



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 33 OF 2019

JOHNNEWTON COMMUNICATION LTD.....1ST PLAINTIFF
THE SUNDAY PUBLISHERS LTD.....2ND PLAINTIFF
THE EXPRESS MEDIA LTD.....3RD PLAINTIFF
CROSS CONTINENTS VENTURE LTD.....4TH PLAINTIFF
SHIELDLOCK LTD.....5TH PLAINTIFF
MELSAV COMPANY LTD.....6TH PLAINTIFF

VERSUS

**MINISTRY OF INFORMATION,
COMMUNICATION & TECHNOLOGY.....DEFENDANT**

JUDGMENT

(1) This suit was filed vide the Plaint dated 10th January 2019 by which the Plaintiffs **JOHNNEWTON COMMUNICATION LTD** (hereinafter the 1st Plaintiff), **THE SUNDAY PUBLISHERS** (hereinafter the 2nd Plaintiff), **THE EXPRESS MEDIA LTD** (hereinafter the 3rd Plaintiff), **CROSS CONTINENTS VENTURE LIMITED** (hereinafter the 4th Plaintiff), **SHIELDLOCK LTD** (hereinafter the 5th Plaintiff) and **MELSAV COMPANY LTD** (hereinafter the 6th Plaintiff) pray that judgment be entered in their favour against the Defendant for:-

“(a) Kshs. 31,850,000/- in favour of the 1st Plaintiff.

(b) Kshs. 10,730,000/- in favour of the 2nd Plaintiff.

(c) Kshs. 9,800,000/- in favour of the 3rd Plaintiff.

(d) Kshs. 4,300,000/- in favour of the 4th Plaintiff.

(e) Kshs. 9,800,000/- in favour of the 5th Plaintiff.

(f) Kshs. 26,250,000/- in favour of the 6th Plaintiff.

(g) Interest on amounts set out under (a), (b), (c), (d), (e) and (f) above at Court rates from the date of filing of the suit until payment in full.

(h) Costs of the suit.”

(2) The Defendants **MINISTRY OF INFORMATION, COMMUNICATION & TECHNOLOGY** (the 1st Defendant) and **THE HON. ATTORNEY GENERAL** (the 2nd Defendant) filed a Statement of Defence dated **21st May 2019** praying that the Plaintiffs suit be dismissed in its entirety with costs to the Defendant. The hearing of the suit commenced before this Court on **17th February 2020**. The Plaintiff called two (2) witnesses in support of their case whilst the Defendant called one (1) witness.

THE EVIDENCE

(3) **PW1 AYUB SAVULA** told the Court that he was a **Member of Parliament** representing **Lugari Constituency**, and was also a Director of all the Plaintiff Companies. **PW1** relied entirely upon his written statement dated **10th January 2019** and Further Written Statement dated **23rd August 2019**. **PW1** stated that the Plaintiffs are the publishers of various publications as follows:-

- (i) The 1st Plaintiff is the Publisher of **Safari Times Magazine**.
- (ii) The 2nd Plaintiff is the Publisher of **Sunday Express Newspaper**.
- (iii) The 3rd Plaintiff is the Publisher of **Economic Focus Magazine**.
- (iv) The 4th Plaintiff is the Publisher of **Sugar Commodity Review Magazine**.
- (v) The 6th Plaintiff is the Publisher of **CEO Africa Magazine**.

(4) **PW1** stated that on diverse dates between **February 2016** and **November 2017** at the 1st Defendant's request the said publications placed advertisements in their various newspapers and magazines. That in breach of their respective contracts and/or terms of Agreement the 1st Defendant has failed and/or refused to pay to the Plaintiffs their respective advertising charges as particularized hereunder:-

1st Plaintiff – Kshs. 31,850,000/-

2nd Plaintiff – Kshs. 10,730,000/-

3rd Plaintiff – Kshs. 9,800,000/-

4th Plaintiff – Kshs. 4,300,000/-

5th Plaintiff – Kshs. 9,800,000/-

6th Plaintiff – Kshs. 26,250,000/-

TOTAL - Kshs. 129,730,000/-

(5) **PW1** stated that despite demand having been made by the Plaintiffs Advocates the Defendant has refused and/or neglected to pay the Plaintiffs the amounts due to them. Hence the present suit.

(6) **PW2 ERIC ONYANGO MARENYO** told the Court that he was a Director of the 5th Plaintiff. **PW2** relied on his written statement dated **10th January 2019**. He stated that on diverse dates between **February 2016** and **October 2017** the 5th Plaintiff at the request of the 1st Defendant placed advertisements in their magazine **The University Magazine** on terms that were mutually agreed upon between the parties.

