



**Maru Piling & Geotechnical Contractors Limited v Tunasco Insaat
Taahhut Turisim Ticaret Anonim Sirketi (Civil Case E063 of 2021)
[2023] KEHC 25741 (KLR) (Civ) (28 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 25741 (KLR)

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

CIVIL

CIVIL CASE E063 OF 2021

AN ONGERI, J

NOVEMBER 28, 2023

BETWEEN

MARU PILING & GEOTECHNICAL CONTRACTORS LIMITED .. PLAINTIFF

AND

**TUNASCO INSAAT TAAHHUT TURISIM TICARET ANONIM
SIRKETI DEFENDANT**

JUDGMENT

1. The plaintiff in this case signed a subcontract with the Defendant on or about 20th June 2016 with the Defendant being the main contractor to perform piling works for 600mm Dia piles for a bridge foundation at Tana River Sub County at a total of Kshs.21,403,920.96.
2. The plaintiff averred that defendant failed to make any payment for the 74 piles which the plaintiff completed. This compelled the plaintiff to suspend the works on or about the 10th of October 2016.
3. Subsequently, the plaintiff filed a plaint dated 3/3/2021 seeking the following remedies for breach of contract;
 - a. The total amount for establishment on site, moving and setting-up each pile position (74 piles) Boring and casting (1,038.9 L.M) – Kshs. 14,049,992
 - b. Interest on the principle amount from 17th August 2016 to 2nd march 2021 which interest continues to accrue until payment in full (interest has been calculated at 17% pursuant to clause 8(d) of the plaintiff's standard terms and conditions which were agreed to and signed by the defendant) – Kshs. 10,849,673.27



- c. Standing charges from 11th October 2016 to 7th March 2018 (878 days @ 96,691 per day) pursuant to the plaintiff's Bill of quantities and section 5 of the plaintiff's standard terms and conditions which were agreed to and signed by the defendant- Kshs. 84,894,698.00.
 - d. Interest on the standing charges from 7th March 2018 to 2nd March 2021 which interest continues to accrue until payment in full – Kshs 43,138,135.99
Subtotal – Kshs. 152,932,499.26
 - e. Add 16% VAT – Kshs. 24,469,199.88
Total=177,401,699.14
 - f. General damages
 - g. Costs of this suit together with the interest thereon at court rates
 - h. Any such other or further relief as this honorable court may deem appropriate.
4. The plaintiff avers as follows in the said plaint; THAT on or about 20th June 2016 the plaintiff signed a contract with the defendant whereby the defendant was the main contractor subcontracted the plaintiff to perform piling works for 600mm dia Piles for Bridge foundation at Tana River Sub County within the Republic of Kenya at a total contract price of kshs.21,403,920.96.
 5. Pursuant to Section 3 of the subcontract agreement the defendant was required to issue an advance payment of 20% immediately at the signing of the contract to the plaintiff and interim payment was to be made after the completion of each 27 piles at the price stipulated in the Bill of quantities.
 6. On 24th of June 2016, the defendant made an initial part payment of kshs.3,776,560.00.
 7. Despite the defendant not making the required 20% advance payment, the plaintiff commenced to perform its part of the agreement on or about 30th of June 2016.
 8. On or about 15th of August 2016, the plaintiff completed the first 27 piles and a certificate dated 17th august 2017 was subsequently issued.
 9. The defendant failed/refused/neglected/ignored to make payment towards the settlement of the first certificate.
 10. The plaintiff proceeded with the works despite the lack of payment for the f/irst 27 piles.
 11. On or about 13th September 2016, the plaintiff completed an additional 31 piles making the total piles completed to be 58 piles. Certificate no. 2 was issued on 13th of September 2016.
 12. The defendant refused/failed/neglected to make any payments towards the settlement of the two certificates despite the plaintiff's numerous reminders and follow ups.
 13. The plaintiff never the less proceeded and completed an additional 16 piles on the 5th of October 2016 making the total piles completed to be 74 piles.
 14. The plaintiff was not in a position to proceed with the work without financing and this compelled the plaintiff to write a notice dated 27th of September 2016 notifying the defendant that if the defendant did to make any payment within seven days, the work would be suspended awaiting payment and it would attract standing/delay charges plus interest.



