



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 68 OF 2012

STAIRS ENTERPRISES.....PLAINTIFF

- VERSUS -

THE MANAGING DIRECTOR NATIONAL

WATER CONSERVATION & PIPELINE CORPORATION.....DEFENDANT

JUDGMENT

1. This case was fully heard by **Justice Ochieng** before his transfer from this Court. On his transfer the responsibility of writing the judgment fell upon me.

2. Stairs Enterprises, the **Plaintiff**, by its **amended plaint** dated **31st January, 2012**, seeks judgment for **Ksh 77,458,405**. That claim relates to various contracts that the Plaintiff alleges were awarded to it by the National Water Conservation and Pipeline Corporation, the **Defendant**. The Plaintiff pleaded that the **Defendant** failed to pay for those contracts even though demand was made.

3. From the pleadings and the evidence adduced by the parties it becomes clear that there are only two main issues for consideration in this judgment. These are:

(i) Whether the Plaintiff has proved its claim; and

(ii) If so whether the defendant has paid that amount proved by the Plaintiff.

4. The Plaintiff by its plaint describes itself as a firm registered under the Business Name Act.

5. By his evidence in chief, the Plaintiff's general manager **Carilus Nyaranga**, stated that the Plaintiff undertakes construction, repairs and consultancies. The General Manager further stated that the Defendant awarded the Plaintiff firm contracts on diverse dates between the year **2006** and **2010**.

6. The general manager on being cross examined enumerated those contracts. That by Local Service Order [**LSO**] No. **000831** dated **30th January 2006** the Plaintiff was ordered to carry out repairs to the Defendant's Headquarters. I have perused that LSO which describes the services the plaintiff was required to carry out on behalf of the Defendant: that is to paint, scrub and polish of offices. The LSO costed that work at **Ksh 494,000/=**.

7. Local Purchase Order (**LPO**) number **699363** dated **1st February 2007** required the Plaintiff, according to the evidence of the general manager, to repair the Plaintiff's headquarters. The LSO at page 12 of the Plaintiff's bundle of documents is not entirely legible, what however is legible seems to have required the plaintiff to paint and scrub office block at the cost of **Ksh 494,000/=**. Oddly however the invoice which the plaintiff raised for that work is dated **14th April, 2006** almost a year earlier than the date seen in the LPO.

8. The plaintiff's general manager in reference to **LPO No. 694787** dated **30th January 2006** stated it related to repairs at headquarters of the defendant. The LPO simply state that the Plaintiff was required to carry out repairs at defendant's office block at the cost of **Ksh 495,000/=**. The plaintiff raised an invoice for that amount dated **15th April 2006**.

9. **LSO No. 000691** dated **7th February 2009** required the plaintiff to construct a pump house and fencing of Kamutei borehole, in Kitui district at the cost of **Ksh 405,150**. It is important to note that that LSO has an error in the addition of the total cost of that work. It is provided therein that the cost of constructing a pump house and fencing was at the costs of **Ksh 349,250**. In addition the value added tax

(VAT) was indicated in that LSO as **Ksh 55,000**. The total amount of those two figures is reflected on the LSO as **Ksh 405,130**. The correct total amount should have been reflected as **Ksh 404,250**. The plaintiff on their part, in respect to that LSO raised an invoice of **Ksh 349,250/=** plus **Ksh 55,890/=** as VAT. The invoice reflected the total of **Ksh 405,130** as the amount payable on that LSO. The correct total of that invoice should have been **Ksh 405,140**.

10. The **LSO order number 000900** dated **12th March 2009** required the plaintiff to undertake installation of pump at Matinyani in Isiolo district at the cost of **Ksh 122,530**. The plaintiff raised its invoice dated **23rd March, 2009** for **ksh 122,530**. But that invoice erroneously stated that the plaintiff had undertaken installation of pump at Matinyani – Kitui District and not Isiolo District as provided under the LSO.

11. The **LSO number 09000535** dated **28th January 2010** directed the plaintiff to construct the water pan of Kuth Awendo, Nyando District at the total cost of **Ksh 2,924,000**. The LSO required the work to be carried out on or before **4th February, 2010**. Even though there was that limitation of time in carrying out the works the plaintiff raised its invoice on **28th February 2011**, a year later after the due date.

12. The plaintiff's general manager referred to the defendant's award to the plaintiff by letter dated **2nd March 2006**, for the plaintiff to undertake consultancy on establishment of independent business unit with defendant's corporation and development of marketing strategies. The plaintiff produced a contract, which was undated, which the general manager of the plaintiff stated set out the plaintiff's and defendant's agreement in respect to that consultancy. The plaintiff raised an invoice dated **20th April, 2006**, for that and consultancy, for **ksh 13,885,000**.

