

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL AND TAX DIVISION

COMMERCIAL CASE NO. 158 OF 2010 & 402 OF 2010 (CONSOLIDATED)

BETWEEN

YVEBILL INVESTMENT LIMITED.....1ST PLAINTIFF

KENNEDY MUTETI MUNUVE T/A MODERN MAKUENI BULKY LOGISTICS.....2ND PLAINTIFF

AND

GERMAN AGRO ACTION.....DEFENDANT

R U L I N G

1. Pursuant to the Court's judgment made on 11/4/2016 and further to the directions of the Court, the plaintiffs filed computations in respect of the amounts payable to them by the defendant.
2. The 1st plaintiff filed its computation dated 8/1/2018 wherein it computed its claim at Kshs. 127,218/- inclusive of Value Added Tax (VAT). On the other hand, the 2nd plaintiff filed its computation dated 10/2/2020 and computed its claim at Kshs. 296,195/- (inclusive of VAT).
3. The defendant replied to the plaintiffs' computation and took issue with the VAT amount included. It submitted that the same was already factored in as per the judgment at paragraphs 10 and 26, respectively. It contended that given that the price was inclusive of all taxes and allowances, the plaintiffs should not have added 16% VAT to the amounts of Kshs. 109,670/66 and 255,340.534/- respectively in their computations. In its view therefore, the actual amount payable to the plaintiffs should be Kshs. 14,118/46 and Kshs. 27,560/53, respectively after the adjustment of VAT.
4. From the defendant's written submissions and reply, it appears that all that it's challenging is the VAT amount claimed by the plaintiffs in their computations.
5. I have considered paragraphs 8, 10 and 26 of the Judgment. Paragraph 26 of the judgment refers to **Clause 3.1** of the contract between the parties which stated in part that; *"The Price of each unit of the service shall be.....Kshs. 25 per metric ton, per km including all taxes and allowances"* [my emphasis].
6. In my view, the intention of the parties was that the sum of Kshs. 25/- was a final price that incorporated all taxes. This must have included VAT. Had the parties intended that the price ought to have excluded VAT or any other tax, nothing would have been easier than for them to use the term 'excluding' as opposed to 'including' in the contract. The term 'including' is explicit enough to confirm that VAT was to be part of the Kshs. 25/- contract unit price that they agreed to. (See *Specialized Aluminium Renovators Limited v. Inform Creative Interiors Limited [2020] eKLR*). This was an error by both plaintiffs in their computations.
7. In this regard, it is my view that after factoring the amount already paid by the defendant the 1st plaintiff should be awarded a sum of Kshs. 14,118/86. As for the 2nd plaintiff, he should be awarded a sum of Kshs. 27,560/53. These sums are inclusive of VAT as stipulated in the contract.
8. Accordingly, the plaintiff is to pay to the 1st plaintiff the sum of Kshs. 14,118/86 and the 2nd plaintiff Kshs.27,560/53. Since the Judgment did not award any interest on the sum I will not do. However, the said sum will attract interest at court rate from the date of this ruling until payment in full.
9. The matter is now referred the Deputy Registrar for the taxation of the bills of costs dated 5/10/2020 and 1/7/2020, respectively.

DATED and DELIVERED at Nairobi this 25th day of February, 2021.

A. MABEYA, FCI Arb

JUDGE