



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 335 OF 2014

AYAZ HUSSEIN MUKHI.....PLAINTIFF

-VERSUS-

SUNDIP PATEL.....1ST DEFENDANT

HINA PATEL.....2ND DEFENDANT

KAPU LIMITED.....3RD DEFENDANT

JUDGMENT

[1] The Plaintiff herein, **Ayaz Hussien Mukhi**, filed this suit on **31 July 2014** through the law firm of **Kemboy & Company, Advocates**, praying for judgment against the Defendants jointly and severally, in the following terms:

[a] Kshs. 40,775,898 being the balance of the contractual sum.

[b] Costs of the suit

[c] Interest on [a] and [b] above at the rate of 14% per annum from 28 February 2013.

The claim is premised on the grounds that the Plaintiff entered into an agreement with the 1st and 2nd Defendants sometimes in **2009** whereby the Plaintiff was to procure the supply of assorted goods to the 1st and 2nd Defendants, for the benefit and use of the 3rd Defendant; and that upon receipt thereof, invoices would be raised and issued by the Plaintiff for prompt settlement by the Defendants.

[2] It was the Plaintiff's contention that an assortment of goods were thus supplied on diverse dates between **January 2009** and **December 2010** on the basis of orders and/or requests of the 1st and 2nd Defendants, pursuant to the agreement aforementioned, for the use of the 3rd Defendant; and that invoices were issued accordingly, but that although the 1st and 2nd Defendants honoured some of the invoices, it neglected and/or ignored others. The result thereof was that the outstanding debt accumulated in no time to **Kshs. 45,076,053**. Subsequent demands for payment saw the 1st and 2nd Defendants reduce the outstanding sum to **Kshs. 40,775,898**, which is the sum that the Plaintiff seeks to recover herein. It was further the Plaintiff's case that at some point efforts were made by the 1st and 2nd Defendants to pay off the outstanding sum in the name of the 3rd Defendant, to which end some post-dated cheques were issued in the name of the 3rd Defendant, but the same were dishonoured on presentation for lack of funds.

Accordingly, the Plaintiff seeks that judgment be entered in his favour in the aforesaid sum of **Kshs. 40,775,898** together with interest and costs as prayed for in the Plaint.

[3] The claim was resisted by the three Defendants vide their respective Statements of Defence filed herein on **5 September 2014**, in which the 1st and 2nd Defendants basically denied having entered into any form of agreement with the Plaintiff as alleged, or that the Plaintiff supplied them with assorted goods as pleaded. They further denied that the Plaintiff issued them with invoices to the tune of **Kshs. 45,076,053**. According to the 1st Defendant, who is said to be the Managing Director of the 3rd Defendant, the Plaintiff was a business associate and that from time to time, he requested and was allowed to use the 3rd Defendant's facilities to import goods, which he would then supply to third parties. It was further the contention of the 1st Defendant that on some occasions the 3rd Defendant sold the Plaintiff's goods on his behalf and remitted all the monies to him, the last such remittance being the sum of **Kshs. 32,817,865** that was made on **4 March 2011** in full and final payment of the accounts between the Plaintiff and the 3rd Defendant. Thus, the 1st Defendant denied that he is liable to the Plaintiff as claimed herein. The 2nd Defendant and 3rd Defendants similarly denied being liable to the Plaintiff as claimed herein or at all, contending that they neither issued nor authorized the execution of cheques in favour of the Plaintiff nor the issuance of the letter of undertaking dated **4 March 2011**.

[4] After the close of pleadings, the matter was processed in readiness for hearing. It was in the course thereof that Counsel for the Defendants sought leave of the Court to cease acting vide their Chamber Application dated **17 July 2015**, filed pursuant to the provisions of **Order 9 Rule 13** of the Civil Procedure Rules. The orders sought therein were granted on **28 September 2015**, whereupon the Hearing Notice for **18 May 2016** was served on the Defendants and duly acknowledged as per the copy thereof attached to the Affidavit of Service sworn by **Benson Ingunzi** on **9 November 2015** and filed on **11 November 2015**, yet on the hearing date, none of the Defendants made an appearance to defend the claim. Accordingly, the Court proceeded *ex parte* and heard the Plaintiff's case.

[5] In support of his case, the Plaintiff adopted the Witness Statement that he made on **12 June 2015** and added that he entered into an agreement with the 1st and 2nd Defendants in the year **2009** that would see him supply an assortment of goods to the three Defendants; and that pursuant to that agreement, he did supply the said goods to the 3rd Defendant at the instance and order of the 1st and 2nd Defendants on diverse dates between **January 2009** and **December 2010**, for which invoices were duly issued. It was his further evidence that although in the first instance the 1st and 2nd Defendants promptly honoured the invoices issued to the 3rd Defendant, they later failed to pay, thereby accumulating a debt of **Kshs. 45,076,053**. That thereafter, upon numerous requests for payment and reminders, the Defendants reduced the outstanding sum to **Kshs. 40,775,898**, which remains outstanding to date.

