



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT VOI**

**CIVIL SUIT. 4 OF 2019**

**PWANI TELECOMMS LIMITED.....PLAINTIFF**

**VERSUS**

**TAITA TAVETA COUNTY GOVERNMENT.....DEFENDANT**

**J U D G E M E N T**

**Outline**

1. On 16<sup>th</sup> October, 2019, by a plaint dated 15<sup>th</sup> October, 2019, the Plaintiff, filed the suit and sought judgment against the defendant for the following orders: -

- a) **The sum of Kshs. 29,462,908.90;**
- b) **Interest on (a) above at the prevailing commercial rates from 1<sup>st</sup> day of May, 2017 until payment in full;**
- c) **Loss of business and income at Kshs. 2,790,000/=;**
- d) **General damages for breach of contract;**
- e) **Costs of this suit; and**
- f) **Any other relief that this Court deems fit and just to grant.**

2. The defendant never filed a defence. The plaintiff's cause of action was that, the defendant invited tenders from interested suppliers through Tender No. **TTDG/RFP/001/2016-2017: RFP FOR PROVISION OF ICT INFRASTRUCTURE**. The plaintiff applied for the tender by way of a form of tender for Kshs. 47,301,361.21.

3. It was the plaintiff's case that as part of the requirement for the tendering process it procured a performance bond of Kshs. 2,500,000/= and advance payment guarantee of Kshs. 15,000,000/= from Occidental Insurance Company Limited through Nomura Insurance Brokers Limited. The plaintiff paid Kshs. 213, 467/=to Occidental Insurance Company Limited as premium for issuance of the performance bond and advanced bank bond to the defendant.

4. That on 23<sup>rd</sup> March, 2017, the plaintiff received an award letter from the defendant through its County secretary Mr. Peter Jumwa. Thereafter, on 3<sup>rd</sup> April, 2017, the defendant submitted its acceptance letter, accepting the offer given. Pursuant to a negotiation meeting that was held on 18<sup>th</sup> April, 2017, it was agreed between the plaintiff and the defendant that the tender project would be done in two phases so as to make the payment in two financial years. It was further agreed that the first phase of the project would be wide area network (WAN) and private automatic branch exchange (PABX) at a cost of Kshs. 25,009,651.90 and that the contract period was for eight weeks. these negotiations culminated in the signing of a contract dated 20<sup>th</sup> April, 2017.

5. The plaintiff averred that he was then issued with a Local Service Order (LSO) number 1287567 for Kshs. 25,009,651.90 confirming that funds for this project are available and that commitment has been noted in the vote bank. On 8<sup>th</sup> May, 2017, the plaintiff raised invoice number IK26815 for Kshs. 15,000,000/= inclusive of V.A.T against advance bank guarantee bond issued by Occidental Insurance Company Limited Policy number OLG/APB/12/53244/04.

6. The plaintiff further averred that upon signing the contract, it started working on the project by generating drawings and designs that were presented to the defendant together with the Bill of Quantities which the defendant reviewed and sought revision of the drawings and designs in accordance with its budget. Thereafter, the plaintiff moved on site, procured materials and equipment and begun installation of the ICT infrastructure.

7. That on 22<sup>nd</sup> June, 2017, the plaintiff issued a certificate number 1 for Kshs. 5,821,678.38 but the defendant defaulted in making payment to the plaintiff in accordance to the terms and conditions. Consequently, on 30<sup>th</sup> August, 2017, the plaintiff moved out of the project site out of frustration, as there was no sign of payment to be made by the defendant.

8. Pursuant to the tender document, the defendant was required to make payments upon the issuance of a certificate and invoice by the plaintiff for the works done so far. The plaintiff issued the certificates of the works done to the defendant and the defendant accepted them by promising to make payment but the defendant breached the contract by refusing and/or ignoring to make good such payment as per the invoice issued.

9. In support of its case, the Plaintiff called the Director of Pwani Telecomms Limited Mr. Mohamed Ali Salim (PW1) to prove its case. Mr. Mohamed Ali Salim relied on and adopted his witness statements as evidence in chief and then produced to produce the bundle of documents filed as exhibits.

