



**Aridsun Contractors & 3 others v County Government of Kitui (Civil Suit 1 of 2019) [2022] KEHC 10859 (KLR) (29 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 10859 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITUI  
CIVIL SUIT 1 OF 2019**

**RK LIMO, J  
JUNE 29, 2022**

**BETWEEN**

**ARIDSUN CONTRACTORS ..... 1<sup>ST</sup> PLAINTIFF  
KATUNGATE CONTRACTORS LTD ..... 2<sup>ND</sup> PLAINTIFF  
SYANO ROADS & BRIDGES CO. LTD ..... 3<sup>RD</sup> PLAINTIFF  
KONZA WORKS CONSTRUCTION & ENGINEERING ..... 4<sup>TH</sup> PLAINTIFF  
**AND**  
**COUNTY GOVERNMENT OF KITUI ..... DEFENDANT****

**JUDGMENT**

1. This suit is about breach of contract and was instituted by the plaintiffs *vide* a plaint dated 24<sup>th</sup> May, 2019 where the defendant the County Government of Kitui is sued for breach of contract. The plaintiffs are seeking the following reliefs from this court namely;
  - a. A declaration that the Defendant breached the terms and conditions of the Forms of contract dated July 8, 2016
  - b. An order for specific performance and fulfillment of contract
  - c. The payment of the special damages as follows;
    - i. Ardisun Contractors Ltd- Ksh 22,610,133.33
    - ii. Katungate Contractors Ltd-Kshs 27,698,510.16
    - iii. Syano Road & Bridges Co. Ltd- 20,881,740.00
      - a. Konza Works Constructions & Engineering Ltd –Kshs 22,260,330.00



- iv. Kwui General Suppliers- Kshs. 8,600,000  
General damages for breach of contract.
- v. Any other this Honourable Court may deem just to grant
- vi. Costs of this suit.

2. The background to the claim is that the Plaintiffs entered into contracts with the Defendant on 8<sup>th</sup> July 2016 for provision of public works within Kitui County as follows;

<b>Contractor</b>	<b>Project</b>	<b>Value Kshs</b>	<b>Completion</b>
Ardisun Contractors Limited	Construction of Kisasi-Mbitini-Voo Road drift construction works lot 1-3	22,610,133.33	100%
Katungate Contractors Limited	Construction of Kisasi-Mbitini-Voo Road drifts construction lot 3	27,698,510.16	100%
Syano Road & Bridges Co. Limited	Construction of drift at Tiva river along Oasis to Mangina market	26,843,963.20	90%
Konza Works Construction & Engineering Ltd	Opening up of Nyanyaa (Oasis) road to Mangina and Kiliko shopping centre to Kavilini Primary School	27,248,647.35	81.69%
Kivui General Supplies and Contractors	Construction of Kilonzi River drift along Waita-Ndithi-Maongoa road in Waita Ward, Mwingi sub-county	9,986,592.08	86.11%

3. It is the Plaintiffs' case that the Defendant was required to pay them for work done pursuant to issuance of certificates of payment pending issuances of certificates completion after expiry of the six months' defects liability period but that was not done. They contend that by its conduct, the Defendant is in breach of the various contracts resulting in the Plaintiffs suffering loss and damages.



4. The Defendant failed to enter appearance or file a defence and an interlocutory judgment was entered on 17<sup>th</sup> July 2019. Parties however entered a consent on 2<sup>nd</sup> October 2019 allowing the Defendant to file a defence which it.
5. This matter proceeded on full trial and the plaintiff called 4 witnesses we were also parties in the respective contracts separately signed with the defendant. The following is a summary of their testimonies:
6. Patrick Mbuvi Kakai (PW1), testified on behalf of his firm, the 2<sup>nd</sup> plaintiff and 1<sup>st</sup> plaintiff whose work with the defendant he supervised. He adopted his statement dated 27<sup>th</sup> January, 2021 as his evidence in Chief adding that they were contracted to construct drifts to help motorists pass across rivers in several places in Kitui County. He clarified that drifts are done instead of bridges because constructing the latter are more expensive and take longer time. He testified that they were requested to proceed urgently and complete the projects as required.  
  
