



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL SUIT NO.6 OF 2018

JAMES KARIUKI GITHINJI t/a JIMAI ELECTRICAL SERVICES....PLAINTIFF

VERSUS

BOARD OF MANAGEMENT ST. MARYS

GIRLS HIGH SCHOOL IGOJI.....DEFENDANTS

JUDGEMENT

1. By a plaint dated 16th March 2018, the Plaintiff James Kariuki Githinji t/a as Jimai Electrical Service sued the Defendant seeking to be paid the sum of Kshs. 13,727,740, together with interest thereon and costs of the suit.
2. The claim arose out of a tender awarded to the Plaintiff on 16th December 2014 for the construction of a dormitory on the Defendant's parcel of land LR.No.Igoji/Gikui/2653 at a cost of Ksh.43,727,740. The agreement was executed on 12th January 2015 by the parties herein and upon completion of the construction on 31st July 2015 the Plaintiff was issued with a certificate of practical completion by the Imenti South Sub County Works Officer and on the same day the Plaintiff handed over the dormitory to the Defendant and was issued with a hand over certificate by the Imenti South Sib County Works Officer.
3. Out of the total contractual sum the Defendants paid to the Plaintiff the sum of Ksh.30,000,000 leaving a balance of Ksh.13,727,740 which they had not paid despite demand and notice of intention to sue being issued to them.
4. The Plaintiff's claims are disputed by the Defendants in their statement of defense dated 15th May 2018 where the Defendants denied the averments contained in the plaint and put the plaintiff to strict proof. Furthermore, the Defendants said that the agreement in the plaintiffs bundle is not executed by the Defendants' legal representatives.
5. At hearing PW1 James Kariuki Githinji in his testimony told the court that on 16th December 2015 he was awarded the tender for construction of a dormitory on LR IGOJI/GIKUI/2653 by the Defendant at Kshs. 43,727,740 and entered into a contract for the same on 12/1/2015. He carried out the construction, and was issued with a certificate of practical completion and on 31st July 2015 he handed the dormitory over to the Defendants and was issued with a handing over certificate. That as at 30th May 2015 he had carried substantial construction work on the dormitory and the Defendant paid him a sum on Ksh. 27,000,000. On 30th May 2015 they entered into another contract where the Plaintiff undertook to complete the remaining construction work on or before 31st July 2015 and gave the defendant a further 18 months to pay the balance of the contract price.
6. The defendant then paid him a further sum of Kshs. 3,000,000 and he completed construction on 31/7/2015. However, after construction was completed the defendant did not pay the balance and therefore breached the contract between them.
7. DW1 JAMES KIMATHI MUGAMBI the Chairperson of the Board of Management of St Mary's Girls High School told the court that he was elected as Chairman vide letter reference No. MRU/C/EDU/23/2C/15 dated 16th May 2019 for a period of three years. On 13th July 2019 during their first board meeting the Principal informed the members of the board of three court cases this one included. As board members they took the initiative of going through the court pleadings and the documents relied upon and the procurement procedures purported to be followed by the Plaintiff and the school, did not adhere to the laid down procurement procedure as per the Public Procurement and Assets Disposal Act.
8. This was due to the fact that the contract should have been procured through an open tender as per Section 91(1) and 37 of the Act. The restricted tendering could not apply because Regulation No. 54 (3) requires procuring entity to invite a minimum of ten persons but only 5 were invited. The quotation method could not apply because the threshold was above Kshs. 500,000 allowed by the law. The opening,

evaluation and the award of the works was done by the same members hence compromising the principle of good governance. There was no information on how private companies were engaged into developing the architectural works, bills of quantities, structural engineering drawings and supervision of works. The officer from the private company that developed bill of quantities is the same supervising and engaged in tender opening, evaluation and award without the approval by technical department of the government (State Department of the Public Works) Works. Therefore there was possibility to compromise and collusion making the institution not getting value for money.

