



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. 106 OF 2013

BETWEEN

EMPOWER INSTALLATIONS LIMITED.....PLAINTIFF

AND

ESWARI ELECTRICALS (PVT) LIMITED.....DEFENDANT

JUDGMENT

Introduction and background

1. The facts giving rise to this suit are not in dispute. By a contract dated 4th February 2011, the defendant (“Eswari”) was contracted by Kenya Electricity Generating Company Limited (“KENGEN”) to carry out construction work at the Ngong’ Hills Substation. That contract was for 12 months commencing 1st July 2011. Eswari subcontracted the plaintiff (“Empower”) by a Sub-contract Work Order dated 2nd August 2011 (“the Sub-contract”) for the price of Kshs. 69,654,336.00.

2. Unfortunately, the Sub-contract was bedeviled by delays which affected the principal contract between Eswari and KENGEN. Both parties blamed each other leading to a fall out. Following direction of the court the parties agreed by consent to value the works done by Empower at the time work stopped. They engaged a Quantity Surveyor, Joseph Nandi Odhingo who, in a report dated 26th August 2013, valued the work done by Empower at Kshs. 35,462,649.00.

3. Empower claimed Kshs. 35,462,649.00 in the Amended Plaint dated 3rd August 2016 being the value of work done upon termination of the Sub-contract. Since the sum was admitted by Eswari, the issue remaining for trial in the counterclaim and set-off was the claim for loss and damage, it claimed as a result of delay it alleged was caused by Empower. Further, out of the Kshs. 35,462,649.00 claimed, Empower admitted that it received Kshs. 14,926,336.00 as part of its fees leaving Kshs. 20,536,313.00.

4. At the hearing, Rathnaraj Jonathan Ebenezer (DW 1), an Engineer and Country Manager for Eswari testified. Engineer Stephen Njoroge Kigera testified on behalf of Empower. The bundles of documents filed by each party were admitted by consent. Since a large scope of were facts were not contested, I will not rehash the witness testimony but will refer to it where necessary to resolve or clarify a factual issue. The parties also filed written submissions to support their respective position. I now turn to consider the defendant’s counterclaim and set-off.

The Counterclaim and Set-off

5. The thrust of the counterclaim is that under the Sub Contract, the works ought to have been completed on or before 15th May 2012 but owing to the breach and failure by Empower to adhere to the schedule, Eswari suffered the following loss and damage pleaded in the counterclaim:

(a) USD 202,280.77 plus Kshs. 10,179,980.18 being 10% contract price forfeited by Eswari to KENGEN owing to the delay.

(b) Costs incurred owing to breach of contract amounting to Kshs. 25,788,599.00 made up as follows:

a) Additional Port Dues/Penalties/Storage Charges Kshs. 10,563,211.80

b) Additional Project Management Costs Kshs. 8,773,285.00

c) Additional Project Office Rentals	Kshs. 1,440,000.00
d) Additional Car Rentals	Kshs. 1,708,800.00
e) Travel and Miscellaneous expenses	Kshs. 695,055.00
f) Bank Charges for extension of Guarantee, and letter of credit	Kshs. 1,635,295.00
g) Additional Insurance Costs	Kshs. 395,831.00

6. As regards the Set-off, Eswari confirmed and admitted the value of work assessed by the Quantity Surveyor but sought to set off Kshs. 14,926,012.01 which it had paid Empower and 10 % retention amounting to Kshs. 3,546,264.90 making a total of Kshs. 16,990,372.09.

Who was the cause of delay?

7. The success of Eswari's claim turn on whether it is able to prove that Empower was the cause of the delay hence liable for the consequences flowing from breach of its contract with KENGEN.

8. DW 1 testified that the delay in completion of Eswari's contract with KENGEN was caused by Empower who did not complete the work as scheduled. DW 1 further testified that Empower abandoned the project site without completing the work as scheduled. DW 1 pointed to a letter written by PW 1 dated 10th November 2012 informing Eswari that, "*This is notice to you that we will be demobilizing the teams from 15th November 2012 until the above project problems are addressed.*" It is Eswari's case that the plaintiff absconded from the site. Eswari wrote to Empower the letter dated 1st February 2013 informing it that due to the slow progress of work done it would not be permitted to start any new work and will be required to complete only the work in progress.

