



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

HC.COMM. 24 OF 2016

MINI-MIX AGENCIES LIMITED.....PLAINTIFF

VERSUS

KENYA MARINE & FISHERIES RESEARCH INSTITUTE.....DEFENDANT

RULING

Outline

1. By its plaint dated the 17/2/2016, the Plaintiff sought to recover from the defendant the sum of Kshs.23,582,122/= on account of goods sold and delivered by the plaintiff to the defendant together with interest thereon at the rate of 15% per month from the date of delivery till payment in full.
2. The Defendant did resist the plaintiffs claim and filed a statement of defence dated 25/5/2016 which did at paragraph 3 deny the contract for supply on account of invoice No. A21138 but did plead in the alternative that the goods were indeed supplied but payment was delayed on account of factors beyond the defendants control and that the principal sum had been paid and interest was conceded in the sum of Kshs.508,235/= there was the last pleading that the plaintiff had failed to attempt a dispute resolution term of the agreement prior to coming to court and therefore the defendant made a plea that the plaintiffs suit be deemed bad in law, incompetent and abusive of the court process.
3. When the matter came up for case conference it was agreed between the parties that the principal sum had been paid in the year 2014 and that what was outstanding was the question of interest which the parties were then directed to calculate and agree on and in default the court would determine the issue by way of case stated. The issue agreed between the parties is therefore the quantum of interest payable.

Submissions by the parties

4. Both parties filed submissions. The plaintiffs submissions are dated 13/3/2017 and filed on 14/3/2017 while the defendants are dated 14th March and filed the same day.
5. The plaintiffs position is put in a straight forward way that there exist an agreement between the parties by virtue of clause 16.5 of the contract that there would be due interest calculated at 15% in case of delay in payment of the principal sum. It was then pointed out as follows:

Date of delivery: December 2013

Dates of invoices: 4/2/2014 Kshs.20,329,416.00

9/7/2014 Kshs. 3,252,206.00

Dates of payment: Invoice dated 4/2/2014 for

Kshs.20,329,416.00 on 4/2/2014

Invoice dated 9/7/2014 for Kshs.3,252,706.00 on 13/8/2014

6. The foregoing dates to the plaintiff are the threshold dates that must be applied to the contract of payment of interest between the parties in terms of clause 16.3 and 16.5 of the General conditions and clause 16.5 of the special conditions.

7. To the plaintiff therefore interest due on the principal is to be calculated from the 7/3/2014 to the date of payment. The contract documents were exhibited and relied upon to support the foregoing position. For the defendant, the position is taken that this suit was filed without regard to the fact that the sum deemed in the plaint was paid more than one year before the suit was filed.

8. On the commencement date of calculation of interests payment the defendant adds a twice to the opponent place on facts as prescribed by the plaintiff. The defendant introduces a date of 8/7/2014 as the date the official inspection and acceptance certificate issued by the purchaser. Reliance was placed on clause 16.2 of the General conditions of contract and clause 16.1 of the special conditions of the contract.

9. On those facts the defendant submit that the certificate of acceptance was made on the 8/7/2014 and payment having been made on the 8/8/2017 the terms of the contract were duly complied with and therefore the plaintiffs claim for interest is neither due nor tenable. The defendant then cited the decision in *Karsam Randia & 2 Others vs Commercial Bank of Africa Ltd [2015] eKLR* for the proposition that a court of law is bound to enforce and respect the terms of the contract as agreed between the parties and have no jurisdiction to re-write such a contract.

10. When the parties attended court to highlight the submissions, nothing new emerged same that the plaintiff took the view that the issuance of acceptance certificate by the defendant having been at its control was not the just yardstick to be used to establish when the delay time started to run and that the submissions filed which deny any amount of interest to be due and payable contradict the pleadings for the defendant Ms. Luganje made relied on the submissions wholly and duly added that on the evidence adduced there was no basics to charge interest.

Issues Analysis and determination

11. As directed and agreed with the parties the only issues for determination is whether or not there was delay in payment of the contract sum and how much is due as interest for such delay, if any is established, using the contracted rate of interest.

12. To answer that question the court is confirmed to only look at the contract as the only source of parties intentions. That the parties agreed that interest would be charged at 15% per month is not in dispute. What is in dispute is whether the payment was due within 30 days from the date of service of the invoice or 30 days after the issue of acceptance certificate.

