



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CIVIL SUIT NO. 1 OF 2014**

**KISUMU STEEL COMPANY LIMITED ..... PLAINTIFF**

**VERSUS**

**ARVIND ENGINEERING LIMITED ..... DEFENDANT**

**JUDGMENT**

By the Amended Plaint filed herein on 28th February 2014 the Plaintiff's claim against the Defendant is for a sum of Kshs.10,143,916/= made up as follows -

- (a) Kshs.4,350,000/= being agreed penalty for 29 weeks delay in completion of the works at the rate of Kshs.150,000/= per week beginning 1st April 2012 to 10th November 2012.**
- (b) Kshs.2,000,000/= being cost of hiring a crane.**
- (c) Kshs.1,625,964/= for loss of profits for the month of September 2012.**
- (d) Kshs.1,625,964/= loss of profits for the month of October 2012.**
- (e) Kshs.541,988/= loss of profits for the period 1st to 10th November 2012.**

The Plaintiff also prays for interest on the above sums at court rates from date of filing suit till payment in full and costs of the suit.

On its part the Defendant counterclaims for a sum of Kshs.1,487,738/= being the balance of the contract sum; interest and costs of the suit.

Briefly the Plaintiff's case is that on 1st September 2011 it entered into a written contract with the Defendant for steel structural works at its premises in Kisumu at a price of Kshs.19,887,720/=. The contract was for building a steel structure shed that would house machinery, raw material and finished goods. The plan area, material specification and design load were all to a specific standard as agreed in the written contract. In addition the agreement had special notes in regard to the plaintiff, delivery and mode of payment. The contract was subject to completion of the column bases, by another of the Plaintiff's contractor by 15th October 2011. Since this foundation was not ready on time the date of commencement was, by mutual agreement pushed to January 2012. On 23rd February 2012 the parties entered into another agreement which amended the colour scheme of the structure, the payment structure and the completion date so that the date now became end of March. It was further agreed that if by Easter weekend it had not been completed there would be a weekly penalty of 150,000/= going forward or until the work was completed. According to Jay Shah (PW1) the Defendant did not complete the works at the end of March as agreed. Instead the works continued until November. For every week of delay the

defendant was liable to pay Kshs.150,000/= hence the claim for Kshs.4,500,000/=.

PW1 testified that as a result of the delay the Plaintiff suffered loss in terms of the profit it would have earned from producing steel plates. He explained that the industry has a profit margin of 11% of the turnover and from November 2012 to January 2014 when production occurred the turnover was Kshs.14,350,000/= hence the claim for Kshs.1,625,964/= for the months of September and October and a proportionate sum in November. He further testified that the works were shoddy and when the Plaintiff requested the Defendant to rectify the defects it refused to do so. The Plaintiff therefore hired a crane at a cost of Kshs.2,000,000/= from Abyssinia iron & Steel Limited to as to remedy the defects. He stated that had the works been completed satisfactorily the Defendant would have issued a completion and occupation certificate but it never did. In regard to the counterclaim he testified that the

Defendant was paid Kshs.18,500,000/= and hence the Defendant is owed only Kshs.203,000/= but not Kshs.1,100,000/=. He contended that the reason the Plaintiff did not pay the balance was because it had to rectify the defects itself and moreover the defendant did not raise an invoice for the sum claimed. He reiterated that there was a delay in completion of the works which in the end were shoddy and that as a result of the delay the Plaintiff suffered loss because of the delay and also for rectifying the defects. He urged this Court to award the Plaintiff the sums claimed. In support of the Plaintiff's case the witness produced the contract dated 1st September 2011, the agreement dated 23rd February 2012, photographs of the alleged defects in the works, compilation of the company's turnover for the period in issue, Profit and Loss Account, Invoice for Kshs.2,000,000/= from Abyssinia Iron & Steel Limited and a demand notice from L.G. Menezes, Advocates and e-mails exchanged between the parties.

The Defendant called Arvind Surajmal Tiwari (DW1) its director who stated that before they could commence the works they had to get electricity connection from Kenya Power & Lighting Company and a civil foundation from another company contracted by the Plaintiff. The works therefore commenced in January 2012. He conceded that on 23rd February 2012 they signed another agreement which stipulated that they would complete the work by end of March 2012. He contended that he could not however do so as he did not have power on site. He stated that the work was completed at the end of April 2012. There was extra work to be done but the Plaintiff gave that to another contractor as he said the Plaintiff's quotation was too high. Regarding the defects he testified that leakage is normal in such structure and that the defendant repaired the leakage at its own cost. He further stated that the defendant was not aware that manufacturing was to commence in September 2012. As for the cost of the crane he stated that hire of a crane should be Kshs.96,000/= per day and the Kshs.2,000,000/= claimed is too high. He contended that out of the contract sum of Kshs.19,687,738/= the Plaintiff paid Kshs.18,200,000/= and this upon confirming that the work was satisfactory. He stated that as a contractor he was not required to issue a completion certificate or even an occupation certificate. He contended that after he was notified of the defects he went and rectified them but another contractor went and disturbed his works. He conceded that he did not issue an invoice for the balance remaining due and neither did he issue a demand notice. He contended that as the Plaintiff admits it paid Kshs.18,200,000/= the Court should award the defendant the balance of Kshs.1,487,738/=.

The Advocates for the parties agreed to sum up their cases through written submissions. Those of the Plaintiff were received on 19th December 2016 and judgment was scheduled on 9th March 2017. However the Court had not received submissions for the Defendant and the judgment was rescheduled to 20th April 2017. The Court was however away on vacation and the judgment was deferred to 26th May 2017 when again the Court did not sit due to other official engagements. The delay in delivering the judgment is nevertheless highly regretted.