13. Plaintiff's general manager further referred to the defendant's award to the plaintiff of consultancy of performance audit report of defendant's small dams, pans and boreholes dated **21st April 2006**. The amount of compensation for that consultancy was stated in that award as **Ksh 10,764,400**. The plaintiff's general manager stated that that consultancy involved the plaintiff to give the defendant a report on the defendant's projects. On being cross examined the said general manager stated that he submitted the plaintiff's report on that audit to the defendant but that the plaintiff did not retain a copy of that report.

14. The defence called one witness, **Tarcisio Muturi**, who worked for the defendant from the years **2005 to 2014**, as the defendant's supervisor of dams/pans. This witness stated that the defendant's premises were destroyed by fire and because the defendant's documents alongside other documents were destroyed by that fire, the defendant wrote to all its suppliers and requested those suppliers to support their claim, against defendant, for verification and forensic audit. Defence witness stated that the plaintiff had failed to forward documents in support of his claim and instead he filed the present suit. The defendant's witness also stated that the plaintiff had failed to prove that he was awarded contracts by the defendant, before this court, except that the contract to construct water pan at **Kuth Awendo**. That however the plaintiff abandoned that construction at **Awendo**, before its finalization.

15. Having considered the evidence tendered, the documents relied upon by the plaintiff and the defendant I will proceed to consider the issues identified above.

16. Has the plaintiff proved its claim? That issue cannot be considered without regard to the defendant's defence. The defendant pleaded in its defence and further supported that defence by the evidence of defence witness **Tarcisio Muturi** that the plaintiff failed to prove its claim.

17. The plaintiff relied on photocopied LPOs, LSOs and invoices. Those documents were not supported by bids or proposals submitted by the plaintiff to the defendant. Indeed one gets the impression that the plaintiff was awarded contracts on verbal presentation on his part.

18. Further it is this court's finding that the LPOs and LSOs were generally vague in the work the plaintiff was required to under-take for example **LPO number 699363** required the plaintiff to scrub and polish the office of the defendant. Other LPOs required the plaintiff to paint and scrub the office. One would expect that what the plaintiff was required to do, for the defendant, would be very specific and unambiguous. In this case I find that the instructions to the plaintiff were ambiguous.

19. Another anomaly is in respect to the **LPO number 699363** which was dated **1st February, 2007** and for which the plaintiff raised an invoice for that work of that LPO one year earlier than the date of the LPO. The LPO was dated **1st February 2007** and the plaintiff's invoice was dated **14th April 2006**.

20. The defendant by its defence pleaded that the plaintiff lacked expertise to offer consultancy work; awarded by letter dated **13th April 2006** and **21st April 2006**.

21. The plaintiff failed to reply to the defendant's pleading that it lacked expertise to undertake consultancy, in its reply to the defence. The plaintiff's general manager on being cross examined on his expertise stated that he was a holder of a Diploma on Project Management which he attained in 1986 at extra mural department of Nairobi University. The said general manager, however, did not produce a certificate to prove the attainment of such a Diploma.

22. In my view, having reviewed the plaintiff's evidence, I form the opinion that the plaintiff failed to prove its claim against the defendant. Even just a close examination of the contractual document, particularly the one at page 28 (of the plaintiff's bundle of documents) it reveals that it was not drawn by a person with legal training. It would be expected that documents drawn by defendant would be by a lawyer.

23. Section 109 of the Evidence Act, Cap 80, provides as follows:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

The plaintiff did not shift the burden of proof. He had an obligation to shift that burden as provided under Section 107 of the Evidence Act that provides:

“(1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

24. The plaintiff’s claim is supported by LSOs, LPOs and contract but there is no supporting document to prove that the plaintiff made proposals for the work awarded to it. The plaintiff did not, even though its expertise was in question, provide its company profile to prove it indeed held expertise to carry out the work.

25. On the whole the plaintiff failed to prove its case on a balance of probability for the claim of **ksh 29,584,560**. On that basis the court will not consider the second issue identified above.

26. Accordingly, the ***plaintiff’s claim*** is hereby ***dismissed with costs to the defendant***.

DATED, SIGNED and DELIVERED at NAIROBI this 22nd day of May 2018.

MARY N. KASANGO

JUDGE

Judgment read in open court in the presence of

Court Assistant.....Sophie

.....for the Plaintiff

.....for the Defendant