### **Evidence by the Plaintiff**

10. To prove the Plaintiff's case, PW 1, introduced his case and went ahead to adopt his witness statement filed in court on the 16<sup>th</sup> October, 2019. He testified that the defendant invited tenders Tender No. **TTDG/RFP/001/2016-2017: RFP FOR PROVISION OF ICT INFRASTRUCTURE** on 10<sup>th</sup> January, 2017 based on preliminary and technical evaluation. The plaintiff submitted their tender and went through as the leading and on 23<sup>rd</sup> March, 2017 it received a letter from the defendant ref; TTCG/PR/IEIR/No/VOL 01 (4) signed by Mr. Peter Jumwa Interim County Secretary notifying it of the same.

11. It was PW 1's testimony that on 3<sup>rd</sup> April, 2017, the plaintiff wrote to the Interim County secretary accepting to work on the proposed Development of the County ICT Infrastructure. This was followed by a negotiation meeting that was held on 18<sup>th</sup> April, 2017 after the plaintiff received an invitation from the evaluation committee chairperson Mr. Amos Mjomba. After the negotiation meeting, a few proposals were negotiated at Kshs. 25,548,108/= from the original bid of Kshs. 47,301,361.21, removing the CCTV, Biometric Data Centre and the V.H.F Radio System, he testified that the plaintiff's bid was now for WAN and PABX only.

12. The plaintiff stated that it submitted a new PFP for provision of ICT infrastructure for supply installation of WAN and PABX at cost of Kshs. 25,009,651.90 inclusive of VAT. Thereafter, on 20<sup>th</sup> April, 2017 the plaintiff and the defendant signed a negotiation report for the development of a County ICT infrastructure as per Tender No/TT/REP/001/2015-2016 for financial year 2016-2017 for Kshs. 25,009,651.90. The contract period was agreed to be eight weeks from the date of signing the contract.

13. PW 1 further testified that on 25<sup>th</sup> April, 2017, the plaintiff issued the defendant with Local Service Order No. 287567 value Kshs. 25,009,651.90 and on 2<sup>nd</sup> May, 2017, it submitted a new program of works and shop drawings for approval, which were subsequently approved on 4<sup>th</sup> May, 2017 and the plaintiff moved to the site with machines and equipment and started work.

14. PW 1 alleged that on 3<sup>rd</sup> May, 2017, the plaintiff was issued with an advanced payment guarantee bond ref No. OLG/APB/12/53244/04 for Kshs. 15,000,000/= according to the conditions of the contract by Occidental Insurance Company Limited which is an approved financial institution for the provision of payment guarantees as per PPOA. He further alleged that on 8<sup>th</sup> May, 2017, the plaintiff submitted its performance Bond ref No. OLG/PB/12/53243/02 issued by Occidental Insurance Company Ltd and invoiced the defendant Kshs. 15,000,000/= inclusive of VAT invoice No. IK 26815.

15. The first site meeting was held at the CECM office in Voi on 16<sup>th</sup> May, 2017 and on 22<sup>nd</sup> June, 2017, thereafter, the plaintiff requested for payment vide payment Certificate No. 1 for Kshs. 5,821,678.38 inclusive of VAT. However, despite being promised that payment shall be processed, and various requests for payments, the same were not honored.

16. During his testimony, PW 1, also produced the list of documents No. 1-20 filed on 16<sup>th</sup> October, 2019 as evidence in the case herein.

### **Issues, analysis and determination**

17. Having perused the evidence above in line with the pleadings filed, read the submissions offered by the plaintiff and the law cited as well, I have isolated the following issues as falling for determination by the court.

**a) Who is in breach of the agreement dated 20<sup>th</sup> April, 2017;**

**b) Whether the plaintiff is entitled to the claim for general and special damages and if so how much; and**

### **Who is in breach of the agreement dated 20<sup>th</sup> April, 2017**

18. It is not in dispute that the parties herein got into an agreement dated 20<sup>th</sup> April, 2017 for installation of County ICT Infrastructure-Tender No: TTCG/RFP/001/2016-2017 at a consideration of Kshs. 25,009,651.90. It was a term of the said agreement that the tender form

and price schedule submitted by the tenderer, schedule of requirements, technical specifications, general conditions of contract, special conditions of contract, employer's notification of award and the negotiation report shall be deemed to form and be read and construed as part of the agreement dated 20<sup>th</sup> April, 2017.

