REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 612 OF 2012

KISUMU CONCRETE PRODUCTS LTD……..……...PLAINTIFF

VERSUS

CEMENTERS LTD…….……..…….…..DEFENDANT

JUDGEMENT

1. The Plaintiff commenced this suit vide a plaint dated 28th August 2012, and filed in Court on 20th September 2012, seeking for a sum of Kshs.14,383,852.40, being the balance of the value of works and services done and/or rendered to the Defendant. Upon service of the summons to enter appearance, the Defendant entered appearance on 3rd October 2012, and filed a statement of Defence on 8th October 2012.

2. Subsequently, the Plaintiff filed an Application under Order 36 of the Civil Procedure Rules, seeking for summary Judgment and on 20th November 2012, the Parties recorded a partial consent on the Application in the following terms:

> ***"By Consent, the Defendant to pay a sum of Kshs.5,109,588.00 to the Plaintiff within 30 days from today."***

3. On 17th December 2012, the Defendant paid the money leaving a balance of Kshs.9, 273,264, which is now the basis of the claim herein.

4. Eventually, the Application for summary Judgment was heard by Hon. Justice Havelock (Rtd), and dismissed on 19th November 2012, with costs to the Defendant.

5. In the meantime the Defendant filed a Notice of Motion Application dated 29th September 2014, seeking for leave to amend its statement of Defence. The leave was granted on 17th October 2014 and the amended statement of Defence and a Counter-Claim was filed.

6. The Defendant is seeking for a sum of kshs.58, 153,778, allegedly being the amount incurred for hire/replacement of machinery to carry out excavation of the site.

7. On 12th November 2014, the Plaintiff filed an amend Plaint and a statement of Defence to the Counter-Claim. Thereafter after the parties complied with the pre-trial directions under Order 11 of the Civil Procedure Rules 2010 and the matter certified ready for hearing,.

8. The background facts of the case are that the Plaintiff was contracted by the Defendant vide a Local Purchase Order dated 10th November 2011, to carry out excavation works at a site situated on Hospital road, Upper Hill, Nairobi and cart away the excavated materials. The excavation works was approximately 18,000 cubic meters, payable at an agreed price of kshs.2,900 per cubic meters per day plus value added tax. Payment was to be made within fifteen (15) days of delivery of the statement of accounts of the amount due for works done.

9. Mr. Lalji Karsan Rabadia, testified for the Plaintiff that, the Plaintiff carried out the excavation works, carted away the excavated material and dumped it as per the contract terms and by 4th July 2012, when the work was stopped, the Plaintiff had excavated a total of 15,719 cubic meters and by 5th July 2012 it had carried out further works worth Kshs.6, 424,735.40 inclusive of value added tax.

10. That as the works continued, delay was experienced in making payments extending up to thirty (30) days, instead of the agreed period of fifteen (15) days, and as at 13th June 2012, the Plaintiff was owed unpaid arrears of Kshs.7,958,117 and Kshs.14, 382,852.40 at the time the Defendant stopped the Plaintiff from carrying on further works.

11. However, the Defendant denied the Plaintiff's claim. Mr Ramesh Vishram testified for the Defendant stating that the Defendant was contracted by Chartwell Holdings Limited to carry out construction works on Land Reference No. 209/11440, situated on Hospital Hill Road, Upper Hill, Nairobi.

12. Subsequently, the Defendant and Plaintiff entered into a sub-contract evidenced by a Local Purchase Order dated 10th November 2011, in which the Defendant contracted the Plaintiff to excavate and cart away the excavated materials from the site.

13. That after the Plaintiff moved to the site and started the works; it soon became clear that the Plaintiff had inadequate machinery and staff to carry out the works, as such the works delayed. That several meetings were held to address the delay but the Plaintiff failed to improve the speed of excavation.

14. On 14th June 2012, the Defendant brought its own excavator, to mitigate the loss and the risk of having the contract with Chartwell Holdings Ltd terminated. That the Defendant hired a machine from Elite Earth Movers to speed up the excavation works, and paid the full costs. On 5th July 2012, the Plaintiff moved out of the site and subsequently filed this suit.

15. The parties filed submission at the close of the case and agreed on the following statement of issues for determination:

i. What were the terms of the contract for excavation works entered into between the Plaintiff and the Defendant?

ii. Did the Plaintiff procure the contract through fraudulent misrepresentation?

iii. Did the Plaintiff breach the contract?

iv. Did the Defendant suffer any loss and damage as a result of the Plaintiff's breach?

v. Did the Defendant mitigate its losses after the Plaintiff's breach?

vi. Did the Plaintiff carry out the work for which it is claiming payment?

vii. Is the Plaintiff owed any monies by the Defendant over the contract for excavation work together with interest thereon?

viii. Is the Defendant entitled to the sum of kshs. 58,153,578.00 together with interest thereon as claimed in the counterclaim?

ix. Who pays costs of the suit and the counterclaim?

