

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 548 OF 2004

KANYOTTA HOLDINGS LIMITED.....PLAINTIFF

VERSUS

KENYA PIPELINE COMPANY LIMITED.....DEFENDANT

JUDGMENT

(1) The Plaintiff **KANYOTTA HOLDINGS LIMITED** instituted this by way of the Plaint dated **12th October 2004** seeking Judgment against the Defendant for:-

(a) Kshs. 14,585,315.05

(b) Interest

(c) Costs

(2) The Defendant **KENYA PIPELINE COMPANY LIMITED** opposed the suit by way of the Amended Defence and Counter Claim dated **15th April 2005**. Aside from denying the Plaintiffs claim the Defendants filed a counterclaim against the Plaintiff seeking Judgment against the Plaintiff for:-

(a) Kshs. 17,916,038.97.

(b) Interest on (a) herein before at Commercial rates of 18% p.a from date of filing suit until payment in full.

(c) Costs of the suit.

(d) Any further or other relief that the Honourable Court may be pleased to grant.

(3) Thereafter the Plaintiff filed a Reply to Amended Defence and Defence to Counter Claim dated **26th May 2005**. Despite this suit having been filed way back in the year **2005** the hearing of the same did not commence until **October 2019** a full fourteen (14) years after the suit had been filed. The Plaintiff and the Defendant each called one (1) witness in support of their case.

THE EVIDENCE

(4) **PW1 WACHIRA MURITU** was the Managing Director of the Plaintiff Company. **PW1** relied entirely upon the contents of his witness statement dated **22nd February 2019**. He told the Court that vide a letter dated **5th November 2002** the Defendant awarded to the Plaintiff Company a contract to undertake the reinstatement of the Defendants right of way along the Mombasa – Nairobi Pipeline at **KM-60-63,138 and 235**. The value of the contract was **Kshs. 20,525,097/-**.

(5) Following the award of the contract the Defendant instructed the Plaintiff vide the letter dated **8th November 2002** to carry out bush clearing between the areas agreed on in the contract. That therefore the entire contract involved the building and establishment of gabions, clearing of bushes along the Defendants right of way as well as the protection of the Pipeline from being washed away by rain and ensuring that the Pipeline was properly secured and protected from damage by rains.

(6) **PW1** testified that at the time the parties entered into the agreement the Defendant did not communicate to the Plaintiff about any varied quantifications save for what was contained in the Original Bills of Quantities. **PW1** stated that after the Plaintiff had performed a substantial part of the contract the Defendant through a letter dated **20th June 2003**, informed the Plaintiff that they would be conducting a joint evaluation of the work done and the remaining works before the Plaintiff would be permitted to resume the works.

(7) According to **PW1** this joint evaluation did not take place. Nevertheless the Defendant on **21st October 2003** wrote to the Plaintiff indicating that a re-evaluation had infact been conducted which evaluation revealed variations in the agreed works. Accordingly the Defendant indicated its intention to re-negotiate the contract in line with the actual works done on site. The said negotiations took place on **12th January, 2005** but no agreement was reached. The Plaintiff then resumed and completed the works. **PW1** concedes that the Plaintiff

was paid the sum of **Kshs. 17,446,332** leaving a balance of **Kshs. 14,585,315.05** from the original contract sum. Despite the Plaintiff making demand for this outstanding amount no payment was forthcoming from the Defendant leaving the Plaintiff with no option but to file the instant suit.

(8) During the pendency of the suit a meeting was held between the parties on **12th February 2005**. At that meeting the Plaintiff insisted that it had done and completed the works within six (6) months to the specifications in the letter of award dated **5th November 2002**. At the meeting it was resolved that the Plaintiff avail evidence to support its claim of work done whilst a **Mr. S. K. Waweru** was tasked to confirm whether the bush clearing which was the responsibility of the Defendant had been done.

(9) However **PW1** states that the Plaintiff was unable to come up with documentary proof required as the same had been submitted to the **Mbela Commission**, which had been appointed to look into and verify all pending claims against the Defendant. That attempts to retrieve said documents from the **Mbela Commission** had proved unsuccessful as the Plaintiff was informed that the documents had been forwarded together with the Final Report of the Commission to the Ministry of Energy. **PW1** pointed out that the **Mbela Commission** had cleared the Plaintiff and had recommended that it be paid its dues.

