



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. 556 OF 2004

COMPUTER CONSULTANTS LIMITED.....PLAINTIFF

-VERSUS-

COUNTY GOVERNMENT OF KAJIADO.....DEFENDANT

JUDGMENT

PRELIMINARY

1. Parties on **6th October 2016**, consented to amend the defendant's name from Ole Kajiado County Council to the County Government of Kajiado. This is because the 2010 constitution created 47 counties in the country and did away with the county councils that existed there before.

THE CASE

2. The plaintiff's claim is for judgment of ksh 5,566,567.80. Although the defendant filed its defence to the plaintiff's claim on **4th November 2004**, it did not support that defence with any evidence during trial. The defendant did not in other words, adduce any evidence in support of its defence. That defence was therefore, not proved. The court in the case of **Mary Njeri Murigi v Peter Macharia & another [2016] eKLR** the court held:

“where a party fails to call evidence in support of its case that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.....”

3. The plaintiff's claim is in respect to the unpaid amount for services and goods which were supplied by the plaintiff to the defendant at the defendant's request between **16th December 2002** to **21st June 2004**.

4. The plaintiff's evidence was adduced by **Philip Karonjo Ndehi** the plaintiff's managing director. By his evidence, that witness stated that the dealings between the plaintiff and the defendant began in the year 2000. The plaintiff supplied to the defendant hardware and software goods and services on adhoc basis as per the defendant's needs. Payments for the goods and services were payable after supply/support of material and services. The defendant however, was always in arrears of those payments. It was later that the parties entered into written contracts to recognise their ongoing relationship. There were two agreements, one relating to software support dated **6th November 2003**. By that agreement, the plaintiff undertook to support the defendant's computer software. That support amongst other things related to Support scheme membership Agreement as stated below:

“4.1 The supplier shall provide maintenance from the date of this agreement subject to the payment of the support scheme membership fee by the licensee to the supplier.

4.2 The support scheme shall comprise the following services and facilities in relation to the software:-

4.2.1 an advisory and explanatory service including the provision of a telephone consultation service (help-line) and a telephone data communication service to enable an off-site diagnostic service and a software transmission service (modern support), all to be provided between the hours of 09.00 and 17.00 each day excluding public holidays and weekends;

4.2.2 a program error correction service which will include the provision of updates or work arounds as soon as reasonably possible (taking into account the seriousness of the loss of specified functionality) to correct the software;

4.2.3 regular communication from the supplier to the licensee on matters of general interest, communicating any relevant programs errors that have been identified and advising the licensee of available upgrades to the software;

4.2.4 the supply of upgrades free of charge from time to time; and

4.2.5 providing the assistance to the licensee set out in clause 4.6.”

5. The 2nd contract was in regard to the license to the defendant to use the software. That agreement provided amongst other provisions for training courses for the defendant’s employees in the use of the software, modify and enhance the software to the defendant’s specific requirements, and maintenance of software.

6. The plaintiff’s witness referred to the statement of the amount claimed in the plaint that is ksh 5,566,567.80 which amount was supported by the plaintiff’s invoices. The plaintiff’s witness stated that the defendant failed to pay the amount claimed.

7. Plaintiff and the defendant had a meeting on **6th November 2003** and the plaintiff produced a document of record of the meeting which was signed by both the plaintiff and the defendant. That document is reproduced as follows:

“Olkejuado County Council

P.O. Box 11

KAJIADO

6th November, 2003

ACCEPTANCE DOCUMENT FOR THE SOFTWARE IMPLEMENTATION PROJECT

1. This document serves as a record of a meeting held on 6th November, 2003 at the offices of the Olkejuado County Council (OCC) between the officers of OCC and Computer Consultants Ltd (CCL).

2. At that meeting, OCC formally confirmed that the project implementation assistance for the payroll, rent, single business permits and cashiering (the modules) provided by CCL was now complete and operating satisfactorily.

3. OCC also confirmed the formal acceptance of the following:-

a. The software of the modules in binary as supplied and licenced by CCL

b. The user manuals explaining the operations of the modules as hard copy.

c. The help feature explaining the operations of the modules as soft copy.

d. The user’s training for the following courses:-

i. Introduction to computers & Ms Windows

ii. CCL Payroll, Rent, Single business permits & cashiering operations

e. Certificates of the above two courses for:

i. Joyce Kihoro

ii. Hellen Nduku

iii. Peter Tianta

iv. Purity Nampasa

v. Donata Sanare

vi. Morris Kaaka

vii. Jonathan Turere

f. All the reports and enquiries as supplied by CCL as standard, and as customized by OCC at the time of signing this document.

g. Own set up disks and back ups.

h. training of the password management to the officer assigned for the job, namely, joyce kihoro.

i. Audit Trail routine

j. One copy of the software license agreement and one copy of the support agreement duly signed by both OCC and CCL

4. OCC officials further agreed to promptly release any outstanding payments due to CCL.

5. Confirmation signatures.”

8. The defendant by its written submissions submitted that the plaintiff’s claim as pleaded in the plaint offended Order 2 Rule 2 of the Civil Procedure Rules 2010. Order 2 Rule 2 (1) (2) is in the following terms:

1. “Every pleading shall be divided into paragraphs numbered consecutively, each allegation being so far as appropriate contained in a separate paragraph.

2. Dates, sums and other numbers shall be expressed in figures and not words.”

9. Unless the defendant had in mind another rule of those rules, I cannot find any offence by the plaintiff in its pleadings as stated in Order 2 Rule 2.

10. Although the defendant submitted that the plaintiff’s claim was not supported by the defendant’s order for services and goods, I find that the plaintiff proved its claim on a balance of probability and that the evidence of the plaintiff remained uncontradicted by the defendant. The plaintiff proved that there was an agreement for provision of hardware and software to the defendant. The defendant acknowledged the supply of goods and services by letter which is reproduced above dated **6th November 2003**. The defendant even by that letter admitted it was indebted to the plaintiff.

11. The plaintiff has proved its claim and is entitled to judgement as prayed. Judgement is therefore entered for the plaintiff against the defendant for Kshs 5,566,567.80 plus interest at court rate from the date of filing this suit until payment in full. The defendant shall pay the plaintiff’s costs of this suit.

DATED, SIGNED and DELIVERED at NAIROBI this 30th day of October, 2018.

MARY KASANGO

JUDGE

Judgment read and delivered in open court in the presence of:

Court Assistant.....Sophie

..... for the Plaintiff

..... for the Defendant

MARY KASANGO

JUDGE