



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 546 OF 2007

EPCO BUILDERS LIMITEDPLAINTIFF

Versus

ALLTEX EPZ LIMITED DEFENDANT

JUDGMENT

[1] By a plaint dated 18th October, 2007, the Plaintiff sought the following relief against the Defendants;

- i. *Judgment in the sum of Kshs.9,054,798.30/=*
- ii. *Interest on the said judgment at 17% per annum from 1st April, 2007*
- iii. *Cost and interest of suit; and*
- iv. *Any other relief deemed necessary by the court*

[2] The cause of action is based on an agreement entered into between the plaintiff and the defendant in 2002, wherein the plaintiff, a company carrying on business as Building and Civil Engineering Contractors, agreed to construct and complete various buildings on the suit property belonging to the Defendant. The plaintiff claims it successfully completed the construction as agreed and so final payment under the contract became due. But despite demand, the Defendant has refused and/or neglected to make payments.

The Plaintiff's claim

[3] The Plaintiff called one witness Mr. RAMJI DEVJI WARSANI. He is the Managing Director of the plaintiff company. He testified that the plaintiff satisfactorily completed the construction of a textile factory at Athi River for the Defendant. But on completion of the main contract, the Defendant verbally requested the plaintiff company to erect a ceremonial dais to be used by the President, His Excellence the Aga Khan. The plaintiff constructed the opening facility at a cost of Kshs. 2,827,408 which sum has not been paid to date. PW1 also told the court that the plaintiff had agreed to waive interest on the principal sum if the defendant paid up the balance on the agreed times. The defendant did not pay on the scheduled time and so the plaintiff is entitled to interest at the contract rate on the delayed payments as well as the cost of the ceremonial dais until payment in full. The total sum the plaintiff is claiming is Kshs. 5,928,671. He produced documents in support of the plaintiff's claim.

[4] He was cross-examined and he admitted that the presidential dais was not part of the main contract. It was based on a verbal agreement. He insisted, however, that the cost of the dais is payable as the defendant received the dais and used it as planned. He was put to task to explain why the plaintiff did not specifically mention the dais in the plaint. His answer was that the figure of Kshs. 9 million in paragraph 7 of the plaint included the cost of the presidential dais. He said the defendant paid only part of the sum owing. He was involved even in meetings with the defendants over the debt owing herein. The defendant also sent several emails particularly from Francis Merekia on the matter. These emails were produced in evidence by the defendant. The emails refer to a sum of Kshs. 4,226,307.75. But that was not the entire debt as there was interest which had been charged and owed because the defendant did not pay the principal sums promptly as agreed. There was a delay of 14 months and 16 months in payment. Interest was automatic on default. PW1 testified that the plaintiff submitted bills of quantities on the dais for the president and so the defendant should pay the sum claimed in the plaint

[5] The plaintiff filed submissions in support of the claim. It submitted that the presidential dais was extra work done by the plaintiff at the request of the defendant. It completed its construction and project Architects issued various certificates for payment. The Defendant has not honoured the contract and should pay the plaintiff. The project Architect was N.J Consultants based in Sri Lanka and the Project Quantity Surveyors were Jabbal & Associates. The Plaintiff's point men in this project were Mr. Ramji Devji Varsani and Mr. Kapil Kochhar the Chief Executive officer and Financial Controller respectively. The Project Coordinators for the defendant were Mr. Francis Marekia, Lutaf Kassam and Mr. Alex Mwathi. At the time of filing this claim, the Defendant in acknowledgment of their indebtedness to the Plaintiff had paid Kshs. 2,100,000/= by its cheque dated 25th July, 2007. The agreement as can be deduced from the email communication dated 9th August, 2007, that these amount were to be remitted without further delay so that the accrued interest would be waived. The Defendants confirmed this position by the email of 9th august, 2007, where the Defendant's wrote:

“You had agreed that you would not charge interest if we made some payments, which we did as per attached DTB banking slip, and as advised we have committed to making the final payment of Kshs.2,126,307.25/= on or before 30th September, 2007.”