19. That looking at the negotiation report dated 20<sup>th</sup> April, 2017 which formed part of the agreement dated 20<sup>th</sup> April, 2017, it was agreed between the parties that payment was to be made after satisfactory completion of work, however, the Contractor can request an advance payment against a bank guarantee. The plaintiff stated that upon signing of the contract, it started working on the project immediately by generating drawings and designs that were presented to the defendant together with the Bills of Quantities. Thereafter, it moved on site, procured materials and equipment and begun installation of the ICT infrastructure.

20. On 8<sup>th</sup> May, 2017, the plaintiff raised invoice number IK26815 for Kshs. 15,000,000/= inclusive of VAT against advance Bank Guarantee Bond issued by Occidental Insurance Company Limited policy number OLG/APB/12/53244/04 dated on 3<sup>rd</sup> May, 2017 as provided for in the negotiation report. At no point did the defendant raise any issues or objections to the bank guarantee bond issued by Occidental Insurance. This was followed by a letter dated 18<sup>th</sup> May, 2017 addressed to the County Secretary Taita Taveta County Government by the plaintiff herein informing them that their insurer is an approved financial institution for the provision of payment guarantees as the PPOA.

21. That on 22<sup>nd</sup> June, 2017, the plaintiff herein issued a request for payment certificate No. 1 for Kshs. 5,821,678.38. The plaintiff avers that despite several reminders as can be seen from the e-mail correspondence contained in the plaintiffs list of documents the defendant defaulted in making payments as agreed instead, it kept making promises of making the said payment which were never fulfilled.

22. In light of the foregoing, it is evident that the plaintiff performed its contractual obligations as per the agreement and the negotiation report both dated 27<sup>th</sup> April, 2017 up to the point that it was frustrated by the defendant by non-payment. It is also evident that the defendant breached the said agreement by failing to make the advance payment despite the plaintiff issuing a bank guarantee from Occidental Insurance, thus frustrating the performance of the said contract.

**Whether the plaintiff is entitled to the claim for general and special damages and if so how much**

23. The law on special damages is well settled and it is that special damages must be particularized and proved to the required standard. In **Maritim & Another v Anjere** [1990-1994] EA 312 at 316, the Court of Appeal emphasized that:

***“In this regard, we can only refer to this court's decision in Sande v Kenya Cooperative Creameries Limited Civil Appeal No. 154 of 1992 (UR) where as we pointed out at the beginning of this judgment, Mr Lakha readily agreed that these sums constituting the total amounts was in the nature of special damages. They were not pleaded. It is now trite law that special damages must not only be pleaded but must also be specifically proved and those damages awarded as special damages but which were not pleaded in the plaint must be disallowed.*”**

24. The plaintiff particularized its claim under paragraph 18 of the Plaint. It estimated cost of design at (8%) of the tender value at Kshs. 47,301,361.121, premium payments on performance bond at Kshs. 213, 467, operational costs and other expenses at Kshs. 479, 790 and contract sum as per the Local Service Order No. 1287567 at Kshs. 25,009,651.90.

25. It is noteworthy that the plaintiff's evidence was not controverted and/or rebutted by the defendant since the matter proceeded by way of formal proof. However, it is trite law that in civil claims the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmation of the issues and who would fail if no evidence at all is laid. This principle is codified in Sections 107 and 108 of the Evidence Act, Cap 80 Laws of Kenya which provides:

***“107. (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.”***

***“108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”***

26. Furthermore, the evidential burden is cast by the provisions of sections 109 which provides:

***“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”***

27. In addition, Section 112 of the same Act provides:

***“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”***

28. It is not in dispute that the plaintiff presented drawings and designs to the defendant which were approved on 4<sup>th</sup> May, 2017. Therefore, the plaintiff is entitled to the cost of design at 8% of the tender value which is Kshs 25,009,651.90 as per the agreement dated 20<sup>th</sup> April, 2017.

