



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO 81 OF 2014

MIDROC WATER DRILLING CO. LTD.....PLAINTIFF

VERSUS

NATIONAL WATER AND CONSERVATION

& PIPELINE CORPORATION.....DEFENDANT

JUDGMENT

1. The Plaintiff commenced this suit by filing a plaint dated 19th December 2013 and amended on 17th April 2014, seeking for judgment against the Defendant for a sum of; Kshs 62,391,433.40, plus costs and interest thereon at court rates.
2. The Plaintiff's case is that, it was contracted by the Defendant to provide services of; drilling boreholes, construction of dams, pump testing and hire of machinery at various areas within the Republic of Kenya. The works were done during the years 2006 to 2010. The Plaintiff was engaged through LPOs and LSOs issued by the Defendant after being pre-qualified.
3. The Plaintiff performed the contracted works and the Defendant was satisfied and approved the same as having been done to the specified standards. However, the Defendant made part payments deferring other payments to be made later. Subsequently, the invoices accumulated and despite the assurance of payment thereof, the Defendant failed to pay the invoices as required.
4. The Plaintiff continued to demand for payment with the Defendant promising on several occasions to pay. The default persisted even as the Defendant request the Plaintiff to carry out more works. Eventually, the Defendant failed to honour any demands for payment and/or make any payments when the outstanding balance was the sum of, Kshs 62,391,433.40 as claimed herein.
5. However, the Defendant filed its statement of defence on 7th April 2014 and amended on 24th April 2014. It admitted having contracted the Plaintiff to perform various works of; drilling boreholes, construction of dams, pump, pump testing, hire of machinery and carry out other water engineering projects as aforesaid.
6. The Defendant however denied being indebted to the Plaintiff as alleged. It was averred that, the Defendant's premises were razed down by a fire in September 2009, as a consequence of which the Defendant lost all its vital documents. It consequently commenced a forensic audit in order to analyse all the pending bills inclusive of the Plaintiff's claims.
7. It was averred that, the Plaintiff was enjoined to provide all the documents being; letters of award, contracts, local purchase orders, local sales orders, and invoices in support of its claim, but it has not fully complied. Thus all invoices not supported by the LPO and LSO are not payable. Further, the Defendant is a public office bound by; Public Financial Regulations and Accountability requirements and cannot make the payment without the requisite documentation.
8. Finally, the Defendant averred that, it filed a request for particulars on 7th April 2014 whereupon the Plaintiff responded on 10th April 2014 and filed amended particulars on 30th January 2019 providing the same. It then generated a schedule of the claim based on the invoices supplied but there is a lot of information missing.
9. The case proceeded to a full hearing. The Plaintiff's case was supported by the evidence of; Mohamed Chute who relied on his witness statement filed in court on 5th March 2014. He reiterated the averments in the amended plaint. In a nutshell he stated that, due to good working relationship between the parties, the Defendant would call upon the Plaintiff to move to a nearby site urgently and the Plaintiff would oblige.
10. That after the works were done, the engineers would then tabulate or prepare a report on the works done and a certificate of completion

would be issued for payment or the Defendant would prepare a report and the Plaintiff would then invoice the Defendant accordingly.

11. That payments were made in an erratic manner and, on several occasions, the Defendant kept assuring the Plaintiff that payments would be made, which assurance was acceptable as the company was still engaged in other ongoing works. However, when the Defendant stopped paying, the Plaintiff's lawyers wrote a demand letter dated 30th March 2012, to which the Defendant's Managing Director responded vide a letter dated 5th April 2012, requesting for indulgence of twenty (21) days and supporting documents to sort out the pending bills.

12. The Plaintiff supplied the documents and the parties held several joint meetings but no payment was made. On 2nd August 2012, the Plaintiff's lawyer wrote another demand letter to which the Defendant responded vide a letter dated 31st August 2012, requesting for more documents in relation to some invoices and attached a schedule highlighting the missing information needed. The documents were forwarded to the Defendant. Again, no payment was received.

13. On 28th June 2013, the Plaintiff's lawyer wrote yet another demand letter, to which Engineer Kiema from the Defendant's office responded thereto, vide an email dated 8th July 2013, requesting for a joint meeting between the parties to sort out grey areas. The meeting took place on 11th July 2013 and the parties agreed that, the Defendant would look at the invoices once again and verify the LPOs and the work done, as there were missing documents on certain claims as the Defendant had misplaced the ones supplied earlier. The Plaintiff photocopied the documents and supplied. However, no payment has been made.

