REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO. 1108 OF 1982

WHISPERING PALMS HOTEL LTD……..PLAINTIFF

VERSUS

COMPUTECH EAST AFRICA LTD……...…….DEFENDANT

JUDGMENT

The plaintiff, Whispering Palms Hotel Ltd, sued the defendant, Computech East Africa Ltd for the refund of a sum of Kshs 158,445 being "money had and received by the defendant on an agreement whose consideration failed totally".

The defendant's defence is contained in paragraph 3, 4, 5 and 6 particularly. It also claimed a set-off for the expenses incurred in "training" the plaintiff's staff, and damages for breach of contract as a result of which the machine was sold at a lower price.

To give evidence for the plaintiff company was one Niti Chandra Krishalal Pandya, now the proprietor of a company known as Coast Computer Bureau Ltd. In 1979 he wished to set up a computer service bureau within Mombasa and it would appear that by sheer coincidence, he met one Mr Schukla, who said he was doing freelance work for the defendant company, which had better computers known as "Wang" computers. Mr Schukla also represented that the defendant company could finance the purchase of the computers.

Mr Pandya soon met the sales manager of the defendant company, one Mr Jamil Batti. They had a discussion as a result of which Mr Bhatti wrote to him on 25th April 1979. He produced the letter in court as an exhibit. He termed it "a letter of offer".

At a later date both Mr Bhatti and Mr Schukla traveled to Mombasa where they held further discussions with Mr Pandya. Mr Mathiessen, the Managing Director of the plaintiff company was present.

By that time Mr Pandya's proposed firm was not yet incorporated. This being so Pandya had to sign an agreement in the name of Whispering Palms Hotel, the plaintiff, as the hotel's managing director was going to be a director and shareholder in Pandya's company. Mr Bhatti told Pandya of the legal requirements because he knew very well that the machine was being purchased for Coast Computer Bureau.

One Mr Matindi, from the defendant's company, an engineer by profession went to Mr Pandya's office to inspect and verify the requirements of the machine. He produced a report of his inspection. He addressed it to Coast Computer Bureau. The report was produced as Ex 1 in court. Thereafter the defendant

company asked Pandya to get a letter from the plaintiff company, giving a guarantee to Diamond Trust, that they would be guarantors, as the Coast Computer Bureau was not yet incorporated was buying the machine. Mr Pandya got a copy of such a letter, signed by the plaintiff's Managing Director Mr Mathiessen. The original was sent to the defendant company. Pandya's copy was produced as Ex 2 in court.

Mr Pandya explained that according to the agreement between the plaintiff company and the defendant company, which agreement was "provisionally" signed on behalf of Coast Computer Bureau Ltd, the equipment was to be delivered within 4 months, and, in case this was not possible then the demonstration machine was to be delivered to Pandya to use in his bureau.

Pandya instructed advocates, Messrs Bryson and Inamdar advocates of Mombasa, in respect of this matter. He produced the bundle of correspondence exchanged. Throughout this transaction, he dealt with one Mr Bhatti of the defendant company. The said Mr Bhatti had since left the country, and left him with a signed document which he produced as Ex 4.

Reading through a letter dated 25th April 1979 from the defendant company to Pandya,and particularly at page 2 headed "Lease/Purchase" Mr Pandya testified that he understood this to mean that the defendant was going to finance the purchase of the equipment. It was on that basis that he, Pandya cancelled the previous dealings with Burroughs Computer, as they were not financing the purchase.

Several questions were put to Mr Pandya, including showing him a letter of offer dated 24th April 1979. He answered that that letter did not mention diamond Trust. He admitted on further questioning that the training for usage of the equipment was duly carried out by the defendant in respect of one staff, (person) however, as the "software" was not available, training on the software could not be carried out. It was Pandya himself who was supposed to be trained on the software. He gave these answers in questions by the defendant's lawyers as to what type of training was carried out by the defendant who is not denying having received the deposit of Kshs 158,500, for the machine, except they are claiming that they trained Pandya's staff, and they had not been paid for it.

The plaintiff company called a second witness, Narendra Mohanlal Schukla. He was the one who approached Pandya in 1979, with a view to selling him a computer machine. Schukla was by then doing free lance work for the defendant company. He knew that the machine Pandya was seeking was for his new company, Coast Computer Bureau, a company which was being registered to start computer work in Mombasa.

Schukla knew that a Burroughs computer deal which Pandya was following did not go through because there was no financier he talked Pandya into buying this "Wang" computer machine. He even invited him to attend a demonstration to see for himself how the machine worked.

Pandya was interested, so Schukla, Bhatti and a representative sent by Dr Ashad the Managing Director of defendant company, all traveled to Mombasa for further negotiations in this respect.

