



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL CASE No 342 of 2013

MAZEN ROYAL FURNISHERS LTD.....PLAINTIFF/APPLICANT

Versus

RED COURT HOTEL LIMITED.....FIRST DEFENDANT/ APPLICANT

KENYA RED CROSS SOCIETY.....SECOND DEFENDANT/RESPONDENT

R U L I N G

1. The Court has before it an Application brought on behalf of the Plaintiff for a Judgment on Admissions, and for the Defence Statement to be struck out with costs.
2. By way of Background, there has been a course of dealings between the Parties. The Plaintiff is an importer and supplier of fittings including light fittings, room appliances, furniture and sanitary ware as well as wall and floor coverings (carpets and tiles). The First Defendant is a limited company and a Hotel. The Second Defendant is the Kenya Red Cross Society, a Society which has a charitable function. It appears that the Plaintiff entered into a series of contracts with the First and Second Defendants. It seems that the first such contract was around early 2009 and the second in late 2009/2010. Unfortunately the details are not completely clear because they are not properly and fully particularised. Nor do the Exhibits and documents produced provide a complete picture. The explanations arise from the email exchanges and in particular the email evidence appearing between pages 36 and 41 of the Plaintiff's List and Bundle of Documents filed on 02 August 2013 described as "Various Email Printouts between the Plaintiff and the Defendant on the amounts due and outstanding".
3. The Plaintiff supplied the goods as required as per the quotation dated 3 February 2010 and in the way required, that is without charging Value Added Tax and Duty to the imported goods. The Plaintiff says it performed the contract as agreed. There is no evidence before the Court that either of the Defendants raised any concerns as to the Plaintiff's performance of its contractual obligations.
4. The Parties' contract was arranged in such a way that the Plaintiff was a sub-contractor to the main contractors, M/s Cementers Limited (Letter from First Defendant dated 17 December 2009) within the scheme of fitting out or refurbishment of the Red Court Hotel. Again, the details are not clear.
5. The Plaintiff was a sub-contractor within the scheme of the refurbishment of the Hotel. However it was an express term of the contract that

(a) the Plaintiff would be paid directly, and

(b) the Party ultimately responsible for payment would be the Red Cross Society of Kenya, the Second Defendant (Letter 2nd February 2010. The contract price was agreed and part payment made.

5. The Plaintiff supplied the goods and they were accepted by the First Defendant. Unfortunately the letters produced within these proceedings seem to relate to the earlier contract, because they were received on 4th June.

6. Various payments were made. By around 2012/2013 payment was still outstanding. The emails show the Plaintiff's frustration at the Defendant's lack of communication and failure to pay. It was only in early 2013 that the First Defendant began the query the sums paid. By an email dated 4th February 2013 the Plaintiff provided clarification saying that all payments made before 19th February 2010 relate to the previous contract. Details of the previous contract are not supplied in the pleading or bundle. There is also reference to "*Extra items and a balance at 3rd June 2009 of US 149,266.85*". That appears to relate to the previous contract. The evidence is not clear.

7. Therefore it is clear that there has been a course of dealing between the Parties, However, the Plaintiff's position has always been clear and consistent. Since February 2013, the Plaintiff has stated clearly and consistently that the sums outstanding are:

1) The Sum of KShs10,997,542.88 and

2) US\$ 277,479.23 at an exchange rate of KShs87:US\$1 amounting to KShs24,104.693.01

8. On 28th February 2013 the Plaintiff stated clearly that unless payment was made it would institute legal proceedings. The Defendants did not challenge the sums demanded. The First Defendant simply asked for more time to pay, until the end of May 2013. Payment was not made, in part or at all.

9. The Plaintiff commenced proceedings by plaint issued on 31st July 2013. The Defendants did not file a Defence. The Plaintiff then filed this Application (dated 16th December 2014) on 11th March 2015.

10. Unfortunately the figures pleaded by the Plaintiff's lawyers are not completely consistent. Further the figures used in the written submissions also vary. I do not think the Defendant is misled by these errors because the Plaintiff's position has been completely clear and consistent as to its claim. It seeks payment of:

1. Kshs. 10,997,542.88 and

2. US\$ 277, 479.13 at a rate of Kshs.87 to the US\$ together with accrued interest. No exchange rate is given in pleading.

The Reply refers to "Boma Hotels" instead of the 1st Defendant but asks for time.

11. The witness statement confirms the same figures have been known since October 2012.

12. The Plaintiff at paragraph 11 states that the Defendants are jointly and severally liable and that the aggregate balance is Kshs.10,997,542.88 and US\$ 277,479.13 or its equivalent in Kenya Shillings at the prevailing foreign exchange rate. No exchange rate is set out there.