That the Plaintiff and the Defendant entered into contract for construction of a steel structure at a cost of Kshs.19,687,738/= is not in dispute. That the date of completion was end of March 2012, is also not in dispute and it is also not disputed that delay in completion of the work would attract a penalty of Kshs.150,000/= per week. Further there is no dispute that the Defendant carried out the works. The issues for determination therefore are -

**(a) Whether there was delay in completion of the works and if so whether the Plaintiff is**

**entitled to the sum claimed as a penalty for the delay.**

**(b) Whether the delay if any occasioned loss to the Plaintiff and whether the Plaintiff is entitled to the sums claimed for loss of profits.**

**(c) Whether the works met the agreed specifications and if not whether the Defendant was obligated to rectify the defects and further whether the Plaintiff is entitled to the Kshs.2,000,000/= it claims for hire of a crane to rectify the defects itself.**

**(d) As the Plaintiff has admitted it paid the Defendant a sum of Kshs.18,200,000/= only whether the Defendant is entitled to the balance of Kshs.1,487,738/=.**

**(e) Who will bear the costs of the suit and the counterclaim.**

On the first issue the Defendant conceded there was delay of one month but stated that it was occasioned by lack of electricity at the site. He did not however prove that as in his own words work only commenced after electricity was connected to the site in January 2012. There was no Completion Certificate produced to prove the date on which the works were completed. According to the Plaintiff the works went on until November 2012 whereas they were to be completed by end of March 2012. The Defendant on his part stated that he completed the works on 30th April 2012 and once that was done his part of the bargain was complete.

It is my finding that the circumstances of this case places the burden of proof (in regard to the date of completion) on the defendant. Since he did not issue a Certificate of Completion as he should have and it is him who alleges he completed the works on 30th April 2012 this becomes a fact within his Special Knowledge and **Section 112 of the Evidence Act** therefore places the burden of proof upon him. Moreover he is the one who would fail if this Court were to find that the work was not completed by end of April 2012 as he alleges and so again the incidence of proof lies upon him – **see Section 108 of the Evidence Act**. The burden of proof being upon the defendant to prove he completed the work by end of April 2012 and that burden having not been discharged it is my finding that the defendant's contention that works continued until November 2012 was not disproved. The agreement dated 23rd February 2012 clearly stipulated that if the works were not completed by the end of March 2012 the defendant was liable to a penalty of Kshs.150,000/= per week of delay. According to the Plaintiff the period of delay was 29 weeks and for this it claims a sum of Kshs.4,350,000/=. I have considered the defendant's submissions on this head and my finding is that this claim has basis in the agreement dated 23rd February 2012 which even the Defendant's witness admitted in his testimony. The sum claimed was also specifically pleaded and it is my finding that the Plaintiff is entitled to it.

On the issue of loss of profits my take is that having agreed that the defendant would compensate the Plaintiff for any delay occasioned in the sum of Kshs.150,000/= it cannot also make a claim for loss of profits. It is my finding that the Kshs.150,000/= per week was to cushion the Plaintiff for any losses that it would have incurred as a result of the delay. To find the defendant liable for loss of profit as well would be to expose the defendant to double jeopardy which would be unjust. In any event the projected returns produced by the Plaintiff would not have been sufficient to prove its profit for the months in issue. Having been in production already such a claim, I agree with the Defendant, would have sufficed only based upon an audited account.

In regard to the hiring of the crane and the allegations of shoddy works my finding is that firstly in regard to the crane it was conceded that the Plaintiff never paid the sum of Kshs.2,000,000/=. That being the case it is not entitled to that sum. I did also scrutinize the legal receipt attached to the invoice produced by the Plaintiff and it is not clear whether the transaction was for sale or hire of the crane. The receipt indicates sale – see the supplementary documents attached to the Notice of Motion dated 30th July 2015. If it was a sale it means the Plaintiff must have purchased it for any other purpose but not merely to rectify the defects. Be that as it may the Plaintiff having omitted to produce a receipt for hire of the crane would not be entitled to the sum claimed.

As for the shoddy works it would have done well for the Plaintiff to call a consultant to confirm what the specification of the works were and if the works carried out met those specifications. As it is we have only the Plaintiff's word against that of the defendant's who contends that he carried out the works, rectified whatever defects that were brought to his notice and that his works were disturbed by another contractor. This Court has no expertise in construction and the evidence of an expert in

that field is what would have come along way in helping this Court to resolve that issue. Accordingly this Court will not make a finding in regard to the quality of the works undertaken and will not order any compensation based on that.

As for the counterclaim the Plaintiff admits and in fact the contract stipulates that the contract sum was Kshs.19,687,738/=. The Plaintiff has by its own admission paid only Kshs.18,200,000/=. The Defendant is therefore entitled to the balance of Kshs.1,487,738/=. This would be the judgment sum in respect of the counterclaim but which I shall set off from the sum of Kshs.4,500,000/= found due by it to the Plaintiff leaving a balance of Kshs.3,012,262/= .

Accordingly I enter judgment for the Plaintiff against the Defendant for a sum of Kshs.3,012,262/= together with interest from the date of this judgment. The Defendant will also pay the Plaintiff's costs based on the sum found due. It is so ordered.

**Signed, dated and delivered at Kisumu this 31st day of May 2017**

**E. N. MAINA**

**JUDGE**

**In the presence of:-**

Mr. Indimuli for the Plaintiff (holding brief for Menezes Advocate)

N/A for the Defendant

Court Assistant – Serah Sidera