



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**CIVIL CASE NO.4 OF 2017**

**COUNTY GOVERNMENT OF HOMA BAY..... APPLICANT**

**VERSUS**

**BAYLEM LIMITED.....RESPONDENT**

**JUDGMENT**

[1] The plaintiff, **Baylem Limited**, is a private limited liability company incorporated under the Company Act (**Cap 486 Laws of Kenya**) while the defendant, **County Government of Homa Bay**, is a distinct and inter-dependent state organ created by the Kenya Constitution, 2010.

The plaintiff's claim against the defendant is for the sum of **Kshs.17, 880,751/23 cts** together with interest thereon at court rate from 15<sup>th</sup> February 2017, until payment in full and additional interest at court rate on the sum of Kshs.26, 415,233/98 cts from 27<sup>th</sup> October 2016 to 1<sup>st</sup> December 2016 and further interest on the sum of Kshs.21, 673,854/68 cts from 1<sup>st</sup> December 2016 to 15<sup>th</sup> February 2017, together with costs of the suit and interest.

[2] In the statement of claim (plaint) dated 20<sup>th</sup> July 2017, it is pleaded that the claimed amount arises from two local purchase orders (LPO's) Nos. **2651882** and **2651883** for Kshs.23, 229378/12 cts and Kshs.3, 185,855/86 cts respectively, under a contract **Ref.No.M.N.No.86/20/2015-2016**, based on a successful bid by the plaintiff for a tender **Ref. No. HB/CITY/MOH/056/2015-2016**, for delivery, installation, commissioning and user training of mortuary equipment for Suba Sub County Hospital.

[3] That, the plaintiff undertook the assignment as required and by the 27<sup>th</sup> October 2016 or thereabouts, it had delivered, installed, commissioned and conducted user training of the equipment as required under the tender, resulting in the issuance of certificates of commission for the equipment and works. That, an invoice for the contract was raised on 27<sup>th</sup> October 2016, for the contractual amount of Kshs.26,415,233/98 cts but the defendant only paid the sum of Kshs.4,761,379/30 cts on 1<sup>st</sup> December 2016, leaving an outstanding balance of Kshs.21, 673,854/68 cts which was reduced to Kshs.17, 880,751/23 cts after the payment of a further sum of Kshs.3, 793,103/45 cts on 15<sup>th</sup> February 2017.

[4] The plaintiff further pleaded and contended that despite demand and notice of intention to sue being given to the defendant, it has refused, failed and neglected to make good the payment of the outstanding amount. It is therefore the plaintiff's prayer that judgment be entered against the defendant as prayed in the plaint.

Appearance was entered by the defendant through Messrs **Nyauke & Co. Advocates**, on or about the 6<sup>th</sup> August 2017. However, a statement of defence was never filed within the prescribed time prompting the plaintiff through Messrs **Otieno Ragot & Co. Advocates**, making a request for ex-parte judgment against the defendant. This was granted on 21<sup>st</sup> August 2017 and the subsequent notice of entry of judgment dated 29<sup>th</sup> August 2017, was issued to the defendant.

[5] On 6<sup>th</sup> September 2017, the plaintiff filed its bill of costs but, the defendant on the 7<sup>th</sup> February 2018, filed a notice of motion dated 21<sup>st</sup> November 2017 for stay of execution of the ex-parte judgment and for the ex-parte judgment to be set aside to enable hearing of the matter on merit.

The court, in its ruling of the 12<sup>th</sup> June 2018, allowed the application and set aside the ex-parte judgment on condition that the draft defence be deemed as duly filed on payment of the requisite court fees and the suit be fixed for hearing in the next thirty (30) days from that date. In default, the application was to stand dismissed forthwith and the plaintiff be at liberty to proceed with necessary execution.

[6] After the payment of the requisite court fees, the statement of defence was formally filed on 2<sup>nd</sup> July 2018.

Its import was to deny the plaintiff's claim in total and call for the dismissal of the claim with costs.

At the hearing of the case, the plaintiff testified through its Managing Director, **John Fredrick Ogumbo (PW1)**, who in the process tendered a bundle of documentary evidence (**P. Exhibit 1 – 9**) to fortify and prove the claim against the defendant. Most importantly, he confirmed the part payment of the claim by the defendant prior to the filing of the suit and indeed, after the filing of the suit.

[7] All in all, the plaintiff confirmed receipt of part payment of Kshs.4, 741,379/30 cts on the **1<sup>st</sup> December 2016** and of Kshs.3, 793,103/45 on the **15<sup>th</sup> June 2017**. These were the payments made by the defendant prior to the filing of the suit on the 21<sup>st</sup> July 2017 and were not included in the claim amount of Kshs.17, 880,751/23 cts. The plaintiff also confirmed receipt of further payments from the defendant after the filing of the suit. These were for the sum of Kshs.500, 000/= made on **9<sup>th</sup> May 2018** and the sum of Kshs.2, 844,827/60 cts made on **19<sup>th</sup> February 2019**.

[8] The plaintiff contended that a sum of Kshs.14, 535,923/63 cts remained outstanding as at 22<sup>nd</sup> February 2019. They are therefore claiming that amount from the defendant together with interest although the actual outstanding balance is the sum of Kshs.15, 030, 923/63 cts if the court's calculation is correct. Nonetheless, what is claimed is what will eventually be awarded as the defendant failed to lead any evidence in support of its defence and probably disprove the plaintiff's oral and documentary evidence.

[9] In sum, it may safely be stated that the plaintiff's claim against the defendant remained largely uncontroverted. The plaintiff has thus discharged its burden of proving on a preponderance of probabilities that the defendant is truly and justly indebted to it in the sum of Kshs.14, 535, 923/63 cts together with interest at court rate with effect from 19<sup>th</sup> February 2019, to date.

In prayer (b) of the plaint, further interest is claimed by the plaintiff on the sum of Kshs.26,415,233/98 cts and the sum of Kshs.21, 673,854/68 cts, but no justification has been given for its award.

[10] In any event, an award of further interest in the present circumstances, considering that what is at stake is public money, would be unconscionable and tantamount to unjustly enriching the plaintiff.

Ultimately, judgment be and is hereby entered against the defendant in favour of the plaintiff for the total sum of Kshs.14,535,923/63 cts together with interest on the sum at court rate from 19<sup>th</sup> February 2019, to date and the costs of the suit.

Ordered accordingly.

**J.R. KARANJAH**

**JUDGE**

**30.10.2019**

[Dated and delivered this **30<sup>th</sup>** day of **October, 2019**].