



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 431 OF 2014

BAMBURI SPECIAL PRODUCTS LIMITED.....PLAINTIFF

VERSUS

REMAX CONSTRUCTION LIMITED.....DEFENDANT

JUDGMENT

1. The Plaintiff commenced this suit vide a Plaint dated 2nd October 2014, seeking for orders that judgment be entered against the Defendant for:-

- (a) *the principal sum of Kshs. 3,168,399.26 together with interest at the rate of 1.5% per month thereon from the respective due dates of the invoices unto payment in full;*
- (b) costs of this suit together with interest thereon at such rate and for such period as this Honourable Court may deem fit to order;
- (c) *any other just and equitable relief as this Honourable Court may deem appropriate.*

2. The Plaintiff's case is that, on or about July 2011, it entered into an Agreement with the Defendant, under which it agreed to supply the Defendant with ready mix concrete for purposes of construction at the Defendant's site. That the Agreement was made partly oral, in writing and by conduct. That in so far as it was oral, the Agreement was made during discussions held between the Plaintiff and Mr. Bulent from the Defendant's Company and; in so far as it was made in writing, it was contained in or can be inferred from the following documents:

- i. Account statements for the period September 2011 to May 2012;
- ii. Invoices dispatched with the said goods for the period of July 2011 to April 2012;
- iii. Cheques drawn in favour of the Plaintiff from September 2012 to May 2012

3. Finally in so far as the Agreement was made by conduct of the parties, this can be inferred from course of dealings between the parties, whereby:-

- i. The plaintiff delivered and sold the said goods at the request of the Defendant;
- ii. The Plaintiff delivered the said goods to the Remax Shopping Centre construction site;
- iii. The Defendant acted in a manner that suggested that it would honour the terms and conditions of the said Agreement and stipulations contained in the documents aforementioned;

4. The Plaintiff avers that the terms and conditions of the Agreements included; but were not limited to the following:-

- i. The Defendant would place an order for the said goods to the Plaintiff
- ii. Upon receiving of the order, the Plaintiff would then prepare a delivery note and dispatch the same, together with the goods

ordered;

iii. The price of the said goods was fixed and no variation of price was allowed at all,

iv. Payment of the said goods was effected by cheque issued by the Defendant in favour of the Plaintiff against the respective invoices.

5. It is further averred that, the Parties commenced and continued trading in accordance with the terms of the Agreement; whereupon consequently between June 2010 and August 2011, the Plaintiff supplied ready mix concrete, worth Kshs. 17, 137,740.23 as per the particulars set out under paragraph 8 of the Plaintiff. That the Defendant has paid a sum of Kshs. 13,967,340.97 thereof. However upon demand of the balance of the said sum, the Defendant has declined to pay and instead wrote to the Plaintiff on 8th August 2014 claiming that the Plaintiff had taken 50 sets of scaffolding from their construction site without the Defendant's knowledge and consent. That in that regard, the Plaintiff owes the Defendant a sum of Kshs.9, 892,300.

6. The Plaintiff admits having borrowed four (4) sets of scaffoldings from the Defendant's site but with the full knowledge of Mr. Bekir the Defendant's site Manager at the time, but denies knowledge of the alleged remaining 46 sets of scaffoldings, and/or owing the Defendant the alleged sum of Kshs. 9,892,300.00, as claimed in the demand letter dated 8th August 2014. The Plaintiff avers it has made a request to the Defendants to supply it with any documentary evidence relating to the claim of the 50 sets of scaffoldings so as to investigate the matter further, but the request has not been honoured, which is clear evidence of the vexatious and malicious nature of the allegations.

7. The Plaintiff reiterated that despite demand for payment of the balance of the sum owed and the notice to sue, the Defendant has failed, refused and/or neglected to pay the said sum or any party thereof hence the suit herein.

8. The Defendant filed a Statement of defence denying the Plaintiff's claim and in particular, that it:-

i. has any interest in the apartments allegedly known Remax Apartments either as claimed by the Plaintiff or at all;

ii. it entered into any Agreement either with the Plaintiff or with any other Party for the supply of ready mix concrete either as claimed or at all;

iii. it received any goods or invoices and made any payment to the Plaintiff for the services or goods as claimed in the Plaintiff or at all.

9. However the Defendant admitted that a demand was made but the same could not be met in view of the fact that it denies owing the Plaintiff any money as claimed in paragraph 14 of the Plaintiff or at all. It was argued that the Plaintiff's suit does not disclose a reasonable cause of action against it.

