



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 61 OF 2010

PYRETHRUM BOARD OF KENYA.....APPELLANT

VERSUS

BUDA CAKE AND FEEDS LTD.....RESPONDENT

(Being an appeal from the Judgment/Decree of Hon. Wilbroda Juma, Chief Magistrate, Nakuru, delivered on 24th February, 2010, in Nakuru CMCC NO. 859 of 2006)

JUDGMENT ON CROSS – APPEAL

1. The Respondent filed a counter-appeal on the 1st September 2014 from the Judgment of the trial court delivered on the 24th February 2010.

The appellant was served with the counter-appeal on the 3rd September 2014. It has not filed any submissions on the same pursuant to directions taken on the 22nd October 2014.

The counter-appeal was filed five months after the trial courts judgment. A perusal of the court record indicates that the respondent was granted leave to file the cross-appeal on the 25th July 2014 – It is therefore competently on record.

The grounds upon which the cross-appeal is based are:

1. **That** the Honourable trial magistrate erred in law and fact in assessing loss of profits only on the basis of 1970 bags of pymarc instead of 5900 bags of pymarc which had not been supplied hence arrived at a wrong figure of Kshs.197,000/= instead of Kshs.590,000/= and also failed to assess general damages for breach of contract.

2. **That** the learned trial Magistrate erred in law and fact in ordering that interest be paid from the date of judgment when the sums claimed apart from loss of profits and damages are liquidated claims in which interest ought to run from the date of filing suit at court rates and from 9th March 2005 to 9th May 2006 at bank rates.

2. The Respondent prays for an award of Kshs.590,000/= being loss of profits, general damages for breach of contract and interest before and after filing of the suit together with costs of the cross appeal.

In the trial court's judgment, it is stated that the Respondents claim was for Kshs.1,180,000/= being the value of Kshs.5.900/= bags of Pymarc at Kshs.200/= per bag, and loss of profit of Kshs.590,000/= at Kshs.100/= per – bag being unsupplied bags at an interest of 30% on monthly basis and refund of the balance of Kshs.212,400/=. It was the finding of the court that the defendant/appellant owes the

respondent the value of 1970 bags of pymarc worth **Kshs.394,000/=**, and a profit loss of Kshs.197,000/= on interest, it was the courts finding that if such interest was awarded, it would amount to double award, and ordered interest from date of the judgment. These are the awards the Respondent want the court to review.

3. In his submissions on the cross appeal, the respondent urged that the sum of Kshs.394,000/= being a liquidated sum ought to accrue interest from date of filing suit until payment, from 9th March 2005 to 9th May 2006 at bank rates, at the minimal 3% per month claimed in the the claim. It is his submission that the trial court had no reason to deny the respondent the interest.

4. On loss of profits, it is stated that the trial court erred in assessing loss on only 1970 bags instead of 5,900.

The court has considered the evidence tendered, the trial courts judgment and submission by counsel.

It is admitted that 5900 bags of Pymarc were paid for and that only 3950 bags were supplied, leaving a balance of 1970 bags not supplied. At the rate of Kshs.200/= per bag, the trial court ordered payment of Kshs.394,000/=.

The court finds no plausible submission that the sum of Kshs.786,000/= ought to attract profit at Kshs.100/= per bag making a total of Kshs.393,000/=. It has not been shown by the parties when this refund was made, but it is confirmed that it was indeed paid back to the respondent by the time the case was listed done for hearing. I find no basis upon which the court can order interest paid on that sum. The trial court was in order when it denied to order interest on the said sum of Kshs.786,000/=.

5. As to the profit alleged that would have been earned at Kshs.394,000/= the trial court is faulted for not making such order for payment of the profit. Having stated above that at the time of refund of the cost of the bags at Kshs.786,000/= issue of interest was not raised by either party, it would not have been possible for the court to order payment of the profit they would have earned.

It is clear from the plaintiff/respondent's evidence that after the payment of the KShs.786,000/= the balance was Kshs.394,000/=. This is the claim that went to trial and that the trial Court found proved and awarded loss of profits on the same at Kshs.197,000/=. The trial court made finding that if interest on the loss of profit of Kshs.197,000/= were ordered, that would amount of double award, and denied to award interest such sum.

6. The Respondents claim was for a liquidated sum . A prayer for interest at court rates was made. Prior to the judgment, a claim for interest before and after judgment at 3% per month from 9th May 2005 to date of filing suit, was also pleaded.

I have considered the pleadings and submissions. The value of the unsupplied bags together with profit have been ordered. At issue is whether interest prior and after the judgment ought to be paid.

7. It is trite that on a liquidated claim, interest ought to be paid from the time the cause of action arose at interest rates as may have been agreed or reasonable rates. In this case, interest rate of 3% per month was stated. I have not seen any evidence suggesting that such interest rate of 3% per month was mutually agreed by the parties.

In the absence of such agreement, the best the court can order is reasonable interest at court rates per annum from the time the said sum of Kshs.394,000/= was paid to the respondent on the 9th March 2005 upto the date of judgment on the 24th February 2010.

A further interest ought to have been ordered as from the date of judgment until payment in full on the same amount of Kshs.394, 000/=. In other words, the court finds that an order for interest at court rates ought to have made from the 9th March 2005 until payment in full on the sum of Kshs.394,000/=.

8. The trial court ordered payment of Kshs.197,000/= to the respondent being loss of profits. I find that the trial court erred in not awarding interest on the sum of Kshs.197,000/=. Once the claim was proved, an award of interest ought to have made from the date of judgment.

The sum of Kshs.197,000/= shall therefore attract interest at court rates from date of judgment until payment in full.

9. On the matter of breach of contract, it is the court's considered view that the Respondents claim having been for a liquidated sum, and the court, having made a finding that the respondent was entitled to payment of the same plus loss of profits and interest, the claim for breach of contract then fails as compensation for loss of the profits and interest would adequately compensate the appellant for the breach. To award damages for the breach of contract would amount to double compensation that would not be anchored in law and would amount to an unjust enrichment. That ground of appeal fails.

10. The upshot of the above is that the cross appeal succeeds, and the trial court's judgment is varied in the following terms:

1. That the appellant shall pay the Respondent the Kshs.197,000/= being loss of profit.
2. That the said sum shall attract interest at court rates from the date of the trial court's judgment until payment in full .
3. That the sum of Kshs.394,000/= payable to the Respondent shall attract interest at court rates from the 9th March 2005 until payment in full.
4. That costs of this cross- appeal shall be paid by the appellant.

Dated, signed and delivered in open court this 9th day of February 2016

JANET MULWA

JUDGE