IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, MUSINGA & KIAGE, JJ.A.)

CIVIL APPEAL NO. 96 OF 2007

BETWEEN

BAWAZIR GLASSWORKS LIMITED...………...….. 1ST APPELLANT MILLY GLASSWORKS LIMITED …………..……….......……….. 2ND APPELLANT

VERSUS

ASEA BROWN BOWERI LIMITED ……………………..………. RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Nyamu, J.) dated 30th July, 2003

in

(HCCC. No. 1619 of 2000)

****

JUDGMENT OF THE COURT

The respondent, **Asea Brown Boveri Limited**, was the plaintiff in HCCC No. 1619 of 2000 a suit filed against the appellants, jointly and severally, in a claim for **US$95,796.41** plus interest thereon at the rate of 3% per month from 1st September, 2000 until payment in full. The respondent stated in its plaint that:

"4. On or about the 12 May 1999, the 1st Defendant placed an order to the Plaintiff for the delivery and installation at the 1st Defendant's premises at Mombasa of one unit of a 3200 Amperes Low Voltage Switchboard Modsys 4000 at the contract price of US$57,500.00 (delivery) and US$13,524.00 (installation) respectively inclusive of Value Added Tax.

5. ***In pursuance of the 1st Defendant's order, the Plaintiff supplied and installed the said switchboard and by Invoice Numbers 2513 and 2739 dated the 30th July 1999 and 20th March 2000, it demanded the respective contract price of US$57,500.00 and US$13,524.00 as and when the same became due.***

6. ***It was a term of the contract for the supply and installation of the said switchboard that the contract price was payable within 30 days of the date of the invoice and that interest would be charged at the rate of 3% per month on all overdue accounts.***

7. ***The Plaintiff avers that the 1st Defendant has, despite several demands made, failed, refused and/or neglected to pay the respective principal sums due upon delivery and installation of the switchboard as a result of which the 1st Defendant is now indebted to the Plaintiff in the sum of US$95,796/41 (as of the 1st September 2000) as particularized below.***

   Particulars

   Delivery ……………………….............US$ 57,500.00

   Interest at 3% per month from 31/7/9 To

   1/9/2000 (1 year, 33 days)...........US$22,571/51

   Installation …………......................US$13,524.00

   Interest at 3% per month from 21/3/2000

   To 1/9/2000 (165 days) ……….........US$ 2,200/90 US$95,796/41

And the Plaintiff avers that the said sum of US$ 95,796.41 continues to accrue interest at the rate of US$ 94.48 per day from the 1st September 2000 until payment in full.

8. ***By its letter dated 23rd June 2000, the 2nd Defendant informed the Plaintiff that it had taken over the management of the 1st Defendant as of the 14th March 2000 and undertook to pay a portion of the debt owed by the 1st Defendant in the sum of US$ 12,000.00 in mid – July 2000, and the balance of the debt at the end of August 2000. The Plaintiff avers that the 2nd Defendant has failed, refused*2 *and/or neglected to pay the said sum of US$12, 000.00 or any part thereof despite demand."***

In their joint statement of defence, the first appellant admitted that it placed an order with the respondent for delivery and installation of the equipment described in the plaint at a contract sum of US$57,500 plus the costs of the installation. The appellants alleged that the respondent delivered the said equipment without any notice at a time when the first appellant's plant was closed. The first appellant denied that the respondent installed the said equipment as agreed.

The appellants denied paragraph 6 of the plaint and stated that it had been agreed that the first appellant would open a letter of credit in favour of the respondent which was never done. They further denied that it was a term of the contract that payment would be made within thirty days of the date of the invoice. They further denied that it was agreed that any interest would be paid on any overdue account.

The appellants denied the respondent's claim of US$95,796.41. The second appellant alleged that it suffered loss and damage as a result of the respondent's failure to install the switchboard unit as agreed and claimed a sum of US$12,500 as a set-off against the respondent's claim for US$57,500, being the amount the second appellant had to expend in order to install the switchboard.

As regards the letter dated 23rd June, 2000 referred to at paragraph 8 of the plaint, the second appellant stated that it issued the said letter as a result of a mistake on its part of not having been informed of the circumstances of the agreement between the first appellant and the respondent.

In its reply to defence and to set off, the respondent denied that it delivered the equipment in question without prior notice and/or when the first appellant's plant was closed. The respondent stated that the equipment was delivered within 6 to 8 weeks after confirmation of the purchase order on 5th June, 1999 as stipulated in the contract. The first appellant acknowledged the delivery and subsequently made promises to pay.

As regards installation of the equipment, the respondent averred that the work was done by its agents, M/S Burhani Engineers (Mombasa) Limited. The first appellant was duly advised that the said company would undertake the installation through the respondent's letter dated 9th July, 1999 and in fact facilitated the installation.

