



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 213 OF 2016

MACHIRA LIMITED.....PLAINTIFF

-VERSUS-

CHINA WU YI LIMITED.....DEFENDANT

AND

KENYA NATIONAL HIGHWAYS AUTHORITY.....THIRD PARTY

RULING

1. On 9th May 2016, the plaintiff filed the suit herein seeking for judgment against the defendant for a sum of Kshs. 139,471,809.70, interest thereon at the rate of 24% per annum from 18th June 2014 until payment in full and the costs of the suit.
2. Upon service of the plaint and summons, the defendant entered appearance and filed a statement of defence dated 4th July 2016 under protest. The defendant also filed a chamber summons application dated 30th January 2017, seeking for leave to issue a Third Party Notice against Kenya National Highways Authority.
3. The Third Party then filed a notice of preliminary objection dated 1st March 2017 on the ground that, the court lacks jurisdiction to hear and determine the defendant's application; in that the application was defective and did not comply with the mandatory provisions of the law. The preliminary objection was heard and dismissed for lack of merit vide a ruling delivered on 31st October 2018. The parties were then ordered to prepare the matter for hearing.
4. On 15th May 2019, the Third Party filed a chamber summons application seeking that the defendant's Third party notice of motion dated 30th January 2017, be struck out and the suit against the Third Party be dismissed with costs. The main reason for the application was stated to be that, under Order 1 Rule 13 of the Civil Procedure Rules, the mandatory timelines for seeking leave to issue Third Party notice is within fourteen (14) days after the close of pleadings. Thus, the ex parte chamber summons application herein for leave to issue ought to have been filed by 3rd August 2017.
5. However, before the hearing of the application, the plaintiff and the defendant entered a consent judgment herein in favour of the plaintiff in the sum of Kshs. 139,471,809.70 as the principal sum. The parties did not agree on the issue of interest and costs and agreed to submit on the same and leave of the court to deal with it accordingly.
6. In that regard, the plaintiff averred that, it tendered the certificate of completion of works and the same became payable within thirty (30) days of issuance. The defendant did not pay the same within that time. Further, it issued a demand letter and the same was not honoured. Finally, it is entitled to costs, as the consent recorded did not compromise the issue of costs but allowed the entire claim as prayed for. The plaintiff made reference to the cases of;

a. Sumac Development Company Limited Vs George Munyi Kigathi & 2 others [2017] eKLR;

b. Michael Otieno Nyaguti & 5 Others Vs Kenya National Highways Authority & 5 Others [2015] eKLR;

c. Everrose Chemtai Obwaka Vs Kenya Railways Corporation [2008] eKLR;

d. True North Construction Limited Vs Kenya National Highways Authority [2014] eKLR

7. In response submission, the defendant submitted that interest is not payable due to the plaintiff's delay in submitting the final certificate of works and statement of accounts within the stated timelines. There is no pleading to state that there was no delay. The defendant relied on the case of; Caltex Oil (Kenya) Limited vs Evanson Wanjihia (2017) eKLR and Root Capital Incorporated vs Tekangu Co-operative Society Ltd & Another (2016) eKLR.

8. Finally, the defendant submitted that costs are not automatic. That if the claim of interest is defeated, then costs are not awarded. Reference was made to several authorities cited in the submission which includes inter alia;-

a. Morgan Air Cargo Limited vs Evrest Enterprises Limited (2014) eKLR;

b. Jane Wambui Nyatetu vs Timothy Kariiri Ngata (2014) eKLR

9. I have considered the submissions on the issue of interest and costs and I find that the issue of interest is based on whether the plaintiff submitted the certificate of completion of works on time or not. I have noted from the contract document at clause 43, it provides that "the Employer shall pay the Contractor the amount certified by the Project Manager within twenty eight (28) days of the date of each certificate. If the Employer makes a late payment, the Contractor shall be paid interest on the late payment in the next payment. Interest shall be calculated from the date when payment should have been made up to the date when the late payment is made at the prevailing rate of interest for commercial borrowing for each of the currencies in which payments are made".

10. The plaintiff pleads at paragraph 7, 8 and 9 of the plaint that the "works were formally certified by the Engineer on 18th June 2014 at Kshs. 326,777,632.64". That after deduction of the amount paid, the Engineer certified the amount due to the "plaintiff as at 18th June 2014, at Kshs. 130,596,830.89." That the certificate was delivered by the Engineer on 18th June 2014 for a total sum of Kshs. 139,472,809.77.

