



**Arm Cement PLC v Civicon Limited (Civil Case 48 of 2018)  
[2024] KEHC 16096 (KLR) (Civ) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16096 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL CASE 48 OF 2018**

**JM NANG'EA, J**

**DECEMBER 19, 2024**

**BETWEEN**

**ARM CEMENT PLC ..... APPELLANT**

**AND**

**CIVICON LIMITED ..... RESPONDENT**

**JUDGMENT**

**Averments in the Suit**

1. By Plaintiff dated 7<sup>th</sup> March 2018 and amended on 7<sup>th</sup> January 2019 the plaintiff prays for judgment against the defendant as hereunder;-
  - a. Payment of an outstanding debt of Kshs. 41,591,755/=.
  - b. Payment of interest owing in the sum of Kshs. 6,654,680/=
  - c. Damages for breach of contract.
  - d. The costs of the suit.
  - e. Any other orders the court deems fit to grant.
2. The plaintiff avers that by agreement entered into by the parties on 24<sup>th</sup> February 2017 it supplied the defendant with 3,128 tons of cement worth Kshs. 50,591,755.30. It was a term of the agreement that the defendant would pay for the supplies within 30 days of receiving the plaintiff's invoices. It was further agreed that any invoice amounts remaining outstanding after the due date within 7 days of receipt of demand in writing would attract 2% interest per annum above the base lending rate of Barclays Bank Limited from the due date until payment in full.



3. Despite receiving the cement supplies and requisite invoices, the defendant is said to have failed to pay the cost of the cement in the sum of Kshs. 41,591,755 as well as accrued interest of Kshs. 6,654,680, hence the suit.

#### **The Defendant's Statement of Defence Amended on 14<sup>th</sup> January, 2019**

4. The defendant admits execution of the cement supply agreement and the terms and conditions thereof as set out by the plaintiff. It, however, denies owing the sums claimed and put the plaintiff to strict proof. The defendant therefore denies breaching the agreement and urges the court to dismiss the suit with costs.

#### **The Plaintiff's Evidence**

5. The plaintiff called its Assistant Credit Controller (Elam Kweya) who underscored the averments in the amended plaint to the effect that the defendant failed to pay the stated amounts on account of cement supplied to it. In support of the evidence the witness tendered copies of the agreement and various invoices and delivery notes in respect of the supply among other documentary exhibits.
6. Under cross-examination by the defence Counsel the witness acknowledged that the defendant had paid Kshs. 9 million of the debt for which credit was given. He also conceded that some invoices referred to in an email dated 10<sup>th</sup> July 2017 forming part of the plaintiff's bundle of documents are not among the invoices exhibited. It also transpired that the defendant had lost 16 invoices it received from the plaintiff but copies of the invoices were provided by the latter.

#### **The Defendant's Evidence**

7. The defendant's Technical Manager (Jeremia Moffat Onsase) testified. He confirmed existence of the cement supply agreement. According to him, they subsequently issued Local Purchase Orders (L.P.O.s) and paid for all the cement they received. The defence witness disowned the delivery notes relied upon by the plaintiff as they don't bear stamps and signatures evidencing receipt of the cement. The plaintiff is also faulted for failing to produce copies of the L.P.O.s issued to it in proof of the contested supply. The court is therefore told that the defendant paid all the invoices it received in respect of the cement supply.

#### **The Plaintiff's Submissions**

8. Counsel for the plaintiff submit that by email dated 21/7/2017 sent to the plaintiff at 10:00 a.m, the defendant admitted the debt by undertaking "to settle the first instalment by month end.....", after a meeting with one Jason apparently of the plaintiff company. Counsel rely on the judicial determination in *Savannah Cement Limited v New Age Developers & Construction Company Limited & Another* [2019] eKLR in which email correspondence indicating promises to pay a debt were found to amount to admission of the debt.
9. The plaintiff therefore contends that the defence is a mere denial which is wholly admissible as determined in *Ragbir Singh Chatte v National Bank of Kenya Limited* [1996] eKLR also cited in the plaintiff's submissions.
10. Regarding the claim for damages for breach of contract, the claim has been abandoned as per the plaintiff's submissions.



### **The Defendant's Submissions**

11. Learned Counsel for the defendant reply that the plaintiff has not proven the claim on a balance of probability. The decision in *Boniface Ndegwa v Jamleck Mwaniki* [2016] eKLR is referred to for the definition of "balance of probability" to wit;

"where the court is faced with two probabilities, it can only decide on a balance of probability if there is evidence to say that one probability was more probable than the others."

12. The defendant insists that they paid for the cement supplied and that any delivery notes not bearing the defendant's receipt stamps are not payable for want of proof of delivery as per inter alia the judicial determination in the case of *Technical Equipment Internations Limited v National Water Conservation and Pipeline Corporation* [2013] eKLR.

### **Analysis and Determination**

13. Having perused the pleadings, the evidence and submissions, it is common ground that the parties had entered into the cement supply agreement in question. The issue for determination is whether the plaintiff proved on a balance of probability that the defendant owes the sums claimed.
14. Among records relating to the alleged debt the plaintiff tendered are email correspondence and statements of accounts. The defendant's email dated 21<sup>st</sup> July 2017 adverted to herein above, shows that the defendant was confirming the debt which it undertook to pay by instalments following a meeting between officials of the two parties. The statements of accounts exhibited by the plaintiff showing that the defendant is indebted as alleged have not been rebutted. The defendant has not tendered any correspondence by which it denied the debt after receiving the plaintiff's invoices. On the totality of the evidence on record, I therefore find proven on a balance of probability that the defendant owes the plaintiff as alleged in the suit.

### **Determination**

15. In the result, the plaintiff has proven its claim on a balance of probability. Judgment is accordingly entered for the plaintiff in the sums of Kshs. 41,591,755 and Kshs. 6,654,680 as per prayers (a) and (b) of the amended plaint together with the costs of the suit.

**J. M. NANG'EA , JUDGE.**

**JUDGEMENT DELIVERED VIRTUALLY THIS 19<sup>TH</sup> DAY OF DECEMBER, 2024 IN THE PRESENCE OF:**

The plaintiff's advocate, Ms Nekesa

The defendant's advocate, Ms Kitoo

**J. M. NANG'EA , JUDGE.**

