IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & MUSINGA, JJ.A)

CIVIL APPEAL NO. 45 OF 2018

BETWEEN

MINI-MAX AGENCIES LIMITED…….APPELLANT

VERSUS

KENYA MARINE & FISHERIES RESEARCH INSTITUTE…..……RESPONDENT

(An appeal from the judgment/decree of the High Court of Kenya at Mombasa (P. J. Otieno, J.) delivered on the 8th day of May, 2017

in

H.C. Civil Case No. 24 of 2016)

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JUDGMENT OF THE COURT

1. The origin of the dispute leading to this appeal is a contract which was entered into between **Mini-Max Agencies Limited,** the appellant, and **Kenya Marine & Fisheries Research Institute,** the respondent herein. As per the plaint dated 17th February, 2016 filed by the appellant, the appellant had a contractual relationship with the respondent vide tender no. KCD/01/2012-2013 whereby the appellant supplied the respondent with GIS Equipment and ICT software on account of an LPO No. A21138.

2. It was the appellant's contention that both parties agreed as a special condition of the contract that in the event of a delay in settlement of the invoice for more than thirty (30) days, the same would attract interest at the rate of 15% per month from the date of delivery of the goods. It is not disputed that the final delivery of the goods to the respondent was in December, 2013 and the total value of the goods supplied was **Kshs 23, 582,122**. A further contention was that the respondent neglected and/or refused to pay the said sum despite being served with demand and notice of intention to sue on several occasions.

3. The respondent denied the appellant's claim through a defence filed on 5th May, 2016 stating at paragraphs 5 and 6 that although the goods were delivered on schedule, delays in payment were occasioned by factors beyond its control and that the mode of payment was incorporated in the general conditions of the contract, **GCC 16.3** and **Section GCC16.5**. The respondent further indicated that the amount owed to the appellant was **Kshs 508,235** which, according to them, was the interest as per the terms of the contract since the invoice sum of **Kshs 20,329,416** had already been paid to them.

4. In the trial court, the learned judge identified the main issue for determination as whether or not there was a delay in payment of the contract sum, and if so, the amount payable inclusive of interest. In dismissing the suit in its entirety, the learned judge found that "… **on evidence availed, in the contract document, there was no delay and no interest was therefore due just as there was no contractual sum outstanding as at the date of the suit**."

5. In addition, the trial judge found that according to the contract, parties were obligated to go to arbitration and that there was no justification for the plaintiff to file the suit in that court. The learned judge also faulted both parties for failing in their duty to disclose the facts available to them which consequently took the court's undue time in an undeserved manner. It is that decision that prompted this appeal.

6. In its memorandum of appeal, the appellant raised eight grounds which can be summarised as follows*: that the learned judge erred in finding: that the principal amount owed to the appellant was paid within time in accordance with the contract; that the 30 days' period for calculating interest started running on 8th July 2014 instead of 4th February 2014 when the invoice of Kshs 20,329,416 was issued to the*

respondent; Further, by relying on extraneous facts not pleaded or evidence not adduced; that there was no delay in payment of the principal amount and no interest had accrued; that the appellant did not have a valid claim on the issue of interest thereby dismissing the suit; failing to make a finding on the sum of Kshs 508,235/= admitted by the respondent as the interest accrued.

7. The appeal came up for hearing on 13/11/2018. The appellant was represented by learned Counsel **Mr. Kennedy Ochieng**'. There was no appearance for the respondent, though a hearing notice had been served upon their advocates, **Kadima & Company**. The respondent had however filed their written submissions on 13/7/2018. In the first instance, the appellant faulted the trial judge for basing his decision on a certificate of acceptance issued on 08/07/2014 by the respondent when in fact the same was neither pleaded nor adduced in court as evidence. The appellant opined that the respondent had a duty to issue them with a certificate of acceptance and the burden was on the respondent to prove the existence of the alleged certificate of acceptance but failed to do so.

8. The appellant relied on **section 36** of the **Sale of Goods Act** for the proposition that "**The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."**

9. The appellant submitted that the respondent had pleaded in its defence that there were delays in payment and the delays were occasioned by factors beyond its control and went on further to indicate the amount owed to the appellant as **Kshs 508,235** being the interest accrued. Thus by virtue of the foregoing the respondent is bound by its pleadings. In this regard the case of **IEBC & Another v Stephen Mutinda Mule & 3 others [2014] eKLR** was relied upon to emphasize that parties are bound by their pleadings. See also **Kenya Airports Authority v Mitu-bell Welfare Society & 2 others [2016] eKLR.**

10. Lastly, it was pointed out that on the sole issue of the quantum of accrued interest, the appellant proved its case to the required standard contrary to what the learned judge found.