29. The plaintiff submitted that it made payments of Kshs. 213, 467/= to Occidental Insurance Company Limited as premium for issuance of the performance bond and advanced bank bond to the defendant, this can be evidenced by the two debit notes from Nomura Insurance Brokers Limited for Kshs. 25, 123 performance bond for Kshs. 2,500,970.00 and Kshs. 188,344 advance payment bond for Kshs. 15,000,000.00.

30. The claim for other expenses at Kshs. 479, 790 was not specifically proved. The plaintiff only submitted that these costs were incurred after the alteration of the initial plan by the defendant. There is no documentary evidence adduced by the plaintiff showing the parties herein agreeing to any charges as a result of alteration of the initial plan by the defendant and/or an invoice for the said amount issued to the defendant. This Court therefore finds that with regards to the claim for other expenses, the plaintiff never discharged its burden of proof as provided for under Sections 107 and 108 of the Evidence Act, Cap 80 Laws of Kenya.

31. Lastly the claim for contract sum as per the Local Service Order No. 1287567 at Kshs. 25,009,651.90 has been specifically pleaded however, the same cannot be awarded since the plaintiff in its plaint avers to moving out of the project site out of frustration on 30<sup>th</sup> August, 2017 before completion of the work assigned to it.

32. In its plaint, the plaintiff also claimed loss of income and business at Kshs. 2,790,000 and general damages for breach of contract. On loss of income and business, the plaintiff in its submissions conceded that no evidence was adduced to support this claim. Accordingly, when it comes to general damages, it is well settled in law that it cannot be awarded on a claim anchored on a breach of contract. In affirming that position, the Court of Appeal in the case of **Joseph Urigadi Kedeva vs. Ebby Kangishal Kavai** Kisumu Civil Appeal No. 239 of 1997 (UR) which was cited by the Court in **James Maranya Mwita v South Nyanza Sugar Co. Ltd** [2017] eKLR emphatically expressed itself thus:

*".... As to the award of Kshs. 250,000/= as general damages, Mr. Adere submitted that there can be no award of general damages for breach of contract.....We respectfully agree. There can be no general damages for breach of contract....."*

33. The Court in in the case of **Consolata Anyango Ouma vs. South Nyanza Sugar Co. Ltd** [2015] eKLR explained why general damages cannot be awarded in cases of breach of a contract as hereunder: -

*"The next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose 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. This principle is encapsulated in the Latin phrase restitution in integrum (see **Kenya Industrial Estates Ltd v Lee Enterprises Ltd** NRB CA Civil Appeal No. 54 of 2004 [2009] eKLR, **Kenya Breweries Ltd v Natex Distributors Ltd Milimani HCCC No. 704 of 2000 [2004] eKLR**). The measure of damages is in accordance with the rule established in the case of **Hadley v Baxendale (1854) 9. Exch. 341** that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see **Standard Chartered Bank Limited v Intercom Services Ltd & Others** NRB CA Civil Appeal No. 37 of 2003 [2004] eKLR). Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved (see **Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others, NRB CA Civil Appeal No. 192 of 92 (UR)** and **Charles C. Sande v Kenya Co-operative Creameries Ltd, NRB CA Civil Appeal No. 154 of 1992 (UR)**)".*

34. From the evidence on record and the testimony PW1, I find that the plaintiff has proved its case on a balance of probability that the defendant was in breach of the contract dated 20<sup>th</sup> April, 2017.

35. Accordingly, this Court enters judgment for the plaintiff against the defendant as follows: -

- a) Cost of the design at the rate of (8%) of the tender value Kshs. 25,009,651.90/= which is equivalent to Kshs. 2,000,772.15.
- b) Premium payments on performance bonds at Kshs. 213, 467/=
- c) The defendant shall bear the costs of this suit.

It is so ordered.

Dated, signed and delivered through e-mail, this 29<sup>th</sup> day of July, 2021

HON. LADY JUSTICE A. ONG'INJO

JUDGE