



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D.S. MAJANJA J.

CIVIL SUIT NO. 5 OF 2018

BETWEEN

ELECON ENGINEERING (K) LIMITED.....PLAINTIFF

AND

JIPA OIL COMPANY LIMITED.....DEFENDANT

JUDGMENT

Plaintiff's Case

1. In 2011, the plaintiff ("ELECON"), a construction company, and the defendant ("JIPA") entered into a contract for the construction of a building on JIPA's property; KISII TOWN/BLOCK III/95. The contract was not completed and the parties agreed to separate whereupon they entered into an agreement contained in a document titled, "FINAL ACCOUNT" in which the value of the work done by ELECON was quantified and the net amount found due to it agreed at Kshs. 39,325,652.65 as at 26th June 2013. ELECON admitted that it later paid Kshs. 10,000,000.00 leaving Kshs. 29,325,652.65 which the plaintiff claimed.

Defendant's Case

2. In its statement of defence and set-off, JIPA admitted that at the time of termination of the contract, the debt in favour of ELECON stood at Kshs. 39,325,652.65 and that ELECON was paid Kshs. 10,000,000.00 leaving a balance of Kshs. 29,325,652.65 only. JIPA contended that ELECON owed it Kshs. 7,128,000.00 for assorted building materials supplied to it and for which it was obliged to pay. It also claimed Kshs. 10,760,000.00 which it paid to Kenya Revenue Authority ("KRA") on account of taxes that were to be paid by ELECON. It also claimed Kshs. 7,341,500.00 being the costs and expenses incurred towards rectification of defective and sub-standard works after ELECON had left the site. In view of the set-off it admitted that it owed Kshs. 3,152,000.00. JIPA prayed that the suit be dismissed save for the amount it admitted.

Pre-trial matters

3. Following an application for judgment on admission, I entered judgment for Kshs. 3,152,000.00 by a ruling dated 29th October 2018. The matter was fixed for hearing and Ebrahim Aliyar (PW 1) testified on behalf of ELECON while Josephat Mwangi Moracha (DW 1) testified on behalf of JIPA. Prior to the hearing I directed the defendant to file an affidavit setting out the basis of its set-off which it did by filing the affidavit sworn on 2nd April 2019 by Mr Moracha. He adopted it and the annexed documents as part of his evidence.

4. I will not rehash the entire evidence as JIPA admitted that it owed Kshs. 29,325,652.65. In light of the admission, the only issue is whether the JIPA is entitled to the amount claimed in the set off. DW 1 raised three issues in the set off. First, whether it was entitled to the Kshs. 7,128,000.00 for the supply of building material. Second, whether it was entitled to claim Kshs. 10,760,000.00 paid to KRA on behalf of ELECON. Lastly, whether it was entitled to Kshs. 7,128,000.00 for repairing the defects.

Whether Defendant is entitled to cost of building materials

5. DW 1 testified that during the period of construction the parties entered into an arrangement whereby the defendant would supply assorted building materials including ballast, hard core and sand amounting to Kshs. 7,960,000.00. In support of this claim, DW 1 relied on a statement of account signed on 13th March 2013 which referred to invoices from 30th May 2012, supply of sand as at 28th January 2013, fuel invoices from 30th June 2012 to 2nd November 2012 and supply invoices from 28th January 2012 to 25th March 2013. The statement also showed that payments were received from ELECON for these supplies.

6. ELECON denied that JIPA supplied it any materials and that the document produced in support of the claim lacked any justification and was not binding. It further contended that the claim was never raised when the relationship between the parties was terminated.

7. The relationship between the parties was terminated and the value of works and material consummated in the "FINAL ACCOUNT." The claim for material was made on 13th March 2013 while the contractual relationship terminated on 25th June 2013. In my view the FINAL ACCOUNT constituted a settlement of all claims hence due valuation by JIPA's Architects, Quantity Surveyor and Project Manager and thus JIPA was estopped from raising any further claims outside the settlement agreed upon by the parties. I therefore reject that claim.

Claim for Kshs. 10,760,000.00 paid to KRA

8. DW 1 testified that ELECON was obliged to pay to KRA tax on account of income received by ELECON as evidenced by Interim Certificates in favour of the ELECON. He stated that since the ELECON failed to remit its taxes, JIPA ended up paying taxes after it agency notices were issued to it. DW 1 produced an agency notice issued to KRA dated 22nd July 2014 issued to Kenya Commercial Bank in respect of Corporation Tax arrears amounting to Kshs. 10,958,118.00 owed by JIPA and a letter dated 30th September 2014 from KRA to KCB informing it that the agency notice had been suspended.

9. When the documents were put to PW 1, he told the court that they were not addressed to or copied to ELECON. He pointed out that no official receipt or evidence of payment was shown to support the claim and that ELECON settled its own tax liabilities with KRA.

10. The evidence supporting this set-off is thin as nothing would have been easier than for JIPA to present evidence of payment of taxes on account of ELECON. The agency notice is for corporation tax arrears from JIPA. Corporation tax is chargeable to the company itself and nothing in the documents shows that the amount was being collected on behalf of ELECON.

Claim for costs of repairs and renovation

11. The claim for costs of repairs and renovations is based on the fact that after termination of the relationship, JIPA had to incur costs in carrying out repairs. DW 1 testified that in the course of repairs, ELECON used substandard materials and failed to tame water that was seeping through the basement. JIPA was constrained to engage another contractor to remove the entire building works particularly the plaster and replace the same with waterproof material which cost it Kshs. 7,128,000.00. DW 1 recalled Wecan Company Limited was engaged to do these works. He produced a letter of award dated 2nd November 2016 and a quotation for the works dated 26th October 2016.

12. ELECON denied the claim and stated that it had no relationship with Wecan and it had not been established that such a claim was viable in view of the settlement.

13. Unless the claim was admitted, in order to claim damages for substandard work, JIPA ought to have established liability by proving either breach of contract or negligence. Such a case was not pleaded as a counterclaim and a set-off cannot sustain this claim. Moreover, in the absence of actual evidence of payment as opposed to a letter of award or quotation, the claim cannot succeed.

Conclusion

14. The FINAL ACCOUNT constitutes an agreement between the parties on the amount due from JIPA to ELECON. In *National Bank of Kenya Limited v Pipeplastic Samkolit (K) Limited and Another NRB CA Civil Appeal No. 95 of 1999 [2001] eKLR* the Court of Appeal held that, "A court of law cannot re-write a Contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved." JIPA has not shown any reason to depart for the agreed terms of settlement between it and ELECON.

15. I allow the plaintiff's claim and enter judgment for the amount due. The judgment shall supersede the earlier judgment on admission.

16. The plaintiff has claimed interest at 18% per annum effective from 20th June 2013. This rate of interest was not contained in the agreement and it was not justified by DW 1 in his evidence. The normal principle governing award of interest shall apply and since the claim is in the nature of special damages, interest at court rates shall apply from the date of filing suit.

17. For the reasons, I have set out above, I enter judgment for the plaintiff against the defendant as follows:

(a) Kshs. 26,325,652.65.

(b) Interest at 12% per annum from the date of filing suit until payment in full.

(c) Costs of the suit to be paid by the defendant.

DATED and DELIVERED at KISII this 30th day of MAY 2019.

D.S. MAJANJA

JUDGE

Mr Mose instructed by Mose Nyambega and Company Advocates for the plaintiff.

Mr Onchwangi instructed by Oguttu-Mboya, Onchwangi and Ochwal Advocates for the defendant.