[6] The Plaintiff further testified that in a bid to settle the outstanding debt, the 1st and 2nd Defendants issued him with certain post-dated cheques issued in the name of the 3rd Defendant which were however dishonoured on presentation for lack of funds; and what when he informed the 1st and 2nd Defendants about the dishonour of the cheques, the 1st Defendant wrote the letters dated **4 March 2011** and **14 April 2011** on behalf of all the three Defendants, not only to confirm their indebtedness to the Plaintiff, but to also provide an undertaking on their behalf to settle the outstanding sum by **28 February 2013**. It was the Plaintiff's case that, again, the Defendants failed to pay as promised, yet on the basis of the aforesaid undertaking, he entered into business engagements with third parties who were demanding payment from him and even threatening to attach and auction his properties. In support of his evidence, the Plaintiff produced as exhibits all the relevant documentation including copies of the cheques and the letters aforementioned.

[7] Although the Plaintiff's evidence was entirely uncontroverted, the Court is duty-bound to consider that evidence in the light of the pleadings filed herein by the parties, including the defences raised by the Defendants. I have carefully considered the same, including the written submissions filed by Counsel for the Plaintiff. I note that a list of 10 issues were framed and filed by the Plaintiff for the Court's consideration, but which, as suggested by the Plaintiff's Counsel, can be condensed into the following:

[a] Whether there was a valid contract between the Plaintiff and the Defendants;

[b] If the answer to the above is in the affirmative, whether there was breach of contract by the Defendants;

[c] Whether the Plaintiff is entitled to the Kshs. 40,775,898, together with interest at 14% from 28 February 2013 as claimed in the Plaint;

[d] Who is to bear the costs of this suit?

[8] On whether there was a **valid contract** between the Plaintiff and the 1st and 2nd Defendants, a careful consideration of the plaintiff's pleadings and evidence does not evince any formal written agreement. It appears to be his case that the agreement was verbal, and although denied by the Defendants, the Plaintiff has adduced uncontroverted evidence to prove that he offered to procure and supply an assortment of goods to the Defendants, which offer was accepted by the Defendants; and that the Plaintiff did supply the Defendants with the said goods and invoiced the Defendants accordingly. It is noteworthy that the Defendants did admit that there was some business arrangements between them, but contended that whatever sums were due to the Plaintiff had been fully paid. Thus, the Court is satisfied that there was indeed an agreement between the parties for the supply of goods as contended by the Plaintiff.

[9] The second issue is whether there was **breach** of that agreement, the Plaintiff's evidence is that although he supplied the goods as ordered, the Defendants made only partial payments therefor, leaving an outstanding balance of **Kshs. 40,775,898**. Whereas the Defendants alleged that full and final payment had been made, it is noteworthy that the alleged last such remittance in the sum of **Kshs. 32,817,865** is said to have been made on **4 March 2011**. Exhibited at **page 42** of the Plaintiff's Bundle of Documents filed with the Plaint on **31 July 2014** is the letter dated **4 March 2011** written on the letter-head of the 3rd Defendant by the 1st Defendant in which he stated thus:

"...We write to confirm that we owe Mr. Ayaz Mukhi a total sum of Kshs. 45,076,053.00.

We shall make full payment of the said amount to him between the dates of 20th March 2011 and 28th February 2013..."

[10] Pursuant to the letter aforementioned, the Defendants issued the Plaintiff with several post-dated cheques bearing the dates of **1 May 2011** to **31 July 2011** which were backed by the letter dated **14 April 2011**. That the cheques were dishonoured is not in dispute, as is evinced by the documents exhibited at pages **53** to **72** of the Plaintiff's Supplementary Bundle of Documents. It is therefore manifest that, contrary to the contention by the Defence that the debt had been fully paid by **4 March 2011**, the Defendants were indeed indebted to the Plaintiff in the sum claimed herein, for which post-dated cheques were issued by the Defendants. There is sufficient proof therefore that the Defendant's breached the terms of their agreement aforementioned and are jointly and severally indebted to the Plaintiff in the sum of **Kshs. 40,775,898**, as claimed.

[11] The Plaintiff claimed interest at the rate of 14% per annum from **18 February 2013**, but did not quite justify the same. This suit was filed on **31 July 2014** and it is now trite that interest antecedent to the filing of the suit is only claimable where there is an agreement stipulating the contractual rate of interest or where the interest is allowed by mercantile usage, which must be pleaded and proved. Nevertheless, the court retains the discretion as to whether or not to award pre-action interest. This is clear in **Section 26(1) of the Civil Procedure Act, Chapter 21 of the Laws of Kenya**, which stipulates that:

"where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit."

[12] It cannot be gainsaid that the payment of interest serves the purpose of compensating a plaintiff for

the deprivation of any money or specific goods through the wrongful act of a defendant (see **Highway Furniture Mart Ltd vs Permanent Secretary Office of the President & Another [2006] eKLR**). As to whether the Plaintiff herein is entitled to pre-action interest, the guiding principle set out in the case of **Lata vs. Mbiyu [1965] EA 592** is that where a person is entitled to a liquidated amount or to specific goods and has been deprived of the same through the wrongful act of another person, he should be awarded interest from the date of filing suit. (see also **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696**)

In the premises, I would award interest from the date this suit was filed till full payment.

[13] In the result therefore, judgment is hereby entered for the Plaintiff in the sum of **Kshs. 40,775,898** with interest thereon at the rate of 14% from the date of filing of the suit till payment in full together with costs of the suit.

Orders accordingly.

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 14th DAY OF SEPTEMBER, 2016

OLGA SEWE

JUDGE