15. Despite numerous reminders from the plaintiff, the defendant failed to make any payment for the 74 piles which had been completed. This compelled the plaintiff to suspend the works on or about the 10th of October 2016.
16. On or about 17th May 2017, the plaintiff forwarded to the defendant certificate no. 3 for the 74 piles plus standing /delay time.
17. The defendant still failed/neglected/refused to make any payments despite promises of payment and numerous reminders from the plaintiff.
18. The plaintiff's equipment remained on the site awaiting defendant's instructions until 7th of March 2018 when the defendant notified the plaintiff vide a letter of even date to remove the plaintiff's plant machinery and equipment remaining at the construction site effectively terminating the contract.
19. The plaintiff further averred in their plaint that the defendant's failure to honour its part of the agreement and discharge its duty under the law as well as the contract when it fell due has immensely prejudiced the plaintiff and occasioned economic loss. The plaintiff holds the defendant solely liable for the losses it has incurred.
20. The defendants filed a statement of defence dated 17/9/2021 denying the plaintiff's claim.
21. The case proceeded orally. The plaintiff's witness MAMESH MARU produced his witness statement as his evidence in chief.
22. He stated as follows in the written witness statement dated 3/3/2021. On or about 20/6/ 2016 the plaintiff signed a contract with the defendant whereby the defendant as the main contractor subcontracted the plaintiff to perform piling works for 600mm Dia Piles for Bridge foundation at Tana River Sub County within the Republic of Kenya at a total contract price of Kshs. 21,403,920.96.
23. That pursuant to section 3 of the Subcontract agreement the defendant was required to issue an advance payment of 20% immediately at the signing of the contract to the plaintiff and interim payment was to be made after the completion of each 27 piles at the price stipulated in the Bill of Quantities.
24. On the 24/6/2016 the defendant made an initial part payment of Kshs. 3,776,560.00. Despite the defendant not making the required 20% advance payment, the Plaintiff commenced to perform its part of the agreement on or about 30/6/2016.
25. That according to Section 5 of the Subcontract agreement it was the duty of the defendant to transport all plant, tools and equipment from the plaintiff's Head Office to Site and back. Mobilization commenced on 29/5/2016, the defendant however took close to two months to deliver the HR 180 Rig from the plaintiff's Head Office to the Tana River Site. The HR 180 Rig was delivered to the Tana River site on 20/7/2016.
26. The plaintiff however continued to perform its part of the contract using another smaller Midi Rig as they awaited the HR 180 Piling Rig from the plaintiff's head office to the Tana River Site. The HR 180 Rig was delivered on 20/7/2017.
27. On or about 15/8/2016 the plaintiff completed the first 27 piles and certificated dated 17/8/2016 was subsequently issued. The defendant failed to make payments towards the settlement of the first certificate despite various reminders from the plaintiff