11. However, the defendant avers at paragraph 14 of the defence that "the submissions of the said certificate was unduly delayed and by the time of submission, the defendant had already submitted its final statement to the client exclusive of the plaintiff's certificate for which the plaintiff is to blame. The defendant further avers at paragraph 19 that, "the alleged clause on interest for delayed payment would only become applicable and operational if there was full compliance on the part of the plaintiff and negligent default on the part of the defendant."

12. The key question remains as to when the Engineer or Project Manager certified the amount in issue and when the same was brought to the knowledge of the defendant. I have considered the documents filed by the plaintiff on 11th March 2013 and noted a report by the consulting Engineer Services (India) Private Ltd dated 18th June 2014, addressed to the Project Manager, China Wu-Yu Company Limited, which relates to the "Final Statement" in accordance with clause 60.8 of the conditions and terms of engagement of the parties. The Engineer certified the amount due to the Contractor from the Client to be Kshs. 130,596,830.89. That report is signed by Engineer P.K. Sateesh, Resident Engineer, Lot 1. It is copied to the General Manager (Design and Construction) KeNHA Team Leader, PIT-Engineer, J.M. Mwatu and Chief Resident Engineer Lot 1- Engineer H. Ramesh. In my considered opinion, the client was duly bound to make payment of the certified amount within the time stipulated in the contract being twenty eight (28) days from the 18th June 2014.

13. I further note that the plaintiff wrote to the defendant on 12th June 2014 notifying them of the outstanding payments. On 2nd August 2013, the consulting Engineer wrote an Internal Memo to Engineer Havri Ramesh to the effect that, they had completed the evaluation informed by various communication on the claim by Machiri Limited (the plaintiff). The Engineer indicated that, they had forwarded the "Draft Claim Evaluation Report" for action.

14. Apparently the payment was not made thus invoking a demand letter exhibited, dated 25th September 2015 to which the defendant replied on 12th October 2015 to the effect that the plaintiff need to "follow the proper channel i.e to submit through the Project Manager, MWSC, who is authorized to scrutinize and approve the same." That the plaintiff had failed so far to "produce the final statement/approved final statement acceptable to the Project Manager, NWSC and or the Engineer's representative." The defendant then included a schedule of payment and admission of a delayed interest attributed to them and a sum of Kshs. 2,036.94, and a sum of USD 15,934.76 payable to the plaintiff which the defendant was ready to pay upon confirmation of the same.

15. On 12th January 2016, the plaintiff's lawyers Njuguna & Partners responded to the letter dated 12th October 2015 by the defendant, maintaining that, there was compliance by the plaintiff and therefore payment should be made by the defendant. However, on 15th February 2016, the defendant wrote back and stood by the contents of its letter dated 12th October 2015 and a letter dated 16th December 2015 from KenNHA assist the parties reach an amicable settlement of the plaintiff's final statement. Apparently, KenNHA had called for a meeting on 4th February 2016 at its office which did not materialize as the defendant indicates in a letter dated 15th February 2016 that, they got the invitation after the due date.

16. As can be seen from the correspondences referred to herein, the parties could not agree on whether the plaintiff properly submitted its claim to the defendant or not. It therefore follows that evidence will have to be adduced to reconcile the varying position. However, I find that route will unnecessarily delay the final decision in the matter as the parties in this matter have already settled the main claim. In the interest of justice, I make the following orders and/or options for the parties to consider for amicable settlement of the matter;-

a. The parties call for oral evidence on whether the plaintiff complied with the terms of the contract in relation to the submission of the final statement of accounts or certified amount; or

b. The delayed interest payable on the subject amount be calculated with effect from 18th June 2014 and be shared by the parties in the equal ratio of 50% in favour and/or as against either party;

c. If option (b) above is acceptable, the parties to determine the commercial interest rate payable as at the said date, and use it to calculate the subject interest rate;

d. Further, if (b) and (c) above is the preferred option, then each party shall meet its own costs;

e. However, if option (a) is agreed on, the issue of the applicable interest rate and costs shall equally be canvassed.

17. Those are the orders of the court.

Dated, delivered and signed in an open court this 28th day of January 2020

G.L. NZIOKA

JUDGE

In the presence of:

Mr. Kairu for the Plaintiff

No appearance for the Defendant

Mr. Omolo for 3rd party

DennisCourt Assistant