16. I have considered the pleadings herein, the witness statements supported by the oral evidence and the bundles of documents filed in support of each party's case. I have also considered the agreed statement of issue and the submissions filed. In my considered opinion, the issues for determination are:

(i) What were the terms of the local purchase order dated 10th November 2011?

(ii) Did the Plaintiff perform its contractual obligation as per the contract?

(iii) If not, did the Defendant suffer any loss or damage as a result of the breach (if any) by the Plaintiff? If yes, is the Defendant entitled to the amount claimed?

(iv) Is the Plaintiff owed any monies by the Defendant? If yes, how much money? and

(v) Who will bear the costs of the suit?

17. As regards the first issue of the terms of the Local Purchase Order dated 10th November 2011, I note that it is written on the Letter heads of the Defendant's Company, with it's the full address and addressed to the Plaintiff's Company, "Kisumu Concrete Products Ltd". The "Job Ref" reads as follows:

"To excavate and cart away to Karen or thereof rock at Hospital road – AMS Site. Approximately 18000cm at Kshs.2,900 + VAT. Payment on account and within 15 days of statement. To pay 10 million end of month on production of invoice". (emphasis mine)

18. Thus the terms of the Contract between the parties were simply:

(i) Nature of work: Excavate and cart away to Karen or off rock

(ii) Site: Hospital Road/AMS

(iii) Approximate Quantity of works 18,000.00 cubic meters.

(iv) Amount Payable: Kshs.2,900 per day plus VAT

(v) Mode of payment: 15 days after receipt of statement.

19. The Defendants submitted extensively on this Local Purchase Order contract saying that it is *"too basic"* and therefore cannot be binding without implied terms thereto. That among the terms to be implied are; *"that the plaintiff had the financial technical, and resource capacity to carry out the excavation works as well as cart away the excavated material to it's dump sites".*

20. Moreover it was an implied term of the contract that the Plaintiff would finish work within a reasonable time".and made reference to the case of ***Sai Sports Ltd Vs Nerinder Singh Boopra and 4 others (2014) eKLR*** and ***Muthuuri VS National Industrial Credit Bank 2003 KLR 145***.

21. The Defendant further referred the Court to Black Law Dictionary 7th Edition page 758 under the title "**Read into the document".** An extract from P.S. Atiyali: "An introduction to the Law of Contract" 178 3rd Edition, where it is stated that:

"Sometimes, when a Court implies a term into a document it is merely reading in what is already logically implicit in the language of the contract. Sometimes a Court is adding something to the contract which the parties probably had in mind but did not actually express. Sometimes again the Court is adding terms which the parties would probably have expressed if the matter had been brought to their attention. In yet other cases a Court adds terms to a contract which it

thinks the parties ought in fairness and justice to have included even though they might not have done so if the matter had been brought to their attention".

22. The Defendant argued that the Court should read into the Local Purchase Order herein and find that the Contract between it and Chartwell Holdings Ltd is implied in the contractual terms between the parties herein.

24. However, the Plaintiff's maintained the Contract between the Parties was a simple and straight forward one. There were no other term(s) to be implied therein and therefore the Contract between the Defendant and Chartwell Holdings Ltd is not relevant, as the Plaintiff was not a party thereto.

25. I have considered the rival arguments above and find that, as aforesaid the contract between the Parties herein was drawn by the Defendant and addressed to the Plaintiff. It was reduced in writing and therefore it should be considered within the express terms thereof. If the Defendant's intention was include the terms of inter alia; timelines, delay, the competence and/or capacity of the Plaintiff to perform its contractual obligation, then nothing was easier than to include these terms into the Local Purchase Order/Contract. If the Defendant failed to include these terms, they cannot now invite the Court to fill in these gaps to remedy the situation.

26. In fact, if the proposed implied terms were to be included in the Contract at this stage of dispute resolution; it will amount to drawing of a complete different Contract.

27. It is trite law that a Court should not rewrite contracts for the parties. In the case of; ***National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd and another*** **[2002] 2 E.A 503,** the Court held that:

"A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the clause. As was stated by Shah JA in the case of; Fina Bank Ltd vs Spares and Industries Ltd (2000) 1 EA 52:

"It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity function to allow a party to escape from a bad bargain"

28. In that regard I uphold the Plaintiff's submission and find that the terms of the Local Purchase Order Contract are to be interpreted in their plain and/or literal meaning and are binding on the parties herein.

29. I shall consider the second and third issue alongside. These issues relate the Plaintiff's performance its contractual obligation. The Question that arises is whether the Plaintiff excavated and carted away excavated materials as per the contractual terms.