10. The Plaintiff called two (2) witnesses at the hearing of the case. Titus Rex Kipkemoi testified that he was working as the Technical Sales Engineer of the Plaintiff's Company at the time of the transaction took place between the parties herein. That it was his role to visit construction sites and find contracts for the Company. He visited the Defendant's site and the Plaintiff supplied the Defendant with ready mix concrete. He was dealing with one Ebu BekirSahin a representative of the Defendant. That upon delivery of the concrete, the Plaintiff prepared invoices, whereupon the Defendant made a number of payments thereon through bank transfers and cheques leaving a balance of Kshs.3, 168,399.26.

11. However, during cross examination, he admitted that he had no document to prove that Ebu Bekir was acting for and/or on behalf of the Defendant's Company. He also did not produce any documents in support to prove orders made by the Defendant for the supply of concrete nor any delivery notes, as evidence of the delivery. Mr. Moses Kiarie Maina, testified as the Plaintiff's second witness and stated that he is the one who delivered the ready mix concrete to the Defendant's site at King'ara Road and although he did not have any delivery notes to prove the delivery was done.

12. At the close of the Plaintiff's case, Defendant called one witness Mr. Bulent the, Gulbahar who testified that he has never engaged the Plaintiff with regard to the Apartments located along King'ara Road, but he has engaged the Plaintiff at a different site. That the copies of the cheques produced by the Plaintiff relate to another site on Argwings Kodhek road.

13. The Parties filed their respective submissions at the close of the case which I have considered alongside the evidence adduced and find that the issues that arise for determination are;

i. Was there was an Agreement between the parties;

ii. Did the Defendant order for and did the Plaintiff supply the Defendant with any ready mix concrete and if so,

iii. if there was delivery of the concrete, where or to which site(s) was it delivered to?

iv. Has the Defendant paid for the goods supplied? (if any)

v. Should the Court grant the orders prayed for herein?

14. As regards the first issue, the Plaintiff submitted that the Agreement between the parties was partly oral, in writing and by conduct and that as a general rule; oral as well as written contracts are fully enforceable in law. That, the terms of such oral contracts are inferred from the

words or conduct of the Parties. Reference was made to Section 120 of the Evidence Act which provides that;-

“When one person has, by his declaration, act, or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.”

15. Further reference was made to the Halsbury’s Laws of England 4th Edition; Re-issue Vol. 9(1) paragraph 602 at page 339, which defines a contract as follows;-

“...the most commonly accepted definition is a promise or set of promises which the law will enforce. The expression ‘contract’ may, however be used to describe any or all of the following: (i) that series of promises or acts themselves constituting the contract; (ii) the document or documents constituting or evidencing that a series of promises or acts, or their performance; (iii) the legal relations resulting from that series.”

16. It was further submitted that page 340 of the text outlines of the elements of a valid contract, whether oral or written which are as follows;-

“to constitute a valid contract, (i) there must be two or more separate and definite parties to the contract; (ii) those parties must be in agreement, that is, there must be consensus on specific matters (often referred to in the older authorities as ‘consensus ad idem’); (iii) those parties must intend to create legal relations in the sense that the promises of each side are to be enforceable simply because they are contractual promises; (iv) the promises of each party must be supported by consideration or by some other factor which the law considers sufficient. Generally speaking, the law does not enforce a bare promise.”

17. The Plaintiff further relied on the case of; Serah Njeri Mwobi vs John Kimani Njoroge (2013) eKLR, where the Court held that:-

“The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person.”

18. The Plaintiff submitted that the Oral Agreement between the parties met these conditions in that there were two definite parties to the Agreement, the Plaintiff and the Defendant and agreed that, the Defendant would place an order and the Plaintiff would supply the ready mix concrete. Therefore the parties clearly and evidently intended to be bound by the Agreement. The Plaintiff supplied the product to the Defendant and the Defendant paid for the product by cheque which was signed by both Mr. Bulent Gulbahar (the Defendant’s witness) and Mr. Ebu Bekir Sahin (his agent and employee).

19. The Plaintiff further submitted that the Defendant is misleading the Court by alluding that it had no Agreement with the Plaintiff and it did not make any orders or receive any goods from the Plaintiff nor subsequently made any payment to the Plaintiff. That the Defendant is hell bent on delaying the fair trial of this matter at the detriment of the Plaintiff. This is because the Defendant drew cheques from September 2011 to May 2012, in favour of the Plaintiff for products supplied during the subsistence of the Agreement, as can be seen in the bundle of documents attached to the Plaintiff dated 2nd October 2014.

