



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 121 OF 2008

MISTRY JADVA PARBAT & CO. LIMITED.....PLAINTIFF

VERSUS

KENYATTA UNIVERSITYDEFENDANT

JUDGEMENT

1. The outcome of this matter substantially depends on whether the Decision of Azangalala J. (*as he then was*), on 30th July 2009 in Mombasa Civil Case No. 109 of 1991, Mistry Jadva Parbat & Company vs. Kenyatta University (the Mombasa suit or matter) has a bearing on it.

2. Mistry Jadva Parbat & Company Limited (the Plaintiff herein), a Construction Company, was on 21st December 1987 contracted by Kenyatta University (the Defendant) a Public University to construct Hostels, Kitchen and dining facilities for them. The Consultants to superintend the Construction works were;-

- Harbans Singh Associates – the lead Consultants
- Armstrong and Duncan – the Quantity Surveyors

3. It is the Plaintiff's case that, although, they were to be paid within 14 days of presentation of Interim Certificates, at no time did the Defendant keep the timelines. That after the issuance of Certificate No.9, the Defendant completely failed to make payments to the Plaintiff who was then constrained to turn to Court hence the Mombasa suit. This Court was told by Mr. Paresh Shivji Varsani (the Chief Executive Officer) of the Plaintiff that the said suit was a claim for Certificate Number 10,12,13 and 14.

4. Emphasized repeatedly is that the current suit is in respect to Certificate No.15 which did not form part of the Cause of action in the Mombasa Suit. In the Plead before this Court the amount said to be due in respect to that Certificate is Kshs.19,800,647.10/-. However, there is a claim of interest at 25% pa which had inflated the sum to Ksh. 75,533,450.00 as at the time of filing of this suit on 7th March 2008. The Plaintiff also claims General Damages for breach of Contract and Costs of this suit. In respect to further interest, the Plaintiff seeks interest on the sum of Kshs.75,533,452.00 at Court rates.

5. The Defendant resists this suit vide a Statement of Defence filed on 8th April 2018. Together with that Defence is a Counterclaim for Kshs.10,738,826.04. In that Pleading, the Defendant states the amount due in respect to Certificate No.15 was the sum of Kshs.17,701,448.10 but that upon the taking of accounts in the Mombasa Case, it was found that the Defendant had made an overpayment by Kshs.28,440,268.14. That upon debit for the sum in Certificate No.15, the overpayment is reduced to Kshs.10,738,820.04. This is the amount sought in the Counterclaim.

6. The Defendant further avers that the Plaintiff deserted the Construction site in March 1989 without completing the works as per the Contract and is guilty of breach thereof. The Defendant seeks General Damages for breach of Contract.

7. This Court received evidence from three witnesses, two on behalf of the Plaintiff and one on behalf of the Defendant. These are Paresh Shivji Varsani (PW1), Weldon C. Mutai (PW2) and Peter Kabuthi Muiruri (DW1). Their evidence shall be considered in so far as it shall be of assistance in determining the issues that present themselves for Resolution which are:-

- (a) What amount if any was due to the Plaintiff from the Defendant in respect to Certificate No. 15?

(b) Was there an overpayment to the Plaintiff found due in the Mombasa suit and does it have any implication on the matter before Court?

(c) If any sum is still due to Plaintiff in respect to Certificate No.15, what rate of interest, if any should it attract?

(d) Is there merit in the Defendants Counterclaim?

(e) What Order on costs should the Court make?

8. It seems clear enough, and there can be no need to break one's back poring over evidence, that a sum of Khs.19,80,642.10 was certified as due for payment under Certificate No. 15. (*See Plaintiff's Exhibit Pages 519,520,521*). The Certificate was issued on 18th May 2001.

9. That amount was however reduced by the sum of Khs.2,099,194.00 which constituted the amount paid directly by the Defendant to Kenya Power and Lighting Company Ltd (KPLC) in February 1989. That the amount due to the Plaintiff under this Certificate and after the debit of Khs. 2,099,194/= is Ksh.17,701,448.10 confirmed by the Plaintiff's second witness Mr. Mutai when he stated that,

"This Certificate was in the sum of Ksh.19,800,642.10 less the Khs.2,099,194/- paid to KPLC leaving an outstanding amount of Khs.17,701,448.10 payable to the Plaintiff. I do confirm this outstanding balance relates to Certificate No.15."

