



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL SUIT NO. 10 OF 2015

JIMAI ELECTRICAL LTD.....PLAINTIFF

VS

COUNTY GOVERNMENT OF MERU.....DEFENDANT

JUDGEMENT

The plaintiff Jimai Electrical Services Ltd sued the County Government of Meru seeking that the defendant be ordered to pay them Kshs 12,182,820/= being consideration for contract between the plaintiff and the defendant for the renovation of pharmacy, store and kitchen at Meru level 5 Hospital.

The plaintiff argued that they carried out the works of renovation as agreed between itself and the defendant and was issued with certificate of practical completion signifying that it had carried out the renovations as agreed between itself and the defendant. The plaintiff claims that the defendant refused to pay the consideration of Kshs 12,182,820 agreed upon and thus they were forced to come to court for redress.

The defendant entered appeared and filed statement of defence and and counter claim denying the claims by the plaintiff generally. The plaintiff framed issued for determination as follows:-

1. Whether the plaintiff was on 18th December 2014 awarded a tender for renovations of Meru Level 5 hospital by the defendant at a cost of Kshs 12,182,820/=?
2. Whether the plaintiff carried out the renovations works as per the terms of the contract between itself and the defendant?
3. Whether the plaintiff was issued with a certificate of practical completion by the county works office signifying the plaintiff had carried out the renovations works as agreed.
4. Whether the defendant has breached the agreement between the plaintiff and the defendant.
5. Whether the plaintiff carried out the aforesaid renovation below the required standards in breach of the contract?
6. Whether the defendant was served with or demand notice before filing of this suit.
7. Whether the plaintiff is entitled to the relief sought in the plaint.
8. Who pays the costs of the suits?

A defence to the counter claim was filed by plaintiff on 15th July 2015 and said they never carried out shoddy works below the expectation of the defendant. It was stated that the renovations were as per the terms of the contract and was not in breach of the contract and the certificate of completion issued by the defendant's employees confirmed that.

Before this matter was listed for hearing defence counsel on 7th April 2016 indicted to the court that he had instructions to negotiate matter out of court and they were given an opportunity by the court.

On 1st September 2016 the parties were yet to agree and defence counsel again indicated that he was optimistic a settlement would be arrived at by the parties. A date for hearing was set for 24th November 2016. The plaintiff testified on 1st March 2017. He relied on his statement and produced the documents listed and filed as exhibits 1 to 11.

In cross examination the plaintiffs Director said Architect Oundo instructed him on the kind of materials to provide and he provided them. He admitted the handover report didn't show the County Architect and Clerks of work were present. He said that project Managers, The Architect, Quantity Surveyor and District Works officer issued the certificate of practical completion – Ex P6 which is duly signed. Plaintiff witness said the certificate was signed by the Technical Team and not one person and any one of the different Engineers could sign on behalf of the others.

The plaintiffs witness said that County Government of Meru was the client but project was supervised by Ministry of public works and not the contracting client. That it was Ministry of Public works which was to advise the defendant to pay if the project has been done satisfactorily although client is always in attendance at site meetings.

The plaintiff testified that both the handing over minutes and certificate of completion are both dated 9th April 2015 PW1 denied having over quoted the cost of materials as alleged by Dr James Gitonga. He said he purchased materials under supervision of the technical team. He said no one asked him to give receipts for materials purchased and it was an afterthought to file counterclaim. PW1 said that the county Pharmacist, Health Administrative Officer and Maintenance officer represented the defendant whenever materials were brought and they did inspect the same. That site meetings were convened by Health Department, project managers and Contractor. PW2 Richard Ng'ang'a Kariuki Public works officer serving Superintendant Building testified that he was seconded to County Government of Meru by a Letter dated 14th April 2014 – Ex P12. He also produced a letter that deployed him to Imenti North as District Public Works officer dated 13.9.2011-Exp13.

He confirmed that plaintiff company was contracted to do renovations work to the kitchen, pharmacy and Drug Store at Meru Level 5 Hospital by the defendant and he was to supervise the project on behalf of the defendant. He said Peter Mukosi is the one who appointed him. He said appropriate officers signed Local Service Order No. MCG/RT/040/2014-2015 dated 29.1.2015 authorising the plaintiff to do renovations. The LSO was attached to BQ priced by the contractor – Ex. 3(a) (b). He said they took contractor to site to commence work and the client was represented.

