



Efil Enterprises Limited & 2 others v Air Travel & Related Studies Centre Limited (Civil Case 166 of 2017) [2023] KEHC 4030 (KLR) (Commercial and Tax) (28 April 2023) (Judgment)

Neutral citation: [2023] KEHC 4030 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 166 OF 2017
A MSHILA, J
APRIL 28, 2023**

BETWEEN

**EFIL ENTERPRISES LIMITED 1ST PLAINTIFF
ALEX NG'ANG'A T/A ALEX TECH ELECTRICAL SERVICES 2ND PLAINTIFF
FLUIDLINE SERVICES LIMITED 3RD PLAINTIFF**

AND

AIR TRAVEL & RELATED STUDIES CENTRE LIMITED DEFENDANT

JUDGMENT

Background.

1. The Plaintiffs filed the Complaint dated 20th April 2017 and stated that the Plaintiffs and the Defendant entered into a contract for building works in respect of an Administration and Academic Block for the Defendant's college situated at LR No 11916/18 Karen-Nairobi.
2. The Plaintiffs averred that the Defendant commissioned them to carry out the building works commencing from 24/03/14 and to be completed on 02/02/15. It was a term of the contract for works that the Defendant would provide accounts to the Plaintiffs' contractors for works completed and fully pay the final contract fees agreed upon between the individual parties. Despite the Plaintiffs furnishing the Defendant with Certificates of Completion at various stages throughout carrying out of the works and at final completion the Defendant failed, neglected and/or refused to settle the final payment due to the contractors.
3. It was the Plaintiffs' further averment that the Defendant's failure, neglect and/or refusal to satisfy full payment for works carried out amounted to breach of contract for which the Defendant remains



liable. In further breach of the aforesaid contract agreement the Defendant purported to issue several bouncing cheques amounting to Kshs 3,578,050.60/- to the Plaintiffs which cheques went unpaid.

4. The Plaintiffs prayed for judgment against the Defendant for;
 - a. Kshs 32,226, 116.77/- owed to Plaintiffs jointly and severally.
 - b. Interest on (a) above at commercial rates of 10% per annum from 9th November 2016 until full payment thereof.
 - c. Costs of the suit.
5. In response, the Defendant filed a Statement of Defence and a Counterclaim. In the Defence, the Defendant stated that the Plaintiffs were paid all their dues according to the work done at each and every stage and if anything was not paid for, then the work was not done and the Defendant had the right not to pay.
6. Further, the Defendant denied the breach of contract and reiterated that it stopped payment of the cheques by directing the bank not to honor the same when it was established that there were structural defects on the premises a fact that was confirmed by an independent quantity surveyor.
7. In its Counter claim, the Defendant averred that there was inordinate delay on the part of the Plaintiffs in completing the work that caused inconvenience to the Defendant forcing the Defendant to take possession of the premises before completion as notice had already been served upon the Defendant by the Defendant's former landlord to vacate the premises it was conducting business from 1st August 2015.
8. Further, the Plaintiffs failure to adhere to their work programme caused losses to the Defendant and to date the Defendant is still incurring huge losses as a result of the Plaintiffs' failure to stick to their work schedule.
9. The Defendant prayed that;
 - a. The Plaintiff's suit be dismissed with costs and the Counter Claim of Kshs 26, 960, 546/= be awarded against the Plaintiffs hereunder as follows.
 - i. 1st Plaintiff - Kshs 16, 279,000/=
 - ii. 2nd Plaintiff - Kshs 7,681,545/=
 - iii. 3rd Plaintiff - Kshs 2,999,999/=
 - b. Costs of this suit together with interest.

Plaintiffs' Case

10. The 1st Plaintiff submitted that the Retention Amount accrued from each tranche of payment made to it following certification of works by the project quantity surveyor upon completion of a particular construction milestone. The Retention Amount is the said Kshs 13,403,487, withheld at the rate of 10% on each payment made to the 1st Plaintiff under the contract, as stated under Sub-Clause 2.3 of the Mediation Settlement Agreement entered into between the 1st Plaintiff and the Defendant. The clause read as follows;

“2. 3. The parties further agree that the total retention under the Contract is Kshs 13,403,487 (Kenya Shillings Thirteen Million, Four Hundred and Three



Thousand, Four Hundred and Eighty-Seven). The parties however failed to agree on any pay out in regards to the retention amount to the Plaintiff.”

11. The 1st Plaintiff provided the Defendant with a final account in January 2016 and by September 2016 (following the expiry of the defects liability period) the 1st Plaintiff had not received any response in regards to their final account. The 1st Plaintiff did not receive any notice of defects liability during the 6 months’ defects liability period stipulated under the contract. As such the its claim in respect to the retention amount arising from the final accounts together with the last valuation amounts to a total of Kshs 13,403,487.
12. The Plaintiff pointed out that the Defendant does not dispute that this amount is owing to the Plaintiff, however, the Defendant claims that their failure to settle this amount is on account of poor workmanship and delays on the part of the Plaintiffs in completing the works as contracted.
13. It was the Plaintiff’s contention that the Defendant failed to produce any notice issued to the 1st Plaintiff evidencing incomplete Works or poor workmanship. The Defendant also failed to summon any witness including the Architect or Quantity Surveyor in support of his claim that the retention amount should not be paid out to the 1st Plaintiff on account of poor workmanship.
14. Further, the Defendant had the obligation to pay the Plaintiff for works done and services rendered. In the absence of the evidence of poor workmanship and completion delays against the 1st Plaintiff, the Defendant inexcusably failed to settle Kshs 13,403,487 in breach of the contract.

