



REPUBLIC OF KENYA



**NFM Alloyz SA Limited Company & another v Tanga Investments (K) Limited & another  
(Commercial Case 7 of 2016) [2024] KEHC 10356 (KLR) (29 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 10356 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
COMMERCIAL CASE 7 OF 2016**

**F WANGARI, J  
APRIL 29, 2024**

**BETWEEN**

**NFM ALLOYZ SA LIMITED COMPANY ..... 1<sup>ST</sup> PLAINTIFF**

**CLAUDE BEVER ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**TANGA INVESTMENTS (K) LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**RAJENDRA KUMAR PREMCHAND ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By an amended plaint dated 16<sup>th</sup> February, 2016 the Plaintiff sought judgement against the Defendants for;
  - a. The Honorable court be pleased to order the defendants within a specified time frame to provide a reconciliation of all invoices, adjustments and payments to date due and owing from the defendant to date.
  - b. The plaintiff prays for general damages arising out of breach of contract by defendant.
  - c. The defendant's bank account number USD 9582020000448 Swift address: Barbkena, at Bank of Baroda(K) Ltd, Kenya be frozen pending the said reconciliation, adjustment and final repayment of all dues owing to the plaintiff in advance payments in default, orders to issue directing the said bank; Banque Internationale Luxembourg, account number lu96 0021 1926 3870 4500, Swift Address: Bill Lull to release all due sums in the said accounts to the Plaintiffs.
  - d. The court to issue a mandatory injunction directing the defendant whether by themselves, their servants and or agents to release the four containers numbers (their numbers Mrku 908984/1 + Msku 512335/9 + Mrku 868648/3+maeu 696077/3) to the plaintiff's agent/



advocates forthwith after verification of the cargo if any pending hearing and determination of this suit.

- e. In the alternative the defendant to offer a suitable security for the due performance o/f the contractual obligations herein.
  - f. That the costs of this suit be provided for.
2. The defendants had filed an amended statement of defence and counterclaim dated 25<sup>th</sup> August, 2016.
  3. Parties had indicated that there were ongoing negotiations with a view to settling the matter out of court but the said negotiations failed. On the 12<sup>th</sup> May, 2022 the matter had been set for hearing on the 7<sup>th</sup> July, 2022. On 7<sup>th</sup> July, 2022 the suit was adjourned as the court was handling a pre-election dispute. On 3<sup>rd</sup> October, 2022 the matter was adjourned at the behest of the plaintiff. The plaintiff was condemned to pay court adjournment fees and the defendant's costs.
  4. A further hearing date was fixed by consent and on the 2<sup>nd</sup> March, 2023 the plaintiff was absent from court either by itself or his counsel. The plaintiff's suit was dismissed for non-attendance with costs to the defendant.
  5. The defendant had filed a Statement of Defence and Counterclaim dated 25<sup>th</sup> February, 2016 praying for the following;
    - i. USD 1,673,727.28
    - ii. Interest on (i) at commercial rates.
    - iii. Costs of the suit.
  6. On the 24<sup>th</sup> October, 2023 the defendant prosecuted its counterclaim. The defendant called two witness who adopted their statements as filed in court together with the documents thereto produced as exhibits.
  7. The defendant had filed submissions dated 3<sup>rd</sup> November, 2023.

### **Determination**

8. I have considered the issues raised herein. The defendant had filed their issues on the 19<sup>th</sup> September 2016. The only outstanding issues given that the Plaintiff's claim stands dismissed are issues no 4 and 5 to wit:
  - a. Is the sum of USD 1,673.727.28 owing to the defendant from the plaintiff in respect of goods delivered as per the invoices and unpaid for by the plaintiff for the period 2010-2015?
  - b. By whom are costs payable.
9. The counterclaim by the defendant is for a liquidated sum. In *Charles Mwalia v The Kenya Bureau of Standards* [2001] 1 EA 151, Ringera, J (as he then was) held that:

“A liquidated demand is in the nature of a debt, a specific sum of money due and payable under or by virtue of a contract. Its amount must either be ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money, even though it be specific or named as a definite figure requires investigation beyond mere calculations, then the sum is not a “debt or liquidated demand”, but constitutes “damages”



...The words “debt or liquidated demand” do not extend to unliquidated damages, whether in tort or contract, even though the amount of such damages be named as a definite figure.”

10. In *J C Eksteen v Kutusi S/O Bukua* [1951] LRK 90 it was held that:

“For an action to constitute a liquidated demand it is sufficient that it should state the amount demanded and give sufficient particulars of the contract to disclose its nature.”

11. In *Cimbria East Africa Limited v Kenya Power & Lighting Company Ltd* [2017] eKLR, Ochieng, J stated as follows:

“Black’s Law Dictionary defines Liquidated Claim thus;

‘1.A claim for an amount previously agreed upon by the parties or that can be precisely determined by operation of Law or by the terms of the parties’ agreement.

2. A claim that was determined in a judicial proceeding’.

25. Meanwhile, *Halsbury’s Laws of England*, 4<sup>th</sup> Edition Vol. 12, at paragraph 1109 says;

‘...In every case where the court has to quantify or assess the damages or loss, whether pecuniary or non-pecuniary the damages are unliquidated’.

Nonetheless, it is to be noted that;

‘A claim does not become a liquidated demand simply because it has been quantified. To qualify as liquidated demand, the amount must be shown to be either already ascertained or capable of being ascertained as a mere matter of arithmetic.’

I adopt the following definition of a debt or liquidated demand from *The Supreme Court Practice* [1985] Volume 1, at page 33;

‘A liquidated demand is in the nature of a debt, i.e. a specific sum of money due and payable under or by virtue of a contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation beyond mere calculation, then the sum is not a ‘debt or liquidated demand’ but constitutes ‘damages’...’

The words ‘debt’ or ‘liquidated demand’ do not extend to unliquidated damages, whether in tort or in contract, even though the amount of such damages be named at a definite figure. Per Ringera J. (as he then was) in *Trust Bank Limited v Anglo African Property Holdings Limited & 2 Others* hccc No. 2118 of 2000.”

12. The Defence witness, one Rajendra Kumar Premchand told the court that he is a director of the 1<sup>st</sup> defendant company and also the 2<sup>nd</sup> defendant herein. That in year 2010, he had started doing business with the plaintiff and he had exported over 300 containers to the plaintiff. That orders for consignment were made verbally or through email and they would wire some cash as down payment and clear the balance once they received the bill of lading.

13. That upon the suit being filed, he had engaged the firm of Saif Abeid Said & Co (CPA) to conduct an audit of his accounts of all business conducted with the plaintiff from 2010-2016 and in a report dated 4<sup>th</sup> February, 2016 an outstanding amount of USD 1,673,727.28 was found due to Tanga Investment (K) Ltd.

14. Defence witness Abba Mohamed Athman had produced the audit report.



15. The Defendants claim against the Plaintiff is in the nature of a debt, a specific sum of money due and payable for work done and the amount claimed is either ascertained or capable of being ascertained as a mere matter of arithmetic.
16. It is a specific sum of money which does not require any further step to be taken in order to ascertain the sum due save for the calculation. Accordingly, judgement is entered for the Defendant against the Plaintiff as hereunder;
  - a. A sum of USD 1,673,727.28.
  - b. The said sum will also accrue interest at court rates from the date of filing the counterclaim till payment in full.
  - c. The costs are awarded to the Defendant

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 29TH DAY OF APRIL, 2024**

.....

**F. WANGARI**

**JUDGE**