In its submissions, the plaintiff stated that the Defendant's only witness Mr. Mathew Okech confirmed the contents of the above reproduced email as the true agreement between the parties. He further confirmed the import and meaning of the agreement was that, should the Defendants fail to remit the agreed amount of money by 30th September, 2007, interest would start to accrue on the principal amount. During cross examination, the witness conceded that the Defendant failed to beat the 30th September, 2007, waiver of interest deadline as agreed. The cheque was deposited and received by the plaintiffs on 25th October, 2007. This was about thirty (30) days after the deadline had passed and therefore the interest was to accrue. The total accrued interest owed by the defendant on the delayed payment of the final Architect Certificate is as follows;

Main contract

i. Alltex EPZ ltd Creche	Kshs. 170,345.80/=
ii. Alltex Phase I	Kshs.1,047,966.20/=
iii. Alltex Phase II	<u>Kshs.1,410,559.10/=</u>

Total **Kshs.2,628,871.10/=**

The 2nd Contract on Extra Work Done

- i. As per the Project's Quantity Surveyors, the total cost of the extra work on preparation for the presidential opening ceremony was Kshs.2,827,408.00/= plus interest calculated at Kshs.472,392.10/=

[6] The plaintiff cited the law of contract which requires the party in breach to compensate the innocent

party. It relied on the case of **BR Chande & Others v E.A. Airways Corp. (1964) EA** at pages 80 – 81 cited with approval in **Francis Obongita v Cocker printers & Designers Ltd (1984)**:

“Now we think a proper rule in such a case as the present is this; where the parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally i.e. according to the usual course of things from such a breach of contract itself or such as may be reasonably supposed to have been in contemplation of both parties at the time they need the contracts the probable results of the breach of it.”

[7] The Plaintiff submitted that the contract is enforceable between the parties. Parties had obligations to performance within or at a certain time. See the case of **Muwonge v Musah (2004) 2 EA page 187** where the court held;

“When the language used in a document and the terms are clear and unambiguous, the duty of the Court is to give effect to the meaning of the words used. There is a presumption that when parties put what they have agreed upon in writing, they are bound or intended to be bound by it. Therefore the terms agreed upon should be protected from unwarranted disputes and alterations.”

The terms on payment were clear and had been reduced into writing. Therefore, they are bound by them. Any breach will attract an award of damages. The defendant cannot, therefore, escape to pay what was agreed upon in writing. The plaintiff was of the view that the court should find in favour of the Plaintiff in terms of the Plaintiff and dismiss the Defence filed with costs.

The defence case

[8] The Defendant filed its defence and denied the claim. It called one witness, Mr. MATHEW OKECH. He testified on 7th of April, 2014 and stated that he is an employee of the defendant. He spoke to the balance of Kshs. 4,226,307.25 which he said was arrived at after the Certificate of completion was issued by the architects. The said sum was the agreed amount for work done. He referred to the email by Marekia dated 9th August, 2007. The email specified that the said amount was to be paid in two instalments. The letter dated 16th August, 2007 also confirmed the contents of the email above. The defendant paid the entire amount in two installments. The payment cheques and acknowledgment of receipt of the said sums were produced in evidence. There was, however, a dispute on other sums which had been uploaded on the debt but they were resolved between the parties as shown in the email for August 2007.

[9] On cross-examination, DW1 stated that he was the Chief Accountant of the defendant company and was aware of the transactions in dispute. He insisted that there was only one contract to build a factory for the Defendant and he was not aware that the defendant did any extra work. He was categorical that only the architect can confirm the extra work if at all was done. He confirmed that the parties agreed that interest will not be charged if the entire sum owing, i.e. Kshs. 4,226,307.25 is paid by 30th September, 2007. The last payment was made on 25th October, 2007 which was outside the agreed time for payment. But he understood that agreement to mean that interest will be charged on any sum which is outstanding after 30th September, 2007.

[9] The defendant filed submissions. It argued that the Plaintiff has not proved their claims for damages and the particulars thereof. They relied on the decision by Lord Goddard CJ in the case of **BONHAM CARTER v HYDE PARK HOTEL LIMITED (1948) 64 TLR 177**. According to the defendant, the issues for determination are;

- i. Whether the sum of Kshs.9,054,789.30 is owing from the defendant
- ii. Whether the plaintiff has proved his case on a balance of probabilities or at all.