After these further negotiations, a 30% deposit was paid vide a cheque drawn on account of Whispering Palms Hotel, the plaintiff. The cheque was for Kshs 158,500. It was paid on behalf of Coast Computer Ltd, a company in co-operation. That at this stage, the agreement was that the defendant company would arrange to finance the whole deal on a lease purchase basis and that "once the LPD was completed, Computech EA Ltd would refund deposit paid in full once finance arrangement was finalized…"

Dr Ashad, who is the Managing Director of the defendant company assured Pandya that he would get the finance arranged since he had good business relations with the Diamond Trust of Kenya Ltd.

Schukla concluded by saying that he initiated this deal, and the defendant company failed to produce the soft and hard ware, the matter became pressing so the deal failed. The defendant's company was represented at the hearing by Ashad Hussein Khawaja, the Managing Director. His company was marketing "Wang" computer machines from USA.

He recalled that sometime in 1979, his company came in touch with the Coast Computer Bureau, and, at the same time, the sales department of his company got in touch with the Whispering Palms Hotel, who wanted to acquire a computer system to enable them to computerize their accounts.

"Upto that time, it was our understanding that Whispering Palms Hotel would purchase the computer from us on lease hire purchase then hand it over to their computer bureau which they were forming, this was the Coast Computer Bureau…" Mr Ashad asserted.

The provisional agreement was signed on 11th May 1979. A copy was produced in court as an exhibit. The leasing company according to the agreement was Diamond Trust Co Ltd because normally his company approached Diamind Trust Co Ltd to finance companies who wished to buy computer machines on lease hire purchase agreement. It would be the responsibility of Diamond Trust to investigate the proposed buyer company. That Diamond Trust Company were quite happy to finance the project if Whispering Palms Hotel was buying it, but not if a new company with no known financial backing was buying it, unless the new company produced a letter of guarantee from a known reputable company. The letter Ex 2 was the letter of guarantee from the plaintiff company, Whispering Palms Hotel to Diamond Trust. That despite this, the Diamond Trust wrote back to say that they were not willing to finance a new company. This reply was, however, not produced in court, as the witness said that it was lost in his office when he was unwell for several months, and was overseas.

He testified further that it was agreed that the computer was to be delivered within 4 months, but unfortunately there was a delay of which he informed Mr Pandya. The computer arrived early 1980, but he did not deliver it to Coast Computer Bureau because the lease hire agreement had not been finalized. The computer was not delivered to Whispering Palms Hotel either because they did not complete lease hire formalities. It was sold to a 3rd party, at a loss.

The defendant company undertook to train personnel from Whispering Palms Hotel, the plaintiff, in connection with the machine. They trained one lady, but they did not know whose employee she was, but her training cost Kshs 12,000. This did not include the soft-ware training.

Having summarized the evidence, I will now deal with issues which arise from the pleadings and also evidence as a whole as the parties herein did not file agreed issues. I have read through the written submissions by both counsel. I found them most useful.

The plaintiff company outlined its claim in the plaint, and called 2 witnesses to support the claim. Their evidence is already summarized in this judgment. The defendant company in denying the claim called its managing director. Again his evidence has been summarized on record.

That the 30% deposit paid by the plaintiff company to the defendant company for the proposed purchase of the "WANG' computer machine, is not denied by both sides, is on record. However, looking at para 3 of the defence there is an averment by the defendant which reads in part,

"the plaintiff was responsible for and had to make arrangements for the financing of the purchase of the computer system with Diamond Trust of Kenya Ltd …"

Pausing here for a minute, and looking at the agreement itself, I would say that nowhere is indicated on the agreement that the plaintiff company was,

"responsible for and had to make arrangements for the financing of the purchase of the computer…" Further, the defendant company's Managing Director, Ashad Hussein Khawaja, whilst giving evidence in chief said the following,

"According to the agreement, the leasing company was Diamond Trust. This was so because normally when we sold a computer and a client showed an interest that he wanted to be financed by a lease hire company, my finance department would contract lease hiring companies and provide them with the name and purchase details."

There is yet further evidence from Mr Pandya who was infact buying the computer machine (but using the plaintiff company as his own company was not yet incorporated) there was his evidence to the effect that he could not buy the computer from his own resourses except through a lease hire agreement, and it was through discussions with Schukla (PW2) and Bhatti, both men speaking on behalf of the defendant company, that Diamond Trust Kenya Ltd, became the leasing company. Mr Bhatt's report signed on 29th May 1980 and produced as Exhibit 4 also confirms the point that the defendant was going to arrange the lease hire arrangement. Finally is the confirmation in Ex 5 dated 25th April 1979, the "letter of offer" to him as Pandya called it. It was written by Bhatti, the then System Sales Manager of the defendant company. On page 2 of this document, under the sub-heading Lease/Purchase, it reads,

"As an alternative to cash purchase price, we will be in a position to arrange lease purchase terms for you over a three years period…"

From all this evidence which I have just considered, I find that the responsibility of finding a financier for the purchase of the computer with the Diamond Trust of Kenya or any other financier for that matter, lay with the defendant company and not the plaintiff company as averred in first part of para 3 of the defence.