14. In cross examination, the witness stated that, before carrying out the works, the client engaged them through LPOs and LSOs and on certain occasions, through a letter, and during emergency on phone call or verbally or in meeting depending on the circumstances of the case. He further stated that, in some instances, the Defendant's stamp does not appear on the LPOs. However, the signature of the senior accountant is on the same.

15. He maintained that LPOs are contracts with terms and conditions. There were no completion certificates in relation to LPOs as they are not required. However, there was a contract agreement between the Plaintiff and the Defendant for Halaula pan.as produced herein and did not require documents.

16. The witness confirmed that, he did not have the work tickets and other completion documents for some works done, but the work ticket produced is signed by the Plaintiff's representative one; Mr. James Malenya. He stated that, the Defendant's engineers were to give the certificates but they have refused to certify the works. In re-examination, he stated that all LPOs were valid, and were signed by the Defendant's accountant. He confirmed that the Plaintiff's company carried out the works as can be verified by visiting the sites.

17. The Plaintiff's further called its Accounts Manager; Joseph Mugo as its second witness. He relied on his witness statement and the bundle of documents filed in court. He stated that, the Plaintiff was claim for Kshs 62,000,000 comprises of the claims supported by with LPOs/LSOs in the sum of; Kshs 25 000,000 and invoices without LPOs/LSOs in sum of; Kshs 27,000,000.

18. He confirmed that the parties had attempted to settle the matter amicably but in vain. That in one of the meetings held on 11th July 2013, the Defendant's representative indicated that they had confirmed about Kshs 46, 000,000 is payable and requested for about two weeks to confirm the rest of the invoices. The Defendant asked for more documents. But no payment was made. The Defendant therefore owes the Plaintiff the stated amount of; Kshs 62,391,433.40.

19. In cross examination he stated that, the documents relied on were originals although other originals were with their lawyer. He confirmed that some of the works were contracted orally. In re-examination he reinstated that, the Plaintiff used to give invoices to the Defendant upon completion of works. The original invoices are with the Defendant and the documents in the court file are not fake but are true copies of the originals and therefore the issue of fake documents does not arise.

20. The Defendant's case was supported by the evidence of the its Chief Engineer; Benjamin Syengo Kiema who he relied on his statement dated 26th May 2014 and reiterated the averments in the statement of defence.

21. He averred that the Defendant never gives oral contracts. That sometimes in September 2009 the Defendant's premises were gutted by fire and it lost valuable documents. The Defendant wrote to all the contractors including the Plaintiff to furnish supporting documents in support of their claims. The Plaintiff provided the documents which were forwarded to a forensic expert for analysis. The expert analysed the claim and concluded that the claim was not documented hence the need for further documentation.

22. The Defendant appointed a Pending Bills Committee he chaired and it analysed the Plaintiff's claim and found the same was not payable due to lack of all necessary supporting documents; LPOs, LSO, delivery notes, invoices etc. The findings were communicated to the Plaintiff. Subsequently, meetings were held but no amicable solution was arrived at due to lack of vital documents to support the claim. He reiterated that, the Defendant as a government institution is bound by Government Financial Regulations and it would be difficult for it to pay a bill unless properly documented

23. In cross examination, he stated that, he was not aware of the Plaintiff being contracted orally or without a contract. He confirmed that, the parties had good working relationship and had business for many years. That his role as an Engineer was to coordinate the team and the issue of LPOs is within the mandate of procurement.

24. In re-examination, he maintained that the Defendant never issued oral contracts and in some cases he has not seen the original documents from the Plaintiff. That all other service providers who gave documentation were proved.

25. At the conclusion of the case, the parties filed their final submissions. The Plaintiff filed submissions dated 10th July 2019, and the

Defendant filed their submissions dated 2nd August 2019 on 23rd October 2019. The Plaintiff filed their issues for determination on 11th November 2014 and the Defendant's 22nd January 2014 respectively. The issues are similar in most aspects and include the following issues:

- a) *Did the Plaintiff provide the particularized services/contracts at the Defendant's own request and instance?*
- b) *If yes, was the Plaintiff entitled to payment for the work/services rendered to the Defendant;*
- c) *Did the Plaintiff furnish the Defendant with all the claim supporting documents due for each and every contract?*
- d) *Was the Plaintiff entitled to payment for the work/services rendered to the Defendant as shown in the claim supporting documents;*
- e) *Did the Defendant make any payments and/or part payments?*
- f) *If yes, how much is the Plaintiff owed by the Defendant*
- g) *Does the court have jurisdiction to entertain this cause of action?*
- h) *Who will bear the costs of the suits?*

26. I have considered the evidence adduced and the arguments advanced alongside the submissions filed and the aforesaid issues raised and I find that, in a nutshell the following issues have arisen: -

- a) *Whether the plaintiff rendered any services to the defendant?*
- b) *If the answer to (a) is in the affirmative, whether the plaintiff has been fully paid?*
- c) *Whether the plaintiff has proved the claim and should be granted the orders sought?*
- d) *Who should bear the costs of the suit?*

27. As regards the 1st issue I find that, there is no dispute that the Defendant engaged the Plaintiff as confirmed by the pleadings at paragraph 3 of the amended defence, wherein the Defendant admitted having engaged the Plaintiff severally on various contracts involving drilling of boreholes, construction of dams, pumps, pump testing, hire and various other water engineering projects.

28. However, the dispute herein is on the mode of engagement and/or the manner in which the Plaintiff was instructed to carry out the works. The Defendant's evidence is that, the instructions to carry out the works and services were issued through LPOs, LSOs and contracts only. That the Defendant never issued oral contracts and the burden of proof lies on the Plaintiff under sections 107 of the Evidence Act to prove the same.

29. The Defendant averred that, it is a public body regulated and bound by the Public Financial Regulation and Accountability Regulations under the Public Finance Management Act, Public Audit Act 2015 and the State Corporation Act. However, to deal with issue right away I note that the contracts herein relate to the period of 2006 to 2010, and the subject laws are post 2010.

30. The provisions of Section 19 of the Interpretation and General Provisions Act provides that where any written law, or part of a written law, come into operation on a particular day, it shall be deemed to have come or shall come into operation immediately on the expiration of the day next preceding such day. Similarly, *Bennion, Statutory Interpretation 4th Edition Section 97 at page 265*, states that unless a contrary intention appears an enactment, it is presumed not to be intended to have a retrospective operation. Therefore, the Defendant's argument holds no water.

31. Be that as it were, according to the Plaintiff, the instructions also included verbal instructions to carry out works/services depending on the prevailing circumstances.

32. Having considered the evidence herein, I find that, the Defendant gave instruction both through LPOs, LSOs and contracts as alleged but also through letter as stated by the Plaintiff. In this regard, the Plaintiff has produced a letter dated 3rd November 2007, whereby the Defendant instructed it to conduct test pump on one borehole at Madagisi and Takama water projects, in Garissa district at; a sum of; Kshs 278,600, exclusive of VAT.

33. That by a further letter dated 21st April 2008, the Defendant instructed the Plaintiff to equip one borehole at Eldoret Moi Girls Water project and trip up and down the pump, at a sum of Kshs 194,800. These two letters and the write up by Engineer Kiema filed in court on works done confirm that there were verbal instructions.

34. I further note that, the Plaintiff has produced completion certificates issued by the Defendant as evidence of works done and work tickets (at pages 158 to 159 of its bundle of documents) on the letterheads of the Defendant showing hire of the vehicles stated therein. In addition, the Defendant's witness testified that, the Defendant appointed a Pending Bills Committee to analyse the Plaintiff's claim and prepared a report which was forwarded to the Plaintiff. The Plaintiff has produced the said report.

35. Upon perusal, I find that, the said report reflects inter alia; serial number of; LSOs, invoices, amount involved and remarks on the Committee's findings. It is noteworthy that, there are LSOs reflected in the Defendant's system, which indicates that the Plaintiff was commissioned to carry out the works. Finally, Engineer Kiema prepared a schedule of works done by the Plaintiff and that corroborates the Plaintiff's evidence that, the works were done to the extent of the documents produced.

36. Be that as it were, the Defendant cannot allege works were not done due to lack of documents as the Defendant could still have visited the site of projects to physically ascertain whether the works were done or not.

37. The next question is whether the Plaintiff was fully paid. The Plaintiff has tabulated the particulars of its claim at paragraph 10 of the amended plaint and divided the same into two parts. Part A relates to invoices supported by LPOs in the sum of; Kshs 35, 078, 435.60, and those without supporting LSOs amount to Kshs 27, 312, 997. 80.

38. However, the Defendant argued that, the Plaintiff has not adduced adequate evidence in support of its claim as it has failed to produce original documents. That, the Plaintiff's documents fail the primary evidence rule and should be disregarded. The Defendant relied on the case of; *In re the Estate of Charles Ndegwa Kiragu alias Ndegwa Kiragu – (Deceased) (2016) eKLR*, where the court observed that, Section 67 of the Evidence Act provides that, documents must be proved by primary evidence except otherwise provided for in cases set out in section 68, of the Act, where secondary evidence may be given of the existence, conditions or content of a document. Further, secondary evidence shall not be given unless a notice to produce a document has been given under section 69. The meaning of primary evidence is found in section 65, which is basically the document itself.

39. The Defendant submitted that the Plaintiff's documents are not secondary evidence as they are not only copies but they are not certified, and are illegible, incomplete, unreliable, lack genuineness, correctness necessary to prove its probative value. Further, the subjects' documents do not prove existence of a contract between the parties, due to lack of valid Tender documents, letters of acceptance of the award, valid LPOs and LSOs, Completion certificates and work tickets.

40. However, the Plaintiff argued that, the original invoices were given to the Defendant and that during the hearing of the case, there was no objection to the production of the impugned documents. Similarly, since the original documents in the Defendant's premises were destroyed by fire; the Plaintiff could not retrieve them. In addition, the Defendant sought for documents and were given and if they had issues they should have raised them. Finally, the Defendant has not produced any documents to rebut the Plaintiff's.

41. In my considered opinion, the Defendant having failed to produce any documents cannot tear into the Plaintiff's documents to fill in the gap they are unable to deal with, however, in admissible the Plaintiff's documents may be. In fact, even if the Plaintiff produced the originals the Defendant would not rebut them. As submitted by the Plaintiff all the evidence led by the Defendant on lacking documents is based on the documents by the Plaintiff.

Finally, all throughout the trial, the Defendant did not invite the court to rule on the admissibility of the subject documents or strike them out. In the given circumstances of this case, I shall allow the documents.

42. The issue remains as to whether the Plaintiff has been paid all money. I have analysed the invoices produced as against the invoices tabulated under paragraph 10 of the amended plaint and I find that, it reveals invoices supported by LSOs and/or LPOs are invoices number 149, 150, 170, 191, 203, 213, 226, 144, 172, 275, 413, 183, 391, 462, 210, 224, 268, 270, 250, 616, 614, 147, 392, 466, 476, 484, 500, 604, 611 and 497. The total sums of these invoices is Kshs. 26, 532,163.80.

43. However, there are invoices which were repeated in Part A: invoices numbers 226, 183 and 391 totalling: Kshs 3,988,491.80. Finally, the invoices without supporting LPOs, are numbers: 471,168,216, 234 totalling Kshs 1,575,210. As regards invoice number 106 in the sum of; Kshs 2,116,010 dated 25th September 2006 supported by an LPO Number 695097; dated 16th November 2006, was partially settled and the amount claimed left unpaid. The Defendant has not disputed the partial payment. I award it accordingly.

44. As regard the claim under Part B of the table under paragraph 10 of the amended plaint, I find that, in the absence of the supporting documents the Plaintiff needed to produce other evidence. In that regard, I relied on the two documents of works done as stated by Engineer Kiema and found six invoices supported. They are numbers; 280, 215, 292, 310, 240, and 242. However, there are two invoices whose details could not be ascertained as they were not legible number 310 and 242, in the sums of: Kshs 136, 600 and Kshs. 345 200, respectively. However, the other four invoices totalling Kshs 626. 320 are payable. The total grand amount is Kshs 29,274,493, 80.

45. The Defendant in their evidence stated that, they conducted a forensic audit on the documents provided by the Plaintiff, however, the said forensic report was not produced to rebut the Plaintiff's evidence. Further, the Defendant during the hearing of the case alleged that, the Plaintiff's documents were not genuine. However, there has been no proof of the same. Indeed, it is trite law that he who alleges must prove and this was not done.

46. In conclusion, I find that the Plaintiff was not fully paid all its dues and despite serving demand letters on 30th March 2012 received by the Defendant on 3rd April 2012 and responded to on 5th April 2012. A subsequent demand on 2nd August 2012 and a response on 31st August 2012 and finally a demand on 28th June 2013 and received on 1st July 2013 and responded to on 8th July 2013, the defendant did not pay.

47. I therefore enter judgment in favour of the Plaintiff as against the Defendant in the sum of Kshs 29,274,493,80 plus interest at court rates from the date of filing the suit until payment in full and costs to the Plaintiff.

48. Those then are the orders of the court.

Dated, delivered and signed on this 18th day of September 2020, virtually.

GRACE L NZIOKA

JUDGE

In the presence of:

Ms. Mugo for the Plaintiff

Baraka for the Defendant

Robert-----Court Assistant