10. Central to the controversy herein is whether the decision of Azangalala J, (as he then was) of 30th July 2009 in the Mombasa Court implicates on this matter. It is to this that the Court turns its attention.

11. In a Plaint filed on 1st February 1991, the Plaintiff filed the Mombasa suit against the Defendant. Paragraph 3 and 4 of that Plaint set out the Claim as follows:-

"3. The Plaintiff's Claim against the Defendant is for the recovery of Kshs. 57,415,818 being the amount due and owing from the Defendant to the Plaintiff in respect of construction services rendered to the Defendant by the Plaintiff which amount should have been duly certified as due and owing to the Plaintiff by the Defendants Architects (Lead Consultant) Harbans Singh Associates and as per the Agreement and Schedule of Conditions of Building Contract (with Quantities) executed by both the Plaintiff and the Defendant and dated the 21st day of December, 1987 the said sum as so certified was payable within 14 days of presentation of such Certificates by the Plaintiff. The said sum is made up as follows:-

(a) To balance outstanding on Certificate No.10 dated 11.8.1989. Kshs.1,999

(b) To Certificate No. 12 dated 26/10/1989 Kshs.13,150,901

(c) To Certificate No. 13 dated 28/3/1990 Kshs. 21,956,289/60

(d) To Certificate No.14 dated 14/6/1990 Kshs.57,415,818/00

The Construction works aforesaid related to the construction of student hostels, kitchen and dining facilities at the Defendant's University Campus at Kenyatta.

4. The Plaintiff states that as per the said Agreement the above Certificates were payable within 14 days of its presentation but the Defendant has failed, refused and/or neglected to pay the same either within 14 days or at all and the Plaintiff has suffered enormous damages, both special and general, by reason of the Defendant's breach of Contract aforesaid.

Particulars of special damages

(a) To loss of Interest and/or to accumulation of interest payable by the Plaintiff to its financiers by reason of failure to service Plaintiff's indebtedness (as per annexed schedule marked "A".....Kshs.16,374,553/10 AND the Plaintiff claims General Damages for breach of contract".

12. The Plaintiff's position that the Mombasa Suit was about Certificate Nos 10,12, 13 and 14 and not about Certificate No 15 is plainly, and from the Statement of Claim, not incorrect and paragraphs 3 and 4 speak loudly to this. If that was all to the matter then the Defence case would not stand a chance.

13. However, certain events took place after the filing of the Mombasa Suit which are not without significance the first being the entry of a Consent Judgement on 31st January 1992. The hallmark of the Consent is as follows:-

a) Judgement was entered in favour of the Plaintiff against the Defendant for Khs.50,243,818/= plus costs and agreed interest of Ks.8,608,283.50.

b) The Court was to hear and determine the Claim of Kshs.7,172,000/= being the disputed sum plus another sum of Ks.16,374,553.00.

14. The Plaintiffs were able to obtain Judgment for the disputed sums plus costs and interest at Court rates of 14% in a Ruling dated and delivered by Wambilyangah J. on 29th June 1995 (D Bundle pages 13-21).

15. Prior to that date, a month earlier, the Court had on 29th May 1995 made the following further orders in regard to the Consented sums:-

“In the premises I arrive at the following conclusions,

(a) That on the 31st January 1992 the outstanding decretal amount was Ksh. 45,701,200/=.

(b) That interest rate applicable and chargeable should be at commercial rate with effect from 1st May 1992 being the date after the default on the instalments started to run against the Defendant. Mr. Gikandi asked for a rate of 32%. But I am of the opinion that that is too high. Having considered the Plaintiff’s complaints and problems vis-à-vis the Defendant’s absolutely poor paying record and the fact that the Plaintiff’s attempts to execute the decree was always frustrated by the Defendant.

I fix the rate of interest on the outstanding debt at 25% w.e.f 1st May, 1992. This would mitigate his losses.

