



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL CASE NO. 241 OF 2011

CABRO EAST AFRICA LTD..... PLAINTIFF

VERSUS

ROSOGA INVESTMENT LTD RESPONDENT

JUDGMENT

1. The plaintiff Cabro East Africa Limited filed this suit against Rosoga Investments Limited vide its plaint dated the 1st September 2011 seeking orders for payment of KshS.4,793,064/= with interest being unpaid money due and owing to the plaintiff by the defendant in respect of services rendered and goods supplied at the request of the defendant on diverse dates between October 2010 and February 2011, **Particulars stated in the body of the plaint.**

2. The defendant in its statements of defence dated 10/10/2010 and filed on the 13/10/22011 denies the plaintiffs claims and any existence of any contract with the plaintiff for the supply of goods and or services rendered and not paid for.

3. Filed with the plaint is a bundle of the plaintiffs documents and witness statements. The defendant too filed is witness statements and documents on the 12th October 2011.

4. Plaintiffs Evidence

Rahim Salim Aroi an accountant at the plaintiffs company testified on his behalf. He relied on his statement recorded on the 27th April 2016. His testimony was that during the period 2008 and 2011, it used to treat poles supplied and delivered by defendant at is designated sites and the defendant would collect after the chemical treatment.

5. It was also his evidence that the plaintiff would from time to time supply the defendant with the chemical used for the treat of the wooden poles.

He testified that for each of the transactions, an invoice showing particulars of poles treated and or chemicals supplied were issued. He testified that due to the long business relationship, the running account would be debited when transaction was done including when chemicals were supplied.

6. He further testified that over the years the defendant made requests for payment of sums owed but from 2011, the defendant ceased to make payments hence the sum claimed. It relates to five invoices. He stated that the last payment was made on the 10th January 2011 for Kshs 993,440/= and despite promises to pay the defendant failed to pay the balance. He produced Pext.1, 2, and 3 showing the customer ledger and summary of transaction, the emails and responses by the defendant advocates demand letters.

The five delivery notes were also produced (Pext, 5,6,7,8 and 9.) He also sought interest at 18% per annum as the company had borrowed funds to run the operations.

8. Upon cross examination, the accountant explained each invoice and how the amounts were arrived at basing the same on orally agreed unit price with the defendant which he stated was not denied. On re examination, the witness stated that the invoices were delivered and received by the customer by stamping and date in and there is no dispute on the amount claimed. He clarified that the delivery notes did not mention unit prices but quantities only. But that the customer ledger showed the prices which were not disputed, and are also stated in the correspondence exchanged.

He further clarified that payments were being made on the running account but not to settle a particular invoice, but a few were paid on specific invoices.

Our rejected poles, the accountant agreed that some poles were rejected and returned to the defendant. He reconfirm that the amount claimed was no disputed.

9. Defence evidence

Shadrack Chipchirchir Too testified as the defendants accountant since 1996. He too adopted his statement recorded on the 10th October 2011. His testimony was that other than the plaintiff treating its poles, it also used to supply chemicals for the treatment from 2008. He confirmed that the defendant was aware of the plaintiffs claim in the sum of Kshs.4,793,064/-, but stated that the main dispute was on how the chemicals supplied were used and delays in the treatment of the poles. He sated that the poles would be rejected if they were not of the standard size, were broken, cracked or rotten.

His testimony was that 660 poles were rejected and were valued at Kshs.3,000/- thus Kshs.1,980,000 which the plaintiff failed to give credit.

10. He further testified that the defendant lost 4 tyres valued a Kshs 45000/-earn when they were damaged at the plaintiff's premises He stated that the defendant was ready to pay if credit was given for the above loses. On cross examination, DW1 stated that the chemicals supplied were not documented nor the rejected poles and not paid for. He further had nothing to show that the defendant requested for credit, that it was rejected or did it file a counterclaim for the said credit of Kshs.2,205,000/= but further stated that it was ready to do reconciliation the account and settle the suit amicably.

11. I have considered the parties written submissions alongside the evidence and documents filed.

The courts re edition of issues for determination are:-

(1) Whether there was a contractual relationship between the plaintiff and the defendant for supply of goods and services for the period 2008-2011 in the sum of Kshs.4,793,064/- as claimed by the plaintiff and denied by the plaintiff.

(2) whether the plaintiff rendered goods and services in the above sum to the defendant.

(3) Whether the plaintiff is entitled to the reliefs sought in its plaint.

12. The evidence as recorded is evident that there was a business relationship between the two parties and admitted by the defendant though its witness DW1, who at the close of his evidence in chief and on cross examination stated that the defendant admitted the claim and was ready to pay, less a sum of Kshs.2,205,000/- thus a sum of Kshs. 2,588,064. On the balance, this witness stated that the defendant was ready to pay if reconciliation is done on the running account.

