



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 43 OF 2014

FAHIM H. AMIR

T/A FAHIM H. AMIR TRANSPORTER..... PLAINTIFF

V E R S U S

TUMAINI TRANSPORT SERVICES CO. LTDDEFENDANT

RULING

1. On 10th April 2012 **FAHIM H. AMIR T/A FAHIM H. AMIR TRANSPORTERS**, the Plaintiff entered into a sub-contract agreement with the Defendant **TUMAINI TRANSPORT SERVICES CO. LTD**. Under that contract Plaintiff was to supply eleven lorries to be used to transport loaded containers from Tata Chemical Magadi warehouse Shed No. 10 to the designated Berth 13 and 14 or any other than may be assigned. The contract term was for three years and each party was required to give three months termination notice. It was also agreed that the Defendant was to pay Plaintiff's charges "*within 30 days from the date of sub contractors (Plaintiff's) correct invoice.*" Those payments according to the agreement could be reviewed from time to time.

PLAINTIFF'S CLAIM

2. Plaintiff has filed this case seeking judgment for Kshs. 26,819,950/- being the amount owed by Defendant for transport services provided under the agreement. Plaintiff pleaded that Defendant had acknowledged that debt by a written proposal of settlement.

DEFENDANT'S DEFENCE

3. Defendant filed a defence and counter claim. In defence to the claim Defendant pleaded that the payments to the Plaintiff were subject to Defendant receiving payment from Tata Chemical Magadi Ltd and Plaintiff had accepted delayed payments on that basis. Defendant denied being in breach of the agreement with Plaintiff; that the Defendant's ability to continue paying the Plaintiff was dependent on the Plaintiff providing the fleet of lorries as provided in the agreement but which was affected by Plaintiff's terminating the contract and withdrawing his entire fleet of lorries. Defendant pleaded that Plaintiff therefore breached the agreement by failing to give three months notice of termination and thereby the Defendant was unable to fulfill its obligation to the Plaintiff.

NOTICE OF MOTION DATED 28TH APRIL 2014

4. Plaintiff has filed this Notice of Motion seeking judgment on admission to be entered as prayed in the Plaintiff.
5. Plaintiff deponed in the affidavit in support of that Notice of Motion that the Defendant is indebted to him for Kshs. 26,819,950 for transport services provided. That the amount of Kshs. 26,485,950 was outstanding as at December 2013 which was acknowledged by Defendant in payment agreement dated 27th January 2014. That agreement provided for Defendant to make payment of that amount by post-dated cheques. The agreement in part provided as follows-

“Tumaini shall upon the signing of this agreement issue postdated cheques of each succeeding month in payment as follows;

1. Kshs. 4,995,000.00 5th February 2014
2. Kshs. 2,550,000.00 4th March 2014
3. Kshs. 2,550,000.00 4th April 2014
4. Kshs. 2,550,000.00 5th May 2014
5. Kshs. 2,550,000.00 5th June 2014
6. Kshs. 2,550,000.00 4th July 2014
7. Kshs. 2,550,000.00 5th August 2014
8. Kshs. 2,997,000.00 5th September 2014
9. Kshs. 2,997,000.00 3rd October 2014
10. Kshs. 206,000.00 15th October 2014.”

6. Plaintiff annexed to his affidavit the post dated cheques issued by Defendant as per the above agreement. Those cheques have not been banked. Plaintiff then deponed-

“THAT I am advised by my Advocates Messrs. Balala & Abed Advocates which I verily believe to be true that the Defendant has made a part payment and admitted the balance outstanding of Kshs. 26,485,950/- which entitles us to judgment on admission.”

7. Defendant opposed the application by reiterating what he stated in his defence and counter-claim.

ANALYSIS

8. I have considered parties written submissions. The Plaintiff although it brought the application seeking judgment on admission it cited Order 36 of the Civil Procedure Rules which permits summary judgment to be entered. That as it may be the principles of entertaining both such applications are almost similar.
9. The case of **Choitram vs. Nazari [1984]KLR, 327** the Court found as follows when considering application on admission-

“For the purpose of Order XII rule 6, admission can be expressed or implied either on the pleadings or otherwise, e.g in correspondence. Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning.”

The case Cassam vs. Sachania [1982]KLR 191, the Court found that-

‘The Judge’s discretion to grant judgment on admission of fact under the order is to be exercised only in plain cases where the admissions of fact are so clear and unequivocal that

they amount to an admission of liability entitling the Plaintiff to judgment.”

10. The Court in the case **INTERGLOBE SERVICES LTD –Vs- HAMA WARE HOUSING LTD [2014]eKLR** considered the principles that should guide a Court considering an application for summary judgment as follows-

“The principles which guide our courts in determining applications for summary judgment are not in dispute. In INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION –Vs- DABER ENTERPRISES LTD (2000)1 EA 75 this Court stated that the purpose of the proceedings in an application for summary judgment is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claims. To justify summary judgment, the matter must be plain and obvious and where it is not plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where, if necessary, there has been discovery and oral evidence subject to cross-examination. (See also CONTINENTAL BUTCHERY LTD V NDHIWA (1989)KLR 573).

11. Those are the principles that will guide me as I consider Plaintiff’s application.

12. The parties entered into an agreement dated 27th January 2014 where Defendant agreed to pay the Plaintiff’s debt by monthly instalments. As I stated before the Defendant did issue those cheques as agreed but the Plaintiff, who annexed those cheques to his application failed to state why he failed to bank them and instead filed this case. The issue then is, is the Defendant in breach of that agreement?

13. The Defendant, quite rightly has submitted that the parties agreement to pay by instalment cannot be altered by the Court because parties are bound by the terms of their contract: See **NATIONAL BANK OF KENYA LTD –Vs- PIPEPLASTIC SAMKOLIT (K) LTD AND ANOTHER (2002)EA 503**.

14. Defendant has also filed a Counter Claim alleging that Plaintiff is in breach of the agreement by prematurely terminating it.

15. In my view this is not a clear or obvious case justifying the entry of judgment. The Defendant has shown bona fide triable issues and the Defendant is entitled to unconditional right to defend this suit. It is essential the various issues raised by the pleadings be subjected to trial.

16. Accordingly the Plaintiff’s Notice of Motion dated 28th April 2014 is dismissed with costs to the Defendant.

DATED and DELIVERED at MOMBASA this 5TH day of MARCH, 2015.

MARY KASANGO

JUDGE