



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MILIMANI LAW COURTS

CIVIL CASE NO. 442 OF 2012

BLUESKY FILMS LIMITED.....PLAINTIFF

VERSUS

LOWE SCANAD KENYA LIMITED.....DEFENDANT

JUDGMENT

Introduction

1. This is a dispute between a film producer and an advertising-cum-marketing company. The dispute arose after an alleged breach of contract to shoot and produce short commercial films. The facts and contractual arrangements are not complex but are also not straightforward especially in the absence of a formal contract which ordinarily would guide such relationships.

2. The Plaintiff seeks liquidated damages in the sum of Kshs. 6,819,557.69 as the balance of the agreed contractual price to produce the short films at the request of the Defendant. The Defendant in turn seeks a refund of the full advance payment of Kshs. 9,719,557.69 made to the Plaintiff.

The Parties

3. The Plaintiff (“ BFL”) is a film production company. Its business includes shooting and producing short films and commercials for television advertising. It is registered in accordance with the laws of Kenya.

4. The Defendant (“ LSKL”) is also a corporate entity registered in accordance with the laws of Kenya. It is in the business of offering advertising and marketing services.

Background facts

5. I take the background facts from the witness statements filed by Assad Shamoan Ali for BFL and Andrew White for LSKL.

6. Bluesky Films Limited are so called because they produce films. In May 2008, LSKL approached BFL. LSKL wanted short 45-60 second commercial-films produced for its client Kenya Breweries Limited. The short films were to be used in television advertisements. There were discussions. There were agreements. BFL and LSKL agreed. BFL was to shoot and produce three short commercials at a total cost of Kshs 19,439,115.28. LSKL issued a local purchase order (LPO) on 19 May 2008. Two days later BFL invoiced LSKL. The invoice was for 50% of the agreed sum. LSKL settled the invoice on 12 June 2008, when production had already begun.

7. Mid-stream the production, the contract was brought to a halt.

8. BFL claim they delivered their part of the bargain. LSKL claim that BFL floundered and faltered on LSKL’s ideas as well as the ideas of LSKL’s client who was the true owner of the films. LSKL alleges that substantial low quality work and non-delivery on the part of BFL led to the cancellation of the contract. BFL counters that there was a mutual agreement to cancel, with a variation in the price.

The trial

9. The trial was short.

10. Only BFL participated. BFL called one witness. LSKL did not participate in the trial notwithstanding the fact that the trial date had been fixed with the consent of both parties. The witness's testimony was thus not tested in cross-examination.

11. The documents used at trial were also few. The LPO, the invoice and the payment slip were all that BFL's witness referred to.

12. Both BFL and LSKL had filed separate issues for determination. Comparatively, they were the same issues. I isolate them as follows:

12.1 Whether there was a binding contract between BFL and LSKL;

12.2 If so, what were the terms of the contract;

12.3 Whether there was a mutual agreement to drop the production of two of the three short commercials;

12.4 Whether there was a breach of contract on the part of either BFL or LSKL;

12.5 Whether there was an agreement that the contract amount be reduced by an amount of Kshs.2,500,000/=;

12.6 Whether BFL is entitled to the reliefs sought in the claim;

12.7 Whether LSKL is entitled to the reliefs sought in the counterclaim and

12.8 Who pays the costs of the suit and of the counterclaim.

BFL's witness

13. The sole witness was Mr. Assad Shamon Ali.

14. Mr. Ali, who has been the managing director of BFL for over 20 years, gave evidence about BFL's business. He gave evidence of the contract with LSKL. He alluded to stubborn agreements and disagreements. He narrated how the shooting of the only commercial had to be repeated severally even with the representatives of both LSKL and its client as part of the filming and directing crew.

15. Mr. Ali narrated how LSKL would be happy with the production one day, only to turn around unhappy the next day, once its client also returned a negative verdict. He availed email correspondence showing LSKL as happy. Mr. Ali confirmed that LSKL had paid the initial payment of 50% of the contract sum. Mr. Ali also confirmed that two of the three commercials were cancelled. He then testified that the parties orally agreed that the final payment was to be made less Kshs. 2,500,000/= due to the "mutual cancellation".

Discussion and determination

A film production contract

16. It is common cause that there was a binding contract for the production of three short commercials. The contract was constituted in the LPO issued by LSKL and accepted by BFL, who proceeded to issue an invoice for part payment of the contract price. Acceptance is further evident by the conduct of both parties. BFL issued an invoice. LSKL settled the invoice. BFL then proceeded to shoot the films, or one of them, with the full knowledge and participation of LSKL.

17. The LPO contained a set of terms as well as conditions and instructions.

18. By the LPO, LSKL sought three Pilsner-Thematic commercials to be produced by BFL. One commercial, referred to as "Salsa", was to run for 60 seconds. The other two commercials, "Ferrari" and "Mobile Phone" were to run for 45 seconds each. The total price, inclusive of VAT was Kshs. 19,439,115.28. There was no indication how much each commercial was to cost. There was also no indication on how long the production of each or all the commercials were to last. There was however agreement that any "delinquency in delivery or otherwise unsatisfactory service, or standard of work produced will be considered cause of cancellation and or rejection at no expense" to LSKL. It was however LSKL who was responsible for all the services availed by BFL but perhaps ultimately appropriated by Kenya Breweries Limited.