[10] The defendant submitted that the sum of Kshs. 9,054,789.30 does not owe from the defendant. The

email dated 9th August, 2007 sent from the Defendant's accounts office to the Plaintiff is important and its pertinent parts are;

- a. That the outstanding amount from the Defendant to the Plaintiff as at 24th June, 2007 was Kshs. 4,226,307.25;
- b. The Defendant was proposing to pay the said outstanding amount in two instalments, Kshs. 2.1 million immediately and the balance of Kshs. 2,126,307.25 to be paid on or before 30th September, 2007;
- c. Interest would be waived if payment was made as stated.

[11] The letter dated 16th August, 2007 by the plaintiff to the Defendant is equally important. Its essential contents are; 1) the letter acknowledges the email dated 9th August, 2007 by the Defendant and its contents; 2) the letter indicates the total outstanding balance between the parties was Kshs. 4,953,715.25, i.e. the principal sum; 3) the letter confirms that the plaintiff would waive interest on the said principal sum if payment is made without further delay. The letter does not state how much time is "without further delay". The Defendant paid Kshs. 2,100,000.00 and Kshs. 2,126,307.25 paid to the Plaintiff, and was acknowledged in the letter dated 6th November, 2007 from the Plaintiff's advocates. Despite the acknowledgement of receipt of the money, the advocates for the plaintiff still enclosed summons to Enter Appearance and Plead claiming Kshs. 9,054,789.30. The outstanding sum was Kshs. 2,126,307.25 + 2,827,408.00 all totaling Kshs. 4,953,715.25 on 16th August, 2007. The defendant, therefore, wonders how the amount increased to Kshs. 9,054,789.30 on 22nd October, 2007.

[12] According to the Defendant, the total sum of Kshs. 4,953,715.25 which the Plaintiff claimed to be owed as at 16th August, 2007, was the gross sum including the so called extra works on dais for the opening ceremony. It is therefore the composite balance on the account of the parties. That is despite the Defendant reconciliation or account assessment yielded Kshs. 4,226,307.25. The sum claimed of Kshs. 9,054,789.30 is fallacious and grossly inflated. The documents at pages 1 to 12 of the plaintiff's bundle all predate August, 2007. In or about August 2007 accounts were re-taken and verified and the Plaintiff's own Financial Controller found the sum of Kshs. 4,953,715.25. These were accounts taken by the Plaintiff; it cannot go behind the stated accounts. The plaintiff did not tender any evidence that the Defendant owes the sum of Kshs. 9,054,789.30. It just exhibited certificates issued between the year 2004 and 2006, all of which have been subsumed in the accounts taken on or about August, 2007. The Defendant acknowledges that work was done by the Plaintiff but the sum owed is Kshs. 4,226,307.25 as at 9th August, 2007 which sum was fully paid. The sum of Kshs. 9,054,789.30 has been pleaded as special damages and must be proved as such. See **Provincial Insurance Co. East Africa Limited v Nandwa (1995-1998) 2 EA 288** at page 291 where the Court of Appeal held that:-

"It is now well settled that special damages need to be specifically pleaded and strictly proved to be awarded. Accordingly none can be awarded for failure to plead."

See also the opinion by Lord Goddard CJ in **Bonham Carter Vs Hyde Park Hotel Limited (1948) 64 TLR 177** that:

"Plaintiff must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down particulars and so to speak, throw them at the head of the court, saying 'this is what I have lost, I ask you to give me these damages.'

[13] The Defendant summed up by saying that the plaintiff has just written down the sum of Kshs. 9,054,789.30 and thrown the claim at court, with zero demonstration. The Plaintiff has not proved its case on a balance of probabilities or at all. It has failed to discharge the burden of proof under Section 107(1) and (2) of the Evidence Act (Chapter 80) of the laws of Kenya which provide as follows;

"(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

(2) When a person is bound to prove the existence of facts it is said that the burden of proof lies on that person.”

See also Section 3(4) of the Evidence Act proceeds as follows:

“A fact is not proved when it is neither proved nor disproved.”

