



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL SUIT NO 256 OF 2016**

**GEORGE CARROL MUCKOYA.....PLAINTIFF**

**VERSUS**

**BHA YEHUA.....1<sup>ST</sup> DEFENDANT**

**QUEST CIVIL ENGINEERING CO LTD.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. In his Complaint dated and filed on 28<sup>th</sup> September 2016, the Plaintiff sought the following reliefs jointly and severally against the Defendant;-

**a. Special damage of Kshs 4,700,000/=.**

**b. Lost expected monthly rent income, (10,000 x 39) – Kshs 390,000/= from 1<sup>st</sup> January 2016 till determination of the suit herein.**

2. The Plaintiff's List of Witnesses, Witness Statement and List and Bundle of Documents were dated and filed on 28<sup>th</sup> March 2016. The Plaintiff filed a Further List of Documents dated 3<sup>rd</sup> April 2018 on 4<sup>th</sup> April 2018 annexing additional documents.

3. Despite Summons to Enter Appearance having been served upon the Defendants herein, they did not enter appearance and/or file their respective defences within the stipulated period provided for by the law. As a result, on 24<sup>th</sup> May 2017, the Plaintiff filed a Request for Judgment dated 23<sup>rd</sup> May 2017 seeking entry of interlocutory judgment against them. The same was duly entered on 26<sup>th</sup> May 2017.

4. The matter was fixed for Formal Proof on 4<sup>th</sup> December 2018. When the matter came up in court on that day, upon being satisfied that the Defendants had been duly served with the Hearing Notice dated 12<sup>th</sup> April 2018 as was evidenced by the Affidavit of Service of Wangalwa Oundu that was sworn on 30<sup>th</sup> November 2018 and filed on 3<sup>rd</sup> December 2018 but that they did not attend court, this court proceeded to hear the case in their absence and/or their advocates, if at all they had any.

5. It also heard this case despite the lower court having had pecuniary jurisdiction to hear and determine the same as it was a Formal Proof thus uncontested. Further, referring the matter to the lower court would have caused delays as it would have been assigned a 2019 number yet it was filed in 2016.

6. The Plaintiff's Written Submissions were dated and filed on 30<sup>th</sup> January 2019. He requested this court to render its decision based on its Written Submissions which he relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

**THE PLAINTIFF'S CASE**

7. The Plaintiff adopted his Witness Statement that was filed in court on 28<sup>th</sup> September 2016 as his evidence-in-chief. He also produced in evidence his List and Bundle of Documents dated and filed on 28<sup>th</sup> September 2016 and his Further List & Bundle of Documents dated 3<sup>rd</sup> December 2018. The same were marked Plaintiff's Exh '1' and Exh '2' respectively.

8. His evidence was that he was the registered owner of two (2) plots namely L R No Nairobi/Block Tassia -11- 97/2052/384 and LR No

Nairobi/Block Tassia -11- 97/2052/385 on which he wanted to develop flats. On 7<sup>th</sup> March 2015, he entered into a contract with the Defendants, who had held themselves out as developers, to construct thirty nine (39) one- bed roomed flats on his aforesaid parcels of land.

9. In performance of his part of the said agreement, he remitted to the Defendants a sum of Kshs 4,700,000/= being seed money and provided vacant possession to enable them develop the same. The construction was to commence on 9<sup>th</sup> March 2015 and be completed on 10<sup>th</sup> December 2015.

10. However, the Defendants did not mobilise equipment and resources and did not commence any construction at all. It was his evidence that they were indebted to him to the tune of Kshs 4,700,000/=.

11. In his further testimony to the court, he stated that he was also demanding to be paid interest earned on Kshs 4,700,000/= to date, lost income for the lost years which was Kshs 14,000,000/=. He confirmed that the Defendants paid him a sum of Kshs 5,000,000/= on 18<sup>th</sup> January 2017, which he said ought to be deducted from the final figure to be awarded by the court.

12. He pointed out that there were several unreceipted miscellaneous expenses to secure the site which he wanted the court to consider. He further testified that he remitted the monies to the Defendants in March 2015 after he took out a loan of Kshs 6,000,000/=. Since there was no business, by the time he was retiring, he had to forfeit a lump sum and was left with over Kshs 1,500,000/= which he was still paying.