28. On or about 13/9/2016 the plaintiff completed an additional 31 piles making the total piles completed to be 58. Certificate No. 2 was issued on 13/9/2016. Still the defendant failed to make any payments towards the settlement of the two certificates.
29. The plaintiff never the less proceeded and completed an additional 16 piles on 5/10/2016 making the total piles completed to be 74 piles.
30. However, the plaintiff was not in a position to proceed with the work without financing and this compelled the plaintiff to write a notice dated 27/9/2016 notifying the defendant that if it did not make any payments within 7 days the work would be suspended awaiting payment and it would attract delay charges plus interest.
31. On or about 9/11/2016 the plaintiff demobilized the HR 180 Machine and its Kelly Bar Back to its back to its head office in Nairobi.
32. On or about 17/5/2017 the plaintiff forwarded to the defendant certificate No. 3 for the 74 piles plus standing/delay time but the defendant still failed to make any payments and on 7/3/2018 the defendant notified the plaintiff to remove plant machinery and equipment remaining at the construction site which action terminated the contract.
33. In cross examination PW 1 said the cost of project was 21 million shillings but he was only paid 3,700,000.
34. The defendants also called one witness ABDUL QUDIR MOHAMED OMAR who also produced his written witness statement dated 10/11/2022 as his evidence in chief.
35. DW 1 stated as follows in the said witness statement where he indicated that the contract amount was Kshs. 21,403,920.96 and not Kshs. 177,401,699.14 as claimed by the plaintiff.
36. He stated that it was a term of the agreement that the defendant pay 20% deposit (Kshs. 3,776,560) of the contract price upon execution of the agreement which was duly paid and a further Kshs. 1,000,000 was subsequently paid making a total of Kshs. 4,776,560.
37. The plaintiff commenced the work and on or about 30/6/2016 and completed 27 piles for which the plaintiff issued Certificate NO. 1 dated 17/8/2016 for Kshs 6,120,442.560.
38. That the plaintiff issued Certificate No. 2 dated 13/9/2016 for an additional 31 piles for Kshs. 5,721,505.15 and Kshs. 24,813,185.71 for Certificate No. 3 on 17/5/2017.
39. The defendant raised issue with each of the 3 certificates issued by the plaintiff largely on the questionable way the delay times were charged.
40. That the plaintiff charged Kshs. 96,691 per day and certificate No. 1 and 2 did not show the number of days which the delay times were charged.
41. Further, that the plaintiff charged delay times from 11/10/2016 to 15/5/2017 by which the plaintiff had suspended work and abandoned the site and removed the main equipment.
42. On 17/2/2017 the defendant wrote to the plaintiff with a final offer to settle the matter by making immediate payment of Kshs. 5,000,000 and the plaintiff resume work.
43. On 15th September 2016, when only 14 piles remained to be constructed, the Defendant was informed by the Plaintiff that the Plaintiff had decided not to take Mait HR 180 pile rig across the river even though the passage had been tested two days earlier and was ready.



44. On 19/9/2016 the Plaintiff confirmed to the Defendant that the Plaintiff had not taken the Mait HR 180 across the river, giving as a reason that the temporary crossing constructed by the Defendant was not suitable for the rig to cross over and that the crossing was not wide enough and that the crossing would not take the weight of the rig.
45. The crossing was in fact 4 meters wide. A suggestion was made on site to the Plaintiff that the rig crosses on the sandy river bed which at the site was only 40cm deep on a sand bed and was well able to carry the rig, as had been verified by the Defendant's heavy excavator crossing the river.
46. However, this suggestion was rejected by the Plaintiff who refused to do so without making any attempt to even try to cross or seek or request the Defendant to seek any outside professional advice on this suggestion.
47. The Defendant had all along in the course of correspondence exchanged with the Plaintiff in respect of the Mait HR 180 rig, denied that the crossing was not wide enough or that it would not take the weight of the rig.
48. The Plaintiff then decided to demobilize the said heavy equipment being the HR 180 Rig, Midi Drill and Kelly requested the Defendant to make available transportation for the said equipment back to the its base, which was done on 2/11/2016
49. The Plaintiff having suspended work, abandoned the site and removed its heavy equipment, the Defendant was obliged in completing the remaining work of 14 piles to sub-contract the work to another sub-contractor whose rig crossed the river safely and without incident whatsoever.
50. The parties filed written submission as follows; the plaintiff submitted that as a result of the breach of contract it has suffered and continues to suffer economic loss and prejudice because of the defendant's breach.
51. That the plaintiff has failed to meet its various financial obligations and commitments due to the breach and therefore claims a total of Kshs. 177,401,699.14
52. The plaintiff submitted that Pursuant to section 3 of the Subcontract agreement the defendant was required to issue an advance payment of 20% immediately at the signing of the contract to the plaintiff; and interim payment was to be made after the completion of each 27 piles at the price stipulated in the Bill of Quantities.
53. Further, that the initial 20% payment was made but the defendant thereafter failed to pay the rest of the interim payments even though the plaintiff continued to meet it obligations.
54. It was the plaintiff's argument that Payment is a critical provision in any commercial contract. Failure of the Defendant to settle the Certificates despite numerous reminders amounts to breach of Contract.
55. On whether they are entitled to the standing charges claimed the plaintiff submitted that it was not in a position to proceed with the work without financing and that the defendant failed to make payment despite numerous reminders from the plaintiff.
56. Further, that the agreement incorporates the bill of quantities as part of the agreement that sets Kshs. 96,691 as the hourly rig rate. The Plaintiff therefore, Claims Standing/ Delay time for 878 days from 11/ 10/2016 when the works were paused to 07/03/2018 when the defendant officially terminated the contract, a total sum of Kshs. 84,894,698.00.