(c) That the advocates should compute the interest and determine the outstanding figure after discounting off or accounting for the payments which have been effected so far. This is merely an arithmetical exercise and should not be difficult.”

16. Following the Orders of 29th May 1995 and 29th June 1995, a dispute arose as to the status of payments made by the Defendant to the Plaintiff and by a Chamber Summons of 30th November 2006, the Defendant moved the Court to refer the accounts respecting the payments of the Decretal sum for examination and determination of indebtedness, if any, of the Defendant to the Plaintiff pursuant to the two Orders. The Chamber Summons was compromised through a Consent entered on 2nd May 2007 and issued on 6th July 2007(D Exhibit page 50) which reads,

1) THAT this Honorable Court be pleased to refer the accounts respecting the payments of Decretal sum for examination and determination of indebtedness (*sic*), if any of the Defendant to the Plaintiff pursuant to the Court orders of 29th May 1995 and 29th June 1995 to Interest Rates Advisory Centre.

2) THAT the costs attendant to the examination of account be borne by the Defendant/Applicant.

The Interest Rates Advisory Centre (IRAC) was to carry out the examination and make the determination.

17. IRAC filed a Report in the Mombasa Suit on 24th July, 2007. The Report itself is dated 12th July 2007 (D Exhibit 51-58) and is the source of all the heartache for the Defendant. It is the ultimate finding of the Report that displeases the Plaintiff and I set it out:-

“Interest on the total claim of Kshs.28,828,856.25 is computed as shown in the report. Kshs. 4,866,947.32 overpaid under the previous debt is accounted for in the recalculation. Interest is calculated at 14% per annum.

After taking into account cheque payments Report made between 22nd November 1995 and 7th January 1998 amounting Kshs.71,313,635.75, the result is an overpayment of Kshs.28,440,268.14 to Mistry Javda Parbat & Co. Ltd as at 7th January 1998.

Although not part of the Court Order, Certificate Number 15 for retention sum of Kshs.17,701,448.10 issued on 15th April 2001 has been debited into the account on the due date which reduces the overpayment to Kshs.10,738,820.04.

Find attached our reports as above.”

In essence the Report revealed an overpayment of the Decretal sum.

18. The Defendant was happy to have the findings of the Report adopted and in a Motion of 12th March 2008, the Defendant sought the following Order:-

1. THAT this Honorable Court be pleased to adopt the Report by the Interest Rates Advisory Centre dated 12.7.2007 and filed in Court on 13.7.2007 as the true position respecting of the decretal sum herein.

2. THAT this Honourable Court be further pleased to order that the decretal sum has been fully paid by the Defendant/Applicant herein pursuant to the adopted Report dated 12.7.2007.

19. Through an affidavit sworn by PW1, the Plaintiff resisted the Application. The Plaintiff criticized the Report for many reasons and saw *malafides* in it. In particular, the Report was faulted for commenting on Certificate No. 15 when it was not part of the dispute. This is what Mr. Versani deponed,

“23. That this demonstrate an element of bad faith and mischief on the part of the Defendant and indeed an attempt to frustrate the Plaintiffs’ Claim arising from Certificate No. 15 which was never an issue before this Honourable Court and hence a Judgement by

back door.”

The Plaintiff was making the point that it had on 7th March 2008 filed this suit in respect to Certificate No.15.

20. The Plaintiff also raised other Complaints which it reiterated in the hearing of this matter. These are that:-

- (i) The Report was not prepared by a qualified Accountant.
- (ii) The Report was one sided and biased.
- (iii) The Report and the Judge’s order that interest take effect from 14th February 1991 on the disputed amount was at variance.
- (iv) The Auctioneers charges and Advocates agreed fees should not have been deducted.
- (v) Interest on costs was wrongly excluded.
- (vi) The Report contain erroneous debits which were not part of the Court Judgment.
- (vii) The Report exceeded the mandate of the Court Order.
- (viii) The Report was selective and purportedly prepared to favour the Lower Interest Account against the Higher Interest Account.
- (ix) The Interest calculated was on a simple interest basis whereas the parties had used compound interest in a reducing balance basis.
- (x) The Report should have kept separate Accounts for the Legal Costs and Auctioneer charges which were allegedly the sole responsibility of the Defendant.