(10) Finally **PW1** asserted that the Plaintiff had undertaken to completion all the work as contracted to it by the Defendant and that it is owed the outstanding balance of **Kshs. 14,585,315.05**. Similarly **PW1** denied categorically that it owed the Defendant the sum of **Kshs. 17,916,038.97** as claimed in the Defendants Amended Counterclaim dated **15th April 2005**. He prayed that the said counter-claim be dismissed in its entirety with costs to the Plaintiff.

(11) **DW1 EDWIN OMOLLO** is a Senior Civil Engineer working with the **Kenya Pipeline Company Limited** since the year **1999**. **DW1** relied entirely upon his written statement filed on **30th April 2019**. **DW1** in his evidence confirms that through a letter dated **5th November 2002** the Defendant contracted the Plaintiff to undertake the reinstatement of the Defendants right of way on the Mombasa – Nairobi Pipeline (**Line 1**) at **KM 60-63, 138 and 235** as well as on the Nairobi – Eldoret Pipeline (**Line 2**) **KM 34-43**.

(12) **DW3** stated that at some point the Defendants conducted an inspection of the works which were being done on **line 1**, which inspection revealed that the works were not being done as per the contract and that the Defendant had potentially overpaid the Plaintiff. That sometime in **March 2003** the Defendants stopped the Plaintiffs from continuing execution of the works as it was alleged that the Plaintiff did not have the necessary work permits and that they were working without a **KPC** supervisor on site.

(13) When the Plaintiff requested to be allowed back on site the Defendant insisted that an evaluation of the work already done would have to be undertaken. **DW1** went on to testify that an evaluation was there after conducted which evaluation revealed that the quantities of actual work done varied substantially with what the Plaintiff had claimed been paid for. Accordingly the Defendant indicated its intention to renegotiate the contract in line with the work actually done on site. **DW1** went on to elaborate that according to the evaluation conducted on **line 1**, it came to light that despite having been paid the sum of **Kshs. 17,466,332.00** the Plaintiff had not completed works of commensurate value – that the Plaintiff had claimed to have done much more work than was actually observed on site and further that some of the work claimed as done by the Plaintiff had actually been carried out by the Civil and Building section of the Defendant as part of their maintenance and rehabilitation activities.

(14) **DW1** told the Court that a meeting was held between representatives of both the Plaintiff and the Defendant in order to resolve inter alia the following issues:-

- (a) the payments already made to the Contractors did not tally with actual value of works carried out on site;**
- (b) the Quantities applicable in the BQs were much more than actual works on site; and**
- (c) the quoted Contractor's rates were much higher than the applicable market rates for the same work.**

(15) That at the said meeting the following resolutions were reached:-

- (a) Joint evaluation / re-measurement of the works would be done to ascertain the works completed and the outstanding works in the contract. The representatives of the Defendant Company and those of the Plaintiff would be present;**
- (b) Bill of Quantities for the works would be availed by the Plaintiff to the Defendant;**
- (c) On completion of the evaluation, another meeting was to be convened; and**
- (d) The deadline for the completion of the above was to be 7th of May 2004.**

(16) According to **DW1** this joint evaluation was undertaken on **27th April 2003** and concluded on **8th May 2003** from which it became clear that the Defendant had overpaid the Plaintiff to the tune of **Kshs. 13,366,038.97** for **line 1** and **Kshs. 4,550,000** for **line 2** making a total overpayment of **Kshs. 17,916,038.97**. **DW1** stated that following the evaluation the following recommendations were made:-

- (a) that the Contractors be requested to go back to site to complete all outstanding works and any other additional works until they have done works equivalent to their contract amounts;**
- (b) that KPC terminates these contracts and recovers from the Contractor all the overpaid amounts;**

(c) That KPC may re-negotiate and enter into a service contract with these contractors for ROW reinstatement works both of Lines I & II with a view of trying to recover the overpaid amounts which at the same time getting value for money.

(17) Thereafter the Plaintiff sent to the Defendant a letter demanding payment for the entire works which the Plaintiff claimed to have completed. At a meeting held on **12th January 2005** it was agreed that the Plaintiff would avail to the Defendant all the necessary documents to enable them tabulate the amount due to the Plaintiff. However to date the Plaintiff has not availed the required documentation.

