



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI COMMERCIAL COURTS**

**CIVIL SUIT NO. 309 OF 2013**

**UNIVERSITY OF NAIROBI.....PLAINTIFF**

**VERSUS**

**N K BROTHERS LIMITED.....DEFENDANT**

**RULING**

The University of Nairobi had entered into three contracts with the Defendant, **N. K. BROTHERS LIMITED**.

1. The said contracts were for purposes of the construction of various buildings at the Plaintiff's Kikuyu Campus.
2. After the Defendant had completed the tasks assigned to it under the contracts, there arose a dispute regarding payment for the work done.
3. The Defendant filed suit against the Plaintiff, being **HIGH COURT CIVIL SUIT NO. 1534 OF 2000**. It is common ground that the High Court rendered a judgment in favour of the Defendant herein.
4. Being dissatisfied, the Plaintiff herein lodged an appeal at the Court of Appeal, being **CIVIL APPEAL NO. 309 OF 2002**. It is common ground that the Court of Appeal referred the matter to Arbitration.
5. The Arbitrator appointed to handle the arbitral process was Hon. Justice Torgbor (Retired).
6. It is common ground that whilst the arbitral process was ongoing, the parties herein entered into a Consent Award dated 5<sup>th</sup> October 2010.
7. **PW1, MICHAEL KIMANI**, was a Senior Accountant at the University of Nairobi. He testified that the parties herein recorded a Consent Award, pursuant to which the Plaintiff was to pay to the Defendant, the sum of Kshs 151,996,101.07.
8. He further testified that the Plaintiff consented to pay the agreed amount by monthly instalments of Kshs 7,000,000/=.
9. In compliance with the terms of the Consent Award, **PW1** testified that the Plaintiff paid a total of Kshs 105,000,000/=.
10. **DW1, RAJESH DAVARAN RATHOD**, acknowledged that the Defendant received payment of the said sum of Kshs 105,000,000/=.
11. It was the testimony of **PW1** that the Defendant ought not to have received that sum because the;

***“Government of Kenya, through the Pending Bills Committee, Ministry of Finance”***

had already settled all the payments which the Defendant was entitled to.

12. However, the Defendant categorically denied receipt of any double payments.

13. Pegged on the belief that the Defendant had already been paid off by the Government of Kenya, **PW1** testified that the Defendant was obliged to refund to the Plaintiff, the sum of Kshs 105,000,000/=.

14. **PW1** also testified that the Consent Award recorded in the Arbitral proceedings should be set aside.

15. However, during cross-examination, **PW1** conceded that he had no personal knowledge about the dates when the Government of Kenya had made payments to the Defendant.

16. According to **PW1**;

***“It is the Treasury which wrote to the University, telling us about the said payment. The letter is dated 8<sup>th</sup> September 2009.”***

17. **PW2, ENG. GEORGE MUREITHI MUTHUURI**, is an Engineer by profession. He was working with the Ministry of Transport, Infrastructure, Housing and Urban Development.

18. He testified that on 14<sup>th</sup> January 2005 the President of the Republic of Kenya established the **“PENDING BILLS CLOSING COMMITTEE”** through **Gazette Notice No. 297**.

19. The said Committee issued Notices to the Public, asking that they should submit any Bills or Claims against the Government.

20. **PW2** was attached to the Secretariat of the Committee. He testified that his responsibility was to provide information to the Committee, to assist them in assessing and determining the Claims submitted to the Government.

21. **PW2** testified that if the Committee certified a claim to be payable, it would also give authority for payment of such claim.

22. According to **PW2**, the Defendant was one of the people who submitted claims to the Committee. It was his testimony that;

***“The Pending Bills Committee considered the claims and produced a report on the claims against the Plaintiff by the Defendant  
.....”***

23. **PW2** added that, in the Committee’s report;

***“The Defendant was advised that all their claims had been settled. Further, that nothing was owed to them.”***

24. During cross-examination, **PW2** said that he was not a member of the Pending Bills Committee. He explained that his work was at the secretariat of the Committee.