Having found so, the next question is, did the defendant discharge that duty? To answer that question I would say that the fact that the Diamond Trust of Kenya Ltd which was named as the leasing company did not finance the deal in the end meant that the defendant did not discharge his obligation, and in these circumstances the deal for the purchase of the computer system failed. The defendant's managing director's evidence was that the financier declined to finance the deal when it discovered that the company actually purchasing the computer was one not yet registered. However, from the evidence adduced in this case, I find that it was infact an implied condition that

"unless and until the Diamond Trust of Kenya Ltd approved the financing of the purchase of the computer system the contract would not be binding either partly, or wholly".

Paragraph 3 of the plaint avers,

"By a document headed Equipment Purchase Agreement and numbered EPA 008 the plaintiff provisionally agreed to purchase from the defendant there set out"

The 2 witnesses called by the plaintiff testified that the agreement was

"provisional" because the proposed company buying the machine was not yet incorporated, so the plaintiff company stepped in temporarily, and that the situation was going to be regularized once Coast Computer Bureau was registered. That this arrangement was well within the knowledge of the defendant company is shown by the fact that the defendant even sent its engineer, a Mr Watindi to go and inspect the premises for the proposed installation of the machine. He prepared a report Ex 1 which was headed,

"Initial observations on the Computer Installation site of Coast Bureau Services Ltd as of 14th November 1979".

The report was addressed to Nitin Pandya, PW 1 who was forming the new company. Mr Bhatti's report, produced as Ex 5, also show that the defendant company was aware of which company was buying the computer. This being so, I find that the explanation given by the plaintiff's witnesses as to why the agreement was "provisional" is the correct one.

The plaintiff's para 6 of the plaint gives a reason why the purchase never became binding-and that is the refusal by Diamond Trust to finance the purchase. I have already made a finding on record that it was an implied condition that

"unless and until Diamond Trust of Kenya Ltd approved the financing of the computer, the contract would not be binding".

The defendant company testified that Diamond Trust Company Ltd declined to finance the purchase when they learnt that it was not Whispering Palms Hotel Ltd purchasing the computer, but a new company, Coast Computer Bureau. However in light of the evidence I have analysed, it is now quite clear that first, the responsibility of finding a financier lay with the defendant company and secondly, that it was within the knowledge of the defendant company all along that it was Coast Computer Bureau buying the machine, and not Whispering Palms Hotel Ltd. Under these circumstances therefore, the defendant company which identified or found the financier should have made a full disclosure to them, since all the facts were within their (defendant's) knowledge. They therefore cannot say that Diamond Trust of Kenya Ltd refused to finance the deal because it was not the plaintiff company buying the computer.

Whatever reason given for the finance company refusing to finance the purchase, the fact is, as revealed by the evidence considered, that as a result of the refusal, the purchase never became binding, and it is because of this that the plaintiff avers at para 7 of his plaint,

"The plaintiff claims from the defendant Kshs 158,445 as money had and received upon a total failure of consideration".

The defendant termed as untrue, the contents of paragraph 3, 6 and 7 of the plaint. However, after going through the evidence in great detail as I have done, I am satisfied that the contents of these paragraphs are true, as there is evidence on record to support them.

I now turn to the contents of para 5 of the defence. This is the paragraph where the defendant avers that he suffered "loss and damage" as a result of the plaintiff requesting it under a separate agreement,

"to designate its top computer system analysts to design data processing for the plaintiff, and trained the responsible plaintiff's staff." The defendant undertook "to claim a set off at the hearing on full discovery".

Particulars of this paragraph was asked for by the plaintiff and the answer obtained from the defendant was that the agreement mentioned herein was verbal between Mr Pandya and Dr Crowther,

"that the plaintiff would provide its top computer analyst to design data processing for the plaintiff to train staff for computer operation and programming."

Mr Pandya who gave evidence for the plaintiff company denied the verbal agreement. Dr Crowther did not give evidence in court. It is on record from Mr Pandya that the training carried out was for one employee on how to operate the machine and it costs Kshs 12,000, but no software programme training was carried out because the software was not ready. It was Pandya himself to be trained. PW2 Schukla, also confirmed this in his evidence.

