



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCCC NO. 819 OF 2010

ARTESIAN (K) LIMITED..... PLAINTIFF

VERSUS

PRIME DRILLERS AND CONTRACTORS LIMITED....DEFENDANT

JUDGEMENT

1. Artesian (k) Limited (The Plaintiff) claims a sum of USD 37,999 from Prime Drillers and Contractors Limited (The Defendant). That claim is presented in a Plaint dated 30th November, 2010 and filed in Court on 1st December 2010.

2. It is alleged by the Plaintiff that the sum is the balance of the consideration for the services offered by the Plaintiff to the Defendant for drilling, borehole construction, borehole development, construction of platform and installation of pumping equipment and commissioning of 7 boreholes in New Cush, South Sudan(for ease of reference together called '**Borehole works**')

3. It is averred by the Plaintiff that the Defendant issued to it a cheque for US Dollars 37,999 which cheque, on presentation, was returned unpaid with remarks "*refer to drawer*".

4. The Defendant denies the claim and states that the Plaintiff breached the terms of the agreement because:-

(i) It never submitted a complete drilling report for each borehole to the Defendant.

(ii) It never submitted a final narrative report to the Defendant within 2 weeks after completion of the drilling activity (if at all).

(iii) It never did pump testing.

5. In respect to the returned cheque, the *Plaintiff* avers that the *Plaintiff* deposited the cheque of USD 37,999 against the Defendants instruction and after it had been informed it that the cheque would not be honoured by the Bank since Sudan Peoples Liberation Army (the Clients) had not paid the Defendant due to the breach of the terms of the contract by the Plaintiff.

6. Eng. Zakaria Njoroge Kiruka (PW1) is a Director of the Plaintiff Company. In his evidence he reiterated the averments contained in the statement of claim. The Plaintiff and Defendant entered a contract dated 18th May 2009 in which the Plaintiff was to conduct drilling, borehole construction, borehole development, construction of platform, installation of pumping equipment and pump filing and commissioning of 7 boreholes in Eastern Equatorial State, South Sudan.

7. It was his evidence that the Plaintiff completed the works as per the contract and on commissioning of the works he was given two cheques. This was on 28th June 2009. One of the cheque was postdated to 30th June, 2009.

8. In cross-examination questions were fielded to him in regard to the commission of the works. He explained that commissioning meant handing over of the boreholes to a client. That is giving it the right to utilize the boreholes. PW1 stated that this could either be in a formal ceremony or informally. The testimony of the witness is that he handed over the boreholes to the clients without a ceremony as they were in a hurry to take them over. He added that the same are now being utilized.

9. The witness was required to respond to allegations that the Plaintiff did not comply with the provisions of Article 7 of the Contract. Article 7 is on the responsibilities of the Plaintiff. It provides:-

1. The Sub Contractor shall make available the drilling equipment and the drilling crew required for the works, and all the

drilling material and consumables as required.

2. The Sub Contractor shall give the client's supervisor a free access to the drill site to fully monitor and inspect the works.

3. The Sub Contractor shall give the Client's supervisor a complete drilling report for each borehole as the UNICEF/GOSS standard borehole logs (or equivalent layout) including:-

a. Name and location (GPS) of the site, date of works, name of master driller, equipment used.

b. Geological formations, drilling depth, drilling diameters, drilling methods, water strikes and complete description of well design.

c. Pump test records (yield and recovery)

d. Type of hand pumps installed, dated, cylinder depth.

4. The Sub Contractor shall submit the final narrative report to the Contractor within two weeks after the completion of drilling activity.

5. The Sub Contractor shall guarantee the boreholes for six months after completion. During this warranty period the Sub Contractor should attend to any problems at no cost, unless the problems resulted due to poor or improper use by the beneficiaries.

6. The Sub Contractor shall ensure that swift action be taken to replace a machine if any mechanical breakdown occurs during the Contract period.

7. The Sub Contractor shall not be made responsible for the quality of water of a drilled borehole.

8. The Sub Contractor shall ensure that the boreholes should have a minimum yield of 60 liters per hour to be considered successful. The decision of whether the borehole is successful or not shall be made by the Client's supervisor. The yield shall be checked by a constant flow pump test of not less than three hours, after air development of the boreholes. In the event the yield falls below 600 litres per hour, the borehole shall be capped and it shall neither be constructed nor installed. The technical standards for OLS-water sector/GOSS shall be followed.

9. The Sub Contractor shall provide all necessary manpower and drilling expertise to complete the Contract Agreement within the set timeframe.

10. The Sub Contractor shall fix stainless steel plate, with information provided by the Client inscribed, and shall fix each plate on each slab respectively, if the plate is provided for by the client.

10. In regard to Article 7.3 the Plaintiff witness stated that he submitted a draft report to the Defendant's supervisor. PW1 however conceded that the Company did not submit the final narrative report as required by Article 7.4. There is then Article 7.10. PW1 stated that the clients (SPLA) did not provide the stainless steel plate.