He told this court that they completed the work and which was inspected and found to be satisfactory. He added that they were not however paid for the work done despite demand. According to him the 1<sup>st</sup> plaintiff contracted work amounting to Kshs. 22,610,133 while his company is owed Kshs. 27,689,510.  
  
He added that he was aware that EACC investigated their contracts with the defendant but found nothing fishy and in fact reportedly advised the defendant to pay.
7. Nelly Kavuu (PW2), the proprietor of the 5<sup>th</sup> Plaintiff testified and stated that her company won a tender of Kshs. 9.8 from the Defendant to construct drifts in Waite Ward. She testified that she completed the projects on December 30, 2016 and that the work was duly inspected and found to be satisfactory. She clarified that she did not have a completion certificate because at the time she had not completed the assignment and was only claiming what had been certified done. She however insisted that she had since finished the projects/assignments.
8. Sebastian Mwangangi Mutua (PW3)-the 4<sup>th</sup> Plaintiff's director stated that he was contracted to construct the Mangina-Kiliko-Kalivuni road in 2015 for the contract sum of Kshs 27,248,647.35. He stated that the work was done in 2016 and inspections conducted following which he was issued a certificate of partial completion which indicated that he was due for payment of Kshs 22,260,330/- He told the court that the failure to pay by the Defendant had resulted in loss of his car and home.
9. PW4 Naomi Kyee Mutuku adopted her statement of 21<sup>st</sup> January 2021 and informed the court that she was the proprietor of the 3<sup>rd</sup> Plaintiff. She stated that she entered into a contract with the Defendant for Kshs 26,843,962.20 which was executed on 8<sup>th</sup> July 2016. She testified that although the contract was due for performance in 4 months, she completed the 90% of the works within 3 months and was issued with a certificate of partial completion. That she issued an invoice to the Defendant on 18<sup>th</sup> October 2016 seeking payment of Kshs 20,881,740.00 but she is yet to be paid. She stated that the failure had affected her business financially. She also stated that once the partial payment is made, she would be able to complete the remainder of the contract.
10. The defendant in its defence did not deny the Plaintiff's claims;  
  
Justus Makau DW 1 adopted his statement of 27<sup>th</sup> May 2021 and stated that he was the Defendant's Chief Officer, County Finance. The witness told the court that the tenders in question were placed under investigations by the Ethic and Anti-Corruption Commissions over suspicion that they were awarded irregularly. He however stated that he was not in office at the time the tenders were issued. The witness however referred the court to his statement and stated that he was aware that the Plaintiff's had been issued with Local Service Orders. He also stated that the Defendant accepted liability and



was willing to pay the Plaintiff's but the process was stalled as filed containing contracts awarded to the Plaintiffs were taken by EACC for investigations. He stated that the files were returned to the Defendant in 2020. He also referred the court to certificates of completion and partial completion awarded to the Plaintiffs in respect to the works done. He stated that the Defendant was willing to pay the amounts owed to the Plaintiffs but it was waiting for approval by the Pending Bills Committee put in place to verify the payments. He also attributed the delay in payments to budgetary constraints.

