



REPUBLIC OF KENYA



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**Mombasa Cement Limited v Paddy (K) Limited (Civil Suit E017 of 2020)
[2023] KEHC 26185 (KLR) (Commercial and Tax) (23 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 26185 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E017 OF 2020
JWW MONG'ARE, J
NOVEMBER 23, 2023**

BETWEEN

MOMBASA CEMENT LIMITED PLAINTIFF

AND

PADDY (K) LIMITED DEFENDANT

JUDGMENT

1. By a plaint dated 18th day of October 2019 and amended Plaint dated on 17th February 2023 the Plaintiff moved this Honourable for Judgment against the Defendant under seeking the following prayers:-
 - a. Unpaid contractual sum of Kenya Shillings Three Hundred and Seventy Million, Fifty-Two Thousand, seven Hundred and Sixty-Nine and Forty-Five Cents (Kshs.370,052,769.45/-) only
 - b. Interest at the rate of 14% per annum with effect from April 2019 till Judgment and until payment in full.
 - c. Costs of and incidental to this suit
 - d. Interest at Court rates on (a), (b) and (c) above.
2. Subsequently and upon being served with the Plaint and summons to enter appearance, the Defendant filed its defence on 10th February 2020 that was duly amended accordingly amended 4th April 2023 pursuant to the filing by the Plaintiff of its amended Plaint. At trial, the Plaintiff called two witness to testify in its case while the Defendant did not call any witness to support its averments in the amended defence.



3. PW1, Harish Kumar Samji Patel who testified on behalf of the Plaintiff. He admitted to having written a statement dated 18/10/2019 which he sought to rely on as his evidence in chief. He also produced the Plaintiff's bundle and list of documents dated 18/10/2019 and informed the court that the same was the Plaintiff's evidence in the matter and had the court admit into evidence the said bundle and list of documents and marked as Plaintiff's exhibits 1-10. He confirmed to court that he was a director of the Plaintiff company.
4. During cross examination by counsel for the Defendant, PW1 confirmed that both the Plaintiff and the Defendant had a long running business relationship where the Plaintiff supplied the Defendant with cement from 2013 to 2018 and the said supply would be guaranteed by a Bank Guarantee sourced by the Defendant. PW1 confirmed to the court that the said Bank guarantee had expired during the pendency of the supply contract leaving the Plaintiff exposed to the tune of Kshs. 370,052,769.45 after reconciliation of sales and payments was done. He confirmed that an Audit Report commissioned by the Plaintiff revealed that the Defendant was truly indebted to the Plaintiff to the sum of Kshs.370,052,769.45/- as at March 2018 and urged the court to find the same and enter judgment as prayed in favour of the plaintiff with interest and costs thereto.
5. PW2 was a Mr. Asif Chaudry who testified for the Plaintiff. He confirmed to the court that he was a professional accountant who was tasked to carry out reconciliation of the accounts between the Plaintiff and the Defendant and he was licensed to practice as such and held a current practising certificate. He informed the court that his firm conducted an audit on the instructions of the Plaintiff and that the same involved looking at all purchase orders placed by the Defendant, delivery notes and invoices issued to determine the that was outstanding balance of unpaid deliveries from the supplies made thereto by the Plaintiff to the Defendant. He testified that the same involved looked at all purchase orders placed since the inception of the business relationship in 2013 to when the dispute arose in 2018 and compared the same with delivery notes and invoices made to the defendant and payments received for the same. PW2 testified that he then prepared a summary of findings. He ascertained that the delivery notes were all signed for by the Defendant and the same were matched to the invoices issued. He further testified that the work involved looking at all the payments received from the Defendant by the Plaintiff during the period in question. He confirmed that the practice had been to allocate payments made by the defendant against the invoices on first in first out basis since the Defendant would usually make bulk payments from time to time against pending invoices. He testified that between the 29th January 2018 to 22nd Mach 2018, the Defendant had made payments of Kshs.362,340,000/- million and these were allocated to previous invoices raised, on a first in first out basis, leaving a balance of Kshs.370,052,769.45/-. He confirmed that upon carrying out the audit, he ascertained that there were no duplicate invoices and that the sum of Kshs.370,052,796.45/- remained unpaid as could be ascertained from the records availed to him and his audit firm.
6. On cross examination by Defendant 's counsel, PW2 testified that he prepared an itemised report against all the orders placed for the period of 29th January 2018 to 20th March 2018 which revealed a payment of Kshs.362,340,000/- and allocated the same to previous invoices. He testified that the audit revealed that the Defendant would make bulk payments as opposed to settling each invoice individually and that the same would be applied to pending invoices. He confirmed that the said funds were fully utilised leaving a balance of Kshs.370,052,769.45/-. PW2 further clarified to the court that he had conducted a full reconciliation of the period the parties were in a business relationship and produced the same as a report.
7. It was PW2 testimony that the business of the Plaintiff and the Defendant spanned several years beginning in 2013 to 2018 when the dispute arose and that the two parties had transacted during the period where all purchase orders of the Defendant were fully honoured and supplies fully paid for until