9. Empower denied that it was to blame for any delay and contended that the delay was caused by Eswari. PW 1 testified that after mobilizing and taking over the site, KENGEN suspended the work on 6th September 2011 after finding the site environmentally unsuitable. As a result, the work was suspended from 6th August 2011 to 20th September 2011 as evidenced by the letter dated 29th November 2011 addressed to Eswari. He further testified that there were further delays which were documented in letters dated 5th May 2012 and 24th May 2012. In particular, PW 1 expressed concern over lack of communication and coordination meetings, lack of documents and non-payment for work done. PW 1 recalled he raised these and other issues including lack of supply of materials at meetings or in letters but Eswari ignored them. PW 1 observed that KENGEN pointed out the same issues and that is why the contract with Eswari was terminated.

10. In order to resolve this issue, it is important to understand the obligations of the parties under the Sub-contract. Under the Scope of Works outlined under Clause 1.0, the contractor, that is, Empower, was required to comply strictly with all drawings and specifications provided by Eswari and approved by KENGEN. The contract also provided that all steel support and substation equipment would be supplied by Eswari. It was also provided that while Empower had the responsibility to transport all raw materials to the site, Eswari had a duty to deliver all equipment and material supplies to Empower.

11. I agree with Empower that part of the delay was attributed to action by KENGEN who suspended the work as evidenced by the letter dated 29th November 2011. In a monthly progress report for February 2012, Empower raised, inter alia, the following concerns:

- All project drawings were still pending except control room architecture.
- Certain equipment had not been supplied.
- Excavation of the control room setting had been put on hold pending guidance from Eswari/KENGEN.

12. In the letter dated 5th May 2012 addressed to Eswari, PW 1 minuted a meeting held between PW 1, DW 1 and a Mr Anand on 28th April 2012. PW 1 drew attention to the lack of anchor bolts to be supplied by Eswari, lack of drawings for buildings, cable trenches, main gate, gantries etc. PW 1 concluded the letter by stating that, "*Efforts to reach you have not been successful to get any update for the whole week. Issues of drawing and anchor bolts needs to be addressed as a matter of urgency.*" In the letter dated 24th May 2012 addressed to Eswari, PW 1 once again expressed frustration that since August 2012 (read 2011) various problems encountered in the project including lack of drawings, non-payment and lack of communication had not been addressed. PW 1 concluded the letter by stating, "*This is a notice to you that we will be Demobilizing the teams from 26th May 2012 until project structures are put in place and agreed upon.*"

13. In a letter dated 5th June 2012, PW 1 addressed Eswari on the work progress and raised concerns about the drawings, lack of anchor bolts and non-payment. He stated that, "*You gave commitment for the site mobilization in your letter dated 7th December 2011 that ALL the civil drawings were to be submitted by 30th December 2011 which has not happened. We made our program based on that commitment. Currently the work is at standstill and an amicable solution needs to be reached.*"

14. PW 1 also produced a series of emails between 7th and 14th June 2012 between PW 1, DW 2 and KENGEN. The tenor of those emails is that KENGEN had expressed concerns about delay in the project and requested a tri-partite meeting with Eswari and Empower but Eswari rebutted the same asserting that KENGEN could not deal with its sub-contractors. Nevertheless, a meeting was held between KENGEN and Empower where PW 1 attended on 1st November 2012. The meeting was memorialized in minutes dated 8th November 2012 signed by PW 1 and DW 1, where it was noted that, "*The programme has been delayed due to issuance of drawings on site*". It was also noted that, "*[I]t is important for site coordination meetings to be held regularly*" and "*It was agreed that all drawings to be availed on site to avoid having idle*

resources.”

15. In the letter dated 7th November 2012, Empower addressed Eswari regarding payments that had been outstanding amounting to Kshs. 10,129,406.15. On the same day by an email dated 7th November 2012, KENGEN addressed Mr Anand of Eswari expressing concerns about the delays in completing the project. It is on 10th November 2012, that Empower expressed its intention to demobilize works. Thereafter, there is email correspondence dated 31st December 2012 from DW 1 to PW 1 now stating as follows:

Dear Steven,

As discussed earlier in your office last week, please find below table of schedule for the Equipment 's suppliers.

Also as agreed over the meeting kindly send the detailed work program till the completion of the project. We have to submit the same to KENGEN by 2nd of Jan.

16. The correspondence produced by Empower was not contested. It is clear that Eswari did not respond to the concerns raised by Empower in writing or produce any other correspondence showing that it took an opposite view of matters on the ground. In fact, after the notice to demobilize works issued on 10th November 2012, the only formal communication from Eswari came about 4 months later by the letter dated 1st February 2013. Of course just before the end of the year, PW 1 had informed DW 1 by email that the equipment it was obliged to supply under the Sub-contract, was coming and that Empower should now commence work.