13. The Application seeks the following Orders that:

"1. This Honourable Court be pleased to enter judgment on admission in favour of the Plaintiff as against the Defendants in the sum of Kshs.10,997,542.88 and USD 277,479.13 (Kshs.25,333,844.56 at the prevailing foreign exchange rate) respectively, together with interest at court rates as prayed in the plaint;

2. Consequent thereto, this honourable court be pleased to strike out the 1st and 2nd Defendants' Statement of Defence dated 25th September 2013 for being an abuse of court process;

3. Costs of this suit and of the application be borne by the Defendants.

On the following Grounds:-

a. The Defendants were truly indebted to the Plaintiff to the sum of Kshs.10,997,542.88 and US\$ 277,479.13 (Kshs.25,333,844.56 at the prevailing foreign exchange rate) with effect from October 2012 and were so indebted at the commencement of this suit;

b. The Defendants have, following the filing of this suit, paid to the Plaintiff the sum of Kshs.34,000,000/- only towards settling the debt;

c. The said sum however could not clear the total amount outstanding at the prevailing foreign exchange rate plus the Plaintiff's costs and interest.

d. The Defendants by their own conduct have, thus, admitted their indebtedness to the Plaintiff's

e. The said admission is clear and unequivocal.

f. The Defence filed herein on behalf of the Defendants on the background of the admission is therefore a sham and an abuse of the Court process;

g. This Honourable Court has the inherent power to make such orders as may be necessary for justice and allowing this case to proceed to full trial defeats the overriding objectives of the Civil Procedure Act Cap 21 Laws of Kenya;

14. Therefore the Notice of Motion is seeking payment of

(1) Kshs.10,997,542.88 and

(2) US\$ 277,479.13 which is converted there to KShs.25,333.844.56 respectively. That uses an exchange rate of KShs91.3 to US\$1 said to be applicable on the date of filing AND Interest at court rates.

15. On the Plaintiff's calculation, the sums due are:

KShs10,997,542.88

KShs25,333,844.56

36,331,387.44

The sum due as set out in paragraph 7 of the Supporting Affidavit is KShs36,331,387.40.

16. It is said that the Defendants (it is not specified which) paid Kshs.34,000,000/- therefore, the sums due are:

Kshs. 36,331,387.44

Less Kshs. 34,000,000.00

Kshs. 2,331,387. 44

17. Paragraph 11 of the Supporting Affidavit says that Kshs.1,138,227.19 is still owing from the Defendants which is a difference of Kshs.1,193,160.25, that balance is different from the result of a straight deduction.

18. The Defendants filed a Replying Affidavit on 6th October 2015. The Defendants dispute the liability on interest saying the contract does not provide for interest to be charged. A copy of the contract has not been exhibited. It is also said interest should only be chargeable post issue of the suit.

19. The Defendant also says that it has not neglected or ignored its liability and says it has made full payment “applying the prevailing exchange rate”. The rate applied is not set out clearly. The Replying Affidavit warns against double recovery by the Plaintiff. It is also argued rates have increased.

20. It is also said the Defendants Defence raises triable issues. The Plaintiff argues that the Defence contain bare denials and so should be struck out. It is correct there is bare denial of liability but there is also an averment of full settlement.

21. Given the absence of contemporaneous evidence on both sides and the inconsistency in the Plaintiffs case, the court will need to conduct an inquiry into the exact sum due and owing as at the date of filing of the suit.

22. Interest is a discretionary remedy and can therefore only be granted after taking into account all the relevant facts and matters. However, that is not to say that the discretion is in anyway fettered and interest could relate back to the date of delivery and acceptance of the goods. The cautionary note to bear in mind is that this is a commercial contract.

23. In relation to the Plaintiffs argument of admission by payment, although that appears to be an attractive argument, in fact it can only apply to the KShs.34,000,000/- and not the balance of KShs.2,331,387.44. That is the amount now in dispute.

24. Therefore the Court cannot make a finding of admission as there is no clear admission on the facts. Further the Court finds that the interests of justice are not served by striking out the Defence, weak as it is, it does raise triable issues on quantum, settlement and the entitlement to and quantum of interest.

25. There is also the question of liability as between the two Defendants.

26. For the reasons set out above, I dismiss the Application. However each party shall pay its own costs. This is a case where the Defendants are not entitled to costs. The Plaintiff's Application was necessary. The Defendant had withheld payment since October 2012. That is three years. It is clear payment was only made after the Plaintiff's Application. In that respect the Plaintiff has succeeded in its Application, in part.

27. Each party to bear its own costs.

28. Given that the issues are well defined, I direct this matter and the limited outstanding issues be listed for final hearing sooner rather than later. I Make the following directions:

- (1) Parties to file all documents within 14 days;
- (2) The Parties to comply with the requirements of case management;
- (3) Parties to file a case management request and checklist within 28 days;

Order accordingly,

FARAH S. AMIN

JUDGE

Dated 3rd day of February 2016.

Signed and Delivered on 8th day of February **2016**.

In the Presence of:

Joseph Kabugi – Court Clerk

Mr. Kiarie HB Mr. Masika for Plaintiff/Applicant

N/A – for the Defendants/Respondents