(7) **PW2** avers that in breach of the contract and terms of Agreement between the parties the 1st Defendant neglected to pay to the 5th Plaintiff the sum of **Kshs. 9,800,000/-** due to it. That despite demand having been made no payment was forthcoming. Hence the present suit.

(8) **DW1 JOHN PAUL MANYUANDA ONGANYI** testified on behalf of the Defendant. The witness relied on his written statement dated **12th June 2019**. **DW1** told the Court that he is a Civil Servant working as a Public Communication Officer / Media Buyer since **November 2016**. **DW1** stated that Government contracts for Advertising were only issued through a centralized body being the **GOVERNMENT ADVERTISING AGENCY** (hereinafter '**GAA**').

(9) **DW1** told the Court that the procedure at the Agency is that it receives requests from Government Agencies for advertising services and the Agency then negotiates with the media houses/suppliers and once an agreement is reached, the Agency signs a Space Order on behalf of the Government Agency then the material to be advertised is forwarded to the Supplier. Once the service has been rendered and the advert run, the media house goes back to the Agency with an invoice together with the attached Space Order and output cutting of the advert or transmission report or electronic advert. The Agency retains all the documents submitted and that all budgetary allocations for adverts for ministries are held by the Agency as well and it also retains all documents relating to the payment process.

(10) **DW1** categorically denies that the 1st Defendant ever entered into any contract / Agreement with the **1st, 2nd, 3rd, 4th, 5th or 6th**

Plaintiffs through the **Government Advertising Agency (“GAR”)** or at all. He states that the 1st Defendant paid the Plaintiffs an amount of **Kshs. 108,212,500/-** for Advertising Services rendered to it. That the above payment is the subject of an ongoing **Criminal Case No. 2053/2018** which is still pending determination. That the Criminal case arose due to queries about the authenticity of the documents used by the Plaintiffs to claim their payments. **DW1** states that the Defendants do not owe the Plaintiffs any money at all and urges the Court to dismiss the suit in its entirety.

(11) At the close of the oral hearing parties were invited to file their written submissions. The Plaintiff filed their written submission dated **28th April 2020** whilst the Defendants filed the written submissions dated **11th June 2020**.

ANALYSIS AND DETERMINATION

(12) I have carefully considered the evidence adduced by all parties in this matter, the written submissions filed as well as the relevant law. It is trite law that he who alleges must prove. The **Evidence Act**, places the burden of proof of any fact on the person who wishes to rely on the same. **Section 107** of the **Evidence Act** provides as follows:-

“Burden of proof

(1) Whoever desires any Court to give judgment as to any legal 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.”

(13) The following are the issue which arise for determination:-

(i) Whether there existed a valid and enforceable contract between the Plaintiffs and the 1st Defendant.

(ii) Whether the Plaintiffs are entitled to this amount of **Kshs. 129,730,000/-** as claimed in the Plaintiff.

(i) EXISTENCE OF A CONTRACT

(14) The Plaintiffs position is that a valid contract existed between the parties for the provision of space for advertising in the Plaintiff's magazines and publications. In support of this claim the Plaintiffs rely on various contract Agreements which include among others:-

- Contract Agreement dated **15th April 2013** executed between the 1st Plaintiff and the Ministry of Public Works (Annexure 1 at **page 3** of the Plaintiff filed on **30th January 2019**)

- Media Booking Contracts executed between the Plaintiffs and the 1st Defendant.

(15) On the other hand the 1st Defendant through **DW1** is adamant that no valid contract existed between the parties. **DW1** stated that all contracts for advertising had to be effected with the **GAA**. That under the **GAA** for a contract it was mandatory that the following documents be shown to exist.

(i) Request letter

(ii) GAA / Media Agreement

(iii) Space Orders

(16) **DW1** asserts that the failure of the Plaintiffs to avail any of the above documents means that no valid contract existed between the parties. However the Defendants appeared to waver on the question of existence of a contract. The Plaintiffs annexed the Media Booking Contracts in the Supplementary Bundle of Documents filed on **18th July 2019**. These contracts were all executed on behalf of the 1st Defendant by one **MR. DENNIS CHEBIWEI**. **PW1** stated that such Media Booking Contracts would only valid if executed by the Principal Secretary of the line Ministry.

(17) **DW1** further stated that the said Media Booking Contracts were only rate cards to be applied for future contracts on a need-basis and did not show the work or adverts placed by the Plaintiffs. Indeed the said contracts read as follows:-

“The rates are subject to availability of space and adjustment occasioned by a negotiated group package.”