the period of January to March of 2018. For instance, PW2 informed the court that in 2014 the total invoices were 61,970,750, while in 2015, the total invoices were Kshs.411,397,797/- with a balance brought forward from 2014 of Kshs. 14,898,480. In 2016 the total invoices raised amounted to Kshs, 1,905,539,817 and the same were paid for with a balance of Kshs.270,464,625/- being carried to 2017 whose total invoices were 1,916,183,652. These were settled leaving a balance of Kshs.335,017,317/- and these were brought forward to 2018 whose total invoices were Kshs.615,291,025/-. Payment of Kshs.562,290,000/- were received and applied to the same leaving a balance of Kshs. 370,052,796.45, the subject matter of the suit before this court.

Analysis and Determination.

8. I have carefully considered the pleadings as filed by both parties and the testimony tendered in evidence in open court on behalf of the Plaintiff by the two witnesses including the submissions made thereto. The Plaintiff produced ten bound volumes as evidence among its list and bundle of documents which I considered. To my mind, the only issue available for determination is “whether the Plaintiff has proved its claim to the required standard to warrant the prayers sought in the amended plaint”.
9. I note that the Defendant opted not to call any witnesses in the case but had the opportunity to test the veracity of the Plaintiff’s evidence through cross examination. The Plaintiff’s claim is divided into four prayers. The first prayer relates to the claim for the sum of Kshs.370,052,769.45/- being contractual sum due from the Defendant. The *evidence Act* under section 107 and 108 thereto places the burden of proof on the Plaintiff. The said sections of the *Evidence Act* provide as follows;

107 Burden of proof

1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108 Incidence of burden

The burden of proof in a suit or proceeding lie on that person who fail would fail if no evidence at all were given.

10. The Plaintiff in the case before the court has a duty to establish that it is indeed entitled to the prayers sought for payment of the sum of Kshs.370,053,796.45/- under prayer 1 of the Plaint. The Plaintiff also prayed to be awarded interest at the rate of 14% from April 2019 plus costs of the suit. To prove its claim, the Plaintiff called two witnesses. The Plaintiff to establish the existence of a contractual relationship between itself and the Defendant called its director who testified of the existence of the business relationship between the Plaintiff and the Defendant in which the Defendant was supplied with cement against a bank guarantee from 2014 to 2018. The Plaintiff in its bundle of documents produced transactional documents that included purchaser orders, delivery notes and invoices. The plaintiff also produced in evidence a reconciliation of accounts report that was contained in 10 separate bundles and called a professional accountant to testify on how the sum of Kshs.370,053,796.45/- claimed in the plaint came to be. The Plaintiff was clear in its evidence that these funds were due and owing due to the nature of the contractual relationship between the parties. The Defendant called no evidence to rebut or controvert the said evidence and therefore lost the opportunity to challenge the evidence of the Plaintiff despite having filed a defence denying the claim. Similarly, counsel for



the Defendant was not able to shake the Plaintiff's evidence during the cross examination of the two witnesses.

11. Having weighed the evidence of the two witnesses and the documents the documents produced thereto, I am persuaded that the Plaintiff has on a balance of probabilities established the claim for judgment against the defendant for the payment of the sum of Kshs.370,053,796.45/- as prayed under prayer 1 of the amended plaint. The court is therefore satisfied that this prayer by the Plaintiff has been proved.
12. The second prayer sought by the Plaintiff is for an award of interest at the rate of 14% on the sum due under prayer 1 from the date of accrual which is given as April 2019. During the testimony in court by the Plaintiff's witnesses, there was no mention of whether any funds that were due and outstanding at the close of reconciliation period attracted interest and what rate was agreed by and between the parties. Instead, when the PW2 took the court through the bundles of the reconciled amount, what emerged was that once supply of cement was done and invoices were issued, payment was made in bulk which was then applied to the invoices on a first in first out basis. More often than not there would be unpaid balances being carried forward to the next year and these would similarly be cleared once the next bulk payment was released. There is nothing in the testimony or the documentary evidence produced to show or establish that parties contracted to have any outstanding balances thereto attract interest or at all at the rate 14% and therefore the prayer to award interest at the said rate of 14% from April of 2019 till judgment and payment in full has not been established. The same is therefore dismissed.
13. Costs follow the event. The Plaintiff did call evidence that established that it was deserving of some of the prayers sought under the first item as in the amended plaint. Costs of this suit are awarded to the Plaintiff herein.

Final disposition

14. I am satisfied that the Plaintiff has proved its case against the Defendants on a balance of probabilities and hereby enter Judgment in favour of the Plaintiff against the Defendant in the following terms;
 - i. The sum of Kshs.370,053,796.45/- with interest at court rates from the date of filing suit till payment in full.
 - ii. Costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY OF NOVEMBER 2023

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J. W. W. MONG'ARE
JUDGE