57. The defendants on the contrary submitted that the plaintiff breached the agreement by charging the standing/delay charge at a daily rate of Kshs. 96,691 and by further not indicating the number of days constituting delay times.
58. That the delay time is claimed across the board for all heavy duty equipment the plaintiff brought on site for the performance of its obligation as subcontractor.
59. The defendant submitted that the plaintiff completed 74 piles out of 96 piles leaving 14 piles which were completed by another subcontractor that the defendant had to pay.
60. Further, the Defendant submitted that the plaintiff was itself in breach of contract by suspending work in the 5/10/2016 as there is no termination clause whatsoever in the sub-contract agreement giving the plaintiff the right for any reason to suspend work or abandon the site.
61. The defendant also submitted that that the Plaintiff cannot charge stand/delay time and interest in the period 11/10/2016 to 15/05/2017 or any time thereafter having suspended the works on 5/10/2016 and 2/11/2016 after its equipment was returned to the Plaintiff.
62. The Defendant therefore submitted that the sum of Kshs. 177,401,699.14 is untenable, unreasonable, unconscionable and exorbitant.
63. I have carefully considered the evidence of both parties together with the rival submission. It is the duty of the plaintiff to prove its case and the standard of proof required is on a balance of probabilities.
64. The issues for determination in this case are as follows;
 - i. Whether this suit ought to have been referred to Arbitration.
 - ii. Whether the plaintiff has proved to the required standard that the defendant was in breach of contract.
 - iii. Whether the plaintiff is entitled to the remedies he is seeking.
65. On the issue as to whether this suit ought to have been referred to Arbitration, I find that the subcontract provides that any dispute be settled amicably and if the same cannot be resolved, the dispute be referred to Arbitration in Nairobi.
66. I find that the parties subjected themselves to the jurisdiction of the court.
67. The Arbitration Act provides that parties can oust the jurisdiction of the court by having an Arbitration clause.
68. The Defendant ought to have applied to the court to refer the case to Arbitration before filing their pleadings.
69. Section 6(1) of the Arbitration Act No. 4 of 1995 provides as follows;

“(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or files any pleadings or takes any other step in the proceedings, stay the proceedings and refer the parties to arbitration unless it finds—

 - (a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or



(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.”