(18) Inasmuch as **DW1** insisted that only the Principal Secretary was authorized to sign the Media Booking Contracts, the witness concedes that **“Dennis Chebiwei”** was in fact a Communications Officer employed by the **GAA**. The contracts having been signed by a Senior Officer with the **GAA** would in my view bind the 1st Defendant. The rule in **TURQUAND’S** case would apply. This Rule was stated in **MORRIS v KANSSEN [1946]AC** as follows:

“Persons contracting with a company and dealing in good faith may assume that acts within its constitution and powers have

been properly and duly performed and are not bound inquire whether acts of internal management have been regular.”

(19) **PW1** told the Court that the invoices for the amounts being claimed by the Plaintiffs had been submitted to the 1st Defendant. However **PW1** admitted that the Plaintiffs had already been paid “**about Kshs. 100 million**” which represented half of the amount due to them.

(20) It is noteworthy that the Plaintiffs are listed in the schedule of the 1st Defendant pending bills for the Financial year ending on **30th June 2017** (page 97-128 of Plaintiffs Supplementary Bundle filed on **26th August 2019**). **DW1** has not controverted this fact. Indeed **DW1** confirms that the 1st Defendant had already paid out to the Plaintiffs the sum of **Kshs. 108,212,500/-** for services rendered. If as **DW1** asserted no contract existed between the parties then what was the basis of the payment to the Plaintiffs of **Kshs. 108,212,500/-**. Further it is improbable that the Plaintiffs claims would be included as pending bills in Official Government Communication if no contract existed between the parties.

(21) In the case of **ABDULKADIR SHARIEF ABDIRAHIM & ANOTHER –VS- AWO SHARRIF MOHAMMED [2014]eKLR** the Court held that:-

“There is no general rule of law that all agreement must be in writing. The numerous benefits of a written agreement notwithstanding, all that the law requires is that certain specific agreements must be in writing or witnesses by some written note or memorandum. Section 3(1) of the Law of Contract Act is one such provision.”

(22) It is evident from the actions of the 1st Defendant in paying the Plaintiffs this sum of **Kshs. 108,212,500/-** and from the fact of listing of the Plaintiffs as Creditors in the Ministry’s list of pending bills that there was a valid contract between the parties. Indeed **DW1** admitted as much under cross-examination when he stated:-

“The amounts being claimed by the Plaintiffs have been listed in the pending bills may be they have not been paid. I do not know if the sums claimed have been paid or not

Therefore I find that it has been proved on a balance of probability that valid contracts existed between the Plaintiffs and the 1st Defendant.

(ii) PLAINTIFF’S CLAIM

(23) Having found that a valid contract existed between the parties the next question is whether the 1st Defendant was in breach of said contract by failing to pay to the Plaintiffs the amounts due to them. The Plaintiffs have already admitted to having been paid the sum of **Kshs. 108,212,500/-** by the 1st Defendant. **PW1** insists that this payment was a separate payment for other contracts and have no bearing on the **Kshs. 129,730,000/-** which the Plaintiffs claim from the 1st Defendant in this suit.

(24) However the Plaintiffs did not avail documentation to prove which invoices had been paid and which ones remained unpaid. All that **PW1** would say is that the relevant invoices had been sent to the 1st Defendant. The list of Pending Bills at **page 102** of the Plaintiffs Supplementary Bundle of Documents indicate that as at **30th June 2017**, the Plaintiffs were owed the sum of **Kshs. 167,180,000/-**. **PW1** admitted that the Plaintiffs have received some monies to offset this amount – this can only be the **Kshs. 108,212,500/-** which the Plaintiffs admit to having received. Accordingly the balance owed to the Plaintiffs is **Kshs. 167,180,000/-** less the **Kshs. 108,212,500/-** already paid = **Kshs. 58,967,500/-**. I therefore find that the Plaintiffs have proved their claim only to the extent of **Kshs. 58,967,500/-**.

(25) In the Plaintiff the six (6) Plaintiffs each claimed a specific amount as due and owing from the 1st Defendant. However the Plaintiffs did not indicate or prove to the Court particulars of how the paid amount of **Kshs. 108,212,500/-** was apportioned between the six (6) Plaintiffs. Accordingly I do enter Judgment in favour for the Plaintiffs jointly in the sum of **Kshs. 58,967,500/-** plus interest at Court rates from the date of filing of suit until payment in full.

Each party to bear its own costs for this suit.

Dated in Nairobi this 26th day of February, 2021.

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MAUREEN A. ODERO

JUDGE