19. The events after the contract was entered into reveal that only one of the three commercials was shot and produced. Severally, the motions were gone through. The editing was then undertaken. This is evident from both the evidence of PW1 as well as the various email correspondences produced in evidence through the BFL's supplementary list and bundle of documents. The list and bundle was filed in court on 11 December 2014. The evidence also reveals that at the instance of Kenya Breweries Limited, LSKL's instructing client- LSKL ended up rejecting the only commercial film produced by BFL. Ultimately there was no attempt made at shooting the other two 45-second commercials.

20. The uncontested evidence before me by PW1 is that the contract was mutually cancelled. There is indeed no evidence, documentary or otherwise, that the other two 45-second commercials were pursued at all. It is also clear that the cancellation of these two commercials was consensual and mutual albeit at the prompting of LSKL's client.

21. LSKL accuses BFL of breach of contract and BFL does likewise of LSKL. According to the pleadings, LSKL contends that BFL

produced a substandard commercial and that LSKL was entitled to cancel the contract.

22. Foremost, I would point out that in the absence of LSKL during trial, there was no evidence led to show the breach by BFL. PW1 indeed expressly denied that BFL was in breach. Instead, PW1 testified and I have no reason to doubt the testimony that LSKL was always happy with the services rendered by BFL. This, according to PW1, applied to the sole commercial that BFL had produced.

23. Secondly, in my judgment, whether a breach is material or not as to warrant the immediate cancellation or repudiation of a contract without a cure notice and opportunity to remedy the breach, depends on the nature of the contract, its provisions and all the circumstances. The circumstances include the consequences of the breach and consequences of termination for the party not in breach.

24. A breach need not be repudiatory to be material but a higher threshold, in my view, is required where there is no express provision for a cure notice and thus no opportunity to remedy the breach before the termination. The higher threshold is necessary as courts ordinarily ought to seek to maintain contractual and commercial relationships rather than encourage their termination. It is thus always appropriate to imply a term requiring notice to be given within a reasonable time to remedy a breach.

25. In the context of the foregoing, could it be said that BFL was in breach and that LSKL was thus entitled to repudiate the contract?

26. Allegations of breach are in the form of the alleged substandard production of the only commercial shot and produced by BFL.

27. I however do not view it that the nature of the contract herein was such as could be terminated without a prior cure notice. The production of a film or short commercial entails the process of "lights, camera and cut". The descriptive evidence of PW1 seemed to lead to this. It involves the process of repeat-editing during the shoot-out. It also involves editing post the shoot but before the ultimate production. The shooting may itself run for days and days. It cannot be the intention of either party that a defect in the produced film roll, no matter how minor, cannot be remedied and must as of necessity lead to repudiation without any cure notice. Indeed, the evidence, both oral and documentary, in the instant case reveals that on no less than three occasions, the shooting of the only commercial was repeated.

28. Additionally, it is evident that LSKL was always satisfied by the production of the commercial though its client was not. In this regard, I do however note that one of the terms and conditions of the LPO was clear that LSKL was contracting as "*principal and not on behalf of any firm*". The consequence was that it was only LSKL's satisfaction that mattered to BFL.

29. I am satisfied that BFL was not in breach of the contract as alleged by LSKL or at all.

30. I am also satisfied that LSKL was not in breach of its contractual obligations. Its contractual obligation was to pay and it did, save for the extra amount which it contested and still contests. LSKL was only to pay the full contract price once full delivery was made.

31. During the evidentiary hearings, PW1 testified that the parties mutually agreed to cancel the contract and that a portion of the contracted services was not to be rendered and delivered. I do not see then, how LSKL could be charged with breach of contract.

32. The only question which now remains is whether BFL is entitled to the amount claimed in damages. This is the amount of Kshs. 6,819,557/69, which is stated to be the balance of the contract price less an amount of Kshs. 2,500,000/=.

33. According to BFL, the parties not only agreed to a mutual termination of the contractual relationship but also to the payment by LSKL to BFL of the balance of the contract price less Kshs. 2,500,000/=. This agreement was not documented. PW1 did not also identify who agreed to this arrangement. PW1 did not even state whether he was a party to such variation and agreement on behalf of BFL.

34. Both parties are corporate entities and it would have been more appropriate and convincing if the individuals involved in the negotiations were identified, absent any documentation.

35. I took note as well of the fact that this arrangement of cancellation with part payment is not referred to in any of the several correspondences exchanged between the parties.

36. BFL has not sought damages for breach of contract or for losses. It simply seeks the balance of the contract price.

37. It is common cause that BFL was paid 50% of the agreed contract price. It is also common cause that less than half of the agreed services and works were performed by BFL. I have found that LSKL was not in breach of contract. I have also found that the contractual relationship between the parties was mutually terminated. I have finally also found that the exact terms of the termination were unclear and have not been proven.

38. The result is that I am unable in the circumstances and on the basis of the available evidence to hold that BFL has established to the required standard that it is entitled to judgement in the amount claimed.

39. The nature of the contract which was for the production of three commercial films at an agreed amount would also not allow me to award the amount sought without a firm basis being laid. I hold the view that the payment of the Kshs. 9,719,557.64 being 50% of the contract price was reasonable compensation for the services rendered by BFL. It certainly could not have been in the contemplation of the parties that BFL would be paid for commercials not produced.

Conclusion and disposal

40. I find that BFL has not proven its claim to the required standard that is to say on a balance of probabilities. I also find that the counterclaim which was denied by BFL, fails for want of evidence.

41. The claim by BFL is consequently dismissed but with no order as to costs. The counterclaim is also dismissed but with costs to BFL.

42. Decree accordingly.

Signed, delivered and dated at Nairobi this day 2nd of February 2018

J.L. ONGUTO

JUDGE