11. In their submissions filed on 26th January, 2022, the Plaintiffs submit that they entered into legally binding contracts with the Defendants and although the contracts were awarded through restricted tendering, it was the Defendant's obligation to ensure that the conditions for restricted tendering were fulfilled. They submit that the public has been benefitting from the works done by the Plaintiffs as such, the Plaintiffs are entitled to payment even though the legality of the contracts was under investigations. They have relied on the case of *Root Capital Incorporated v Tekangu Farmers' Co-operative Society Ltd & Anor* (2016) eKLR where the court dismissed an application which sought a freezing order of funds that were held by the Defendant. The court considered the question of enforceability of contracts where an illegality had been cited and held that although it was dismissing the application at the preliminary stage, the Applicant had the possibility of succeeding in the suit. The court stated that although contracts were either by statute or public policy were unenforceable, a party was due to make a recovery only to the extent of placing him/her back to the state they were before they entered into the contract.
12. The Plaintiff further submitted that they fulfilled their obligations under the contracts and relied on certification of performance of the work done by the Defendant. They also rely on inspection reports and certificates of partial completion issued as proof that the work they were contracted to do were done and done satisfactorily. They have relied on the case of *Gichinga Kibutha v Caroline Nduku* [2018] eKLR where the Environment and Land Court dismissed an appeal after making a finding that the Appellant had failed to prove his claim of fraud against the Respondent. The court cited Section 107 of the *Evidence Act* which lays the burden of proof in civil cases to the party who wishes the court to give a judgment on a factual issue to provide evidence to facilitate proof of the facts in issue.
13. The Plaintiffs further submitted that for the ones who had not been certified as having completed 100% of the work eventually completed the work but the Defendant failed to inspect the work. They have also submitted that there was no proof to the allegation that the work was done negligently and they have relied on the case of *Trishon Construction Co. Ltd versus Avtar Singh Babra* [2017] eKLR where the court allowed a claim for breach of a construction contract between the parties and dismissed the Defendants counter-claim for want of proof.
14. The Plaintiffs have also asked the court to be guided by decisions in *Local Environment for Good Governance & six others v Community Executive Committee Member Finance and Economic Planning-County Government of Mombasa & 2 Others* (2021) eKLR as well as *John Masinde Kanchenja v Land Adjudication Settlement Officer Trans-Nzoia County & 2 Others; Jeremiah Marabu Miyoro (Interested Party)* [2021] eKLR. In both cases, the courts found that proper interpretation of the *constitution* allowed courts to issue remedies it deemed fit and just in different circumstances.
15. The defendant in its defence denies the Plaintiffs claims but when its representative turned up in court to testify it stated that it is willing to clear all pending bills pursuant to getting clearance from the Pending Bills Committee.
16. On the question of breach, the Defendant submits that payment was subject to full completion of works and that the present suit is pre-mature as the Defendant has been making efforts to resolve the matter amicably. The Defendant also argued that the contracts in issue were entered into towards the



end of the term of the last County Government before elections. The Defendant submits that the current government could not have anticipated that the Ethics and Anti-Corruption Commission was going to conduct investigation on the legality of the tendering process with respect to the contracts and as such, it cannot be held liable for breaching the contracts.

17. It submits that an order of specific performance would occasion difficulty on the Defendant as the Defendant is guided by procurement policies. It has relied on the case of *Amina Abdul Kadir Hava v Rabinder Nath Anand & Anor* [2012] eKLR and *Reliable Electrical Engineers Ltd vs Mantrac Kenya Limited* [2006] eKLR where orders of specific performance were held to be discretionary and that courts would only grant them on certain guiding principles.
18. On damages, the Defendant submits has submitted that general damages cannot be awarded for breach of contract and has relied on two cases being *James Maranya Mwita v South Nyanza Sugar Co. Ltd* (2017) eKLR and *Consolata Anyango Ouma vs South Nyanza Sugar Co. Ltd* [2015] eKLR where it was held that the general principle in award of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred.

### **Determination**

19. This court has considered the Plaintiffs case as well as the defendant's. This matter boiled down to whether or not there was valid contracts and if so whether there were breaches and the attendant consequences of breach.
20. The background to the claim is that by a letter of notification of award dated 29th June 2016, the Defendant informed each of the Plaintiffs that their tender applications for provision of various public works within Kitui County had been successful. All the Plaintiffs responded to the letter of notification of award on the same day accepting the award except the 5th Plaintiff, Kivui General Supplies and Contractors who accepted the award on 30<sup>th</sup> June 2016.
21. It is also not in dispute that all the Plaintiffs and the Defendant executed Contract, Agreements on 8th July 2016 for provision of the aforementioned public works.
22. The Plaintiffs have submitted much on the legality of the contracts when the same is not in dispute as all parties are in agreement that the said contracts were as a result of a restrictive tendering process. The court has been informed that the process was under investigations by the Ethics and Anti-Corruption Commission however, there has been no evidence indicating that the process tendering process was found to have been unlawful. As it stands therefore, the legality of the contracts is not in dispute.
23. The Plaintiffs case is that, following execution, due performance and completion of the public works, the Defendant has refused and/or neglected to pay for the works.
24. These were valid contracts entered between the plaintiffs and the defendant. There are evidence that the contracts were at various stages of completion and the admission by the defendant that the contracts were subjected to investigation by investigative agency does not mean that the contracts were illegal.
25. This court finds that the defendant claims that the plaintiff's ought to have been a bit patient and exhausted internal dispute resolution mechanism is not supported by evidence. The existence of internal dispute resolution mechanism was not properly pleaded and there was no evidence placed before me to suggest that such mechanism exist and had not been exhausted. It is quite evident that the projects were done more than 5 years ago and the defendant has conceded that in fact the same contracts were executed by the last regime. There has been some delay which certainly is not justified.