13. There is clause 16.1 which provide for two scenarios; whether goods are supplied from abroad or within the purchaser's country. However in both scenarios there is a sub-clause (iii) which is common in both situations and it provides:-

“(iii) On acceptance: One hundred (100) percent of the contract price shall be paid to the supplier within thirty (30) days after the date of the acceptance certificate of the Respective delivery issued by the purchaser”.

14. I have looked at clause 26 of the General conditions of contract, it provides that inspection and test of

the purchased items is important and critical for the parties and that it would be the duty of the plaintiff to carry out such test or inspection and provide a report. It further provide that the execution of the test or inspection or the attendance of the purchaser's representative at such test or importation nor the issuance of any report on test or inspection shall not release the seller from the warranties provided for under Clause 28.

15. The reaching of the contract lead one to the conclusion that upon delivery, the parties agreed that there would be related services, say installation and inspection which would entitle the purchaser to reject or accept the goods, hence the need for an acceptance Certificate.

16. To this Court therefore, the totality of the contract is that time for payment would start running from the date a Certificate of acceptance is issued by the purchaser. That is the only clear and natural interpretation of clause 16.1 (iii) of the contract.

17. That interpretation when applied to the threshold dates supplied by the parties, and, I find that the plaintiff has not taken a position when the Certificate of acceptance was issued, lead to the conclusion that the certificate of acceptance having been issued on the 8/7/2014, the payment for the contract sum was itself due on the 8/8/2014, and not 9/8/2014 as asserted by the defendant since the month of July has 31 days. Both parties agree that the payment of the principal sum was made on the 8/8/2014 within the contractual timelines and therefore there was no delay to entitle the plaintiff to claim interests.

18. How does this finding sit with the defendants statement of defence at paragraph 7 which admit interest in the sum of Kshs.508,235/= ? It is true that parties are bound by their pleadings. That is the dictate of Order Rule 6 Civil Procedure Act. But pleading are what they are.

19. Allegations of facts that ought to be proved by evidence. It is critical that the plaintiff did file a Reply to the statement of defence and at paragraph 9 denied. That the defendants position that it owed Kshs.508,235. This state of affairs made the quantum of interest to be subject of proof by evidence. It would have been a different position had the plaintiff unequivocally admitted the sum as the one owing or just failed to file a Reply to defence.

20. In the circumstance of the case and the rules of procedure, Withstanding, and noting that they must remain handmaids of justice not its masters, must remain what they are Rules of Procedure. The rules of procedure should never be used to overtook the truth. In this case, the truth in that the parties agreed in a written document that interest would be calculated in the event that there is delay of payment beyond 30days after the issuance of a Certificate of acceptance. The documents by the parties show that there was never such delay with the consequence than parties are bound by their contract and this court ought not to read what is not therein contain or seek to ignore reading what the parties contractually wrote in the contract.

21. I find that on the evidence availed, in the contract document, there was no delay and no interest was therefore due just as there was no contractual sum outstanding as at the date the suit was filed.

22. There is the consequent issue of costs of the suit. In the matter the plaintiff had no reason to file the suit had it sought to go by the terms of the contract. Even if it believed that there was an interest due, it had no reason to claim the full contract sum that had been paid long before the suit was concerned and filed. But even then the contract under clause mandated and obligated the parties to go to arbitration under the Arbitration Act prior to filing suit. In other words the parties agreed on the forum for their dispute resolution to be one away from this court. The plaintiff had no justification at all to bring these suit as it did.

23. Even the defendant cannot escape the blame for failure to discharge its duty to court. That duty was due by clear and unequivocal pleading stating the facts as they were rather than what I consider to be otherwise convoluted pleading even if expressed to be in the alternative. The defendant was equally enjoined to take the earlier opportunity and deny the forum rather than taking a halfhearted position as in paragraph 8 of the statement of defence.

24. The facts of this suit reminds the court of the prevalent notion in the general public domain that it is possible to supply a public institution, get paid and have the evidence of payment spirited away and make subsequent demands for payment. I take notice that the defendant being a state corporation, has no funds or property of its own but has which is placed on its hands for use on behalf of the Kenyan people. The Kenyan people continue to complain about wastage in public institutions and the court taking the position of the guardian against such mischief will not miss the opportunity to say that the public need to have that confidence in public institutions they have established to serve them.

25. Both sides have failed on their duty to fully disclose the facts available to them and has a consequence taken undue courts time in an underserved manner. For that reason, I order that each party will bear own costs.

Dated and delivered at **Mombasa** this **08th** day of **May 2017**.

HON. P. J. O. OTIENO

JUDGE