11. PW1 was adamant that it was the Defendant who breached the Contract and that the Defendant would not have drawn the Cheques if the Plaintiff had not completed the Borehole works.

12. PW1 told Court that the cheques were given to him by a Mr. Gichuhi of the Defendant Company on 28th June 2009 at the Plaintiff's office at Kamiti Road. Other than requesting him to delay the deposit of the cheques for about 2 weeks, Mr. Gichuhi never raised any other issues.

13. On the part of the Defence, Patrick Wainaina Gichuhi (DW1) testified on 15th December 2016. He is a Director of the Defendant Company. He confirmed that his Company subcontracted the Plaintiff in respect to the Borehole works.

14. In his written statement of 27th July 2016 which was adopted as part of his evidence in chief, the witness stated that the Plaintiff was paid USD 13350 as down payment and the balance was to be paid after the Plaintiff submitted the Completion Reports on the successful completion of the seven boreholes. The Plaintiff was also required to submit an invoice.

15. His evidence was that the Plaintiff has to date not submitted the Completion Reports or Invoices. Further that the Plaintiff has not complied with the terms of the Contract or done pump testing. DW1 states that he had to personally prepare the Completion Reports.

16. A little more on the performance of the Contract. It is the evidence of DW1 that the Plaintiff never informed him when going to the site and so he never nominated a representative. He also testified that the Plaintiff could not have commissioned the boreholes without involving him.

17. DW1 told Court that the Defendant has never been paid by SPLA because no work was done. However on cross-examination he told Court that SPLA had complained that the works were not satisfactorily done.

18. On the issue of payments, DW1's testimony was that on 18th May, 2009, he gave Zakaria two postdated cheques as follows:-

Cheque No.30011 for USD.13300 due on 31st May, 2009

Cheque No.30012 for USD.32999 due on 30th June 2009

The first cheque was not paid and was returned on 28th August 2009.

19. So as to make up for the returned cheque the Defendant transferred USD 12,000 to the Plaintiff's account NO. 0227734016. This was on 31st August 2009. Later on 3rd September 2009, the Defendant transferred the balance of USD 1300.

20. In respect to the second cheque of USD.37999, the Defendant's case was that it was postdated to the contemplated date of completion. In his witness statement, DW1 stated that it was agreed that the Plaintiff would hold on to the cheque and bank it once it was confirmed that works were done. That the Plaintiff presented the cheque even when aware that there were outstanding Contractual issues. The Defendant maintains that it has not been paid to date by SPLA because of non-compliance of the subcontract by the Plaintiff.

21. At the close of taking of evidence the parties filed written submissions. This Court has considered those submissions. The singular issue for determination is whether the Plaintiff performed the Contract and whether it is entitled to the balance of Contract sum.

22. It is common ground that the Plaintiff and the Defendant entered into a Borehole Drilling Contract on 18th May 2009. The clients in the Contract were the Government of South Sudan, Sudan Peoples Liberation Army (SPLA). The scope of works was the drilling and completion of seven (7) boreholes in Eastern Equatorial State, Southern Sudan. The total consideration was USD 51100. Pursuant to this Contract, the Defendant paid the Plaintiff a sum of USD 13300. This payment is not in contention. In accordance with Article 8.3 of the Contract the balance of USD 37,800 as final payment was to be made upon delivery of the completion reports of seven (7) successful boreholes to the Defendant with borehole logs and upon receipt of invoices submitted by the Plaintiff.

23. It is the Plaintiffs case that it successfully completed the works by 25th June 2009 and on 28th June 2009 the Defendant made out payments by issue of two cheques. One was backdated to 30th May 2009 and the other postdated.

24. The Defendant denies the completion of the works and explained that one cheque was postdated to the anticipated date of completion.

25. The testimony by the Plaintiff's witness was that it completed the works and passed over the Draft completion report to the Defendants supervisor. This is denied by the Defendant. The Plaintiff however did not produce the completion reports in evidence.

26. It would be clear to this Court that even if the Plaintiff had carried out the works, it did not quite proceed as anticipated by the Contract. For instance, the Plaintiff readily accepted that it did not submit the final narrative report to the Defendant within two weeks after the completion of the drilling activity as required by Article 7.4 of the Contract. Citing Section 97 of the Evidence Act, the Defendant's Counsel had submitted that the Plaintiff needed to show that it followed the terms of the Contract to the letter or show by secondary evidence that it finished the project. Section 97 (i) of The Evidence Act provides:-

“97.(1). When the terms of contract, or of a grant, or of any other disposition of property, have been reduced to the form of document, and in all cases in which any matter is required by law to be reduced to the form of document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act”.

