



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**  
**CIVIL SUIT NO. 80 OF 2019**

**ALLEN WAIYAKI GICHUHI.....PLAINTIFF**

**VERSUS**

**TIBA OIL COMPANY LIMITED.....1<sup>ST</sup> DEFENDANT**

**ABDIJAN PETROLEUM EQUIPMENT & SERVICES LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

**ORIGINATING SUMMONS**

The Applicant filed an Originating Summons Application dated **18<sup>th</sup> February 2019** for orders; -

1. Judgment is entered jointly and severally against the Defendants for a sum of Kshs.275,774.05 as at 12<sup>th</sup> November 2018 together with interest thereon at 14% per annum from 12<sup>th</sup> November 2018 until payment in full.
2. Upon payment of the fees and the costs the decretal award be released to the Defendants.
3. Costs of this suit on an indemnity basis and interest thereon at court rates until payment in full.

Which Application was supported by the sworn Affidavit of **Allen Waiyaki Gichuhi** dated **18<sup>th</sup> February 2019** on the grounds that; -

1. The Defendants entered into a Construction Agreement dated 27<sup>th</sup> April 2015, to erect a petrol station and provide civil, electrical and structural works on the agreed site. Dispute arose and through a letter dated 30<sup>th</sup> September 2015, the Plaintiff was appointed to act as the sole arbitrator in the matter.
2. By a letter dated 16<sup>th</sup> December 2016, the Arbitrator informed the parties that he had concluded writing the final award and the same was ready for collection upon payment of the Arbitrator's final fees of Kshs.626, 400 as per the deposit request note enclosed in the letter.
3. The 1<sup>st</sup> Defendant, on 26<sup>th</sup> July 2017, forwarded a cheque of Kshs.313, 260 being half of the fees and expenses. On 28<sup>th</sup> February 2018, the 2<sup>nd</sup> Defendant forwarded a cheque of Kshs.100, 000 in part settlement of the outstanding fees.
4. The Defendants only made payment of the sum of Kshs.413, 260. They made promises to pay the balance but reneged on the promises.
5. By a letter dated 14<sup>th</sup> September 2017, the Plaintiff requested the 1<sup>st</sup> Defendant to settle the balance of the fees to enable the release of the final award. The Plaintiff also informed the parties that a 14% per annum interest rate would be charged on the fees in the event that the same was not settled within 14 days of the letter.
6. The Plaintiff informed the Defendants vide a letter dated 19<sup>th</sup> February 2018 that he had a lien on the final award until the balance of the fees was paid and that the party paying on behalf of the defaulter would recover the portion during the execution process. The

Plaintiff also notified the Defendants that a suit would be instituted if the balance of the fees was not settled within 7 days of the letter.

7. The amount outstanding as at 12<sup>th</sup> November 2018 is Kshs.275, 774.05 which continues to accrue interest at the rate of 14% per annum. The Arbitrator on numerous occasions called upon the Defendants to settle the fees so that the final award can be released but to no avail.

### **1<sup>ST</sup> DEFENDANT'S REPLYING AFFIDAVIT**

The 1<sup>st</sup> Defendant opposed the Application vide the sworn Affidavit of Nur Shillow Hassan dated 11<sup>th</sup> April 2019 and stated as follows; -

1. A preliminary meeting was held on 12<sup>th</sup> November 2015 and it was agreed that each party would pay half of the amount raised on any fee note or invoice.
2. The 1<sup>st</sup> Defendant paid out a cheque of Kshs.224, 400 as the fees raised for initial 20 hours of work and upon completion of the Arbitration the Plaintiff raised a fee note claiming that the total time spent on the Arbitration to be 50 hours hence the payment of an additional Kshs.626, 400 to be paid at 50% per party to facilitate the collection of the Final Award.
3. The Defendants disputed the 50 hours billed by the Plaintiff since only brief 10 minute meetings were held, hearing was conducted for about 12 hours and the submissions for around one hour.
4. The Plaintiff refused to negotiate the demanded amount and the total hours leaving the 1<sup>st</sup> Defendant with no other option but to pay the demanded amount.
5. The 1<sup>st</sup> Defendant paid the total amount of Kshs.313, 260 the 50% obligation for the Arbitration and the Plaintiff should claim from the 2<sup>nd</sup> Defendant.
6. The purpose of Arbitration should be to provide a cheaper alternative and by demanding the 1<sup>st</sup> Defendant to pay the whole cost of the Arbitration it would be expensive and unfair to the 1<sup>st</sup> Defendant.
7. The Plaintiff has no reasonable or justifiable claim against the 1<sup>st</sup> Defendant.