26. Evidence in form of Inspection reports and certificates of completion do point to the fact that indeed work was done and payment is owing. The evidence further shows that some of the works were completed in 2017 and the letter from Ethics and Anti-Corruption Commission dated 18<sup>th</sup> May 2018 also indicates that the Defendant was directed to make payments but ensure that the same were done lawfully. The excuse given about delays spanning almost 5 years is in my view unreasonable
27. This court finds that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff have proved that they finished the work they were contracted to do as per the completion certificate exhibited. They therefore, had legitimate expectation to be paid the contracted sum upon completion of the work done. The defence put forward that the defendant was awaiting clearance by the investigative agency in my view is only an excuse since the reports exhibited in this court shows that Ethics and Anti-Corruption Commission had no issues with the contracts.
28. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Plaintiffs' claims are based on the work done rather than the contracted sum.
29. The 3<sup>rd</sup> Plaintiff's documents shows that the contracted sum was Kshs. 26,843.20 but the work certified done is Kshs. 20,881,740. The contract between the 3<sup>rd</sup> Plaintiff and defendant exhibited under clause 3 states as follows: -

“The procuring entity hereby covenants to pay contractor in consideration of the execution and completion of the works and the remedying of defects wherein the contract price or such other sum as become payable under the provision of the contract .....

”
30. The certificate issued by the defendant shows that the sum payable to 3<sup>rd</sup> plaintiff as per the work done was Kshs. 20,881,74-.00. In my view that certificate issued by the defendant is an admission on its part that it sums were payable and on that the 3<sup>rd</sup> plaintiff should be paid.
31. The 4<sup>th</sup> Plaintiff, Konza Works Construction & Engineering Ltd, claim is also based on partial completion though he claims it had completed the works and the defendant refused to issue certificate of completion. It however failed to show any letter written to the defendant expressing its frustrations of not being issued with a completion certificate despite completion of work. I have noted that the contract signed between the 4<sup>th</sup> Plaintiff and the defendant also provided for part payment of the work certified as done. I have also noted from the certificate issued by the defendant after inspection that the amount certified to be payable is Kshs. 22,260,330. I therefore, find that the 4<sup>th</sup> Plaintiff has proved the amount claimed to the required standard.
32. The fifth plaintiff Kivui General Suppliers and Contractors has in the same way also established that the claim amount of Kshs. 8,600,000 was certified and approved by the defendant as the value of the work done. I find that she has proved her claim as well.
33. The Plaintiffs have asked for general damages for breach of contracts but I do not find any clause for general damages in the contracts. I am however persuaded to award interests on the sums claimed to at least cater for interests of bank loans or overdrafts, the Plaintiffs may have taken to complete or undertake the projects they contracted to do.

In sum, this court finds that the Plaintiffs claims have been proved to the required standard.

The defence offered as I have noted above is a concession. This court enters judgement against the defendant as follows: -

a.

- (i) Aridson Contractors Ltd. - Kshs. 22,610,133.33



- (ii) Katungate Contractors - Kshs. 27,698,510.16
- (iii) Syano Road & Bridges Co. Ltd- Kshs. 20,881,740.00
- (iv) Konza Works Construction & Engineering Ltd.- Kshs. 22,260,330.00
- (v) Kivui General Suppliers & Contractor-Kshs. 8,600,000.00

b. The plaintiff will have costs and interests of above amount at court rates.

**DATED, SIGNED AND DELIVERED AT KITUI THIS 29<sup>TH</sup> DAY OF JUNE, 2022.**

**HON. JUSTICE R. K. LIMO**

**JUDGE**

