



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION

HCCC NO. 60 OF 2014

OFFICE TECHNOLOGIES LIMITED ::::::::::: PLAINTIFF/APPLICANT

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION ::::::::::: DEFENDANT/RESPONDENT

R U L I N G

1. The Notice of Motion before the court is dated 3rd April 2014. The application is brought under Order 2 Rule 15, Order 13 Rule 2 of the Civil Procedure Rules, Sections 1A, 1B, 3 & 3A of the Civil Procedure Act, the Inherent Powers of the Court and all Enabling Provisions of the Law.
2. The application seeks the following main orders:-
 1. *That the Defendant's Statement of Defence dated 12th March 2014 be struck out with costs.*
 2. *That there be Judgement for the Plaintiff for the sum of Kshs.220,440,000.00*
 3. *That in the alternative, there be judgement on the admitted sum of Kshs.220,444,000.00 plus interest at 30% from the 14th March 2013 until payment in full.*
3. The application is premised on the 11 grounds stated therein, and is supported by affidavit of Mr. Basil mark Serrao dated 3rd April 2014, together with annexures thereto Mr. Serrao describes himself as the Managing Director of the Plaintiff Company and duly authorised to depone to the said affidavit.
4. In brief, the facts about the application, as gathered from the pleadings are that on or about 1st December 2012, the Defendant invited the Plaintiff to tender for the supply and delivery of general elections material for use during the 2012 – 2013 elections period in the Republic of Kenya. The Plaintiff responded to the invitation and by a tender number IEBC/01/2012-2013, the Plaintiff tendered to supply and deliver three hundred and thirty seven (337) tallying centre printers model-Cannon IR 5035 ("printers") at a unit price of Kenya shillings seven hundred and sixty thousand (Kshs.760,000.00), for a total of Kshs.Two Hundred And Fifty Six Million, One Hundred and Twenty Thousand (Kshs.256,120,000).

By a letter dated 3rd December 2012, the Defendant accepted the Plaintiff's bid and communicated the award of the tender to the Plaintiff, and required acceptance of the award. The Plaintiff responded to the Defendant, and unequivocally accepted the award by a letter dated 30th January 2013. On or about 10th January 2013, the Plaintiff entered into a contract for the supply and delivery of the printers. It was a term of the contract that the Defendant would make payment

of the contractual sum to the Plaintiff within thirty (30) days after the Plaintiff's presentation of an invoice in respect thereof. By a local purchase order dated 3rd January 2013, the Defendant placed an order with the Plaintiff for supply and delivery of two hundred and ninety (290) printers at a total cost of Kenya shillings two hundred and fifty six million, one hundred and twenty thousand (Kshs.256,120,000.) The printers were to be delivered before 20th January 2013. In compliance with the terms of the order aforesaid, on 14th February 2013, the Plaintiff delivered to the Defendant and the Defendant received the two hundred and ninety (290) printers. On the same day, the Plaintiff submitted its invoices for the sum of Kenya Shillings Two Hundred And Fifty Six Million, One Hundred and Twenty Thousand (Kshs.256,120,000) being the contractual price for two hundred and ninety (290) printers. In alleged breach of the express terms of the contract, the Defendant failed to pay the Plaintiff the sum of Kenya shillings Two Hundred And Fifty Six Million, One Hundred and Twenty Thousand (Kshs.256,120,000) by 14th March 2013, as agreed or at all and the default continues to date, and hence this application.

5. The application is opposed vide a replying affidavit of MAHAMUD MOHAMED JABANE dated 30th April 2014. The Defendant also filed a Defence to the claim on 13th March 2014. The contents of the defence are substantially reiterated in the Replying Affidavit in opposition to this application. The Defendant /Respondent avers that the Parties transacted on the basis of a Local Purchase Order dated 3rd January 2013 issued before the contract was signed on 10th January 2013. Further, the Defendant stated that the Plaintiff did not supply and deliver the General Election Material in accordance with Tender Number IEBC/01/2012-2013 and the acceptance thereof, which leads to the fact that the relationship between the Parties is founded not only on the Contract but on circumstances which are pertinent and relevant to this case. The Defendant further avers that the said Local Purchase Order was in respect of a different quantity and specification of goods from those detailed and particularly specified in the Tender invitation and that the same were supplied in flagrant breach of the Tender invitation which may therefore not be invoked by the Plaintiff. The Defendant further submitted that the Plaintiff was to retain the property in the goods until the same were fully paid for. The Defendant therefore avers that the Plaintiff is at liberty to collect the 290 printers from the Defendant's warehouse by prior appointment in response to paragraph 10 of the Plaintiff.

Entirely without prejudice to the foregoing, Defendant states that any payments to the Plaintiff, if at all, were contingent upon approval of and receipt of funds from the National Treasury, a fact the Plaintiff was well aware of as constituting a condition in the contract – clause 2. The Defendant is an organ of the State and is subject to financial regulations, Finance Acts and supplementary budgeting processes which the National Assembly and National Treasury, from time to time, are mandated to pass and effect. This, the Defendant submitted, meant that the Defendant could not pay for the goods at will, the said contract notwithstanding.