25. Eng. Muthuuri testified that he was not aware whether or not the Committee made payments to the Defendant.

26. He also testified that he was not sure if the Treasury had paid any money directly to the Defendant.

27. During re-examination, **PW2** said that the Committee did not carry out an Independent Investigation in respect to the pending claims.

28. He explained that the Committee interrogated the documents which were placed before it.

29. He further explained that the Defendant executed a Discharge Agreement dated 19<sup>th</sup> October 1999.

30. After **PW2** testified, the Plaintiff closed its case.

31. **DW1, RAJESH DAYARAN RATHOD**, was the Defendant’s Chief Executive Officer.

32. He said that the Consent Award which the parties entered into, in the Arbitral proceedings that were before Hon. Justice Torgbor (Retired), was not induced by any fraud on the part of the Defendant.

33. Indeed, he emphasized that at the said Arbitral proceedings, the parties were represented by advocates.

34. During cross-examination, **DW1** denied the Plaintiff’s assertion, that the Defendant had received the sum of Kshs 128,833,437/= from the Ministry of Finance.

35. After the close of the Defendant’s case, the Plaintiff sought and was granted leave to recall **PW2** (Eng. George Muriithi Muthuuri).

36. **PW2** produced the Executive Summary of the Pending Bills Committee Report. The said report concluded that the Defendant’s claims were not payable. If anything, it is the Defendant who is said to owe the Plaintiff, as it had been overpaid by Kshs 2,150,209.30.

37. During cross-examination **PW2** said that the head of the Committee’s Secretariat, Mr. S. M. Wagithu, was still working at the said Secretariat.

38. Secondly, **PW2** confirmed that the Defendant was never called upon by the Committee, to shed light on the issues which the Committee was inquiring into.

39. Thirdly, **PW2** confirmed that in this case a Completion Certificate was issued. He conceded that once a Completion Certificate had been issued, it could only be amended by the author thereof.

40. During re-examination **PW2** explained that the Pending Bills Committee was formed by the Government of Kenya.

41. He said that the Committee;

**“..... dealt with claims of companies owed money by the Government; so it was voluntary.”**

42. His further explanation was that;

**“..... the outcome of the case, the payment will come from Treasury; so the Government.”**

43. From the pleadings and the evidence tendered by the parties, the Court was tasked to determine the following Issues;

**a) Whether the Defendant received Kshs 128,833,437.00 from the Ministry of Finance?**

**b) Whether the Defendant obtained the consent arbitral award in the payment of Kshs 105,000,000.00 through fraud?**

**c) Whether the Plaintiff is entitled to the refund of Kshs 105,000,000.00 from the Defendant?**

**d) Whether the Plaintiff owes the Defendant a sum of Kshs 47,996,101,77?**

**e) Whether the Pending Bills Committee settled the Defendant's claim against the Plaintiff?**

**f) What legal authority did the Pending Bills Committee have to unilaterally decide on the monies owing to the Claimant?**

**g) Who is entitled to costs?”**

**a. Whether the Defendant received Kshs 128,833,437.00 from the Ministry of Finance?**

44. The Plaintiff's two witnesses, both testified that they did not know whether or not the Defendant was paid that sum.

45. **PW1** said that it was the Treasury which wrote to the University of Nairobi, telling them about the payment.

46. It is noteworthy that the Plaintiff made available to the court, copies of documents which clearly demonstrated how the University had remitted payments to the Defendant, through **RTGS** Money Transfer.

47. In contrast, the payments allegedly remitted by the Government, do not have any comparable supporting documents. Instead, the Plaintiff made available letters dated 8<sup>th</sup> September, 2009, through which the Treasury provided an analysis of information which had been evaluated by the Pending Bills Closing Committee.

48. In my considered opinion, considering that the Defendant had categorically denied receiving the payments from the Government, the Plaintiff was well aware that it would need to provide proof of the said payments.

49. The two letters dated 8<sup>th</sup> September 2009, which were signed by the Permanent Secretary, Treasury do not constitute proof of payment.

50. The letters merely relay information obtained by the Permanent Secretary, from the Pending Bills Committee.

51. **PW2**, who was attached to that Committee's Secretariat, said that he was not a member of the Committee.