### **2<sup>ND</sup> DEFENDANT'S REPLYING AFFIDAVIT**

The 2<sup>nd</sup> Defendant opposed the Application vide the sworn Affidavit of Caleb Oluoch Obunga Owino dated 12<sup>th</sup> July 2019 and stated as follows; -

1. After the 1<sup>st</sup> preliminary meeting the Plaintiff raised an invoice for 20 hours covering the fees and other expenses which the Defendants paid in full.
2. Thereafter 4 meetings were held which took less than 10 minutes each and a two days hearing after which the parties were given less than an hour to highlight their submissions.
3. The 2<sup>nd</sup> Defendant the Arbitration cost to still be within the 20 hours charges and any additional fees was to be utmost for 3 to 4 hours.
4. The Plaintiff raised a further invoice of Kshs.626, 400 being legal fees and the Defendants found the fee note to be too high since they were always present during the meetings and requested the Plaintiff to review the same.
5. The 2<sup>nd</sup> Defendant has not been able to get any contract since the arbitration process making it difficult to settle the balance of the cost of the Arbitration.
6. The 2<sup>nd</sup> Defendant proposed the following
  - a. The Plaintiff to write off the interest charged on the balance of the fees.
  - b. 2<sup>nd</sup> Defendant be allowed to settle the balance of the fees by monthly instalment.
  - c. 2<sup>nd</sup> Defendant be allowed to pay the 1<sup>st</sup> instalment of Kshs.150, 000 followed by a monthly instalment of Kshs.10, 000 payable by the 10<sup>th</sup> day of every month.
  - d. All parties to meet their cost of the suit.

### **PLAINTIFF'S SUBMISSIONS**

The Plaintiff submitted that under the doctrine of joint and several liability, each liable party is individually responsible for the entire obligation, but a paying party may have a right of contribution and indemnify the non-paying party.

In the case of *Hellen Njenga –versus- Wachira Murage & Another [2015] eKLR* cited the decision in *Dubai Electronics –versus- Total Kenya & 2 Others Civil Case No. 870 of 1998* where the court explained the concept of joint and several liability as follows;

**“Clearly therefore where you have joint liability all the tortfeasors are and each one of them is liable to settle the full liability. However, in a purely several liability each tortfeasor is only liable to settle the sum due to the tune of his liability. Where, however, the liability is joint and/or several the plaintiff has the option either directing his claim against any one of the tortfeasors or making his claim against each one of the tortfeasors according to their individual liability. Either way he cannot recover more than the total sum decreed. However, the defendants are entitled to reimbursement from the co-defendants in the event that the plaintiff only opts to recover from one of them. That is my understanding of joint and several liability.”**

Further, the Plaintiff submitted that he has the right to execute judgment against one of the Defendants. The only recourse available to the Defendants is to claim from its co-defendant the amount after satisfying the decretal sum.

## **DETERMINATION**

After considering the pleadings filed by the parties and the submissions by the Plaintiff (the Defendants did not file submissions), the issue for determination is whether Judgment be entered jointly and severally against the Defendants.

The Plaintiff sought judgment to be entered jointly and severally against the Defendants for a sum of **Kshs.275, 774.05** as at 12<sup>th</sup> November 2018 together with interest thereon at **14%** per annum from 12<sup>th</sup> November 2018 until payment in full.