Later, during the hearing of the case for the defendant, Dr Ashad the Managing Director contended during questioning that there was soft-ware programme training, however, he conceded that the costs for such training was not included in the sum of Kshs 12,000. Dr Ashad then referred to an invoice dated 2nd July 1980, marked MFI A, during the hearing. I now rule the document admissible. Though it is a photo-copy, and therefore not the original copy which the defendant company should have been having in their custody, I accepted the explanation by Dr Ashad that he fell ill and was away from his offices for four months receiving treatment in Britain and on return, he found that most things in his office, including documents had been stolen. It is therefore reasonable to assume that this was one of those documents stolen. Under those circumstances therefore he could not produce the original invoice.

Anyway, to come back to the point, the purpose of producing the invoice according to Dr Ashad was to show how much money was incurred in the preparation of 5 packages for the soft-ware training programme, which was prepared by a company called Computer Soft-ware Ltd, under the directorship of one Dr Pepella.

To this evidence I would say the following:-

First, I am unable to find that there was a verbal agreement for soft-ware training between Pandya and Dr Crowther did not come to court to testify to the existence of the agreement or rebut Pandya's denial of the agreement.

Secondly, the person who is supposed to have conducted the training and or prepared the programme, and thereafter prepared the invoice, did not give evidence in court. This is important especially in view of the fact that Pandya who was supposed to have been trained in software programme denied having been trained. Dr Ashad was not involved in that training, so the very person who undertook the training or prepared the programme should have come to say so in court. Apart from simply producing the invoice, Dr Ashad could not give evidence on the contents because he was not personally involved with what the invoice says was done. The further evidence on record about the software training came from PW2 Schukla, who testified,

"Dr Pepella was software Manager of Computech East Africa at the time of these negotiations. He was not independent. Computech EA was to provide software. Up to the time Mr Pandya took action in this matter, no software had been provided".

It is my considered opinion therefore that the evidence adduced by the defence is not sufficient to show that there was software training or that programmes for such training was prepared to the tune of money shown on the invoice. Further, there is no evidence that the sums claimed on the

invoice had ever been agreed on by the plaintiff and defendant, especially in view of the fact that the soft-ware programme talked of was not included in the provisional agreement but was supposed to be prepared for Pandya's company, which was not yet incorporated. In view of all this, I find that the claim for set-off cannot succeed, because it has not been proved on a balance of probabilities. Submissions were made about a counter-claim, but with respect there is none in the defence filed on 20th March 1982.

On the question of the sum of Kshs 12,000 incurred in training one lady, I noted that that sum had been catered for in the agreement which was signed by the plaintiff and the defendant, the agreement for which a 30% deposit had been paid, the agreement which never became binding, as I have already found in evidence. It is therefore not open to the defendant to claim that sum of money under these circumstances, that sum cannot be pulled out of agreement and treated separately.

Finally for consideration is the averment in para 6 of the defence, which states *inter alia*,

"At all material times the defendant states that there was a binding contract between the plaintiff and the defendant for the purchase of Wang machinery. The defendant has fulfilled all its obligations on its part in respect of the aforementioned agreement and the plaintiff was in breach of the express or implied terms of the agreement in the premises whereof the defendant had to sell the computer at a lesser price and suffered loss and damage…"

The defendant then claimed damages for the loss suffered as a result of breach of contract.

In the first place, there is already a finding on record that the agreement entered into herein by the plaintiff and defendant never became binding because the financier refused to finance the deal. The financier according to my further finding was established or recommended by the defendant company. The averment that there was a binding contract between the plaintiff and the defendant is therefore not correct. Also I am unable to find that the defendant fulfilled all its obligations "in respect of the aforesaid agreement", and that it was the plaintiff who was in breach of the said agreement. Since the purchase of the computer was through a 3rd party lease, and the responsibility of finding and or recommending such a financier was with the defendant, and the evidence I have considered does show that the defendant did infact find the financier whose names it endorsed on the "agreement", I find that it was the respondent's further responsibility to disclose all facts of the deal to the financier so that the said financier could agree to finance the purchase. In this case the financier declined to finance the purchase for the reasons given in evidence. Under these circumstances, I cannot find that it was the plaintiff who breached the contract, and therefore entitled to pay damages. Furthermore, the said computer arrived long after the 4 months period

as per the agreement.

From all the evidence I have considered, I find that the plaintiff company has proved on a balance of probabilities that it is entitled to the refund of a sum of Kshs 158,445 from the defendant company as this was money received by the defendant "upon a total failure of consideration". I also award the plaintiff the costs of the suit.

Dated and Delivered at Nairobi this 16th Day of December, 1987

J.A. ALUOCH

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JUDGE