70. The Defendant did not make any such application and he is estopped from raising the said issue in their submissions having submitted themselves to the jurisdiction of this court.
71. On the issue as to whether the plaintiff has proved his case to the required standard, I find that the plaintiff's claim is based on breach of contract.
72. There is evidence that the plaintiff entered into a subcontract with the Defendant on 20/6/2016.
73. It was a term of the agreement that the defendant pay 20% deposit of the contract price upon execution of the agreement.
74. According to the plaintiff, the defendant did not make the required 20% advance payment, nonetheless, the plaintiff commenced to perform its part of the agreement on or about 30th of June 2016.
75. The plaintiff said that on 24/6/2016 the defendant made an initial part payment of Kshs. 3,776,560.00.
76. The plaintiffs further said that according to Section 5 of the Subcontract agreement it was the duty of the defendant to transport all plant, tools and equipment from the plaintiff's Head Office to Site and back.
77. Further, that mobilization commenced on 29/5/2016, the defendant however took close to two months to deliver the HR 180 Rig from the plaintiff's Head Office to the Tana River Site.
78. That the HR 180 Rig was delivered to the Tana River site on 20/7/2017.
79. The plaintiff said they continued to perform its part of the contract using another smaller Midi Rig as they awaited the HR 180 Piling Rig from the plaintiff's head office to the Tana River Site.
80. On or about 15/8/2016 the plaintiff said they completed the first 27 piles and certificate dated 17/8/2016 was subsequently issued.
81. Further that the defendant failed to make payments towards the settlement of the first certificate despite various reminders from the plaintiff.
82. On or about 13/9/2016 the plaintiff completed an additional 31 piles making the total piles completed to be 58 and Certificate No. 2 was issued on 13/9/2016. Still the defendant failed to make any payments towards the settlement of the two certificates.
83. The plaintiff never the less proceeded and completed an additional 16 piles on 5/10/2016 making the total piles completed to be 74 piles.
84. However, the plaintiff said they were not in a position to proceed with the work without financing and this compelled the plaintiff to write a notice dated 27/9/2016 notifying the defendant that if it did not make any payments within 7 days the work would be suspended awaiting payment and it would attract delay charges plus interest.
85. On or about 9/11/2016 the plaintiff demobilized the HR 180 Machine and its Kelly Bar Back to its head office in Nairobi. They intended to complete the assignment after payments were made with the smaller Midi Rig.
86. On or about 17/5/2017 the plaintiff forwarded to the defendant certificate No. 3 for the 74 piles plus standing/delay time but the defendant still failed to make any payments and on 7/3/2018



- the defendant notified the plaintiff to remove plant machinery and equipment remaining at the construction site which action terminated the contract.
87. I find that there is undisputed evidence that the plaintiff completed 74 piles out of 89 piles leaving 14 piles which were completed by another subcontractor.
 88. The defendant was the main contractor under the contract and the plaintiff was the subcontractor.
 89. It is not in dispute that on 2/6/2016, the defendant paid 3,776,560 and thereafter, only one more payment of Kshs 1,000,000 was made which is acknowledged in the 3rd certificate dated 17/5/2017 making it a total of Kshs.4,776,560. No other payment was made by the Defendant.
 90. The plaintiff's evidence was that the defendant also failed to transport equipment and all plant and tools from the plaintiff's headquarter to site contrary to what was agreed in the subcontract signed by the parties.
 91. The plaintiff commenced with the work using a mid rig and winch machine which they acquired on their own.
 92. The plaintiff's evidence that on 15/8/2016, the plaintiff completed the first 27 piles and a certificate dated 17/8/2016 was issued but they were not paid has not been disputed.
 93. Again on 13/9/2016 the plaintiff said they completed an additional 31 piles making a total of 58 piles and they issued a second certificate but they were not paid.
 94. On 15/10/2016 again, the plaintiff said they completed an additional 16 piles making a total completed piles 74 in number but again they were not paid.
 95. The plaintiff said they suspended the work on 10/10/2016 due to non-payment and on 9/11/2016, the plaintiff demobilized the HR 180 machine and its Kelly Bar back to the headquarters.
 96. The defendant on their part agreed that they signed the agreement on 20/6/2016 under which the plaintiff was to perform piling works for 60mm Dia piles for bridge foundation at Tana River sub county for a total of ksh.21,403,920.96.
 97. The defendant said after the completion of 27 piles the plaintiff demanded ksh.6,120,442.81 including 5,276,243.80 in respect of delay charges which was unconscionable and unreasonable and exorbitant.
 98. The defendant said they raised issue with each of the 3 certificates issued by the plaintiff largely on the questionable way the delay times were charged.
 99. The Defendants said that the plaintiff charged Kshs. 96,691 per day and that certificates No. 1 and 2 did not show the number of days which the delay times were charged.
 100. Further, they said that the plaintiff charged delay times for 11/10/2016 to 15/5/2017 by which the plaintiff had suspended work and abandoned the site and removed the main equipment.
 101. On 17/2/2017 the defendant said they wrote to the plaintiff with a final offer to settle the matter by making immediate payment of Kshs. 5,000,000 and the plaintiff to resume work.
 102. On 15th September 2016, when only 14 piles remained to be constructed, the Defendant said they were informed by the Plaintiff that the Plaintiff had decided not to take Mait HR 180 pile rig across the river even though the passage had been tested two days earlier and was ready.