(18) **DW1** further stated that the Defendant prepared a report applying the rates in the Bill of Quantities to the physical works actually done on site. The said report was particularized as below:-

	Section	Contract Amount (Kes)	Payments made (Kes)	Value of measured work (Kes)	Money owed to Defendant (Kes)
Line I	KM 1/60-63,138,183&235	20,525,047.00	17,466,332.00	4,100,293.03	13,366,038.97
Line II	KM II/34-43	15,167,000.00	4,550,000.00	0.00	4,550,000.00
TOTALS			22,016,332.00	4,100,293.03	17,916,038.97

(19) However **DW1** states that the Plaintiff refused and/or declined to sign the above report to confirm its findings. The Defendant asserts that the Plaintiff failed to complete the works as contracted and insists that the Defendants have overpaid the Plaintiff to the tune of **Kshs. 17,916,038.97** which amount the Defendant claims from the Plaintiff through the Counter-Claim dated **15th April 2005**. Therefore the Defendant prays that the Plaintiffs suit against it be dismissed in its entirety and further seeks for Judgment as prayed in the Counter-Claim.

(20) At the close of oral hearing parties were invited to file and exchange their written submissions. The Plaintiff filed its written submissions on **29th January 2020** whilst at the time of preparation of this Judgment the Defendants submissions were not in the Court file despite their having been given 14 days from **25th February 2020** to file the same.

ANALYSIS AND DETERMINATION

(21) I have carefully considered the evidence adduced by the witnesses in this case, the written submissions filed as well as the relevant law. The two issues which arise for determination are as follows:-

(i) **Whether the Plaintiff has proved its claim against the Defendant.**

(ii) **Whether the Defendants Counter Claim has been proved.**

(22) In any Civil case the burden lies upon the party alleging the existence of a particular fact or a set of facts to prove the existence of the same. This principle is encapsulated by **Section 107** of the **Evidence Act Cap 80, Laws of Kenya** which provides as follows:-

“107 Burden of Proof

(1) **Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

(2) **When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”**

(23) In the case of **Gichinga Kibutha V Caroline Nduku [2018]eKLR**, the Court stated:-

“It is therefore, settled law that in Civil Cases, a party who wishes the Court to give a Judgment or to declare any legal right dependent on a particular fact or sets of facts, that party has a legal obligation to provide evidence that will best facilitate the proof of the existence of those facts. The party must present to the Court all the evidence reasonably available on a litigated factual issue.”

(i) The Plaintiff's Claim

(24) The question of whether a contract existed between the parties is not in any doubt. Annexed to the Plaintiffs Bundle of Documents filed on **25th February 2019** (Annexure ‘P.1’) is the Letter of Award dated **5th November 2002** written by a **Dr. L. L. Cheruiyot** the Managing Director of the Defendant. The Letter of Award read inter alia as follows:-

“... The contract has been awarded to you at the cost of Kshs. 20,525,097/-. You are requested to mobilize immediately and begin work. The work should be completed as soon as possible. One of our Engineers will be attached to you for the supervision of the work.”

(25) Annexure P-2 to the Plaintiffs Bundle of Documents filed on 25th February 2019 is a further letter from the Defendants to the Plaintiff. The letter dated 8th November 2002 and reads as follows:-

“CONTRACT TO REINSTATE RIGHT OF WAY ON LINE 1 – MOMBASA – NAIROBI PIPELINE AT KM 60-63, 138, 183,235

Further to our letter Ref AD/RW/1030 dated 5th November 2002 awarding you contract to carry out the reinstatement of the right of way at the above points, you are also required to carry out bush clearing between the above stated points and whose cost is already included in the cost shown in the said letter of award.”

(26) The Defendants readily concede that they had contracted the Plaintiff to carry out the reinstatement works. In his written statement filed on 30th April 2019 DW1 stated as follows:-

“On 5th November 2002, the Defendant Company through a letter informed the Plaintiff to undertake the reinstatement of the Defendant’s right of way on the Mombasa – Nairobi Pipeline (Line1) at KM 6063, 138, 183 and 235, and on the Nairobi – Eldoret line (line 2) KM 34-45.”

I am therefore satisfied that there existed a legally valid and enforceable contract between the Plaintiff and the Defendant.

(27) The Plaintiff claims that following the award of the contract, they commenced the reinstatement works and that all was proceeding well until **June 2003** when the Defendant stopped the works ostensibly in order to conduct an inspection. The Defendant after conducting that inspection then declared that the works done by the Plaintiff did not meet the required standard. This inspection of works was to have been conducted **jointly** with both parties present but the Plaintiff denies having participated in or having been involved in any joint evaluation. The Plaintiff maintains that the Defendant decided unilaterally to conduct an evaluation as communicated vide their letter dated **20th June 2003**. The Plaintiff states that by this time it had completed a substantial portion of the works to be done (upto 90%).

(28) It is not in doubt that by this time the Plaintiff had already been paid a sum of **Kshs. 17,916,038.97**. The Plaintiff asserts that it completed the works as awarded and is thus owed the balance of the contract sum being **Kshs. 14,585,315.05**.

(29) The fact that the Plaintiff had been paid the sum of **Kshs. 17,916,038.97** suggests to this Court that the works upto the point when payment of that amount was made, were found to be satisfactory. Indeed **DW1** confirmed to the Court that it was not possible for a contractor to be paid unless the Defendants Engineers had inspected the works and confirmed the same to be satisfactory. Only then would payment to a contractor be approved.

(30) In this case the Plaintiff was paid in full for the works done on the Mombasa – Nairobi Pipeline (**Line 1**) and had been partially paid for the Nairobi – Eldoret Line (**Line 2**). **DW2** confirms that the Plaintiff was stopped from proceedings with the works at **Mai-Mahiu**. It is curious to say the least that after having done a large portion of the works, the Defendant decided to stop the works ostensibly to conduct an evaluation of the same. There was no provision in the contract between the parties for such evaluation.

(31) In a letter dated **20th June 2003** (Annexure ‘P3’ at page 10 of the Defendants Bundle of Documents filed on **30th April 2019**) the Defendant purports that the evaluation was necessitated by the fact that the Plaintiff had all along been working without a **KPC** Supervisor on site. It is not conceivable that the Plaintiff would have mobilized in **November 2002** conducted and completed the works on **line 1** and proceeded with the works on **line 2** upto **Mai-Mahiu** without the Defendants site Engineers inspecting an approving said works. On what basis then was the sum of **Kshs. 17,916,038.97** approved for payment to the Plaintiff. That would suggest a great dereliction of duty by the Defendants in their supervision of the works.

(32) I find that the payment of **Kshs. 17,916,038.97** could only have been approved and paid to the Plaintiff once the works upto that point were inspected found to be satisfactory. The Defendant cannot two (2) years after that payment turn round and suddenly claim that the payment of **Kshs. 17,916,038.97** ought not to have been made to the Plaintiff and that there was need to evaluate works which had already been completed and paid for.

(33) At **page 10** of the Plaintiffs Bundle of Documents filed on **25th February 2019** is an Internal Memo dated **5th June 2003** from the Defendant. In that Memo under **“Recommended the way forward.”** It reads as follows:-

1. The Administration Department to hand-over these works to the Engineering Department who are better placed to execute the works. The hand-over should include the contract documents, payments made and outstanding, contract agreements if any, physical sites as indicated in the contract documents, etc.

2. The Engineering Department to carry out an evaluation of the works done and the outstanding works.

3. The Company to negotiate with the contractors with an aim to reduce the contract sums.

4. The Contractors be allowed to move back to site and complete the works under the supervision of the Civil Engineering Division. [own emphasis]

(34) From the above it is clear that the actions of the Defendant were motivated largely by a desire to reduce the contract amount. This is why the Defendants sought to re-negotiate the contract after having paid part of the contract sum to the Plaintiff. I find that it is more than

probable that the Defendants action of stopping the works and insisting upon a re-evaluation was motivated by a desire to reduce the contract amount through a re-negotiation. The Agreement between the parties made no provision for evaluation of works and/or for re-negotiation of the contract. It is trite law that a party is bound by the terms of a contract it has entered into. Courts will not be used to re-write contracts between parties. In the case of **GATOBU M'IBUUTU KARATHO –VS- CHRISTOPHER MURIITHI KUBAI [2014]eKLR** it was held that:-

“A Court of law cannot re-write contracts between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved.”

(35) The issue arose that the Plaintiff was requested to avail documents including reports from the supervisor. The supervisor was to have been engaged by the Defendant. How can the Plaintiff be required to produce and avail to the Defendant reports prepared by the Defendants own agent? Regarding the other supporting documents which the Plaintiff was to produce, **PW1** has explained that these were submitted to the **Mbela Commission**, which was investigating the contract and payments made to the Plaintiff. The Commission then submitted that report to the Ministry of Energy under which the Defendant fell. As such these documents were more easily accessible to the Defendant and it was unreasonable to require the Plaintiff to produce the same.

(36) Based on the above I am satisfied that the Plaintiff has proved its claim on a balance of probability. The Defendants have failed to prove where the contracted works were either not completed or not satisfactorily done. Accordingly the Plaintiffs suit succeeds. I enter Judgment for the Plaintiff against the Defendant for **Kshs. 14,585,315.05** plus interest at Court rates from the date of filing of this suit until payment in full. The costs of the suit are also awarded to the Plaintiff.

(ii) Counterclaim

(37) The Defendants have counterclaimed for the sum of **Kshs. 17,916,038.97** which it claims was overpaid to the Plaintiff. As discussed earlier this court rejects the notion that the Defendant paid out such a large amount without ascertaining that the works had been satisfactorily conducted. At **page 4** of the Defendants Bundle filed on **30th April 2019** is an Audit Report prepared by the Defendant. **Item No. 2** of that report under the heading **“POTENTIAL OVER PAYEMNT OF WORK DONE”** reads as follows:-

“OBSERVATION

As at the time we carried out the inspection, it is most likely (subject to Civil Engineer’s Evaluation) that there was potential over payment of work done. We noted that the contractor had significantly mobilized his work force to complete the remaining work in the short time possible. It appears that substantial payments were made when no work had been done. It is now that work is being done to justify the payments earlier made and to match work done with the payments made to date.” [own emphasis]

(38) The wording used in this paragraph suggests that the fact of overpayment was merely ‘suspected’. Even the Defendants themselves were not certain that there had in fact been an overpayment. The fact that this counter-claim is merely an afterthought by the Defendants is evidenced by the fact that in the meeting held between the parties on **12th January 2005** (after the commencement of this suit) the Defendants made no mention at all of the alleged overpayment of **Kshs. 17,916,038.97**. Furthermore the documents on which the defendant sought to rely to prove its counter-claim were all internal memos to which the Plaintiff had no input at all. Moreover since **June 2003** when the works were stopped the Defendant has made no written demand for refund of this alleged overpayment from the Plaintiff. It is telling that in the Defendants original Defence there was no counter claim. The counter claim only surfaced in the Amended Defence dated **15th April 2005**. **DW1** sought to rely on the ‘Field Notes’ in the handwritten document appearing from pages **39-44** of the Defendants Bundle of Documents filed on **30th April 2019**. The said Document bears a signature on each page. **DW1** said he did not author the said field notes nor did he sign the field notes. **DW1** was unable to identify whose signature appeared on the said documents. The Court cannot be expected to rely on unsubstantiated documents as proof of the Defendants counter-claim.

(39) Under cross-examination **DW1** confirmed that no contractor can be paid any amount unless a Certificate of Payment signed by the Defendants Site Engineers confirming that the work for which payment is being invoiced has actually been done, certified and approved. Under cross-examination **DW1** states that he was unable to confirm whether or not **KPC** supervisors certified the works done by the Plaintiff. How then can the Defendant claim that the payment to the Plaintiff of this **Kshs. 17,916,038.97** was not properly approved and certified? As I stated earlier it is inconceivable that such a large sum could be paid out to a contractor by the Defendant without the requisite confirmations and approvals having first been obtained. The Defendants have failed to prove that the Plaintiffs were paid when no works had been undertaken or where the works were found to be unsubstantial. If this were the case then I am certain no payment would have been made to the Plaintiffs at all. I therefore find that the Defendants have failed to prove their counter-claim. The same is hereby dismissed and costs are awarded to the Plaintiff.

CONCLUSION

(40) Finally this Court makes the following orders:-

(i) Judgment be and is hereby entered in favour of the Plaintiff against the Defendant in the sum of Kshs. 14,585,315.05.

(ii) Interest is awarded on (i) above at Court rates from the date of filing of this Suit until payment in full.

(iii) Costs of this suit are awarded to the Plaintiff together with interest at Court rates until payment in full.

It is so ordered.

Dated in Nairobi this 21ST day of DECEMBER, 2020.

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MAUREEN A. ODERO

JUDGE