13. Without further ado, I find that there existed a contractual relationship though not written, a business relationship from the year 2008-2011 and that, payments for the supply of the goods and services were being paid on account, and thus the balance stated in the plaint as unpaid.

Admittedly there was no written contract settling down the terms of the business of contractual relationship, but an oral agreement was in existence.

The invoices Produce as evidence by the plaintiff (Pext 4-8) confirm an oral and business practice agreement exhibited by the customer ledger (Pext 1) that bears the particulars of the payments made by the defendant over the period on account, every 30 days through out the period. This customer ledger shows clearly the dates of supply, the sales, the amount debited and dates of payment, amount paid, and the balance at any particular date after payment.

14. The defendant confirmed that the last payment to the plaintiff of Kshs. 993,440/- was made and acknowledging the balance, stated that it was making arrangements to pay in response to the demand letter issued for the payment of the claim (PEXh 3) on the 25th July 2011 and received on the 1st August 2011 necessitating filing of this suit. It did not raise any issue on the account nor the amount demanded.

15. In its defence filed on the 11th October 2011, the defendants filed a statement of general denials, not only of the sum claimed but also of any services and/or goods supplied.

In the letter by its advocates to the plaintiff dated 4th August 2011 the defendant, for the first time tabulated a claim of Kshs.1,980,000/- and Kshs.180,000/- and attached invoices of what was termed as Delivery notes on rejected poles on various dates.

The defendants witness DW1 told the court that it had nothing to show, documentary or otherwise, of the rejected poles or the request for credit for the tabulated sum for the lost tyres.

16. I have carefully scrutinized the five invoices purportedly rejected.

The documents were produced as D.ext no 2-8. The delivery notes for the rejected poles were made in the month of April and May 2011. On the face of the delivery notes, one Mr Chepkwony is shown to have received them on various dates. They do not however show the value of the rejected poles save for the number, 660. The prices are not shown. The defendants accountant did not tell the court the price of a pole, nor how the claim of Kshs.1,980,000/- was arrived at. It is not clear on what dates, and in what lot they were delivered to the defendant for treatment.

17. In the plaintiffs' plaint, the invoices under dispute were deliveries on the 5th October 2010, 1st November 2010, 23rd November 2010 and 9th February 2011 and 14th February 2011. What the Defendant claims to have been rejected invoices are for earlier dates on the 14th April 2010, 15th April ,2010, 17th April 2010, 3rd May 2010 and 6th May 2010. These invoices as far as the plaint shows are not in dispute at all.

It has not been shown by the defendant that the deliveries at the five invoices were rejected.

That being the case, and the admission by the defendants witness that he had nothing to show or confirm the rejections, then the defendants claim remains unsubstantiated, and therefore not proved.

The same goes for the alleged value of lost tyres in the sum of Kshs.225,000/-

It is trite that he who alleges must prove. See **Section 107-108 of the Evidence Act, Chapter 80 Laws of Kenya.**

18. I have considered the authorities cited by the plaintiff and the defendant in support of their respective positions.

I am satisfied that the plaintiff has proved its case against the defendant on a balance of probability. See **Miller – vs- Minister of Pensions (1947) 2 ALL ER 372**, and quoted with approval in the case **DT Dobie Company. (K) Ltd – vs- Wanyonyi Chebukati (2014) e KLR** where Lord Denning discussing

the burden of proof stated.

“It must carry a reasonable degree of probability, but not so high as is required in a criminal case --thus proof on a balance or preponderance of probabilities means a win, however narrow.....”

19. The defendant did not raise a counterclaim against the plaintiffs claim. I find no reason therefore to order a set off of the sum of Kshs.1,980,000/= as submitted.

The issue of interest was not adequately conversed by the parties. The court is however empowered under **Section 26 of the Civil Procedure Act** to exercise its discretion on the mode and rates of interest payable on a decree. The disputed claim was upon a running account, but the relevant invoices that were unpaid were supplied in the months of October, November, 2010 and February 2011. There was nothing shown on the invoices that failure to pay would attract interest. I am minded that this was out of business transactions and delay in payment for goods and services would cause undue stress and hardship to a business.

20. The plaintiff urged the court to apply and uphold the trade and usage norm on interests rates at 18% per annum from date of filing the suit. See **Hccc. No. 1483 of 2000 Veleo (K) Ltd – vs- BBK Ltd (2013) e KLR**

It is not in dispute that the plaintiff lost the use and benefit of the unpaid monies. Interest would not have accrued if the payment was made in time. Taking into account the above, I am persuaded to order interest at rates 14% per annum from the date of filing the suit.

21. Consequently and for the reasons stated above, there shall be judgment entered for the plaintiff against the defendant in the sum of Kshs.4,793,064/-. This sum shall attract interest from the date of filing this suit at the rate of 14% per annum.

22. Costs of the suit are awarded to the plaintiff.

Dated, Signed and Delivered this 4th Day of May 2017

J. N. MULWA

JUDGE