The concept of joint and several liability is defined in **Black’s law Dictionary 10<sup>th</sup> Edition** as follows:

**“liability that may be apportioned among two or more parties or to only one or a few select members of the group at the adversary’s discretion. Thus, each liable party is individually responsible for the entire obligation, but a paying party may have a right of contribution and indemnity from non-paying parties”**

**Order 1 Rules 4, 7 and 24 of the Civil Procedure Rules, 2010** provide as follows; -

### **Rule 4 - Court may give judgment for or against one or more of joint parties**

#### **Judgment may be given without amendment—**

**(a) for such one or more of the plaintiffs as may be found to be entitled to relief for such relief as he or they may be entitled to;**

**(b) against such one or more of the defendants as may be found to be liable according to their respective liabilities.**

In the case of *Africa Planning & Design Consultants –versus- Sololo Outlets Ltd (In Receivership) & Anor (2018) eKLR*; the court quoted the case of *Kenya Airways Limited v Mwaniki Gachohi* it was stated thus;

**“...The concept of joint and several liability comprehends one judgment and decree against two or more persons who are liable collectively and individually to the full extent of such decree...”**

The 1<sup>st</sup> Defendant paid the Plaintiff **Kshs.313, 260** being half of the fees and expenses. While the 2<sup>nd</sup> Defendant paid **Kshs.100, 000** in part settlement of the outstanding fees. Further, the Plaintiff informed the Defendants that he had a lien on the final award until the balance of the fees was paid and that the party paying on behalf of the defaulter would recover the portion during the execution process.

The 1<sup>st</sup> Defendant argued that the Plaintiff has no reasonable or justifiable claim against the 1<sup>st</sup> Defendant as it had paid 50% of its share and paying the whole cost of the Arbitration would be expensive and unfair to it.

The sum owed is **Kshs.275, 774.05** as at 12<sup>th</sup> November 2018 together with interest thereon at **14%** per annum from 12<sup>th</sup> November 2018 until payment in full. This amount has continued and continues to accrue interest.

Entering judgment against the Defendants jointly and severally would amount to injustice against the 1<sup>st</sup> Defendant as it had paid its 50% share and in addition, compelling the 1<sup>st</sup> Defendant to pay the interest accrued over the years would be unjust and unfair.

The 2<sup>nd</sup> Defendant on the other hand acknowledged its indebtedness to the Plaintiff and asked to be allowed to settle the balance of the fees by monthly instalment. The 2<sup>nd</sup> Defendant is willing to settle the balance of the amount in instalments.

The parties entered into an dispute resolution agreement and by their choice contracted arbitration as their choice of forum. It is not disputed

that both parties participated in arbitration proceedings before the Arbitrator the Plaintiff herein.

The 2nd Defendant was served with Mention notice to appear in Court on 17<sup>th</sup> February 2020 and the Affidavit of Service was filed on 14<sup>th</sup> February 202. The 2<sup>nd</sup> defendant failed to attend/appear.

The plaintiff confirmed release of Final Award after 1<sup>st</sup> Defendant paid part of the Arbitration Fees. The 2<sup>nd</sup> Defendant was to negotiate with the plaintiff on repayment of its part of the Fees.

On 16<sup>th</sup> March 2020, the matter was mentioned but no proposals were received from the 2<sup>nd</sup> Defendant on payment of the outstanding debt save for the proposals in the Replying Affidavit. There was no proof on payment in instalments as proposed.

The law encourages Arbitration as an efficient, cost effective and expeditious mechanism of dispute resolution over litigation. The Final Award was ready on 16<sup>th</sup> December 2016 and five years have since passed.

The 2<sup>nd</sup> Defendant if aggrieved by the Legal Fees and Expenses imposed by the Arbitrator/Plaintiff ought to have pursued the remedy provided by **Section 32B (4) of Arbitration Act**, to tax the Bill of Costs. The 1<sup>st</sup> Defendant paid its part of Legal Fees and expenses and cannot be penalized to judgment severally and jointly without liability.

#### **DISPOSITION**

**1. The upshot of the above is that judgment is entered for the Plaintiff as prayed against the 2ndDefendant NOT jointly and severally.**

**2. The judgment sum to be paid by the 2<sup>nd</sup> Defendant with interest at Court Rates and costs of the suit as the 1<sup>st</sup> Defendant had already paid its share of the Arbitration fees.**

**DELIVERED SIGNED & DATED IN OPEN COURT ON 30<sup>TH</sup> JULY 2021. (VIRTUAL CONFERENCE DUE TO CORVID 19 PANDEMIC MEASURES RESTRICTING OPEN COURT OPERATIONS AS PER CHIEF JUSTICE DIRECTIONS OF 17TH APRIL 2020)**

**M.W. MUIGAI**

**JUDGE**