Regarding the alleged letter of credit, the respondent stated that under the original terms of the contract, the first appellant was to open a letter of credit but the said term was varied at the first appellant's request via a facsimile message dated 5th June, 1999. The respondent further stated that the second appellant by its letter dated 23rd June, 2000 had given an unequivocal undertaking to pay the first appellant's debt that was owing, having taken over the first appellant's business and was presumed to know the exact status of the transaction giving rise to the suit.

After a full hearing, Nyamu, J. (as he then was) found that the respondent had proved its claim on a balance of probabilities and entered judgment in its favour against the appellants jointly and severally in the sum of:

(a) US$57,500 plus interest at 3% per month from 29.8.1999 being 30 days after 30.7.1999 the date of the invoice raised in respect of the delivery of the switchboard until payment in full.

(b) US$13,524 plus interest at 3% per month from 19.4.2000 being 30 days after 20.3.2000 the date of the invoice raised in respect of installation of the switchboard until payment in full.

He also awarded the costs of the suit to the respondent.

Being dissatisfied with the said judgment, the appellants preferred an appeal to this Court. They advanced the following grounds of appeal:

> ***"1. The learned judge erred in fact and in law in finding that there was an agreement between the Plaintiff and the Defendants to pay interest at the rate of 3% per month on overdue accounts after 30 days.***
>
> 2. ***The learned judge erred in fact and in law in finding that the 1st Defendant was indebted to the Plaintiff in the sum of US$95,796.40 as at 1.9.2000.***
>
> 3. ***The learned judge erred in law in holding that the take over of the first defendant by the second defendant constituted a guarantee by the second defendant of thefirst defendant's liabilities under the Law of ContractAct.***
>
> 4. ***The learned judge erred in law in holding that the interest rate claimed of 3% per month did not constitute penalty interest.***
>
> 5. ***The learned judge misdirected himself that the rate of interest claimed by the Plaintiff was different from liquidated damages.***
>
> 6. ***The learned judge misdirected himself in holding that the letter dated 23/6/2000 by the second defendant constituted an undertaking by the second defendant to pay the whole sum claimed by the Plaintiff from the first defendant.***
>
> 7. ***The learned judge erred in giving judgment for the Plaintiff against both Defendants jointly and severally in light of the circumstances and evidence adduced by the Defendants therein."***

Grounds 1, 4 and 5 relate to the issue of interest and we shall therefore combine them and dispose of them together.

Mr. Wandabwa, the appellant's learned counsel, submitted that there was no agreement between the first

appellant and the respondent that the interest rate on any overdue account after 30 days would be 3% per month. He said that the issue was alluded to by the respondent in various documents in an ambiguous manner. In that regard, he cited the respondent's quotation dated 12th May, 1999 which stated: **"…..interest of 3% is applicable on any outstanding amount due after this date".** He said that it did not specify whether the said rate of interest was chargeable per month or per year. Similarly, the respondent's invoice dated 30th July,1999 also stated that: "Interest of 3% will be charged on all overdue invoices".

He however conceded that the proforma invoice dated 12th May, 1999 stated that:

"Interest of 3% per month will be charged on overdue accounts."

The demand letters by the respondent's advocates to the appellants also claimed interest at the rate of 3% per month calculated on a daily basis.

On the other hand, **Mr. Nderitu**, the respondent's learned counsel, submitted that on 12th May, 1999 the first appellant made an inquiry for delivery and installation of a switchboard and on the same day the respondent submitted its proforma invoice, indicating that it would supply the same at a price of US$50,000 plus 16% V.A.T. The cost of installation would be US$11,760 plus 16% V.A.T. The payment instructions were stated as direct to the respondent's account at Standard Bank, account No. 87060560000. **"Interest of 3% per month"** was to be charged on any outstanding amount. The proforma invoice was delivered to the first appellant and on the same day the first appellant issued to the respondent a local purchase order No.8084 as per the proforma voice.

On 5th June, 1999 the first appellant sent a fax to the respondent which stated the following:

"We are confirming our order for equipment as per your proforma invoice ref: ABBO/990090b/KS".

In the same fax, the first appellant said that it was finding it difficult to open a letter of credit due to fluctuation in exchange rate of the local currency and requested that a fixed dollar rate be agreed between the parties.

After installation of the switchboard, several invoices were sent by the respondent indicated that **"Interest of 3% will be charged on all overdue invoices."** The appellants did not enquire whether the quoted rate of interest was annually or monthly, although the first appellant was aware that the proforma invoice which it had accepted stated that the interest rate was per month. Further, the demand letters dated 8th August, 2000 that were sent to the appellants by M/S. Nderitu & Partners, Advocates for the respondent, clearly stated that interest on the unpaid sums was accruing at the rate of 3% per month calculated on a daily basis. The second appellant responded to the demand letters but said nothing about the interest rate.