Defendant’s Case

15. It was the Defendant’s case that the 1st Plaintiff was guilty of breach of contract having failed to execute the construction project as per the scope of the contract and to the required standard as contracted with the Defendant and within the scheduled completion time neither did it tender reasons for the unexplained delay.
16. The Defendant argued that the 1st Plaintiff is legally estopped from seeking to benefit and / or unjustly enrich itself from its own omissions / breaches as it is its own conduct that contributed to the inordinate and inexcusable delay in the completion of the project. The 1st Plaintiff from the onset having alleged that the Defendant owes it the retention sum of Kshs 13,403,487/= was under a duty to adduce such evidence on a balance of probabilities that it was entitled to be paid the retention amount having satisfactorily completed the project assignment in accordance with the contract and there was no faulty work.
17. To discharge this burden, the 1st Plaintiff should have summoned the project architect and quantity surveyor as crucial witnesses / project consultants (design team) to lead evidence to the extent of satisfactory works executed by the 1st Plaintiff having measured and valued such completed works. Unfortunately, the 1st Plaintiff did not deem it necessary, to invite these consultants neither did the 1st Plaintiff in evidence produce any progress charts showing the detailed programme and progress of the project.
18. Further, in the absence of any other evidence to the contrary, the Defendant’s evidence remains uncontroverted and irrefutable that the 1st Plaintiff did not complete the project as contracted. The Defendant asked the Court to uphold the doctrine of *res ipsa loquitur* and uphold the facts as pleaded and stated by the Defendant since the 1st Plaintiff has not tendered any evidence to show that the Plaintiff was indeed in breach of the parties contract and/or was obliged to pay the retention amount.



The legal position is that a party should never be allowed to take advantage of its own wrongs/ omissions at the expense of the other party.

19. It was the Defendants submission that the 1st Plaintiff's case does not raise any reasonable cause of action, and in the circumstances ought to be dismissed with costs.

Issues For Determination

20. Having carefully considered the Plaintiff's and Defendant's case and their written submissions; the following issue has been framed for determination:
 - a. Whether the outstanding retention amount of Kshs 13,403,487 is payable to the 1st Plaintiff?

Analysis

21. The 1st Plaintiff prayed for judgment against the Defendant for payment of Kshs 13,403,487 (the "Claim"). The Claim was the only outstanding amount, all other amounts having been settled in a court supervised mediation process in Mediation Case No 178 of 2019 and the subsequent Settlement Agreement entered by the parties dated 26th August 2019 and filed in court accordingly
22. The Defendant argued that 1st Plaintiff was guilty of breach of contract having failed to execute the construction project as per the scope of the contract and to the required standard as contracted with the Defendant and within the scheduled completion time neither did it tender reasons for the unexplained delay. In this regard the Defendant annexed a Bill of Quantifier for unfinished work and report prepared by Techplan Designers Limited dated 3rd June 2017 for the amount of Kshs 13, 225, 000.
23. The reason behind incorporation of retention clauses in such contracts is to provide for retention of a percentage of the contract sum by the employer as security for the due performance of the contract by the contractor and as a fund to be drawn upon either to complete the work or to rectify defects should the contractor fail to do so as stated in *Chitty on Contracts* 31st Edition Volume II para 347.
24. The 1st Plaintiff submitted that it provided the Defendant with a final account in January 2016 and by September 2016 (following the expiry of the defects liability period) the 1st Plaintiff had not received any response with regard to its final account. The 1st Plaintiff did not receive any notice of defects liability during the six (6) months' defects liability period stipulated under the contract.
25. Sir Charles Newbold P in *Damondar Jibabbhai & Co Ltd and another v Eustace Sisal Estates Ltd* [1967] EA 153 emphasized that the function of Courts is to enforce and give effect to the intention of the parties as expressed in their agreement.
26. It is notable that the defects liability period expired without the Defendant raising any objection to the 1st Plaintiff's work and also the annexed Bill of Quantifier for unfinished work and report prepared by Techplan Designers Limited which is dated 3rd June 2017 almost a year after the defects liability period expired. There was no substantial explanation given for this delay by the Defendant.
27. This court is satisfied that the 1st Plaintiff has proved that it is deserving of the outstanding retention amount in the sum of Kshs 13,403,487; this court finds the wrongs and omissions against the 1st Plaintiff to be unproven to the desired standard of proof; and therefore finds the Defendants Counter-claim to be devoid of merit.



Findings and Determination

28. In view of the forgoing this court makes the following findings and determinations;

- i. This court finds that the Plaintiffs proved their case to the desired threshold
- ii. Judgment be and is hereby entered in favour of the Plaintiffs for the outstanding retention amount in the sum of Kshs 13,403,487/- together with interest thereon at court rates; the costs to be borne by the Defendant.
- iii. The Defendants' Counter-claim is found to be unproven and devoid of merit; and it is hereby dismissed with costs to be borne by the Defendant.

29 Orders Accordingly.

DATED SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 28TH DAY OF APRIL, 2023.

HON. A. MSHILA

JUDGE

In the presence of;

Victor Omondi for the Plaintiff

Gikaria for the Defendant

Sarah-- Court Assistant