52. Therefore, apart from the fact that the Committee did not engage the Defendant when it was drawing up its conclusions and recommendations, the fact that the Plaintiff did not make available a witness from the Committee, meant that whatever conclusions were drawn up by the Committee could not be interrogated by the Defendant or by the Court.

53. I find that it would be wrong for the Court to place reliance upon a report whose author was not available to testify about his or her conclusions, especially when the Plaintiff was well aware that the Defendant was denying receipt of the payments cited in the Committee's Report.

54. As the two witnesses who testified for the Plaintiff clearly said that they were not sure whether or not the Treasury or the Government paid the money which the Committee mentioned in its Report, I hold that the Plaintiff failed to provide proof of the alleged payments.

**b. Whether the Defendant obtained the consent arbitral award in the payment of Kshs 105,000,000.00 through fraud?**

55. The Plaintiff did not adduce evidence to show that the Defendant had acted fraudulently, as alleged or at all.

56. I have taken into account the fact that both parties were represented by advocates during the arbitral process.

57. By the time the parties went to arbitration, there had already been a determination by the High Court. And it is whilst there was an appeal at the Court of Appeal, that the matter was referred to arbitration.

58. Just in the same way that the parties had pursued their rights through the court, so too, they could have chosen to do so during the arbitral process.

59. There is absolutely no evidence that the Defendant manipulated either the process or the Plaintiff, through fraud, leading to the consent arbitral award.

**c. Whether the Plaintiff is entitled to the refund of Kshs 105,000,000.00 from the Defendant?**

60. The Plaintiff remitted the sum of Kshs 105,000,000.00 to the Defendant, pursuant to a valid consent arbitral award.

61. The Plaintiff has not proved to this Court, that there is any basis, in law or in fact to justify a refund of the money paid in accordance with the arbitral award.

**d. Whether the Plaintiff owes the Defendant a sum of Kshs 47,996,100.77?**

62. In accordance with the consent arbitral award and the Final Accounts as at 30<sup>th</sup> April 1994, the Plaintiff committed itself to pay to the Defendant the sum of Kshs 151,996,101.07.

63. The said award has never been set aside or varied through any lawful process or at all.

64. Following the consent arbitral award and in compliance with its terms, the Plaintiff paid Kshs 105,000,000/=.

65. By a simple task of subtraction, the balance still due and payable, pursuant to the consent arbitral award is Kshs 46,996,101.07.

**e. Whether the Pending Bills Committee settled the Defendant's claim against the Plaintiff?**

**AND**

**f. What legal authority did the Pending Bills Committee have to unilaterally decide on the monies owing to the Claimant?**

66. Those two issues are best answered together.

67. The Committee was put together at the instance of the President of the Republic of Kenya.

68. The intent and purpose of the said Committee was to scrutinize, analyze and verify all claims of payment from the Government, and to approve payment.

69. It was the Plaintiff's case that the contracts between the parties herein had been approved by the Government of Kenya.

70. Therefore, the Plaintiff submitted that the Pending Bills Committee, which was a creation of the Government, had mandate in verifying the authenticity of the bills which the Defendant had raised, and also to ascertain the bills which had not yet been settled.

71. If the Government was a party to the contract with the Defendant, whether directly or indirectly, it would imply that the Government was not a neutral arbiter, in determining any issues that may have arisen between the Defendant and the Plaintiff.

72. But the truth is that the Government was not a party to the contract between the Plaintiff and the Defendant. The Government had an interest in the contract, because the funds being used in settling the bills raised by the Defendant, were being sourced by the Government.

73. By a letter dated 4<sup>th</sup> December 2009, the Permanent Secretary to the Treasury, Mr. Joseph K. Kinyua made the following statement concerning the assessment conducted by the Pending Bills Committee;

***"It has been noted that some claimants have raised issues on the legal validity of claim assessments communicated to them by the Permanent Secretary/Treasury who might not have been identified as the 'Employer' in the contract Agreement for projects on which their claims are based.***

***In order to pre-empt such issues it is advised that in all cases where the Contract Agreement relating to any of the claims***

*identifies you (i.e Accounting Officer) as the “Employer” you should urgently prepare a letter in the manner illustrated in the attached “draft” and send the same to the claimant.*

*This action will make the Committee’s claim assessment the bonafide position of the Employer and thus pre-empt any disputes on that aspect.”*

74. It is clear that the Permanent Secretary/Treasury was well aware of the lack of a legal mandate on the part of the Pending Bills Committee, hence the advice that was intended to make the Committee’s assessment bonafide.