6. Parties made oral submissions which I have considered. The main issues I wish to raise to determine the matter are:-
 - i. ***Whether there is unequivocal admission of debt by the Defendant.***
 - ii. ***Whether the goods supplied were to remain the property of the Plaintiff until fully paid for.***
 - iii. ***Whether the Defence is a sham or mere defence.***
 - iv. ***What rate of interest, if any, is applicable.***
7. The Defendant's main defence is that the said goods supplied by the Plaintiff were not in accordance to the quality, standard or specifications. On this aspect it must be noted that the Defendant had accepted the said printers as being of the contracted quality. Indeed, in many correspondences in which the Plaintiff sought to be paid the outstanding sum, the Defendant never raised any issue regarding the quality and merchantability of the printers. The Defendant rather sought Plaintiff's indulgence to pay the same. I also hasten to add that the said printers were used for the purposes for which they were acquired, and if they were of unmerchantable quality they would not have been used during the last General Elections. So it appears to me that this kind of defence adopted by the Defendant is a sham and a tactic meant to delay the finalisation of this

matter.

8. The Defendant cannot at this trial raise the issues and terms of the Tender Invitation. Those terms and issues in the Tender Invitation were deemed to have been fully complied with by the Plaintiff the moment the Plaintiff delivered the goods, and the same were accepted without question, and put to the use for which they were bought. Many months after the deliveries were made and many months after the Defendant refused to pay the claim the Defendant finally on 26th November 2013, wrote a letter to the Plaintiff Titled

“RE: LONG STANDING PAYMENT KSHS.220,440,000/=”

and stated:-

Reference is made to your letter dated 17th October 2013 on the above matter.

Further, we refer to the discussion held in my office, on Thursday, 21st November related to the long outstanding payment of amounts owed to Office Technologies Ltd, following the delivery of 290 printing machines to the Independence Electoral and Boundary Commission (IEBC) in the month of February – March 2013.

We recognise that your payment has taken long to finalise and further request for more time to bring this matter to an end. We have engaged the National Treasury with a view to releasing money for settlement of all pending bills that arose from the last General Election elections.

Yours sincerely,

B. Sungura – N.

Ag. Commission Secretary/Chei Executive Officer.”

9. That letter was in response to the Plaintiff’s letter demanding the sum of Kshs.220,400,000/= plus interest of Kshs.41,586,340. The Defendants aforesaid letter does not make any qualification on the quality of the printers supplied or indeed on the sum due. The letter does not even question the alleged interest of Kshs.41,586,340/= or the rate used to arrive at the same. That Defendant’s letter is a blunt admission of the claim which at the same time noted the Defendant’s helplessness to pay the same as the money had not been released to them from the Treasury. I therefore find that the Defendant had unequivocally admitted the claim of Kshs.220,400,000/=.
10. The second issue is whether the property in the goods supplied were to remain with the Plaintiff until the same were paid for in full. In my view, the determination of this issue is not necessary, pursuant to my finding above that the Defendant had unequivocally admitted the claim. The Plaintiff has not filed a claim for the return or repossession of the said printers. The Plaintiff wants the purchase price sum paid, and the Defendant has admitted owing that money. What the Defendant eventually decides to do with the goods is none of the business of the Plaintiff once the Plaintiff’s money is paid pursuant to the tender contract.
11. Pursuant to the foregoing finding and in answer to issue number (iii) above I find that the defence herein is a sham and a mere defence meant to prolong these proceedings and to embarrass the Plaintiff who had to secure a loan to finance the tender.
12. This leads me to the final issue of interest rate applicable. The Plaintiff alleges to have financed the tender through a loan provided by Ecobank. At page 52 of the Plaintiff’s bundle is a letter of offer renewing the credit facilities. At page 54 it is stated that the applicable loan was 21.5% per annum. However in this application the Plaintiff seeks interest at a rate of 30%. I am not satisfied firstly that the Plaintiff should impose some kind of interest but even if it can, it need not necessarily be the interest at which the Plaintiff borrowed the money from the bank. In any event,

it is not clear whether or not the said renewed facilities from Ecobank were used solely for the financing of the said tender. I agree with the Defendant that the issue of interest applicable, if at all, is one which must be canvassed before the court can make a finding.

13. In the upshot, I rely on the authority of *Equatorial Commercial Bank Ltd. – V – Microhouse Net Ltd. (2005) eKLR* where the court held that “*an admission can be expressed or implied either from the pleadings or otherwise.*”

14. Under Order 2 Rule 15 this court can at any stage of the proceedings strike out any pleading on the grounds that:-

- a. *It disclosed no reasonable . . . defence in law; or*
- b. *It is scandalous, frivolous or vexatious; or*
- c. *It may prejudice, embarrass or delay the fair trial of the action; or*
- d. *It is otherwise an abuse of the process of the court.*

15. Under Order 13 Rule 2 of the Civil Procedure Rules 2010 this court can enter judgement on admission notwithstanding that other issues in the matter have not been determined.

16. In the exercise of the laws I have cited above, and pursuant to my findings above, I make the following orders:-

- a. *I hereby enter judgement for the Plaintiff against the Defendant on the admitted sum of Kshs.220,440,000/= plus interest from 14th March 2013 until payment in full.*
- b. *The interest referred to in (a) above shall abide further orders of this court.*
- c. *The costs of the suit shall be borne by the Defendant.*
- d. *In determining the applicable rate of interest the parties shall submit on the issue before the court on date convenient to them.*

Orders accordingly.

DATED, READ AND DELIVERED AT NAIROBI THIS 11TH DAY OF JULY 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Gitonga for Plaintiff/Applicant

Mutubwa for Defendant/Respondent

Teresia – Court Clerk