There is no evidence to even show that interest agreed by the parties was 17% per annum, the agreement has not even produced before court. On what basis therefore does the court award the plaintiff Kshs. 9,054,789.30 and interest at 17% per annum? In sum, the suit herein should be struck out with costs.

THE DETERMINATION

Issues

[14] I am able to discern two issues for determination; 1) whether work done on the dais for the opening ceremony is payable; 2) whether the Plaintiff is entitled to interest on the principal sum; and 3) ultimately, what is the balance payable, if at all?

[15] It is not in dispute that the parties agreed that the Plaintiff was to construct the proposed factory PLOT L.R. NO 111, 112, 113-EPZ ZONE ATHI RIVER for the Defendant. The Plaintiff did the work but payments were not forthcoming as agreed. The Plaintiff testified that they had agreed interest shall be paid on the sum which is not paid on time. According to the Plaintiff's witness, the interest was that of Barclays Bank, thus it was at commercial bank rate. But, neither the Plaintiff nor the Defendant filed the construction agreement which the Plaintiff's witness claimed contained the clause on interest rate. That notwithstanding, the correspondences between the parties show there was some agreement on interest. The Defendant admitted in its email dated 9th August, 2007 that:

“You had agreed that you would not charge interest if we made some payment...”.

The letter by the Plaintiff in response to the said email stated:

Please note that, we are ready to waive interest on the above mentioned amounts if the payment is remitted to us without further delay”.

These exchanges show there was an agreement to charge interest on late payment. The Plaintiff produced a tabulation of interest on all late payments from the inception of the contract and it is contained in the letter dated 6th April, 2006 appearing at page 8-12 of the Plaintiff's documents. The plaintiff applied a rate of 16.75% in its calculations. The only problem is that the rate to be applied on the late payment was not clearly established despite the fact that the Plaintiff used 16.75% in its tabulation. Let me state here that, there is nothing wrong for parties in a contract to provide for a penalty clause in the event of default by a party. But, where the default penalty takes the form of a charge of interest, it must be clearly stated or expressed; the rate must be specified or provide a clear criteria which is ascertainable, for instance, you may refer to the basic borrowing rate applied by Kenya Commercial Banks at the time etc. Those requirements, where necessary, are the ones which assist the Court to determine whether one party gave another unconscionable and most unfair bargain which no reasonable person would propose to another. Although, therefore, it seems there was an agreement that the Plaintiff would charge interest as penalty for late payment by the Defendant, there is nothing which was placed before the court to show the amount of interest to be charged. As a court, in the absence of the contract agreement or some form of agreement on the rate, it may not be possible to assign a rate without re-writing the contract for the parties-a practice the law has prohibited the courts from doing. The Plaintiff bore the burden of proving the interest payable and the court cannot assist the Plaintiff to fill up the omission.

[16] The above notwithstanding, I wish to state that the Plaintiff agreed in its letter dated 16th August, 2007 to waive interest on the principle sum as long as the Defendant paid the principle sum without delay. The Defendant was of the view that the plaintiff had agreed to waive interest as long as they made some

payment. The email by the Defendant predates the letter by the plaintiff. There is nothing to show what the real agreement was on the matter and at this stage it will be difficult for the court to uphold one position and not the other. But what is important for this judgment is that a compromise was reached eventually that balance should be paid by 30th September, 2007. The actual balance is in dispute and will be discussed in issues 2 and 3 below. At the moment, the Defendant did not pay the sum Kshs. 2,126,307.25 which it believed was the balance, on time. It paid it on 25th October, 2007 which was out of time and therefore unraveled the compromise. On that basis, the Plaintiff was entitled to go back to the earlier position and claim the interest due on the late payments. But again, the court has no proof on the amount of interest which was to be charged. When I combine these things, surely, the Defendant has utilized the omission by the Plaintiff as any party would do, which makes me, even with a lot of trepidation, unable to assign any particular rate of interest in the absence of the contract document or <http://kenyalaw.org/caselaw/admin/cases/edit/102484/wf/14481>/some evidence on the applicable rate. On that basis, the plaintiff's case on the amount of interest charged fails.