30. From the pleadings and document filed in support of the claim and submissions of the parties, I gather that there is no dispute that the approximate area for excavation was 18,000.00 cubic meters and by the time the Plaintiff left the site on 5th July 2012, they had excavated and carted away materials on a surface area of 15,719.690 cubic meters as per the Report produced by Mapsoft Africa Ltd.

31. I note that the total amount demanded as per the demand letter dated 17th July 2012 written by Messrs Amuga & Company Advocates on behalf of the Plaintiff, for works done namely excavation and cart away of material at a surface area of 15, 719. 690, sq metres, at the rate of Kshs 2,900 per sq metres is kshs5, 109, 588 I get the figure of Kshs.45, 587,101.00 plus VAT and when vat is factored the Defendant place the figure at Kshs 52, 878, 716. The Plaintiff acknowledges receipt of Kshs.38, 487, 858. Therefore if the said sum is deducted the balance is Kshs 14, 390, 858. If the sum paid in Court of Kshs 5, 109, 588, is deducted the balance is Kshs 9, 281,270 . But I note the Plaintiff is claiming a balance of Kshs 9, 273, 264 gives a difference of Kshs 8,006. As the figure claimed is less than the one arrived at by the Court I shall consider what is claimed.

32. I shall now consider the Defendant submissions that, the Plaintiff breached the Contract by failing to complete the works within reasonable time or in time and failing to avail additional machinery and cart away excavated materials, which caused it to incur the sum claimed in the Counter- Claim.

33. However what is quite clear is that, there was no time limit in the Contract for the works to be done. Therefore the same can only be inferred from the usual trade practices in relation to works of the nature herein. The works are expected to be done *"within a reasonable"* time taking into account the nature of work and surrounding circumstances. In that regard the averments by the Plaintiff that, the work was to be completed by 15th July 2012 and similarly the Defendant's averments that contract was breached by failure to complete the work within reasonable time is unfounded and unsupported.

34. However, be that as it were, there was indeed delay partly by the Plaintiff and due to other factors, as herein evidenced by the minutes here under reproduced.

i) The Minutes of 29th February 2012 indicate among the issues discussed as follows:-

· ***Delay in the works was attributed to slow excavation works due to the fact that there were only two excavators on site.***

· ***NEMA working hours leading to delay in procurement of work permit. It was suggested a special permit be procured. (This has nothing to do with the Plaintiff).***

ii) The Minutes of 14th March 2012; indicate works were behind schedule, and the ***delay was not attributed to excavation works.***

iii) In the Minutes of 11th April 2012, an observation is made that ***the basement excavation was slow and needed to be completed in one month's time by 11th May 2012.***

iv) The Minutes of 20th June 2012, and 4th July 2012, made an observation that ***the Defendant was given three weeks within which to complete the excavation works.***

v) I also note that although the Plaintiff allegedly left site on 5th July 2012, the Minutes of 1st August 2012 instructing client is recorded as having complained to the Defendant of the ***"Consistent and continuous failure to meet timelines on excavation works, observing work worth only Kshs.6m per work was done and he was directed to speed up.*** This continued up to 15th and 29th August 2012 where the client expresses disappointment, at the Defendant's inability to meet timelines and milestone and that the excavation works required speeding up.

35. It is therefore evident from these minutes, that there was delay when the Plaintiff was at site and it persisted after its departure. Also observed from the minutes is the fact that the delay on the overall project was not purely due to excavation works but other factors, including but not limited to NEMA Work Permit. Therefore the Defendant cannot lay the total blame on the Plaintiff.

36. This leads me to the issue as to whether the Plaintiff fraudulent misrepresented the Defendant, that they had the capacity to do the works. The Defendant has submitted quite extensively on fraudulent misrepresentation relying on Black Law's Dictionary. They argue that, the Plaintiff lacked machinery, staff and finances but the Plaintiff denies the same and submits that, they performed 87% of the works at the time the work was stopped. However I find that the report of Mapsoft Africa Ltd, deals with the issue of how the Plaintiff performed the Contract and the works done as indicated therein.

37. The issue therefore is; is the Plaintiff or Defendant entitled to the sum sought? I find that, the Plaintiff was to be paid for work done, basically on "Quantum Meriut" basis. First I note from the terms of the Contract that, the area of excavation was approximated at 18,000 Cubic Meters and the amount payable was Kshs.2,900 per Cubic Meter. Therefore the Defendant was at liberty to stop the works at any time if there was delay and be liable to pay only for works done as at that time. Secondly, I note from the terms

of the Local Purchase Order that the Defendant was to pay the Plaintiff Kshs.10 million by end of November 2011. That was not done. If the Defendant failed to pay, how then can they allege that the Plaintiff lacked financial capacity to do the works!