The appellants' argument regarding the rate of interest is that there was no inequivocal agreement on the issue of interest. It was further submitted that a rate of interest of 3% per month on a dollar account is unconscionable. Mr. Wandabwa cited, *inter alia*, this Court's decision in **SHAH v GUILDERS INTERNATIONAL BANK LTD [2003] KLR 8**. In that appeal, the Court held that if by their agreement the parties have fixed the rate of interest payable, then the Court has no discretion in the matter and must enforce the agreed rate unless it be shown that the agreed rate is illegal or unconscionable or fraudulent. The trial court had entered judgment against the appellant in the sum of Kshs.15,000,000/= plus interest at 35% per annum. The parties had not agreed on any specific rate of interest but the guarantee document stated that the appellant would repay the sum lent and in addition:

"Such interest (in the absence of any agreement to the contrary) shall be calculated with usual rests and at the ruling rate from time to time for the bank advances in the territory in which liability of the principal is incurred."

The trial court was satisfied that the applicable rate of interest at the material time was 35% per annum. The Court of Appeal dismissed the appeal.

In our view, in the circumstances as explained above, the interest rate of 3% per month, which works out to 36% per annum, cannot be said to be unconscionable. The rate had been agreed upon. The proforma invoice clearly stipulated interest rate of 3% per month on any overdue account and the first appellant endorsed that rate by a letter dated 5th June, 1999. In any event, the appellants did not settle even the principal sum several years after supply and installation of the equipment. While we agree that some invoices did not specifically state that the rate of interest was chargeable monthly or annually, we are satisfied that there is ample evidence that what was initially agreed upon was interest rate of 3% per month. If the first appellant had promptly paid the principal sum as per the contract, the issue of interest would never have arisen.

We also do not agree that the rate of interest claimed was liquidated damages, which refers to damages whose amount parties designate during formation of a contract for the injured party to collect as compensation upon a specific breach. We must dismiss grounds 1, 4 and 5 of the appeal.

Turning to ground 2 of the appeal which alleges that the trial judge erred in fact and in law in finding that the 1st appellant was indebted to the respondent in the sum of US$95,796.40 as at 1.9.2000, we do not think that this ground presents any difficult at all because the breakdown of the said sum is shown at paragraph 7 of the plaint. There can be no dispute that the sum of US$57,500 for the switchboard was not paid. We have already determined that the interest payable on the said principal sum was at the rate of 3% per month. From 31/7/99 to 1/9/2000 it amounts to US$22,571.51.

Regarding installation of the switchboard, there was an agreement that the work was to be undertaken by Burhani Engineers (Mombasa) Ltd for and on behalf of the respondent. The installation fees was US$13,524. Zahur Hussein Pirbhai, one of the directors of Burhani Engineers, testified that the installation work was completed in February, 2000. They were to be paid by the respondent but they were not paid. The first appellant did not settle the installation fees, they only paid Burhani Engineers for some extra work which they did at the 1st appellant's request.

There was no contract between the first appellant and Burhani Engineers regarding the installation, the contract was directly between the first appellant and the respondent. It follows therefore that interest at the rate of 3% per month was rightly payable because of the appellants' delay in settling the installation charges. The same was allowed at US$2,200.90.

Turning to grounds 3 and 6 of the appeal, by a letter dated 23rd June, 2000, the second appellant informed the respondent that it had bought the 1st appellant as of 14th March, 2000 and it would pay US$12,000 mid July, 2000 and the balance would be paid by August 2000. The second respondent did not honour that undertaking. We do not agree that there was any mistake on the part of the second appellant in penning that letter. The second appellant is deemed to have exercised due diligence before making such a firm commitment.

In any event, **section 3 (1)** of the **Transfer of Business Act Cap 500 Laws of Kenya** states that:

"Whenever any business or any portion of any business is transferred with or without goodwill or any portion thereof, the transferee shall, notwithstanding any agreement to the contrary, become liable for all the liabilities incurred in the business by the transferor, unless due notice in accordance with this Act has been given and has become complete."

The second respondent cannot therefore deny liability to settle the first appellant's liability to the respondent in terms of the decree passed by the trial court. We dismiss the third and sixth grounds of appeal.

For reasons stated hereinabove, we find that the learned judge was right in entering judgment for the

respondent against the appellants, jointly and severally. We find this appeal lacking in merit and dismiss it in its entirety. The appellants shall bear the costs of the appeal as well as the costs in the High Court.

Dated and Delivered at Nairobi this 12th day of June, 2015.

M. WARSAME

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OFAPPEAL

P.O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR