



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO.731 OF 2008

NORTH END TRADING COMPANY LIMITED

(Carrying on the Business under the registered name of

KENYA REFUSE HANDLERS LIMITED.....PLAINTIFF

VERSUS

THE CITY COUNCIL OF NAIROBI.....DEFENDANT

JUDGMENT

1. The plaintiff **NORTH END TRADING COMPANY LIMITED** (carrying on the Business under the registered name of **KENYA REFUSE HANDLERS LIMITED**) through a plaint dated 8th December 2008, and filed on the even day sued the defendant seeking the following orders:-

- a) Kshs.124,953,468.75/- being the total principal amount outstanding.
- b) Interest on (a) above compounded at the prevailing commercial bank rates from 1st March 2004 until full and final determination of this suit.
- c) Costs.
- d) Any other or further relief as may be deemed necessary by this Honourable Court.

2. The defendant upon service entered appearance on 16th January 2009 and filed defence on 26th January 2009.

3. On 18th May 2011 parties entered consent on the following terms:-

1) Judgement be and is hereby entered partly in favour of the Plaintiff for the sum of Kshs.70, 372,160/- plus costs to be paid to the plaintiff by the defendant herein.

2) The disputed balance as per the Plaint namely Kshs.54,581,308.75 to be proved by way of evidence at the trial and that all documents in proof be exchanged by parties before the suit is fixed for any further hearing or orders.

3) That costs in respect of clause (2) above to abide the outcome of the hearing.

4. That despite the above mentioned Consent Judgement, the Defendant has failed, ignored and blatantly refused to honour the order to pay the Plaintiff Company Kshs.70,372,160/-. That owing to the Defendant's non-compliance with the Consent Order, the Plaintiff was compelled to institute Judicial Review proceedings seeking orders of mandamus to compel the Defendant to pay the decretal sum contained in the order dated 23rd of August, 2011. The Honourable court proceeded to issue an order of Mandamus directed at the Defendant and compelling them to pay the Plaintiff the sum of Kshs.72, 374,610/- as contained in the decree dated 23rd August, 2011. To date the defendant only paid Kshs.20 Million on 22nd May 2015 out of the 72,374,610 Shillings that the defendant had consented to pay. Accordingly, the defendant further deprived the plaintiff of Kshs. 52,374,610 that was due under the consent in addition to the other payment claimed under the plaint.

5. When the matter came up for hearing the plaintiff called one witness, who adopted the plaintiff's witness statement and the list of documents of exhibits which were accordingly marked as **Exhibit P1 and P2**. The defence on its part did not call any witness and closed their case without producing any evidence to controvert the evidence of the plaintiff.

6. I have very carefully considered the plaintiff's plaint, evidence adduced, the defendant's defence, and submissions by the plaintiff dated 3rd December 2018 as well as the submissions on behalf of the defendant dated 4th December 2018. The issues arising thereto for determination are in my view as follows:-

a) **Whether there was a contract between the Plaintiff Company and the Defendant?**

b) **Whether the Plaintiff Company was paid for the works done?**

c) **Whether the Plaintiff Company is entitled to interest on the amounts owing to the Plaintiff Company for works done?**

d) **Whether the Plaintiff Company is entitled to general damages accruing from the Defendant's failure to honour their contractual obligations on time?**

e) **Whether the Plaintiff Company is entitled to interests on the amount of general damages that may be awarded?**

A) Whether there was a contract entered into between the plaintiff and the defendant?

7. In the instant case, the plaintiff testified that it entered into contract with the defendant dated 14th May 1997. The content of the same is contained in the plaintiff's plaint under paragraphs 3,4,5,6 and 7 which the defendant did not controvert or deny in its defence. It was further testified that the defendant through its Tender and Finance Committee awarded the plaintiff, the contract **ENV/2/97 (the original contract)** for refuse collection, road sweeping, litter collection and disposal (**Exhibit 2**).

8. That the plaintiff further testified that upon expiry of the original contract, the same was extended for a further period of one year on 16th September 1998. That as per council meeting held on 14th September 1999 the original contract was once again extended and on 24th July 2001 the original contract was again extended for a further term of six months commencing 20th August 2001. (**See exhibit P2**).

9. The defendant did not call any evidence before this court controverting the plaintiff's any way. I find that the plaintiff's evidence remains unchallenged. I am therefore satisfied with it as the plaintiff was supposed to call evidence to prove its claim on balance of probability and there being no rebuttal of its evidence, the plaintiff proved that there was a valid contract entered into between itself and the defendant herein.

B) Whether the plaintiff company was paid for the work done?

10. According to **PW1**, in her evidence, it was averred that it was an express condition of the original contract and each extension of the original contract and other contractual engagements pursuant to the original contract the same would be governed by terms and conditions of the original contract. The original contract provided for provision of services was on an invoice, credit and/or check off system in which the defendant would from time to time request for services which the plaintiff was under obligation to provide and upon providing the services would provide the invoices to the defendant for payment of the rendered services. The defendant was under obligation to process the invoices and make payments.

11. The plaintiff called evidence to the effect that owing to the defendant's negligence and want of due care it misplaced and/or lost all the invoices provided to it by the plaintiff and sought the plaintiff to furnish it with the rest of the invoices in possession of the plaintiff. **PW1** testified that the plaintiff forwarded to the defendant the rest of the invoices as well as the folios that were remaining in the original invoice book in plaintiff's possession. The defendant acknowledged having been supplied with the invoices and documents supporting the plaintiff's claim of Kshs. 156 million. The position was considered by the defendant's legal manager as per Exhibit 2 on pages 155 and 156 of the plaintiff's bundle of documents. At the hearing **PW1** was able to present to the court bundle of all invoices that has been left in possession of the plaintiff after handing over the original documents, which was done through exhibit 3. The plaintiff demonstrated that it made several demands of payment of its claim as per exhibit 2 on pages 85 – 86, 108 – 110, 114 – 137. It is of great concern to note none of the said demands was challenged and none was honoured by the defendant. The defendant appointed committee to reconcile the accounts on plaintiff's claim but the committee failed, neglected and/or refused to amicably settle the plaintiff's claim (*see exhibit 2 pages 130 and 142 – 144*).

12. **PW1** further testified that on 9th January 2006 the defendant indicated the amount as outstanding from its reconciliation of account as being Kshs.70, 372,160 (*Exhibit 2 page 99*) and as per letter dated 9/1/2008 the defendant admitted the total debt owing was Kshs.125, 795,650 thereby leaving a dispute of Kshs.84, 792,515 being the balance after the deduction of the admitted amount. In the instant suit, the defendant did not dispute there being money owed to the plaintiff. The only issue raised by the defendant was only the issue of reconciliation of accounts which the defendant undertook to do but failed so to do for no apparent reason after the plaintiff had supplied the defendant with even their original documents. Indeed the plaintiff in its plaint under paragraph 32 the plaintiff gave particulars of all unpaid invoices running to 8 pages of the plaint. The defendant in its defence dated 26th January 2009 did not deny or comment on the contents of the plaintiff's plaint under paragraph 32. The defendant in its defence behaved as if paragraph 32 did not exist and as if it was not of any value when the case of the plaintiff's claim lied squarely under the said paragraph. I find the defendant did not deny the plaintiff's claim on unpaid invoices as set out in the plaint.

13. In the defendant's counsel submissions it is urged that **PW1's** failed to prove that it rendered the services worth the amount claimed as the plaintiff was unable to produce invoices but testified that it had given the original invoices to the defendant and that there was no notice

to the defendant to produce the invoices and that the plaintiff did not explain where she got the data from as all originals were with the defendant.

14. **PW1** gave evidence before court and clearly without any ambiguity explained that she had given the original receipts to the defendant and had her own copies. I observed her demeanor and found **PW1** as a truthful witness and I believe that she gave the original receipts to the defendant for reconciliation purposes and had her own data when she relied up in bringing up this suit. The invoices listed under paragraph 32 of the plaint have not been denied nor challenged. The defendant who was supplied with the original documents and failed to reconcile the accounts cannot use his own mistakes or negligence to deny the plaintiff its lawful payments.

15. I am alive to the fact that the defendant apart from filing a defence failed for no apparent reason to appear and defend itself. No single witness was called on behalf of the defendant. The issue arising therefore is what are the consequences of the defendant failing to adduce evidence having filed a defence to the plaintiff's claim.

16. **Section 107 of the Evidence Act (Cap 80) Laws of Kenya** provides:-

"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."

17. It is settled law 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.

18. In **Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No.23 of 1997**, it was held that where a defendant does not adduce evidence the plaintiff's evidence is to be believed, as allegations by the defence is not evidence.

19. In the case of **Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No.834 of 2002**, Lesiit, J. citing the case of **Autar Singh Bahra and Another vs. Raju Govindji, HCCC No.548 of 1998** appreciated that:

"Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail."

20. In the case of **Karuru Munyororo vs Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988**, Makhandia, J held that:

"The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon."

21. It is my view, that a party to a case having filed his pleadings should call evidence where the matter is considered to proceed by way of evidence. It is trite law that where a party fails to call evidence in support of its case, the party's pleading are not to be taken as evidence, but the same remain mere statements of fact which are of no probative value since the same remain unsubstantiated pleading which have not been subjected to the required test of cross-examination. A defence in which no evidence is adduced to support it cannot be used to challenge the plaintiff's case. The failure to call evidence means that the evidence adduced by the plaintiff remain uncontroverted and therefore unchallenged. In such a situation the plaintiff is taken to have proved its case on balance of probability in absence of the defendant's evidence. In the instant case the plaintiff gave evidence which was not challenged, proved documents in support of her claim. I find the plaintiff's evidence to be credible and I am satisfied the plaintiff pleaded and proved her claim for special damages.

C) Whether the plaintiff company is entitled to interest on the suit owing to the plaint for work done?

22. The parties had as per their contract agreed that the invoices were to be settled within 30 days from the date which each invoice fell due and that failure to settle the invoices within 30 days were to attract interest on a monthly basis at the prevailing Central Bank's commercial rate. I am alive to the fact that it is not the business of the court to rewrite contract between parties but courts are bound by the terms of the contract between parties unless coercion, fraud or undue influence are pleaded and proved. In support of this proposition I rely on the case of Court of Appeal in **National Bank of Kenya vs Pipe plastic Samkolit (K) Ltd (2002) 2 ER 503** where the Court of Appeal held; that the primary task of the court is to construe the contract and any terms implied in it.

23. I find and agree with plaintiff's Advocate that the plaintiff has been deprived of the use of the monies due to it by reason of flagrant default on the part of the Defendant, and therefore ought to be compensated for such deprivation by way of compound interest this having been a commercial transaction. I have taken into consideration the Court of Appeal decision in **Lata vs Mbiyu [1965] EA 392** where it was held that:-

"The award of interest on a decree for payment of money for a period from the date of the suit to the date of the decree is a matter entirely within the court's discretion, by section 26 of the Civil Procedure Act but such discretion must, of course, be judicially exercised...It is clearly right that in cases where the successful party was deprived of the use of goods or money by reason of a wrongful act on the part of the defendant, the party who has been deprived of the goods or money to which he is entitled should be compensated for such deprivation by the award of interest."

24. Under **Section 48 of the Public Procurement and Disposal Act, and Section 140** of the current Public Procurement and Asset Disposal

Act, No. 33 of 2015 both recognize that unless the contract provides otherwise, the procurer is under obligation to pay interest on overdue amount at the prevailing commercial bank rates.

D) Whether the plaintiff company is entitled to General damages for the defendant's failure to honour their contractual obligations on time?

25. It is trite law that general damages are not generally payable for breach of contract, however there are exceptional to that general rule. The conduct of the plaintiff and the defendant is to be taken into account in determining whether to grant or not to grant general damages. In the instant case, the plaintiff company discharged its contractual obligations as had been agreed and contained in the original contract document, reference ENV/2/97 and in the extensions that followed thereafter.

26. Faced with similar situation Hon. Justice Chitembwe in Kakamega HCCC No. 19 of 2011 Abel M. Momanyi Birundu vs Kenya Power & Lighting Company Limited, had the following to say:-

"Although counsel for the respondent appears to suggest that the appellant ought to have specifically proved general damages it is clear that where there is a wrong which is established to have occurred then damages ought to follow. I do find that a sum of Kshs.200, 000/- would be reasonable compensation for the appellant...The appeal on general damages is hereby allowed and the appellant is awarded a sum of Kshs.200, 000/-."

27. In view of the above, I find the defendant applied all manner of delaying tactics not to settle the plaintiff's claim even after recording a consent admitting substantial part of the plaintiff's claim, the defendant has deliberately failed to settle the admitted claim. The defendant further tried to use all tricks it could master so as not to discharge its contractual obligations. I find that though general damages are not generously payable for breach of contract, that the plaintiff's case is an exceptional to the general rule in view of the unjustified conduct exhibited by the defendant in denying the plaintiff its lawful payments. The plaintiff has established a wrong has occurred in support of its claim. I would find that a sum of Kshs.500, 000 would be a reasonable compensation to the plaintiff in the form of general damages.

E) Who should bear the costs of this suit?

28. Section 27 of the Civil Procedure Act, provides that costs follow event and the same can be granted at the discretion of the court, which discretion should be exercised judiciously. In the instant case, I have come to the conclusion that it is due to the defendant's unjustifiable and unreasonable actions that precipitated to these proceedings and it is in the interest of justice that this court do substantive justice to all the parties having legal and equitable interest in the matter. I therefore find that the defendant is to blame for the filing of this suit and that as the plaintiff is successful, the defendant should bear costs of the suit.

29. The upshot is that the plaintiff's suit succeeds. I proceed to enter judgement in favour of the plaintiff as follows:-

a) The plaintiff is awarded Kshs.124,953,468/75/- less Kshs.70, 372,160/- as per consent dated 18th May 2011 leaving a balance of Kshs.54, 581,308/75.

b) Interest on (a) above at the prevailing commercial bank rates from 1st March 2004 until payment in full.

c) Costs of the suit to the plaintiff.

Dated, signed and delivered at Nairobi this 24th day of January, 2019.

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J .A. MAKAU

JUDGE