17. The totality of the communication shows that the delay was caused by lack of drawings which was a responsibility of Eswari and KENGEN, lack of certain materials which was a responsibility of Eswari, certain variations which could not be attributed to Empower and lack of clear communication from Eswari to Empower on the project. All this evidence displaces any notion that the delay could not be attributed to Empower.

18. Empower's position was further corroborated by the actions well documented and taken by KENGEN. The letter dated 7th February 2013 from KENGEN to Eswari notifying it of default stated, in part, as follows:

1. You have failed to complete the works by 30th June 2012 and have subsequently failed to complete the works by 10th November 2012 as committed in your programme dated 14th May 2012.

2. You have failed to progress with the works at the site as agreed during the meeting held on 18th December 2012; and

3. You have failed without any reasonable excuse to conclude manufacturing and shipment of equipment being sourced from outside Kenya.

19. Further, the letter dated 10th March 2015 from KENGEN addressed to Eswari for recovery of delay damages stated, in part, as follows:

The Contract commenced on 1st July 2011 and completion was expected to be on 30th June 2012. Through various variations, the Contractor was awarded extension of time of 111 days and the Amended Contract completion date is 19th October, 2012.

The works were taken over on 31st December 2014, 803 days beyond the completion Date. The works were delayed due to circumstances attributable to the contractor and the Employer is therefore entitled to recovery of maximum amount of Delay Damages of 10% of revised contract sum amounting to USD 202,280.77 and KES 10,179,980.17.

20. Both letters from KENGEN show that Eswari cannot run away from shouldering the blame for the delay in the project. It had the burden of proving that Empower was liable for the delay of the project on a balance of probabilities in order to succeed in its counterclaim. It failed to discharge that burden. I find and hold that Empower is not liable for delay in completing the project. Consequently, Eswari cannot recover damages delay as claimed in the counterclaim.

21. From the 15th November 2012 when Empower indicated that it was demobilizing its team as indicated in the letter dated 10th November 2012, the contract between the Eswari and KENGEN had not been terminated. Eswari had the duty to mitigate damages and indeed complete its contract with KENGEN. In fact, in the letter dated 1st February 2013 addressed to Empower, Eswari stated that, *“It is also to inform you that the balance of works (unstarted) on this project as on 01/02/2013, shall be engaged directly by ESWARI on its own in accordance to their plan of work scheduled.”*

22. The fact that Eswari took over the Sub-contract and continued to perform it means that it continued to bear all the costs associated with fulfilling its contractual obligations to KENGEN. This means that it cannot claim Kshs. 25,788,599.00 which are ordinary administrative expenses and financial charges incurred in performance of the contract with KENGEN from Empower.

23. The defendant also claimed 10 % retention amounting to Kshs. 3,546,264.90 as part of the set-off. As counsel for the plaintiff submitted, the retention amount is paid at the completion of the contract and in this is case it was only applicable to the contract between Eswari and KENGEN. The contract between Eswari and Empower did not make any provision for retention and none can be implied. This claim is not tenable in the circumstances.

Whether the plaintiff is entitled to value for work done?

24. There is no dispute that Empower did substantial work on the project. During performance of the Sub-contract, Empower continued to raise the issue of lack of payment for work done as evidenced by the correspondence I have set out elsewhere in this judgment. The parties agreed upon the direction of the court, to value the work done and the Quantity Surveyor assessed the value of the work at Kshs. 35,462,649.00. Empower admitted that it had been paid Kshs. 14,926,012.01 leaving a balance of Kshs. 20,536,637.00.

25. The assessment carried out by the Quantity Surveyor represents the work done by Empower for which it was entitled to payment. The amount was expressly admitted but for the counterclaim and set-off which I have dismissed, I now award that sum the net amount.

26. Further and as submitted by counsel for the plaintiff, the plaintiff's claim and relief is also grounded on the principle of *quantum meruit* as it represents reasonable compensation for work done under the contract. Upon termination of the contract, the measure of work was ascertained by consent of the parties and it is proper that no party takes unjust advantage of the other.

Disposition

27. I now make the following orders in light of the reasons I have set out above:

- (a) Judgment be and is hereby entered for the plaintiff against the defendant for Kshs. 20,536,637.00.
- (b) Interest on (a) shall be at court rates and shall run from the date 5th August 2016 until payment in full.
- (c) The defendant's defence, counter-claim and set-off are dismissed with costs to the plaintiff.
- (d) The defendant shall bear the cost of this suit.

DATED and DELIVERED at NAIROBI this 30th day of JANUARY 2020.

D. S. MAJANJA

JUDGE

Mr Chege instructed by Abdulrahman, Saad and Associates Advocates for the plaintiff.

Mr Ongondi instructed by Shah and Shah Advocates for the defendant.