He said on completion handing over was done under his chairmanship and he produced the handing over minutes Ex P4. He said the renovations were carried out to their satisfaction and site inspection was done on 9th April 2015 for concurrent handing over. He said that the plaintiff was issued with a certificate of practical completion and a payment voucher was raised on 13.4.2015 signed by County Quantity Surveyor as well as himself – Ex P9. He said they didn't receive any letter of complaint in regard to the works in the course of or after completion of the renovation

He said the materials specified in the BQ are the ones that were used for the renovation works and the measurements given by Dr Gitonga were incorrect. He said that sample racks were provided by plaintiff and they approved before they fixed them and it is Dr Koome who gave specification. He said the quality of racks supplied were similar to the sample they saw. He said certificate of completion is usually issued from National Government and they did issue one. He said that inspection is done by those who supervised the works. He said Dr Gitonga was always represented by Dr Koome, Dr Macharia, Mr Magambo, Mr Githinji, Mr Martin and Mr Muriuki Pw3 Benedict Kithinji Mbaabu said while he was working at Meru Level 5 Hospital by 18th December 2014 the plaintiff was contracted by the defendant to renovate Meru Level 5 Hospital Pharmacy Drugs Store as well as Kitchen. He said he was present when site was handed over to the contractor on 11th February 2015 and that on 9th April 2015 he was also present when final inspection was done. He said he attended on behalf of the hospital. He said renovation works was done to his satisfaction.

PW3 testified in absence of defence counsel who had notice of hearing date of 19th September 2017 but failed to attend even after the court placed the file aside unto 2.15 pm to wait for him. When plaintiffs case was closed, the plaintiffs counsel was instructed to serve defendants counsel to attend defence hearing on 22.11.2017. However, the trial court was presiding over elections petitions and another date 19.12.2017 was taken before the DR.

On 19.12.2017 defence case was closed when advocate holding brief for defence lawyer didn't give satisfactory reasons for an adjournment. Despite the long mention date taken defendants didn't seek to reopen their case and tender any evidence. The defence counsel simply filed submissions and said the plaintiff should be ordered to re-do and finish renovation works as per the contract and pay damages for breach of contract. The defence lawyer gives reason for failure to call witnesses as change of administration at the County Government and that some employees who were witnesses had left employment and could not be traced.

The defendant in compliance with court order to comply with order 11 CPR filed list of defendants documents among them a letter written by Dr James Gitonga giving reasons why the plaintiff company's claim cannot be processed. We were not given list of defendant witnesses names and we have not been told whether Dr James Gitonga resigned from employment of County Government to justify failure to attend court and testify.

PW2 controverted allegations in the internal memo from Chief Health Officer Dr. James Gitonga dated 26th June 2015. The plaintiffs claim remains unchallenged and overwhelming evidence given by the technical team members who were actually representing the defendant in the project and the claims by Dr James Gitonga could only have been regarded if an expert in the field of construction, an Engineer, Quantity/Quality Surveyor and/or Architect disputed the manner in which the works were carried out. Dr. James Gitonga not being a professional in the field of construction industry and having failed to attend court to ventilate his claims/allegations cannot have the same ventilated through submissions. This court finds that there was a valid contract between the plaintiff and the defendant. This court also finds that the plaintiff carried out the renovation works as per the terms and conditions of the contract under the supervision of the defendant's agents PW2 and PW3.

This court also finds out that the plaintiff having satisfied the terms and conditions of the contract and having handed over the project to the defendants and/or defendants, agents and a certificate of Practical completion having been issued the defendant had a duty to pay consideration for the said works.

This court therefore orders that the defendant shall pay to the plaintiff the sums of Kshs. 12,182, 820/= together with interest at court rates from the date of filing of the suit. The defendant is also condemned to pay costs of the suit.

HON. A.ONG'INJO

JUDGE

RULING, DELIVERED, DATED AND SIGNED IN COURT ON 23RD MAY 2018.

In the presence of:

C/A: Penina

Plaintiff: Ms Waigwa Advocate for Gitonga Advocate

Defendant: Mr Omari Advocate holding brief for Laichena for Defendants.

Mr Omari Advocate.

I pray for stay of execution for 60 days. I also apply for a copy of Judgment.

Order

Copy of Judgment to be supplied at costs of defence. Stay granted to defendants for 14 days pending formal application.

HON. A. ONG'INJO

JUDGE