal **BAWAZIR GLASSWORKS LIMITED & ANOTHER V ASEA BROWN BOWERI LIMITED [2015] eKLR** the Court was facing facts that are on all fours to this case. This is how 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 proforma 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.”

25. In the end I find and I hold that the 3% interest per month charged by the Plaintiff for late payments was not excessive. It was the term of parties’ agreement.

26. The Plaintiff has prevailed on all the issues presented for determination by this Court and therefore in accordance with the provisions of Section 27 of the Civil Procedure Act the Plaintiff shall be awarded the costs of the suit.

27. The Plaintiff proved on a balance of probability its claim for the late interest payment. As stated before the Plaintiff submitted in evidence all the proforma invoices, invoices, delivery notes and bills of lading. The Plaintiff met the civil standard of proof to specifically prove special damages which had been specifically pleaded. Accordingly judgment will be awarded to the Plaintiff as prayed.

28. There shall therefore be judgment for the Plaintiff for:

- a) **Kshs. 3,249,079.39**
- b) **USD 613,818.39**
- c) **Euro 313.53**
- d) **Interest at Court rate for (a) to (d) above from the date of filing suit until payment in full.**
- e) **Costs of the suit.**

DATED, SIGNED and DELIVERED at NAIROBI this 8TH day of MAY, 2019.

MARY KASANGO

JUDGE

Judgment Read and Delivered in Open Court in the presence of:

Sophie..... **COURT ASSISTANT**

..... **FOR THE PLAINTIFF**

.....**FOR THE DEFENDANT**