



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO.198 OF 2016

ROCKEY AFRICA LIMITED.....PLAINTIFF

VERSUS

THE HONOURABLE ATTORNEY GENERAL.....DEFENDANT

JUDGMENT

1. On 25th May 2016 the plaintiff herein, a limited liability company incorporated under the Companies Act Cap 486, Laws of Kenya, sued the defendant, the Honourable Attorney General on behalf of the Ministry of Health and the Government of the Republic of Kenya seeking the following orders:-

a) The payment of the sum of Kshs 326,891,900 with accrued interest at contractual rates.

b) Costs of the suit.

c) Interest on a) and b) above at court rates till payment in full.

2. At the hearing of the case, the applicant sought and obtained leave to amend the plaint so as to indicate that the interest should be calculated at the rate of 20% per quarter from 1st July 2012 and further, that the interest at prayer (c) hereinabove be at the contract rate.

3. The plaintiff's case is that vide a contract dated 19th June 2012, the plaintiff agreed to supply and deliver renal dialysis consumables to hospitals around the country. The plaintiff states that it was an agreed term of the contract that he would be paid Kshs 316,891,900/- within 60 days from the date of the delivery of the said products and that pursuant to the said agreement, the plaintiff delivered the renal dialysis consumables to various hospitals around the country namely: Nakuru, Mombasa and Kisumu at the agreed consideration.

4. The plaintiff contends that despite fulfilling his part of the contract, the defendant has failed to honour the deal thereby precipitating the filing of this suit.

5. At the hearing of the suit, the plaintiff's director, **Robert Kamau Wachira**, adopted his written statement filed together with the plaint as his evidence before the court. He confirmed that the correct interest rate on the amount due to the plaintiff is 20% from the date of the acceptance of the goods. He also produced the documents contained in the plaintiff's list of document dated 22nd May 2019 as exhibits. Some of the documents highlighted by the plaintiff's witness were:

a) The letter of acceptance.

b) Copy of the performance bond.

c) Copy of the contract dated 19th June 2012 signed by the plaintiff and the Permanent Secretary Ministry of Health.

d) Copies of delivery notes.

e) Inspection and acceptance committee report on the delivered goods.

f) Report on verification of the supplied goods.

g) Executive Summary of verification report

6. The plaintiff's witness reiterated that the claim for the value of goods supplied is Kshs 316,891,900 as stated in the plaint.

7. On cross examination, the witness testified that the goods that were delivered to the defendant were not defective as the said goods were verified and found to be in good quality and were put into use. The witness also stated that the plaintiff obtained a bank loan (performance bond) in order to facilitate the purchase and delivery of the contracted goods. He further testified that the alleged "excess" goods were not returned to the plaintiff.

Defendant's case

8. Through the statement of defence filed on 27th June 2016, the defendant denied the plaintiff's entire claim including the allegation that all payments to the plaintiff ought to have been made within 60 days of the delivery of the goods.

9. The defendant further stated that the plaintiff breached the terms of contract by supplying defective goods. It added that there was no proof of delivery of the said goods and that the plaintiff's claim of Kshs 316,891,900 is grossly inflated and therefore not justified.

10. At the hearing of the suit, the defendant's sole witness one **John Kamau** the Assistant Supply chains Manager in the Ministry of Health testified and produced the defendant's list of documents dated 21st July 2017. He conceded that the plaintiff entered into a contract with the Ministry of Health to supply the goods and that the contract amount was Kshs 362,891,900. He further testified that the said amount had not been paid to the plaintiff.

11. He also confirmed that it was an express term of the contract that the late payment would attract a penalty of 20% interest per quarter and that the plaintiff is therefore entitled to the interest claimed.

12. He further testified that even though the inspection committee made reference to excess supply to certain hospitals, the said excess was never returned to the supplier, the plaintiff herein and added that all the supplied items were put into use by the respective hospitals.

13. It was his testimony that the verification committee found that the supplied products were in good order and that the goods were put into use by the respective hospitals where they were delivered. He produced the delivery notes to confirm that the said goods were delivered to the various hospitals.

14. Parties filed written submissions in support of their respective positions which I have carefully considered. I find that the main issue for determination is whether the plaintiff proved its case against the defendant on a balance of probabilities.

15. I have considered pleadings filed herein and the testimony of both the plaintiff's and the defendant's witnesses. I note that it is not disputed that the parties herein entered into an agreement for the supply and delivery of Renal Dialysis Consumables for which the contract price was Kshs 316,891,900. I have also considered the Form of Agreement signed by the parties on 19th June 2012 in which the sum of Kshs 316,891,900 is stated as the contract price.

16. The defendant's witness was categorical that all the contracted goods were supplied by the plaintiff to various government hospitals and that the said goods were inspected and found to be in good order. I am therefore satisfied that the plaintiff proved its claim for the sum of Kshs. 316,891,900 on a balance of probabilities. Strictly speaking, the defendant admitted the plaintiff's entire claim during the hearing of the case.

17. On the applicable interest rate/penalty for late payment, the defendant's witness confirmed that the penalty for late payment was 20% per quarter interest on the contract amount. In fact, the defendant's witness was categorical that the plaintiff is entitled to the contract amount of Kshs 361, 891,900, plus interest at 20%.

18. I therefore reiterate my finding that the plaintiff proved its case against the defendant on a balance of probabilities. Consequently, I allow the plaintiff's case and enter judgment for the plaintiff against the defendant in the following terms:

a. The payment of the sum of Kshs 326,891,900 with accrued interest at the agreed contractual rate of 20% per quarter from 1st July 2012 till payment in full.

b. Costs of the suit.

c. Interest b) above at court rates till payment in full.

Dated, signed and delivered in open court at Nairobi this 31st October 2019.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Kihara for the defendant.

Mr. Muguku for Ochieng for the plaintiff.

Court Assistant – Sylvia