9. The agreement dated 12/1/2015 produced by the Plaintiff does not bear the seal of the school which is a requirement, also the person purported to have executed the document is not the Chairperson of the school. DW1 said that due to the challenges that arose from the procurement procedure in the contract between the parties herein the EACC took up the matter for purposes of investigations which were still pending and that it will be unlawful for him to continue making payments to the Plaintiff against the provisions of Section 79(2) of the Public Finance and Management Act of 2012.

10. In cross examination DW1 said that he did not have documents to show who were members of management in 2014/2015, he also said that the duty to advertise for tenders lay with management and that he was not present during the opening and evaluation of the tenders. He also did not have any documents to show who was in the evaluation and awards committee. He also said he did not know how the parties who engaged the contractor were procured but it is the employer who was supposed to look for the professionals to supervise the works and not the contractor. He said that he does not have an expert report to show that the school did not have value for money as the pages of the BQ are missing and it would be difficult to ascertain the value.

11. He confirmed that the agreement was signed by the principle of the school on behalf of the employer and that the school stamp was appended on the agreement. He also said that the agreement was witnessed by the District Works Officer. He confirmed that agreements for government are prepared by Public Works and Housing

12. DW1 said he was not a board member when the agreements were signed and the agreement signed on 30th May 2015 is not known to him although it is signed by the Chairman and the Principal and it is authentic. He said that if the procurement process was not properly done it doesn't make the agreement binding. He admitted that the dormitory was constructed and it is occupied by over 400 students with 12 students occupying one cubicle.

13. He said that the Sub County Works Officer signed the certificate of completion but the electrical and mechanical engineers have not signed the certificate of completion. He said he doesn't have a report to show that the electrical and mechanical installations were not done. He confirmed that the principal signed the handing over certificate but that the same is not witnessed. He confirmed that after he took over as chairman he did not write to the contractor to complain about any defects to the dormitory that was constructed.

14. DW1 also confirms that in their statement of defense dated 15th May 2018 they did not plead that procurement procedures were not followed and they also did not plead that the school did not get value for money neither did they plead that there were miscalculations in the tender documents. He said that from the documents he found in school the Plaintiff was owed only 9 million but he did not have those documents in court as he alleged they were taken by EACC for investigations. He confirmed that the building has lighting but the electrical engineer did not sign certificate of completion. He said that his problem was with the procurement process which did not give room for competition.

Plaintiffs Submissions

15. In the Plaintiff's written submissions dated 8th February 2020 it was argued that the Defendant through the board of management vide a letter dated 16th December 2014 informed the Plaintiff that he had been awarded a tender to construct a dormitory at the cost of Kshs 43,727,740 and by a letter dated 20th December 2014 he accepted the offer. The court was therefore urged to find there was a valid contract between the Plaintiff and the Defendant that was signed on 12th January 2015 and 30th May 2015.

16. The Plaintiff argued that he had proved his case on a balance of probabilities that after entering into the contract with the Defendant he carried out the construction of the dormitory as per the terms of the contract and that he was paid part of the consideration of Ksh. 30,000,000 leaving a balance of Ksh 13,727,740 unpaid. He urged the court to find that the Defendants owe him that amount and that they should be ordered to pay.

17. In their further submission the Plaintiff argued that allegations by DW1 in regard to procurement procedures in the contract not having been followed were not pleaded in their statement of defence and DW1 was not a member of the board of management of the Defendant's school when the Plaintiff was awarded the tender for construction of the dormitory and that his evidence is mere hearsay which is inadmissible. The Plaintiff urged the court to disregard the issues raised by DW1 in his evidence which were not pleaded in the Defendants statement of defense and further that the same were recorded in DW1's statement after the Plaintiff had closed his case and therefore did not have an opportunity to respond to the same. The Plaintiff relied on the authority of Zacharia Orwa Ondoro Vs South Nyanza Sugar Company Ltd HC at Migori Civil Appeal No.83 of 2016, IEBC and Another Vs Stephen Mutinda Mule and 3 Others [2014]eKLR as well as Adetoun Oladeji Vs Nigeria Breweries PLC SC 91/2002 to support their position that parties are bound by their pleadings and that it is erroneous to raise issues contrary to the pleadings of parties.

18. The Plaintiff further submitted he was entitled to a sum of Ksh .13,727.740 plus interest from 31st January 2017 because it was agreed between the parties that the balance was to be paid within 18 months from the date of completion of construction which was on 31st July 2015.

19. It was also argued that the Defendant was served with a demand notice before filing of this suit and that the suit should be allowed with costs to the Plaintiff.

Defendants Submissions

20. The Defendants in their submissions framed the following issues for determination

- a. Whether the procurement procedure was duly followed to warrant the contract being valid
- b. Whether there was any duly executed between the Plaintiff and the Defendant
- c. Whether the Defendants were served with a demand notice before filing of this suit
- d. Whether the court has jurisdiction to hear and determine this suit
- e. Whether the Plaintiff is entitled to general damages and cost of the suit

21. On the first issues the Defendants argued that the Plaintiff violated Article 10 of the Constitution of Kenya, Public Procurement and Assets Disposal Act 2015 and Public Procurement Disposal Regulations 2006. It was the Defendants argument that the Plaintiff did not adduce any evidence in support of the advertisement, which method under Part 9 of the Public Procurement and Assets Act 2015 and Public Procurement Disposal Regulations 2006

22. According to the Defendants Section 91(1) of the Public Procurement and Assets Disposal Act state that open tendering is the preferred methods and Rule 37 of the Public Procurement Disposal Regulations 2006 gives the threshold for open tender being an expenditure of a minimum of Ksh. 6,000,000. It was argued that restricted tender could not apply because the Regulation No.54(3) requires procuring entity to invite a minimum of 10 persons but only 5 were invited.

23. The Defendants also argued that the opening, evaluation and the award of the works was done by the same members hence compromising the principle of good governance and that this amounted to an illegality. The Defendants relied on Article 227 of the Constitution to support their position. It was noted by the defendants that private companies were engaged to develop the architectural works, bills of quantities, structural engineering drawings and supervision of works. That the same officer from the private company is the same one who supervising engaged in tender opening, evaluation and award without approval by the public works who were the technical department of the government.

24. It was further submitted that since the laid down procurement procedures were never followed and that since the agreement was lacking the signature of the chairman of the board of management and since the agreement was not sealed by the seal of the school the same was not duly executed and was not binding on the school and cannot therefore be enforced.

25. The Defendants also disputed service of a demand notice claiming that EX10 does not bear the receiving stamp of the Defendant school or acknowledgement remarks from the Secretary of the Board and therefore costs should not be awarded.

26. As regards jurisdiction of the court to determine this cause the defendant submitted that the claim of Ksh. 13,727,740 ought to have been filed under the Magistrates court and not in the High Court.

27. While relying on the case of **Root Capital Incorporated Vs TekanguFarmers' Cooperative Ltd and Another [2016] eKLR** the Defendants argued that they were not liable to pay the balance of the contractual sum after illegalities have been discovered. The court was urged to dismiss the suit with costs to the Defendants

28. On the other hand the defendants argued that the procurement procedure violated article 10 of the constitution, the public procurement and assets disposal Act 2015 and the public procurement disposal regulations 2006. It was their argument that the plaintiff was awarded the tender for the dormitory but never adduced any evidence in support if the advertisement which mentioned under part IX of the Public Procurement and asset Act 2015 and Public Procurement Disposal Regulations 2006. It should have been done through an open tender and therefore the quotation method should not apply because the threshold was above Ksh. 500,000. It was therefore evident that the opening, evaluation and the award of the works was done by the same members hence compromising the principle of good governance as the laid down procedure was never followed.

29. In consideration of the pleadings on record, the testimony of the Plaintiff and the Defendant's witness as well as the submissions filed herein the issues for determination are:

- a. Whether there was a valid contract between the Plaintiff and the Defendant in consideration of the claim by the Defendant's witness that procurement procedures under the Public Procurement and Assets Disposal Act were not followed,
- b. Whether the Defendant pleaded flouting of procurement procedures as an issue in their statement defense.
- c. Whether the Plaintiff is entitled to the sum of Ksh. 13,727,740
- d. Whether the Plaintiff served the Defendants with a demand notice before filing this suit.
- e. Whether the Plaintiff is entitled to costs of the suit.

30. By a letter dated 16th December 2014, Mrs Ruteere FM Secretary to the Board of Management of the Defendant School wrote to the Plaintiff informing him that his tender dated 13th December 2014 was accepted subject to there being no appeal in the ensuing 14 days in line with the provisions of clause 33(1) of the Public Procurement Regulations. The letter goes on to say that the contract documents are in the course of preparation and will be ready for the Plaintiff's signature after the said 14 days. The Plaintiff was required to provide an acceptance performance bond and approved work program before the contract is signed. The secretary informed the Plaintiff that the school had appointed a project manager M/S Archviews Consultants of Nairobi and the Plaintiff was asked to communicate with the project manager immediately and thereafter on all matters relating to this contract

31. By a letter dated 20th December 2014 the Plaintiff wrote to the Principal of the Defendant School informing the school that they had accepted the tender and promised to execute the work in the shortest time possible. Subsequently an agreement dated 12th January 2015 was entered into between the Board of Management of the Defendant School and the Plaintiff in regard to the tender and the same was signed by the Plaintiff, the school in the presence of James .M.Kirimi District Works Officer Meru Central District and one Kaaria D.T who according to the Plaintiff was Chairman of the School's Parents and Teachers Association. The stamps for the Plaintiff, the Districts Work Officer Meru Central and the Defendant School are appended on the said agreement. In the course of the construction the Plaintiff was paid a total of Ksh. 30,000,000 leaving a balance of Ksh. 16,727,740.

32. A further agreement was entered into between the parties herein on 30th May 2015 in which the parties agreed to rearrange the period of payment of the balance of the contractual sum of Ksh. 16,727,740 within 18 months from 31st July 2015 the date when the works were expected to be completed. The agreement is signed by the Chairman of the Board of Management, The Secretary and the Contractor.

33. Upon completion of the construction of the dormitory Mr.J.M.Kirimi of Meru Central Public Works Office issued a certificates of practical completion and handing over certificate dated 31st July 2015 and issued to the Plaintiff and a certificate of making good defects dated 31st January 2016 was also issued.

34. The Defendant's witness was not a member of the Board of Management when the contract herein was entered into. He was appointed by a letter dated 16th May 2019 and he came to testify in his capacity as the Chairman of the Board of Management of the Defendant School. In his testimony he claimed that procurement procedures were flouted and therefore in his view the contract was not binding on the school. He however confirmed that the Plaintiff constructed a story building in the school that is occupied as a dormitory by over 400 students currently. He said that he did not have any expert report to prove that the building was not completed to specifications and that the Sub County Public Works Officer signed the certificate of completion.

35. He also said in cross examination that he did not have a report to show that the school did not have value for money. He admitted that the principle signed the agreement on behalf of the employer and there was no space for the chairman of the board to sign the agreement. He confirmed that agreements for the government are prepared by Public Works and Housing. DW1 also admitted that the agreement dated 30th May 2015 was signed by the Chairman and the principal of the school and it as authentic.

36. DW1 testified that he never wrote to the Plaintiff to complain of any defects on the dormitory that was constructed and that their statement of defense did not raise issues of procurement procedures.

37. According to the Defendant's witness the Plaintiff is only owed Ksh. 9,000,000 by the school but due to procedural flaws the contract is not binding.

38. The Defendants had already started paying the Plaintiff and the Defendant's witness acknowledges without any proof that the Plaintiff is owed only Ksh. 9,000,000. The partial payment by the Defendants and the acceptance of the payment by the Plaintiff is evidence of the parties intention to be bound by the said agreement. In **Kenya Breweries Ltd V. Natex Distributors Ltd, Nairobi HCCC No.704 of 2000**, the Court held that: -

“Parties to a written contract are bound by its terms and the invocation of nonexistent clause to terminate a contract is not legitimate even though there is a termination clause. However much a party resents the behavior of another party to the contract, it cannot terminate it without following the laid down procedure”.

39. It was the Defendant's argument that the proper procedure for procurement was not followed however, he cannot rely on irregularities committed by its own officers in the procurement of the Plaintiff's services. This was aptly expressed in **Alghussein Establishment vs. Eton College (1991) 1 ALLER 267** as follows:

“The principle that in the absence of clear express provisions in a contract to the contrary it was not to be presumed that the parties intended that a party should be entitled to take advantage of his own breach as against the other party was not limited to cases where a party was relying on his own wrong to avoid his obligations under the contract but applied also where a party sought to obtain a benefit under a continuing contract on account of his breach.”

40. In the Defendant's letter dated 16th December 2014 the Secretary BOM indicated that the Plaintiff's tender dated 13th December 2014 was accepted subject to there being no appeal in the ensuing 14 days in line with the provisions of Clause 33(1) of the Public Procurement Regulations. The Defendant did not show that there was any complaint raised by any other contractor or an interested party as to the manner the Plaintiff's services were procured. Having failed to plead issues of procurement of the tender awarded to the Plaintiff in the statement of defense I would agree with the Plaintiff that it is an afterthought to raise it long after the close of pleadings and close of the Plaintiff's case as well as in the submissions.

41. The Defendants' witness confirmed that his predecessor Mrs Anne Kinyua was still in the Public Service and could have been the best

witness in the circumstances. The former Principal/Secretary BOM Mrs.Ruteere was also said to have been transferred to another school. There was no explanation why she was not caused to record a statement and confirm or refute the claim by the Plaintiff and answer the questions raised by DW1 as to how the services of the Plaintiff were procured.

42. As regards the demand notice the same was addressed to the Secretary Board of Management of the Defendant School and the Defendants denied at paragraph 6 that they were served but in their reply to the defence the Plaintiffs did not explain how they served the demand notice and the copy that is in the bundle of documents dated 18th July 2017 does not show evidence of service.

43. I do agree with the defendants that for that reason the cost of the suit will not be awarded to the Plaintiffs.

44. As to whether this court lacks jurisdiction the Defendants stated so in paragraph 8 of their statement of defense and indicated that they were to raise a preliminary objection to that effect but throughout the proceeding no such objection was raised and as a result the matter proceeded without the notice of the court that there was an intention to raise an objection as to monetary jurisdiction of the court. Article 165(3)(a) confers upon the High Court unlimited jurisdiction in criminal and civil matters. This is to say that save for the fact that the Magistrate's Court have monetary jurisdiction of up to Ksh. 20,000,000 the Magistrate's Court Act does not oust the unlimited original jurisdiction of the High Court.

45. The Defendants' argument that the Plaintiff went forum shopping with the intention of getting a higher award in terms of cost is unfortunate and misplaced. Had the court's attention been drawn to the claim the matter could have been transferred at the earliest possible to the Magistrate's Court for hearing and determination.

46. In conclusion this court finds that the Plaintiff has proved his case on a balance of probabilities and judgement is entered as prayed save that no award of costs is made and interest on the sum of Ksh. 13,727,740 from 31st January 2017

HON.A. ONG'INJO

JUDGE

DATED AND DELIVERED AT NAIROBI VIA EMAIL THIS 28TH DAY OF MAY 2020 DUE TO THE PRESIDENTIAL DIRECTIVES ISSUED ON 15TH MARCH 2020 AND SUBSEQUENTLY ON 7TH APRIL 2020 DUE TO COVID-19 PANDEMIC.

HON.A. ONG'INJO

JUDGE