13. It was his evidence that he suffered embarrassment and mental torture as he had to remove from his "little" pension money to pay the loan. He therefore urged this court to enter judgment against the Defendants as he had sought in his Plaintiff.

### **LEGAL ANALYSIS**

14. The Plaintiff submitted that had the Defendants honoured their part of contract, he would have earned his first income in the month of January 2016. He argued that for each of the one (1) bed roomed flat, he would have earned a sum of Kshs 390,000 per month which translated to an annual income of approximately Kshs 4,680,000/=.

15. He computed his loss of rent at Kshs 14,430,000/= from January 2016 until January 2019, which was exactly three (3) years and one (1) month, as follows:-

**10,000 x 39 x 12 x 3 + 390,000    Kshs 14,430,000/=**

**Less paid by the Defendant on    Kshs 5,000,000/=**

**18<sup>th</sup> January 2018**

**Plus interest at commercial rates at fourteen (14%) per cent per annum from the 1<sup>st</sup> January 2016 until payment in full.**

16. Notably, the matter proceeded as a Formal proof. When the Defendants failed to enter appearance and/or defence, they were precluded from tendering evidence in this matter. However, a court hearing a case that is proceeding undefended must also be satisfied that a plaintiff has proved his case on a balance of probability.

17. In other words, a court must not act and/or proceed blindly merely because a matter is uncontested. It must carefully analyse the evidence that has been adduced by a plaintiff in making a determination of a formal proof case before it.

18. In the first instance, this court carefully perused at the Construction Agreement dated 7<sup>th</sup> March 2015 between the Plaintiff and the Defendants herein and noted that it was not stamped as required under the Stamp Duty Act Cap 480 (Laws of Kenya) and was therefore inadmissible in evidence herein. He did not seek time to have the same stamped before he proceeded with his case as contemplated under Section 20 of the Stamp Duty Act.

19. Indeed, Section 19 (1) and (2) of the Stamp Duty Act provides as follows:-

**1. Subject to the provisions of subsection (3) of this section and to the provisions of sections 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except—**

**a. in criminal proceedings; and**

**b. in civil proceedings by a collector to recover stamp duty, unless it is duly stamped.**

**2. No instrument chargeable with stamp duty shall be filed, enrolled, registered or acted upon by any person unless it is duly stamped.**

20. Section 20 (1) (a) and (b) of the Stamp Duty stipulates that:-

**1. Where an instrument is chargeable with stamp duty under this Act and should have been stamped before a certain event or before the expiration of a certain period, but has not been so stamped, a collector may give leave for the stamping of the**

instrument if he is satisfied—

**a. that the omission or neglect to stamp duly did not arise from any intention to evade payment of stamp duty or otherwise to defraud; and**

**b. that the circumstances of the case are such as to justify leave being given.**

21. Going further, this court also noted that this matter ought not to have been before it. This is notwithstanding the provisions of Article 50 (1) of the Constitution of Kenya, 2010 that provides that every person has a right to fair trial and to have his dispute heard and determined by a competent and/or impartial court or tribunal. This is because the Construction Agreement provided for an alternative mode of resolution of disputes between the Plaintiff and the Defendants herein.

22. Clause 9 of the said Construction Agreement related to Dispute Resolution. The same provided as follows:-

**“If any dispute arises out of or in connection with this agreement, the BQ or the issue of compliance by any party to this Agreement each or either party can give a seven (7) days notice to the other party of the same wherein the parties shall meet promptly and in a good faith attempt to reach an amicable settlement through mutual consultation and negotiation.**

**And in the event the parties do not resolve the dispute within fourteen (14) days after the notice of the dispute has been given, either party shall refer the dispute to the firm of M/S Wangalwa Oundo & Co Advocates for determination. If any of the parties is dissatisfied with the decision reached by M/S Wangalwa Oundo & Co Advocates the said party shall refer the dispute to a single Arbitrator to be appointed by the Chairman of the Law Society of Kenya (LSK).”**

23. There was no evidence that the Plaintiff complied with the said clause which is promoted by Article 159 (2) (c) of the Constitution of Kenya that stipulates that:-

**2. In exercising judicial authority, the courts and tribunals shall be guided by the following principles—**

**c. alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause**

24. Having said so, the parties subjected themselves to the jurisdiction of this court when the Defendants did not apply for a stay of the proceedings under Section 6 of the Arbitration Act, No 4 of 1995 (Laws of Kenya). The said provision states that:-

**1. A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds—**

**a. that the arbitration agreement is null and void, inoperative or incapable of being performed; or**

**b. that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.**

25. Further, jurisdiction of this court was invoked and confirmed when interlocutory judgment was entered against the Defendants herein. This court was hence obligated to proceed to hear and determine this matter.