20. That it is very clear that the signature on the cheques from the Defendant in favour of the Plaintiff match the Defendant’s signature in the witness statement, otherwise why would the Defendant pay the Plaintiff if it was not supplied with any goods. That the Honourable Court should see through the Defendant’s deception and find in favour of the Plaintiff. That indeed the Defendant admitted while giving his testimony stated that he had made payments for goods received from the Plaintiff.

21. The Plaintiff submitted that the invoices raised contain the delivery note numbers, for the period of July 2011 to April 2012, which clearly show that the Plaintiff supplied the goods to the Defendant for the period of the Agreement. In addition, the Defendant made part payment for the goods delivered but neglected to make full payment for undisclosed reasons.

22. It was further submitted that the Defendant acted in a manner that suggested to the Plaintiff that he would honour the terms of the Agreement and the stipulations contained in the documents aforementioned. The conduct of the Defendant can be interpreted to mean that there was an Agreement between the parties and that the Plaintiff relied on the Agreement and conduct of the Defendant. Therefore the Defendant should be estopped from denying that there was any Agreement between the Parties and be compelled to pay the Plaintiff the amount due.

23. The Plaintiff revisited the doctrine of estoppel quoting from the Halsbury’s Laws of England as follows:-

“estoppel by conduct, otherwise known as estoppels in pais, arises where a person has by words or conduct made to another clear and unequivocal representation of fact, either with knowledge of its falsehood or with the intention that it should be acted upon, or has so conducted himself that another would, as a reasonable person understand that a certain representation of fact was intended to be acted upon and the other person has acted upon such representation and thereby altered his position. The estoppel arises against the party who made the representation, and he is not allowed to aver that the fact is otherwise than he represented it to be. Estoppel by conduct is generally regarded as a rule of substantive law....”

24. However, the Defendant opposed the Plaintiff’s submissions and reiterating the averments that most of the invoices produced do not relate to the King’ara road site and some have numbers that do not in any way indicate where if any, the concrete mix was delivered and neither has the Plaintiff either produced the orders made by the Defendant or a delivery notes in evidence of the delivery.

25. It was submitted that the burden of proof is placed upon the Plaintiff to demonstrate that it actually delivered the concrete mix in order to be entitled to payment. The Plaintiff has not discharged this burden and therefore its claim should fail. The Court in the case of; ***Eknical Equipment International Ltd vs National Water Conservation & Pipeline Corporation (2013) eKLR*** was cited where the Court allegedly dismissed a similar claim because the Plaintiff did not produce any delivery notes. In the circumstances, the suit should be dismissed with costs.

26. At the closure of the case, I have considered the evidence adduced and the submissions filed and I find that it is clear that the Parties herein did not execute any formal contract. The Plaintiff relies on the doctrine of estoppel to establish the contractual relationship between the Parties.

27. However before I delve into the merits of the case, I note that on 31st July 2015 the Court delivered a ruling, on the Notice of Motion Application seeking to strike out the statement of Defence and at paragraph 9 of the Ruling, it observed as follows:-

“this total denial of the claims or any relationship with the Plaintiff would either make the Defendant a serial liar or a Party who is being falsely accused. Because the Plaintiff has not demonstrated any evidence of the contract, my view is that the complete denial by the Defendant of the claim requires more verification through the process of a trial if just to avoid any doubt.the required verification in this case would be to establish the source and authentication of the said invoices and other correspondences which have denied in total by the Defendant.”

28. The Court further stated at paragraph 12 thereof as follows;-

“if the Plaintiff’s application is to succeed, the case must be self evident. However, this is not the case. It is not self evident that the Defendant allegedly ordered or requested to supplied with the ready mix concrete. Further it is not self evident that the alleged products were ever supplied or delivered. It is not self evident that there was any contract between the Plaintiff and the Defendant capable of being enforced. The documents annexed to the Applicant’s Affidavit had been challenged in the Replying Affidavit of Mr. Bulent Gulbahar. They are not self evident. As demonstrated above the Defence raises pertinent issues.”