21. Notwithstanding opposition from the Plaintiff, the Court accepted the Report and in the Decision of 30th July, 2009, Hon Azangalala J (as he then was) held,

“In the premises, I see no reason why the Report of Interest Rates Advisory Centre dated 12th July 2007 and filed on 13th July 2007 should not be adopted to the extent that I find and hold that the Decretal amount herein has been paid in full”.

22. The battle here is won or lost on what this Court makes in respect to the Report and that holding by the Judge.

23. The Plaintiffs’ Counsel forcefully submits that Certificate Number 15 was not part of the dispute in the Mombasa Case. And that really is the position but I do not understand the Defence case to be that. The gist of the Defence is that although the sums under Certificate No. 15 would have been due and payable, the Defendant is not obliged to make the payment because it had overpaid the decretal sums in the Mombasa Case. In other words, the Defendant is entitled to a set-off. That does not bring the issue of the Certificate No. 15 within the ambit of the Mombasa dispute.

24. After the entry of Judgements in the Mombasa matter and some payments had been met towards meeting the Judgements, a dispute arose as to whether or not the Defendant had fully discharged its liability to the Plaintiff under the terms of the Judgement. By Consent of the parties, that dispute, essentially an accounting exercise was referred to IRAC for resolution. Once the Report was filed, the Court by the Ruling of 30th July 2009, accepted the Report. The decision of the Judge has not been set aside or revised or varied by a Review or Appeal and remains. The Judge was fairly categorical that on the basis of the Report he found that the Decretal sum in the Mombasa matter had been paid in full. That Report had also found that there was an overpayment by Khs.28,828,856.25. That Report, it bears repeating, was accepted by the Court as representing the status of the settlement of the Decretal amount sum in the Mombasa matter. A finding that remains unchallenged to date.

25. Whilst PW2, an Accountant told this Court that he did not agree with the IRAC Report on the overpayment, I note that in challenging the adoption of IRAC’s Report in the Mombasa case, the Plaintiff did not present an Accountant’s Report that faulted the findings on IRAC. It is little wonder that in accepting IRACs Report, the Judge observed;

“The Report is dated 12th July 2007. To date the Plaintiff has not sought to have the Report set aside or reviewed and I entertain doubt as to whether the objections raised by the Plaintiff would entitle the Plaintiff to an Order setting aside the said Report.”

26. A defining finding of that Report, for purposes of the Dispute before court, is that there was overpayment to the Plaintiff of Khs.28,440,268.14 as at 7th January 1998. Now, Certificate Number 15 for Khs.17,701,448.10 was issued on 18th May 2001, over three (3) years after the overpayment and so it would fully settle that Certificate. This Court is alive to the argument made by Counsel for the Plaintiff that the Defendant’s witness admitted that the process and approval for payment of Certificate Number 15 was from their Department and the Defendant is therefore estopped from challenging it. That really, in my view is to miss the point. The quantum and veracity of Certificate No. 15 is not in question. The issue is whether there was an overpayment made by the Defendant to the Plaintiff in the Mombasa case as to entitle it to a set off in this matter.

27. I would also think and so hold that the strength of the Defendant's case is not taken away by the admission by the Deputy Vice Chancellor (Finance, Planning & Development) in a letter of 28th June 2002 (P Exhibit page 464) that the amount due to the Contract was Khs.17,701,448.10. This was an admission as to what Certificate No. 15 (after credit for what was paid to KPLC) represented. This letter came about 5 years before the Report by IRAC found an overpayment in favour of the Defendant.

28. Is the Defendant entitled to the Counterclaim? Let me first observe that this suit was filed on 7th March 2008 which was over a year after the IRAC Report. If then an overpayment had been made by the Defendant then it was entitled to seek a set off and Counterclaim in these proceedings.