27. Having found that the Plaintiff had not stuck to the letter of the Contract, what should concern the Court is whether the works were completed to the satisfaction of the Defendant. In respect to this DW1 had stated as follows:-

***“I personally prepared the completion reports to SPLA for payment after he verbally confirmed to me that he had done the work which after inspection was found not to have been done as agreed, hence no payment was made by SPLA.*”**

28. In his oral evidence DW1 added that he prepared the completion reports based on a representation by the Plaintiff's driller and that,

“I was told to go to the site and confirm that the works had been done”.

DW1 nevertheless states that he has not visited the site.

29. Now, the Contract was entered into on 18th May 2009. The down payment of USD 13300 was to be made in two weeks of the date of the agreement (Article 8.2 of the Agreement). According to Article 2, the Contract was to terminate in June 2009 unless otherwise extended by mutual consent in writing by both parties. While Article 4.1 provided:-

“1. The Sub Contractor shall commence and complete the work within the time as given in the Agreement or within an extended Contract period if an extension has been granted by the Client (SPLA)”.

30. The evidence by the Plaintiff was that it completed the works on 25th June 2009 and was thereafter given two cheques one of which was backdated to 20th May 2009. It is common ground that there has been part payment of USD 13300. This is acknowledged by the Plaintiff while the Defendant says that it paid USD 12000 by way of money transfer into the Plaintiff's account on 31st August 2009 and a smaller payment of USD 1300 again by transfer on 3rd September 2009. Even if one was to accept the evidence of DW1, It would be that the deposit was not paid in the two weeks but way after on 31st August 2009 when USD 12,000 was transferred into the Plaintiff's account and on 3rd September 2009 by way of transfer of USD.1300.

31. It is to be observed that the part payment which ought to have been the deposit was made even after the expiry of the term of Contract which was June 2009 (Article 2 of the Agreement). And there is no evidence of extension of the Agreement in writing as contemplated by the terms of Article 2. It would seem therefore that both the Plaintiff and the Defendant did not adhere strictly to the terms of the Contract. However, there is evidence by no less than the Defendant's own witness that it prepared and presented completion certificates to the Clients. It must be asked whether the Defendant was being dishonest to its Client when it prepared and presented those certificates without first being satisfied that the Plaintiff had indeed carried out the works.

32. There is undisputed evidence that the Defendant made out a postdated cheque of USD 37999 representing the balance of the consideration. When this payment is taken up together with the issuance of the completion certificate by the Defendant, then the Plaintiff's case that it successfully completed the works is believable.

33. The common evidence is that the cheque for the balance was returned unpaid. The Defendant's explanation is that it had, through DW1, requested for the delay in the deposit thereof for the reason that it was to await confirmation that the works had been done. A cheque is a bill of exchange drawn on a bank payable on demand. Liability of a drawer of a bill is provided under Section 55 of the Bills of Exchange Act, (Cap 27), in the following terms:-

(1) The drawer of a bill by drawing it—

(a) engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or any endorser who is compelled to pay it, so long as the requisite proceedings on dishonour be duly taken;

(b) is precluded from denying to a holder in due course the existence of the payee and his then capacity to endorse.

(2) The endorser of a bill by endorsing it—

(a) engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or a subsequent endorser who is compelled to pay it, so long as the requisite proceedings on dishonour be duly taken;

(b) is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous endorsements;

(c) is precluded from denying to his immediate or a subsequent endorsee that the bill was at the time of his endorsement a valid and subsisting bill, and that he had then a good title thereto.

34. By virtue of the Provisions of section 55(i) of the Bill of Exchange Act, the Defendant who was the drawer of the dishonoured cheque of USD 37999 is liable, to compensate the Plaintiff for payment because these proceedings, which in part, is based on the dishonoured cheque have been duly taken unless the Defendant is able to show some good reason why the Plaintiff is not entitled to the payment (See the case of Hassanah Issa & Co vs. Jeraj Produce Store (1967) EA 55).

35. Has the Defendant offered a good and plausible explanation to disentitle the Plaintiff of the relief he seeks? The Court has found that by issuing the completion certificates to the client the Defendant held out that the works had been completed. In addition, whilst the Defendant complains of breach of the Contract it has not sought a refund of the part payment of USD 11300. The two put together supports the theory by the Plaintiff that it had carried out the works to the satisfaction of the Defendant who then made further payment by way of the cheque of USD 37999. It must be concluded that by not recalling the cheque or stopping its payment, the Defendant acknowledged that the Plaintiff was entitled to the sum drawn on the dishonoured cheque.

36. On a balance of probabilities, this Court finds that the Plaintiff has proved its case and enters judgement in its favour for USD 37,999 or its equivalent in Kenyan currency as at the date of this Judgement together with interest thereon at Court rates from the date of filing of this suit until payment in full. The Plaintiff shall have costs of the suit.

Dated, Signed and Delivered in Court at Nairobi this 29th day of September, 2017.

F. TUIYOTT

JUDGE

PRESENT:

Akongu for Plaintiff

Ngulu h/b Karuga for Defendant

Alex - Court Clerk