26. The two (2) issues raised herein above, though technical in nature obligated this court to consider how the same impacted on the case herein. It was the considered view of this court that failure by the Plaintiff to have had his Construction Agreement stamped under the Stamp Duty Act rendered that very evidence, which was central to his case, inadmissible.

27. However, so as not to determine this case on technicality only as Article 159 (2) (d) of Constitution of Kenya mandates courts to administer justice without undue regard to procedural technicalities, this court considered the same. It provided that the cost of the project was Kshs 39,796,503.01 which was to be contributed as follows:-

**Proprietor                      Kshs 4,700,000/=**

**Developer                      Kshs 34,300,000/=**

28. Clause 1(g) of the said Construction Agreement provided that the monthly rents were to be collected until the debt due to the 2<sup>nd</sup> Defendant was settled in full. Clause 1 (h) of the said Construction Agreement also provided that the ratio by which the rent proceeds were to be paid were to be shared between the Plaintiff and the 2<sup>nd</sup> Defendant after settling all other expenses.

29. The Plaintiff gave a block figure of Kshs 10,000/= for each one (1) bed roomed flat. He did not demonstrate:-

**1. How he arrived at the conclusion that the cost of the one (1) bed roomed flat would be Kshs 10,000/=.**

**2. The ratio by which the rent proceeds were to be shared between him and the 2<sup>nd</sup> Defendant.**

**3. That he had fully paid the 2<sup>nd</sup> Defendant all the monies that were due to him so that he could be entitled to all the rent without the 2<sup>nd</sup> Defendant being paid any amount from the said collected rent.**

30. Further, as the Defendants breached the contract right from the start, the Plaintiff did not demonstrate how he mitigated his losses seven (7) days after the commencement date of 9<sup>th</sup> March 2015 when the 2<sup>nd</sup> Defendant did not move all the necessary equipment to the site and commence construction as was provided for under Clause III (B) (i) of the Construction Agreement.

31. The Plaintiff did not also demonstrate or adduce any documentary evidence to prove that he had borrowed a commercial loan which would have entitled him to claim interest at fourteen (14%) per cent commercial rates.

32. Accordingly, having considered the Plaintiff's oral and documentary evidence and his Written Submissions, this court came to the firm conclusion that despite the case having been a formal proof and uncontested, he had not proven his case against the Defendants on a balance of probability.

33. It was the considered opinion of this court that the sum of Kshs 5,000,000/= paid on 18<sup>th</sup> January 2017 to the Plaintiff by the Defendants herein could be deemed to have been a reimbursement of the said money in the sum of Kshs 4,700,000/= that he had invested in the project.

34. Bearing in mind that the Plaintiff filed suit on 28<sup>th</sup> September 2016 and the Defendants paid him a sum of Kshs 5,000,000/= on 31<sup>st</sup> January 2017, almost three months later, the sum of Kshs 300,000/= over and above the sum of Kshs 4,700,000/= that the Plaintiff was owed by the Defendants would be adequate to cover the interest for the period between 28<sup>th</sup> September 2016 and 18<sup>th</sup> January 2017.

#### **DISPOSITION**

35. For the foregoing reasons, the upshot of this court's decision was that the Plaintiff's claim was not merited and the same is hereby dismissed but with no order as to costs as the Defendants did not enter appearance and/or file any defence.

36. The resultant effect of this decision is that the entry of interlocutory judgment that was entered on 26<sup>th</sup> May 2017 against the Defendants has been rendered moot for the reason that this court found that the Plaintiff had not proved his claim for Kshs 4,700,000/= and claim for lost expected monthly rent income at the sum of Kshs 390,000/= per month from 1<sup>st</sup> January 2016 until payment in full.

37. It is so ordered.

**DATED and DELIVERED at NAIROBI this 30<sup>th</sup> day of May 2019**

**J. KAMAU**

**JUDGE**