11. The appellant submitted that it is entitled to interest for the delay in payment of the principal amount for the provision of goods and services under the subject contract and urged us to allow the appeal with costs and overturn the High Court decision.

12. In opposing the appeal, the respondent maintained that the appellant had been paid the full purchase price plus VAT at 16% on 07/08/2014 before the suit was filed in the year 2016 but had not disclosed that fact to the court.

13. The respondent asserted that the appellant had not shown by any evidence that Part 111 of the special conditions had been breached. They also submitted that the plaintiff is not entitled to Kshs 508,235/= as the same was and is still disputed by the respondent. The respondent further contested the appellant's claim for the sum of Kshs 23,582,122, arguing that the colossal interest of 15% over a period of 40 months would then be Kshs 141,492,732.

14. The respondent concurred with the learned judge's finding that the pleading as framed on the issue of interest was a fact that needed to be established but the appellant failed to do so. The respondent urged the Court to dismiss the appeal with costs.

15. This being a first appeal, our mandate is to reconsider and re-evaluate the evidence and come to our own conclusion, taking into account that the trial judge had the advantage of seeing and assessing the demeanor of the witnesses. See **Selle & Another v Associated Motor Boats Company Ltd [1968] EA 123**. We are also mindful of the fact that a Court of Appeal will not normally interfere with the finding of the trial court unless it is based on no evidence or misapprehension of the evidence, or the judge is demonstrated to have acted on wrong principles in reaching the findings.

16. We have reconsidered and re-evaluated the evidence which was adduced before the trial judge, the submissions as well as the authorities that were cited before us. Clearly there is no dispute as to whether a contract existed between the parties and whether the appellant delivered goods to the respondent as per the terms of the contract. From the plaint, the appellant sought judgment against the respondent for the sum of Kshs **23,582,122** as amount due and owing in regards to the delivery of goods to the respondent together with interest at the rate of 15% per month from the delivery date. It also prayed for costs of the suit and interest on both at court rates.

17. Although the respondent denied the appellant's claim and contended that it had repaid the entire amount to the appellant, it is evident that it conceded owing the appellant Kshs 508,235 as accrued interest. It is indeed interesting that apart from mentioning the said interest in its defence and blatantly denying the same, we note that the respondent did not address the issue of the said interest at the trial court or even give an explanation as to how that amount was arrived at. For that reason, we are unable to discern the basis of that figure.

18. However, having established that during the pre-trial parties agreed that the main issue for determination was the quantum of interest, the proceedings show that the learned judge ordered the parties to work out the interest due based on the provisions of the contract and record a consent, failure to reach an agreement, the question of quantum of interest to be decided by the court.

19. In the premises then, we find that the main issue for determination is whether the appellant is entitled to the interest as claimed. It is undisputed that the appellant received the sum of Kshs **23,582,122** sometime in July, 2014 from the respondent. At the trial court the issue was not the existence of the agreement or receipt of the money as this was no longer in issue, but the terms under which the interest ought to have been computed. Although the written contract makes reference to 15%, it is not clear whether it is monthly or annually.

20. The respondent in its submissions before the trial court stated that the only amount owing to the appellant as interest was **Kshs 508,235.** On page 188 of the record **Ms. Waswa**, advocate for the defendant stated as follows**…"in our defence we concede only owing Kshs. 508,235 in interest having paid the principal in full. There being evidence that the principal was paid in full only interest is pending and there is a clear clause in the agreement on interest which does not require plaint to be amended**."

21. In our view, this in itself constitutes an admission. It is indeed surprising that now before us the respondent has completely denied owing the appellant any monies, even after directions from the trial judge that both parties agree on the interest owed and record consent on the same.

22. It is by now well settled by precedent that parties are bound by their pleadings and that any attempt to give evidence which departs from the pleadings should be disregarded. Pleadings are the bedrock upon which all proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however credible, that tends to vary with the pleadings must be rejected.

23. The Supreme Court of Kenya in the case of **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR** found and held as follows in respect to the essence of pleadings: -

> ***"In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings…..'"***

24. Going back to the pleadings and the evidence in this matter, the evidence tendered by the respondent admitting to having owed the appellant Ksh 508,235 does not in any way support its submissions. The position changed in their written submissions when the respondent stated that it had fully paid its dues and did not owe the appellant any interest. We find this evidence contradictory and it is therefore rejected

25. This then only leads us to the issue of quantum of interest. The respondent raised the issue of certificate of inspection and acceptance and argued that time only started running once a certificate of acceptance was issued on 08/07/3014.