[18] I move to the other burning issue on the extra work done on the opening ceremony dais. Although the Defendant vehemently denied through its witness that there was no such work done by the Plaintiff, there is ample evidence there were some extra work done on the dais for the opening ceremony by His Excellence the President, the Aga Khan. The email dated 9th August, 2007 by the Defendant in item 3 acknowledged there was a claim for the "presidential opening ceremony" but which was slated for discussion between Mr. Ramji for the Plaintiff and Mr. Kassam for the Defendant. The plaintiff has provided evidence that it did the work which was measured to be of the sum of Kshs. 2,827,408. The quantity surveyors M/S Jabbal & Associates verified the quantities and the rates used in the account prepared by the Plaintiff and forwarded the verified accounts to the Defendant for payment through their letter dated 20th December, 2004. In the letter dated 1st July, 2005, the item number 4 was on "Presidential Opening" and showed the outstanding account was Kshs. 2,827,408. From the train of history gathered from the correspondences herein, these services were rendered on a separate verbal contract and the Defendant received the work done. The defendant's witness did not deny the facility was opened. The Plaintiff proved the projects it constructed were opened on a platform it constructed for the opening ceremony. From the documents and viva voce evidence herein, the plaintiff has proved that the figure of Kshs. 9,054,978.30 pleaded in the plaint was a composite figure on the balance of sums it believed were owed to it including the cost of "Presidential Opening" facility and interest thereof. The issue on "Presidential Opening" facility became one for determination by the Court as documents were produced in court on it including the email by the Defendant. Much debate has been expended on this subject. I should only state; when a court is faced with such scenario where a party is claiming that the other has not clearly pleaded an issue but on sufficient evidence being led in the course of proceedings on the matter, the court should go ahead to determine the issue. I am guided by the rendition of Court in the case of **REPUBLIC v PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD & 3 OTHERS [2014] eKLR** that:

It was contended that the decision in Odd Jobs Vs. Mubia [1974] EA 476 where it was held that a Court may base its decision on an issue, where it appears from the course followed at the trial that the issue has been left to the Court for decision, is no longer good law in light of the decision of the Court of Appeal in Nairobi City Council vs. Thabiti Enterprises Ltd [1995-1998] 2 EA 231. The latter decision was delivered on 7th March, 1997. However, the former case was followed in Abdi S Rahman Shire vs. Thabiti Finance Co. Ltd. [2002] 1 EA 279 which was delivered by the same (Court) on 8th March, 2002. Similarly the case was considered with approval by the Court in Marco Munuve Kieti vs. Official Receiver And Interim Liquidator Rural Urban Credit Finance & Another Civil Appeal No. 164 of 2002 which was a decision delivered on 28th May, 2010 by a bench composed of judges, one of whom decided the Thabiti Case. The same course was followed in Jackson K Kiptoo vs. The Hon Attorney General [2009] KLR 657, a decision decided on 6th November, 2009 by the same Court. It is therefore clear that even after the Thabiti Case the Court of Appeal continued to cite with approval the Odd Jobs Case.

[19] On that basis, I hereby award the plaintiff a sum of Kshs. 2,827,408 for the extra work done on what they call "Presidential Opening". I also award interest on the said sum plus costs. The 20th day of

December, 2004 when the Quantity Surveyors submitted their approval of the work done should be the time the sum became due and owing. However, following the compromise on interest herein, and the fact that the claim is for a liquidated sum for work done and materials used, it is only fair if I peg the date from when interest will run to the date of filing of the suit-which is 22nd October, 2007. The interest rate will be the court rate per annum, i.e. 12% until payment in full. See the case of **PREM LATA v PETER MUSA MBIYU [1965] E.A 592** that:

“... The principle that emerges is that where a person is entitled to a liquidated amount or to specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interest from the date of filing suit”.

Across the border, the High Court of Uganda in the case of **PAN AFRICAN INSURANCE COMPANY (U) LTD. v INTERNATIONAL AIR TRANSPORT ASSOC. (HCT-00-CC-CS-0667 OF 2003)** was as categorical that,

“As regarded interest, the principle is that where a party is entitled to a liquidated amount or specific goods and has been deprived of them through the wrongful act of another party, he should be awarded interest from the date of filing the suit”.

Dated, signed and delivered in court at Nairobi this 16th day of October, 2014

F. GIKONYO

JUDGE