29. The Defendant asserts a Counterclaim of Khs.10,738,820.04. He who asserts must prove. The Plaintiff's Counsel submits that the Defendant has not produced any evidence in support of its claim. Counsel submits that the Defendant has relied upon the evidence of IRAC Report to build up its case. The Plaintiff then submits;

"its evidence which was technically presented in by error of Judgment on the part of the Plaintiff in HCC 109/1991 Which the Judge reluctantly allowed for purpose of the conclusion of that case and in particular to determine the Decretal sum in respect of Certificate part 10,12,13 and 14."

30. Is this so? Perhaps this Court needs to again rehash the purpose for requiring the IRAC Report. It was for purposes of informing the parties and the Court whether the Decretal sum in the Mombasa case had been settled after insistence by the Defendant that there had been an overpayment. The Court accepted the Report and found that the Decretal sum had been fully settled. As to the limb of the Report that found an overpayment, the Judge observed;

"The Centre was to examine the accounts respecting the payments of the decretal sum and make a determination of whether, from that examination, the Defendant was indebted to the Plaintiff. Their determination is clear that the Defendant is not so indebted to the Plaintiff. The finding of the overpayment was incidental or consequential and does not invalidate the Report. In any event the Defendant has not sought reimbursement."

31. I do not understand the Judge to be faulting the finding of overpayment simply because it was incidental or consequential. And while the Defendant had not sought a reimbursement then it is now seeking it by way of counterclaim. If the Judge accepted the Report as an accurate finding that the Decree was fully paid then it seems logical that the finding of overpayment was as well accurate. It is unhelpful to attempt to segregate one finding from the other and more particularly when the Plaintiff did not seek to challenge the Decision by way of Appeal or Review. I find that upon reliance of the Report and its acceptance by the Judge in the Decision of 30th July 2009 as representing the status of payments made in the Mombasa case, the Defendant has proved its case on a balance of probabilities.

32. And this Court thinks that it has indeed reached a correct decision on this question because when the Defendant sought the adoption of the Report in the Mombasa Suit in the Motion of 12th March, 2008, the Plaintiff was fully cognizant of the possible implication of the orders sought therein in these proceedings. In paragraph 23,24,25 of his affidavit sworn on 27th April, 2008 Mr. Varsani depones as follows:-

"23. THAT this demonstrate an element of bad faith and mischief on the part of the Defendant and indeed an attempt to frustrate the Plaintiff's claim arising from certificate number 15 which was never an issue before this Honourable Court and hence a Judgement by backdoor.

24. THAT I am advised by our Advocate on record that the Defendant have filed a counterclaim and set-off as per annexed statement of defence, set-off and counterclaim herein annexure PSJV/7 and the same issue cannot be determined through the Defendant's application.

25. THAT I am also advised which advise I verily believe to be true that the Defendant is claiming an overpayment of the decretal sum by Kshs.18,911,458.68 which sum has not been in any way determined by this Honourable Court nor agreed by the Parties and therefore cannot be casually adopted to be part of the decree of this Honourable Court."

33. Well aware of the possible implication then I must wonder why the Plaintiff did not seek to Review or Appeal the Decision of 30th July 2009, if it thought it was erroneous in accepting the IRAC Report as being a true Report of the status of payments made by Defendant to the Plaintiff. The Plaintiffs must live with the consequences of that Decision. It would be unconscionable to allow the Plaintiff to obtain Judgement herein when it has been overpaid. It is not equitable for the Plaintiff to retain the overpayment. In addition, an overpayment made from Public Funds 10 years before the filing of this suit.

34. On General Damages for breach of Contract, no evidence was led by the Defendant. It is a limb that must have been abandoned.

35. The upshot is that I dismiss the Plaintiff's suit with costs and enter Judgement in favour of the Defendant against the Plaintiff for Ksh.10,738,820.04 with interest at Court rates from the date of filing of the Counterclaim. The Defendant will also have costs of the Counterclaim. Those are the Orders of the Court.

Dated, Signed and Delivered in Court at Nairobi this 27th day of July, 2018.

F. TUIYOTT

JUDGE

PRESENT:

Muriuki for the Plaintiffs

Omugala for the Defendant

Nixon - Court Assistant