103. The Defendants said that on 19/9/2016 the Plaintiff confirmed to the Defendant that the Plaintiff had not taken the Mait HR 180 across the river, giving as a reason that the temporary crossing constructed by the Defendant was not suitable for the rig to cross over and that the crossing was not wide enough and that the crossing would not take the weight of the rig.
104. The Defendants said that the crossing was in fact 4 meters wide. A suggestion was made on site to the Plaintiff that the rig crosses on the sandy river bed which at the site was only 40cm deep on a sand bed and was well able to carry the rig, as had been verified by the Defendant's heavy excavator crossing the river.
105. However, the Defendants maintained that the suggestion was rejected by the Plaintiff who refused to do so without making any attempt to even try to cross or seek or request the Defendant to seek any outside professional advice on this suggestion.
106. The Defendant said they had all along in the course of correspondence exchanged with the Plaintiff in respect of the Mait HR 180 rig, the plaintiff denied that the crossing was not wide enough or that it would not take the weight of the rig.
107. The Defendants were responsible for transporting the equipment to site and back according to the agreement but they failed to do so.
108. I find that Defendants were in breach of the terms of the subcontract in terms of delaying in making payments and also in failing to transport the plaintiff's equipment to the site.
109. The Defendants have not denied the delays in making payments and in doing their part of the assignment such as transporting the equipment to the site.
110. I find that the parties did not have a default clause in their subcontract. However, the parties had agreed on clause 7 of their subcontract that the Bill of Quantity rates would apply.
111. On the issue as to whether the plaintiff is entitled to the remedies it is seeking against the Defendant, I find that the plaintiff is entitled to the outstanding payments in terms of prayer (a) of the plaint.
112. It is not clear how the plaintiff arrived at the figure of 878 days @ 96,691 per day totaling Kshs. 84,894,698.00. which the plaintiff is claiming in respect of and standing charges in prayer (c) of the plaint.
113. I award Standing charges from 11th October 2016 to 17/5/2017(216 days @ 96,691 per day) pursuant to the plaintiff's Bill of quantities and section 5 of the plaintiff's standard terms and conditions which were agreed to and signed by the defendant.
114. There is evidence that the plaintiff suspended the work on 10/10/2016 due to non-payment and on 17th May 2017, the plaintiff forwarded to the defendant certificate no. 3 for the 74 piles plus standing / delay time.
115. In the circumstances, I find that the plaintiff is entitled to the equivalent to the work done plus 216 delay time @ kshs.96,691 per day.
116. I grant the plaintiff prayer (a) of the plaint which is in respect of the total amount for establishment on site, moving and setting-up each pile position (74 piles) Boring and casting (1,038.9 L.M) – Kshs. 14,049,992.
117. The rest of the claim namely (b),(d), (f) and (h) be and is hereby dismissed with no orders as to costs.
118. The total sum payable to the plaintiff is as follows;



Actual work done-Kshs.14,049,992
Delay of 216 days@96,691 per day
Standing charges for the delay Kshs.20,885,256
Total=34,935,248
VAT@ 16% (5,589,639.68)
Total= Kshs.40,524,887.68

119. Judgment be and is hereby entered in favor of the plaintiff against the Defendant in the sum of Kshs.40,524,887.68 plus costs and interest at court rates from the time of filing suit until payment in full.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 28TH DAY OF NOVEMBER, 2023.

.....

A. N. ONGERI
JUDGE

In the presence of:

..... **for the Plaintiff**

..... **for the Defendant**