29. The question that arises then is; has the Plaintiff then proved its case on the required standard? To answer this question, I have gone through all the documents produced by the Plaintiff in support of its claim and I find they include: invoices, debit memos, various cheques and a statement of account showing a balance payable of Kshs. 3,144,298.6 34. The invoices and debit memos, totaling 16 in number show the following details; the Invoice number, the date of the delivery note and Order No. and date, collection No. and date, the customer, currency, PIN No, VAT No, and the site. All these invoices are addressed to the Defendants; whose address is indicated as, P. O. Box 7048-00200 Nairobi, Kenya. It is noteworthy that this address is not denied and/or disputed.

30. I also noted that the Plaintiff has produced a total of 11 of cheques. All these cheques are drawn on the Defendant’s account No. 0102012037400, held at the Standard Chartered Bank, Kenyatta Avenue Nairobi and drawn in favour of the Plaintiff. Although the dates on four of the cheques are not clear, they indicate they were all drawn in the year 2011, for various sums of money totaling Kshs. 7,940,000. The question is, what these cheques were in payment of? The total amount claimed under paragraph 8 of the Plaintiff is Kshs. 17,135,740.23. According to paragraph 9 of the Plaintiff thereof, the Plaintiff has been paid a sum of Kshs. 13,967,340.97, of the total amount owing leaving a balance of **Kshs. 3,168, 399.26** together with interest of 1.5% per month (as pleaded under paragraph 14 of the Plaintiff). However, I note that when the Plaintiff filed a Notice of Motion Application dated 4th February 2014, that the Defendant’s written statement of Defence be struck out and judgment be entered in its favour, the Plaintiff annexed to the Affidavit sworn in support of that Application, a letter dated 26th June 2014, demanding from the Defendant payment of outstanding amount of **Kshs. 3,144,298.66** including interest at the rate of 1.5% per month.

31. It is therefore clear that the amount claimed in the Demand notice and the amount prayed for in the Plaintiff is different. Taking into account that the amount in the Demand notice is lesser than the amount subsequently claimed in the Plaintiff, the Court shall be guided by the amount in the Demand notice. Even then, the difference between the two amounts is Kshs. 24,100.60. I also note that the Plaintiff is seeking for interest at the rate of 1.5% per month on the amount claimed, from the respective due dates of the invoices until payment in full. However, I find that there is no evidence that the parties agreed that such interest would be payable. Therefore there is no basis thereof.

32. Against these evidence, the Defendant in its statement of Defense made a general traverse of the averments in the Plaintiff and fails to respond to some averments in the Plaintiff. The Plaintiff pleads under paragraphs 11, 12 and 13 of the Plaintiff that the Defendant has refused to pay them on the ground that, they leased or took the Defendant’s 50 scaffolding without authority and have failed to return them. However throughout the entire Defense the Defendant does not address these averments. Instead, the Defendant’s witness statement simply states that another entity known as “Paragon Electronics Limited” has allegedly admitted having engaged the Plaintiff to deliver the goods alleged herein.

33. In fact, the Defendant denies the Plaintiff’s allegations that it wrote to the Plaintiffs about the scaffolding vide letter dated 8th August 2014. However, the Defendant might be right as the alleged letter was not produced at all. Be that as it may, it is surprising to note, that although the Defendant denies all the averments in the Plaintiff, the Defendant does not specifically or otherwise deny paragraph 4 of the Plaintiff, which states that;

“at all material times, the Defendant was a customer of the Plaintiff”

34. Further the Defendant’s witness, one Mr. Bullent Gulbahar, states in his Statement at paragraph (3) that;

“Further, the cheque and letter exhibited and that (sic) were issued to the Plaintiff from a Third Party Paragon Electronics Ltd., and not the Defendant”

He goes on to state that;

“I am aware that, another entity Paragon Electronics Ltd has admitted having engaged the Plaintiff to deliver the alleged goods herein. The pleadings filed in the bundle of documents.”

35. I have perused the alleged pleadings in HCCC No. 314 of 2015 *Paragon Electronics Limited vs Bamburi Special Products Limited* and I note that the Plaintiff therein alleges that the Plaintiff herein collected 50 scaffolds from its construction site, returned 4 and failed to return 46 and claims a sum of Kshs. 9,892,300.

36. It is also noteworthy that, when the Defendants responded to the Application to strike out its statement of Defence, it filed a supplementary list of documents namely, the Plaintiff and a witness statement in a suit HCCC No. 314 of 2015, dated 6th and 25th of August 2015 respectively. However I note that the matter is between Paragon Electronics Limited and Bamburi Special Products Limited and relates to scaffolding. On the other hand, this matter involves Bamburi Special Products Limited and Remax Construction Limited who are complete different parties and so is the subject matter which is Ready Mix Concrete.