75. In my considered opinion, the Committee’s assessment could not have become bonafide simply because their decision was communicated by the Plaintiff.

76. Justice can only be seen to have been done when the matters in issue between two or more parties are resolved by either an independent, neutral and competent person, or amicably resolved by the parties themselves.

77. When a person who has an interest in the issues in dispute, makes a determination, it is improbable that justice will be done.

78. In this case, the Pending Bills Committee had an interest on how the issues between the Plaintiff and the Defendant were determined. Therefore, even if the said Committee had the requisite mandate to determine the issues, it was unlikely that the Defendant would find the Committee’s determination to be fair.

79. Furthermore, the Committee reached its determination without engaging the Defendant; and that therefore gave rise to a legitimate suspicion on the Defendant’s part.

80. In any event, the parties had already taken the dispute through litigation. At the High Court, the determination was in favour of the Defendant.

81. When the Plaintiff lodged an appeal, the Court of Appeal referred the matter to arbitration. And the two parties resolved the matter through a consent award.

82. Therefore, as at the time when the Pending Bills Committee made its determination, there were no outstanding issues which required resolution.

83. In any event, the Pending Bills Committee lacked the legal mandate to intervene in the Arbitral Award.

84. Pursuant to **Section 35** of the **Arbitration Act**, it is the High Court that has the requisite legal authority to set aside an arbitral award, and even then, the court can only do so within the narrow confines of that provision.

85. I find that the Plaintiff has failed to show that the consent arbitral award should be set aside.

86. I also hold that the Plaintiff has not shown that the Defendant had received any benefit through mistake or through compulsion. In effect, there was no evidence of unjust enrichment by the Defendant. I so find on the basis of the testimonies by the Plaintiffs’ witnesses, who said that they did not know if the Defendant received the money allegedly remitted by either the Pending Bills Committee or by the Treasury.

87. Therefore, there does not arise any obligation for the Plaintiff to make restitution.

88. In the result, I find that the Plaintiff’s case against the Defendant fails, whilst the Defendant’s claim against the Plaintiff succeeds.

89. I therefore dismiss the Plaintiff’s case against the Defendant, whilst I award to the Defendant the sum of Kshs 46,996,101.07.

90. The Defendant is awarded the costs of both the claim against it, as well as the costs of the counter-claim.

91. Finally, the principal sum shall attract interest at the Court rates from the date of Judgment, until payment in full.

92. Before signing-off this judgment I wish to point out that the Plaintiff sought to introduce a new issue, through its submissions. According to the Plaintiff, the counter-claim was fatally defective because it was filed without an accompanying Authority to file suit.

93. I hold the considered view that the Issues which the trial court was being called upon to determine must be set out before the commencement of the trial. It is only then that each party will be aware of matters which require it to adduce evidence and also to make legal submissions.

94. Whether or not the Defendant company had passed a resolution to institute the counter-claim is a matter of fact.

95. If the question had arisen prior to the commencement of the trial, the Defendant would have been put on notice that it needed to make available the requisite proof.

96. Indeed, the question ought to have been raised at the earliest opportunity, because it would then have been incumbent upon the court to

first determine whether or not to strike out the counter-claim.

97. Justice demands that parties do not ambush each other. That is the reason why parties now exchange both Witness Statements and Documentary Evidence very early in the life of the case.

98. In the result, I find that it was wrong for the Plaintiff to attempt to sneak in, a new Issue at the tail-end of its final submissions.

99. As the so-called Issue was improperly introduced into the submissions, I do strike it out.

**FRED A. OCHIENG**

**JUDGE**

**DATED,SIGNED and DELIVERED at NAIROBI This 31<sup>st</sup> day of January 2020**

**MARY KASANGO**

**JUDGE**