26. We have looked at the record and there is no indication of any certificate of inspection and acceptance as alleged by the respondent. The respondent claims that the same was issued to the appellant. We respectfully agree that in this instance, the onus was on the respondent to produce that same document if it alleges that it was issued.

27. Under ***section 109*** of the Evidence Act,

> "***The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person."***

28. ***Section 107(1)*** of the Evidence Act provides as follows:

> ***"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of fact which he asserts must prove that those facts exist"***

29. The evidential burden of proof of admissibility is provided for under ***section 110*** of the Evidence Act that provides as follows:

> ***"110. The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence"***

30. Applying the above provisions, the respondent had the burden to lay the basis for its assertion that it had issued a certificate of acceptance to the appellant by producing the said certificate. Therefore, in our view, the learned judge erred in finding "…**that the plaintiff has not taken a position when the certificate of acceptance was issued, leads to the conclusion that the certificate of acceptance having been issued on 8/7/2014, the payment for the contract sum was itself due on the 8/8/2014 and not 9/8/2014…"**

31. The appellant did not need to produce the certificate of acceptance. We find that the trial judge misdirected himself in concluding that the certificate of acceptance was issued on 8/7/2014 when the same is not on record. If the respondent was able to produce all other documents which they relied upon as evidence of full repayment of the principal sum, one may wonder why the respondent did not produce the certificate, if at all it existed.

32. We now turn to the core issue of this appeal, which is the interest payable and the rate thereof. Clause **GCC 16.5** provides that **"The payment-delay period after which the purchaser shall pay interest to the supplier shall be 30 days. The interest rate that shall be applied is 15%."**

33. However, notwithstanding the evidence that was adduced by the parties regarding the interest, the appellant claimed interest of 15% per month with effect from 07/03/2014. They had issued their invoice dated 4th February, 2014. We note that the respondent issued instructions to transfer funds to the appellant on 25/07/2014. The payment was remitted to the appellant's account on 07/8/2014.

34. Therefore, the written contract allowed the respondent a 30 day payment delay period, failing which 15% interest would be charged. Four months down the line, the respondent was in no hurry to pay the said sums. Evidently, the appellant produced various correspondences reminding the respondent of its obligations to pay the amount owed to the appellant. The respondent, on the other hand, only acted sometime in July, 2014 by making the payment. Further, the respondent clearly admitted in its defence that although the goods were delivered on schedule, the delay was occasioned by factors beyond its control. No further explanation was given on the nature of the factors that

occasioned the delay.

35. The respondent cannot therefore rely on his own default to escape its obligation to repay the interest as per the terms of the contract. The respondent maintains that the date of inspection of and acceptance of the goods was on 8/7/2014, yet acknowledges that delivery was done in December 2013. It is our considered view that it is highly improbable that the goods delivered by the appellant were stored in the respondent's premises awaiting inspection seven months later.

36. With respect, we must depart from the finding of the learned judge that there was no delay and no interest was therefore due as this finding was based on a misapprehension of the law and the evidence, even after directing the parties to agree and calculate the interest payable during the pre-trial. We come to the conclusion that there was clear and uncontroverted evidence that the appellant met its obligations under the contract while the respondent failed in its attempt to demonstrate that it paid the appellant on time and therefore no interest was owed. ***Section 97(1)*** of the Evidence Act is clear that where the terms of a contract have been reduced in writing, no evidence is to be given in proof of the terms of the contract.

37. The respondent was in clear breach of the contract as it had failed to honour its obligations, and by absolving the respondent of the duty to pay the interest owed, the trial court had by its judgment allowed the respondent to unfairly get away with its contractual obligations at the detriment of the appellant.

38. Accordingly, we allow the appeal, set aside the judgment of the learned judge dismissing the appellant's suit, and substitute therefor an order for judgment in favour of the appellant in the sum of **Kshs. 508, 235** plus interest at the rate of 15% per annum. As rightfully put forth by the learned judge, the respondent, being a public institution, it would be unjust to award the amount as tabulated in the appellant's schedule as that would amount to unfairly enriching the appellant at the expense of not only the respondent but also the public at large. We therefore award costs at the interest rate of **15% per annum** of the principal sum for the period of delay, being four months from the period of the delivery note, 04/02/2014 to the date of full payment. We also award the appellant costs of this appeal.

Dated and delivered at Mombasa this 7th day of March, 2019

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR