



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CIVIL SUIT NO. 2 OF 2017

GANUNI CONSTRUCTION CO. LTD.....PLAINTIFF

VERSUS

THE COUNTY GOVERNMENT OF GARISSA.....1ST DEFENDANT

GARISSA COUNTY SECRETARY.....2ND DEFENDANT

JUDGEMENT

1. The Plaintiff commenced this suit on 25th April, 2017 by filing a Plaint dated 25th April, 2017 and amended on 19th May, 2017 seeking judgement against the defendant for Orders that: -

- 1. A Mandatory injunction do issue, compelling defendants to forthwith pay the plaintiff the sum of the remaining balance of Kshs. 13,208,570/=.**
- 2. Damages for the non-payment of the balance of the contractual amount.**
- 3. Damages for breach of contract.**
- 4. Costs of the suit.**
- 5. Any other relief or orders that this Honourable court may deem fit and just to grant.**

2. The background facts of the Plaintiff case are that, the 1st defendant advertised for re-carpeting of the Garissa University College road in the star newspaper on 20th March, 2015, where the Plaintiff Company successfully bid for the same and were notified vide a letter dated 19th May, 2015.

2. They averred that they subsequently entered into a contract on 15th June, 2015 for the re-carpeting of the said road. It is their case that the total value of the contract as bid and agreed upon was Kshs. Twenty-Nine Million, Nine Hundred and Seventy-One Thousand and Forty-Seven and Sixty Cents (29,971,047.60/=). They also aver that it was an express term of the agreement that the 1st Defendant would pay the agreed consideration upon completion of the re-carpeting work.

4. It is the plaintiff pleading that they commenced the work as per the contract on 18th June, 2015 and handed over the completed project on 8th July, 2016. And that on 15th July, 2016 the 1st Defendant issued a taking over certificate of the re-carpeting work which signified completion of the project. They aver that the 1st Defendant made a part payment on 22nd January, 2016 totaling Kshs. Fifteen Million, Seven Hundred and Thirty Thousand, One Hundred and Eighty (Read 15,730,180 /=-), leaving behind a balance of Kshs. Thirteen Million, Two Hundred and Eight Thousand, Five Hundred and Seventy (13,208,507/=) which sum remains unpaid to date, which amount they are claiming in this suit.

5. They plead that their persistent attempts to have the 1st Defendant pay the outstanding amount has been fruitless and that they continue to suffer as they had borrowed from financial institution to finance the project, and therefore putting them at a financial strain as the amount remain unpaid.

6. The Plaintiff particularized their loss and damage as follows, that they are being deprived of the use of the contractual proceeds after duly performing the works as agreed in the subject contract, lost time in pursuing the balance of the contractual sum, anxiety, stress and lack of

sleep to the owners of the plaintiff and that the 2nd Defendant being the chief accounting officer of the 1st Defendant has neglected his duty to honour the 1st Defendants contracts.

7. The plaintiff list of documents as produced in court include:

1. **Certificate of incorporation for the Plaintiff, Certificate No. CPR/2010/18735.**
2. **CR12 Search dated 28/5/2018.**
3. **Company Resolution dated 20/4/2017.**
4. **Company Resolution.**
5. **Star Newspaper Advert dated 20/3/2015 for Tender Ref. No GCG/T/67/2014/2015 for re-carpeting of Garissa University College Road.**
6. **Receipt No. 6063901 dated 27/3/2015 for Kshs. 1000/= being payment for the tender document.**
7. **Tender Document No. GCG/T/67/2014-2015.**
8. **Notification of Award dated 19/5/2015 Ref No. CGC/CCO/RLH &PW/651.**
9. **Acceptance Letter dated 28/5/2015.**
10. **Agreement between the Plaintiff and the 1st Defendant dated 15/6/2015.**
11. **Letter to Commence work dated 8/6/ 2015.**
12. **Letter dated 8/7/2016 from the Plaintiff addressed to the Resident Engineer requesting take over.**
13. **Handing over certificate No. 6 signed on 23/7/ 2016.**
14. **Site handing over photos.**
15. **Payment voucher No. 0174 R155 for payment of Kshs 15, 730, 180/= paid on 22/1/2016.**
16. **Bank Statement from KCB for 30/5/2016 for Kshs. 14,444,644.60/=.**
17. **Demand Letter.**
18. **Tender Evaluation Report.**

8. The Defendants on their part filed a statement of Defense dated 4th June, 2018 and filed on 6th June, 2018, this was after they were granted leave to do so by Hon. Justice Dulu who had partly presided over this matter. In their defence they denied all the claims made by the Plaintiff, and that if indeed the same were true, the work done was duly paid for. It prayed that the claim by the Plaintiff should be dismissed with costs.

9. The hearing of the matter commenced with the plaintiff calling three (3) witness. **PW1 Hassan Ahmed Basabir** testified as the Director of the Plaintiff Company. He told the court that the Plaintiff successfully bid for tender Ref. No GCG/T/67/2014-2015 as advertised by the 1st Defendant vide Star Newspaper dated 20/3/2015 for the for re-carpeting of the Garissa University College road. It was his testimony that the plaintiff completed his obligations under the contract, undertook the re-carpeting of the said road, adhered to all the terms of the contract and handed over a complete project as certified by the Resident Engineer. It is his case that the cost of the Contract, which he was to be paid upon conclusion was Kshs. 29, 971, 047.60/=, however, upon conclusion of the project he was only paid Kshs. 15, 730, 180/= vide a voucher No. 0174 on 22nd January, 2016 and a balance of Kshs. 13, 208, 5700/= is yet to be paid and remains outstanding to date. It is this amount that the Plaintiff is claiming from the 1st Defendant in this instant suit.

10. Additionally, he told the court that he took loans to finance the project and that the failure by the 1st Defendants to settle the said outstanding amount has caused him financial strain, which has also affecting his health as he has developed high blood pressure as a result of lack of sleep. On cross examination, he admitted that he did not plead for interest on the owing amount. He produced the above list of documents in support of his case and urged the court to allow the same as prayed.

11. **PW2 Bernard Wambua Nzau** testified that he is a Supply Chain Manager at the Office of the County Commissioner Garissa County and previously worked as Garissa County Supply Chain Manager on secondment. He told the court that on 20/3/2015 the 1st Respondent vide the Star Newspaper advertised for re-carpeting of Garissa University Road, where the Plaintiff was among the bidders. It was his testimony that he was part of the Tender Opening Committee consisting of 8 members, where he was the secretary. He told the court that

after the evaluation of the tender and the respective bids, the Plaintiff was awarded the tender as his bid of Kshs 29,971, 047.60/= was the lowest and thus the County Tender Committee as constituted then awarded the Plaintiff the tender. A letter of award was issued and an acceptance letter received from the Plaintiff, and since there was no complaint raised over the same within 14 days an agreement was recorded between the Plaintiff and the 1st Defendant.

12. Thereafter the site handing over to the Plaintiff was undertaken, the work carried out by the plaintiff to completion and a completion certificate issued, where the Plaintiff was paid Kshs. 15, 730, 180/= as part payment via IFMIS. And that he ought to be paid a balance of Kshs. 13, 208, 507/=, and that a completion certificate signifies an authority for the payment of the entire contract amount. Further, it was his testimony that there was no complaint on the workmanship undertaken by the Plaintiff.

13. PW3 Abdikadir Ibrahim testified that he is an Engineer by profession and that in the year 2014-2015 he was working with the 1st Defendant as the Director Department of Roads, and that the tender No. GCG/t/67/ 2014-2015 was advertised by the 1st Defendant vide star newspaper on 20/3/2015. And that his role was to prepare Bill of Quantities as part of the tender documents. His testimony is similar to that of PW2, only that he was the Engineer and stated that he supervised the project and he is the one who signed the agreement between the Plaintiff and the 1st Defendant after the successful award of the contract. Additionally, he told the court that he is the one who signed the completion certificate and the payment voucher for the entire contract sum. It is his testimony that the plaintiff ought to be paid the balance of Kshs. 13, 208, 570/= outstanding as he had been paid Kshs. 15, 730, 280/=.

14. The plaintiff closed their case on 25th April, 2019, where Counsel for the Defendants indicated to the court that they had one witness who was the County Secretary but had an emergency and the matter was adjourned to 23/5/2018. On 23/5/2018 the defendants raised a Preliminary Objection which was heard and determined by the 25/9/2018 and subsequently the parties on 27/1/2020 by consent fixed the matter for hearing on 13/2/2020, however on the said date of 13/02/2020 the defendant counsel sought for further adjournment purportedly to put their defence documents in order. This court after considering the circumstance herein and the fact that the defence did not even file their list of documents and witnesses, but only a defence disallowed the said adjournment, however it went ahead and granted them the liberty to put in their witness statement as well as their written submissions.

15. The parties sought to put in written submission, which request was granted, however only the plaintiff filed their written submissions which are dated 19th May, 2020 and filed on even date.

16. Vide their written submissions, the Plaintiff reiterated their case as above. They submitted that they have availed documentary evidence that proved beyond reasonable doubt that the contract existed and that the project was carried out and demonstrated that they were partly paid and that indeed there is an outstanding balance and that all documents were admitted to evidence and none of those availed were contested by the defendants. It is their submissions that they have established that the defendants advertised for the subject contract, awarded the Plaintiff the same, the plaintiff performed the contract and a completion certificate issued and subsequently payment of the same was authorized where the sum of Kshs 15, 730, 280/= was paid leaving a balance of Kshs. 13, 208, 507/=.

17. Further, they submitted that as it stands the instant suit is undefended, as the defendants failed to file at the very least witness statements to justify their filed Defence and that no witnesses were called to explain and substantiate the Defence offered. They urged the court to allow the suit and grant general damages amounting to Kshs. 5,000,000 for breach of contract together with the balance of the contractual amount and costs so as to be a lesson to county governments for failure to honour bidding contracts.

18. They relied in the cases of **Linus Nganga Kiongo & 3 Others v Town Council of Kikuyu [2012] e KLR** and **Judge R.E. Aburili in Mary Njeri Murugi vs Peter Macharia & anor. [2016] eKLR**.

ANALYSIS AND DETERMINATION

19. I find the following issues have arisen for consideration: -

i. Whether the Plaintiff was Contracted by the 1st Defendant vide Tender No. GCG/T/67/2014/2015 to Re-carpet Garissa University College road?

ii. Is the Plaintiff entitled to the orders sought for herein?

Whether the Plaintiff was Contracted by the 1st Defendant vide Tender No. GCG/T/67/2014/2015 to re-carpet Garissa University College road

20. I have carefully considered the evidence tendered herein by the plaintiff and on whether there is indeed an existence of a tender for the re-carpeting of the Garissa University Road, it is imperative that I examine the respective tender documents. I have looked at the produced advert in the newspaper allegedly for star newspaper dated 20th March, 2015 and it is clear that indeed the 1st Respondent among other tenders advertised Tender No. GCG/T/67/2014/2015 for Re-carpeting of Garissa University College road. The notification of award to the Plaintiff was communicated to them vide a letter dated 19th May, 2015 by the then Chief Officer Roads and Public Works one Abddinasir S. Yusuf.

21. The plaintiff wrote an acceptance letter dated 28th May, 2015, and commencement letter dated 18th June, 2015 was issued by the 1st Defendant vide a letter written by PW2. On 8th July, 2016 the Plaintiff vide a letter written by Hassan Mzahir (PW1) notified the 1st defendant of their completion of the project and subsequently a Completion Certificate was issued by PW2 who testified that he was the 1st Respondent Resident Engineer then. I have also perused the agreement form dated 15th June, 2015 between the Plaintiff and the 1st Defendant.

22. Additionally, I have looked at the statement for payment on account that is dated 30/5/2016 where the plaintiff is paid the sum of Ksh 14, 444,644.60/=. It is not disputed that the Plaintiff was paid the said amount by the 1st Defendant and that the amount is part payment in respect to the subject tender No. GCG/T/67/2014/2015 for Kshs. 29,971,047/=.

23. Therefore, having considered the pleadings herein and the evidence adduced in support thereof. It is my finding that the following are the indisputable facts being that; the plaintiff was awarded tender No. GCG/T/67/2014/2015 for Re-carpeting of Garissa University College road and he was duly notified of the award; there was a contract that was executed between the plaintiff and the defendant; there were unpaid amounts due under the contract; and that the plaintiff received some monies towards the performance of the contract.

24. Therefore, on a balance of probability, this court based on the evidence tendered and the witnesses' testimonies, it is my finding that indeed the 1st Defendant contracted the Plaintiff vide tender No. GCG/T/67/2014/2015 for Re-carpeting of Garissa University College road at the cost of Kshs 29,971,047/= and that the Plaintiff has since been paid the sum of Kshs. 15, 730, 280/=. Leaving unpaid balance of 13,208,507/=.

25. The question that arises is whether the parties fulfilled all their respective obligations under the contract. The understanding from the pleadings and the evidence of the plaintiff is that the defendant has refused to pay the outstanding sum herein despite incessant demands. They are seeking an order from this court directing the defendant to pay the outstanding sum, clearly establishing that one party to the contract has failed to fulfill part of his obligations.

Whether the Plaintiff are entitled to the Orders sought

26. The Plaintiff in their prayers are seeking an order to compel the Defendants to pay them their outstanding balance and general damages. In regard to general damages for breach of contract, it is crucial to lay down the principle on this limb of damages as was held in the case of **James Maranya Mweta v South Nyanza Sugar context HCA No. 92 of 2015** that:

“An award of general damages for a claim on breach of contract, however the claimant must be put as far as possible in the same position he would have been if the breach complained of had not occurred. The measure of such damages would naturally flow from the contract itself or as contemplated by the parties at the time, the contract was made and that such damages are not at large but in the nature of special damages.”

27. Therefore, for purposes of payment of general damages, the intention is to restitute the claimant to as much as possible to the position he was before the breach occurred. The Plaintiff herein is claiming Kshs. 5,000,000/= in this respect. However, in my view I find that there is no evidence of loss as a result of the alleged failure by the Plaintiff as a result of the defendant failure to pay part of the contractual balance, what the Plaintiff ought to have claimed is interest, which however they did not claim in their prayers.

28. It is indeed clear to me that the Defendants are in breach of contract and their defence in my view is full of mere denials. The law of contracts is clear. In the instant case, when the Defendant contracted the plaintiff, they had an obligation to pay them within reasonable time upon conclusion of the project. Additionally, the defendant opted not to tender evidence in defence and thus the plaintiff's evidence remained uncontroverted.

29. In **Damondar Jihabhai & Co Ltd and another vs. Eustace Sisal Estates Ltd [1967] EA 153** Sir Charles Newbold P emphasized that the function of courts is to enforce and give effect to the intention of the parties as expressed in their agreement. It is evident that the 1st Defendant paid the Plaintiff of Kshs. 15, 730, 280/=. Leaving unpaid balance of 13,208,507/=, this has not been controverted by the Defendant. The Plaintiff received the sum of Ksh 14, 444,644.60/= after statutory deductions were made from the sum of Kshs. 15, 730, 280/=.

30. The Plaintiff through PW1 the director admitted in his testimony that they did not seek interest, however this court notes that in their prayers they have urged the court to issue any other prayer it deems fit. Guided by Forbes J observation in the case of **Tate & Lyle Food and Distribution Ltd vs. Greater London Council and another [1981] 3 All ER 716** where he held at page 722 that award of interest is not a punitive measure for having kept the Plaintiff out of his money but part of the attempt to achieve restitutio in integrum, this court therefore exercises its discretion in this regard and awards the Plaintiff interest at court rates from the date of this suit was instituted until payment of the outstanding amount in full. This is because the claim is liquidated.

CONCLUSION

31. The upshot of the foregoing is that I find that the plaintiff's case has succeeded in above terms and allow the same with costs.

32. Thus, the court makes the following orders

i. A Mandatory injunction do and is hereby issued, compelling defendants to forthwith pay the plaintiff the sum of the remaining balance of Kshs. 13,208,570/=.

ii. Costs to the plaintiff.

iii. Interest from the date the suit was instituted to date of payment in full.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 29TH DAY OF JULY, 2020.

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C. KARIUKI

JUDGE