37. As aforesaid, the Defendant herein alleges that the Company Paragon has admitted receipt of the goods allegedly delivered by the Plaintiff herein and therefore the question that arises is this: What is the relationship between the Defendant in this matter and the Plaintiff in that matter? The documents produced reveals that the Defendant's witness herein Mr. Bulent Gulbahar is a Director in both Companies. This is evident from the verifying Affidavit filed in Court on 9th September 2015, in the HCCC 314 of 2015, where he avers that he is the Director of the Plaintiff Company and in his Statement of Defense filed herein on 18th September 2015, where he states that he is the Director of the Defendant Company. If that is so, then it is therefore clear that the witness has been in a business relationship with the Plaintiff herein either through Paragon Electronics Limited as alleged or through the Defendant Company herein.

38. Even then, what is clear is that he signed all the cheques that have been exhibited and produced by the Plaintiff allegedly in part payment of the goods supplied herein. I note all the cheques are drawn on the account of the Defendant herein and not the alleged Paragon Company; although each of these cheques bear handwritten words "Paragon Holdings Ltd" in pen, which seems to suggest that being a Director in both Companies, he was instructing his Bankers as to which of the two Companies accounts should be debited with the amount indicated in the respective cheques.

39. I therefore find that the Defendant's denial that it made any payment to the Plaintiff as stated under Paragraph 9 of the Plaintiff or at all, is untruthful and/or insincere. It is therefore, not surprising that the Court that heard the Application to strike out the statement of Defence remarked that he could be a "a serial liar"

40. At the trial of the case, the Defendant's witness acknowledged that he has engaged the Plaintiff in business of delivery of the subject matter herein but in relation to a different site namely; Argwings Kodhek and not King'ara Road as indicated in most of the invoices. I note that a total of 10 invoices/debit memos were produced, 8 of them indicate that Ready Mix Concrete was delivered at King'ara Road site, one shows that delivery was made at Remax, one shows Riara road, while the others show the site by codes.

41. However, although the Defendant has denied receipt of the goods, it has failed to explain why they drew the cheques in payment of goods not received and why they are drawn in the Defendant's Company. It is therefore ironical that the Defendant denies at paragraph 7 of the Statement of defence as having made any payment to the Plaintiff either as claimed under paragraph 9 of the Plaintiff or at all, and does not rebut the evidence of the cheque drawn. All these cheques were in my opinion in response to the invoices drawn and issued to the Defendant. I have seen the copies thereof in the Plaintiff's bundle of documents.

42. I also note that a letter dated 26th June 2014, was sent to the MD of the Defendant's Company demanding an outstanding amount of Kshs. 3,144,298.66, including interest at the rate of 1.5% per month. The Defendant has not denied knowledge of that letter. A final demand letter made was sent to the Defendant on 7th July 2014, again, it was not responded to. Hence the suit herein.

43. In conclusion I find that the evidence adduced herein clearly shows that the Parties herein have been involved in business transactions and/or relationship. In fact the Defendant does not deny the goods were supplied but states that they were supplied to a different site and another entity, but as stated herein these allegations were only introduced through the Defendant's submissions and not statement of Defence. If anything there is no proof that the Paragon Electronics Limited have admitted the debt, and nothing would have been easier than the Defendant's witness who is a Director in the two companies, producing that evidence, as he who alleges proves. Had he produced that evidence this case would probably not have seen the light of the day.

44. In my opinion, what seems to have transpired herein is that the Defendant's witness, Mr. Bulent Gulbahar who is a Director in both Companies that is: Remax Construction Ltd and the Paragon Electronics Ltd, made the payment upon issuance of invoices and is bound to conclude the payment unless the balance of the payment, or the sum claimed is in dispute, which is not the case.

45. The upshot is I find that the Plaintiff has proved its case as required under the law and I enter judgment in its favor in the sum of Kshs. 3,144,298.66, (as per the Demand notice) with interest at Court rates from the date of filing the suit to payment in full plus costs of the suit.

46. It is so ordered

Dated, delivered and signed in an open Court on this 3rd day of May 2018.

G.L.NZIOKA

JUDGE

In the presence of:

Ms. Nthiwa for the Plaintiff

Mr. Jaoko for Ms. Kimathi for the Defendant

Mr Lang'at-----Court Assistance