38. Thirdly, evidence reveals that the Defendant paid USD 30,000 to a Third Party on behalf of the Plaintiff's Account, that sum of money was payable to the Plaintiff, it was mutually agreed and cannot thereafter be termed as fraud or fraudulent misrepresentation as alleged by the Defendant.

39. I therefore find that taking into account the evidence herein, both Parties contributed to the delay in excavation works as evidenced here before and none of the Parties can lay blame on the other.

40. The next issue to consider is whether the Defendant suffered any loss. The defendant submitted that the Plaintiff delayed the "Project by 48 weeks" and that the Contract between Chartwell Holding Ltd and Defendant provided for penalty of Kshs.500,000 per calendar week, as a result the Defendant hired machines as per the tabulation at Paragraph 11 of Defence and Counter Claim. Of course the Plaintiff denied having knowledge of the Contract between Chartwell Holdings Ltd & Defendants and/or the issue of penalties or timelines. The sum claimed under Paragraph 11 of Amended statement of Defence and Counter-claim are:

(a) Kshs.56,961,452, the amount incurred for hire and replacement of machines to do Excavation

(b) Kshs.27,840,000, Penalties for delay of excavation and

(c) Kshs.58,153,00, as overpayment due to breach of contract

41. As already stated herein the scope of works was 18,000 cubic meters valued at Kshs.2,900 giving a total of Kshs.52,200,000 + V.A.T. The Defendant avers that the sums payable was as follows:

i. Payment if there was no breach Kshs.72,931,520.

ii. Amount paid for works done by Plaintiff Kshs.46,283,646

iii. Amount that should have been paid to any other party to complete the works Kshs.26,647,847.

42. Therefore if the amount "payable" is as outlined above, and the amount paid is as reflected, and the amount due if the Plaintiff had completed work is Kshs.26, 647,874. How did Defendant incur a sum of Kshs.56, 961,452 as an amount of hire of machines to carry out excavations? Yet by the time the Plaintiff left a total of Kshs.15,716.690 cubic meters of work out of 18,000 cubic meters had been done leaving a balance of 2283.31 cubic meters representing less than 20% of works undone?.

43. I have keenly and deeply analyzed the delivery notes and invoices produced by the Defendants and noted the following:

(i) The invoices run from the dates of 9th July 2012 to 3rd April 2012.

(ii) Total sum of attached summary schedule is Kshs.22,749.200

(iii) No physical invoice for the date of 3rd April 2013 reflected in the schedule.

(iv) Physical Invoice dated 5th April 2013, attached and reflected in the summary schedule

(v) Last attached Invoice not dated

(vi) Additional item marked 7826 unexplained

44. I have also taken cognizance of a letter dated 27th March 2012, from Victoria Commercial Bank to AAA Growers Ltd, concerning the sale of one used 320DL Caterpillar excavator at kshs.12, 400,000 and CC to Cementers Ltd (Defendants). The question is: was this bought for the Defendant's use or at the Plaintiff's expense. The saving grace is that, there is no claim in the Amended Defence and Counter-Claim for it.

45. Further analysis of the Defendants witness statements indicates at;

(i) Paragraph 6, the excavators were taken to the site first on 14th June 2012, to increase speed therefore any claim before 14th June 2012 before then is untenable. The Plaintiff left on 5th July 2012.

(ii) Paragraph 7 refers to the Hire from Elite Earthmovers to speed up works. No mention of Choka Suppliers. (See paragraph 11 of Amended Defence/Counter-Claim)

(iii) Additionally, the Defendant at page 7 of witness statement allegation that it bought machine is not supported in the pleadings.

(iv) Further averments that the Defendant carried away materials, is not supported by pleading (see paragraph 11 of defence and Counter-Claim).

46. I have also analyzed the attached daily work sheets for the period from 12th May 2012 to 28th June 2012 produced by the Defendant and find there is no explanation given as to what they represent or are intended to prove or support.

47. In the same vein the delivery notes produced revealed the following:

(i) Delivery of excavated materials was taken to Kileleshwa and Lavington, although the contract between the parties referred to Karen, however that is not in dispute.

(ii) Other delivery notes do not show dumping site (see CLDNA Nos. 46055 to 46060).

(iii) Others refer to Hardcore from Fortis Site to KRW.

(iv) There is a delivery note of 1 X 200 Litres of Diesel in drum for Kajuju holdings. There is no accompanying invoice as to who Kajuju Holdings is. To the contrary at Paragraph 11 of Defence/ Counter-Claim amount of diesel claimed is Kshs.6,493,100.

48. It seems that the Defendant simply included all sorts of documents to the Court to "use" it as it finds appropriate. Some are relevant others are not. Some are understandable and others are not. Be it as it were; of great significance is the fact that, there is no proof of payment of the sums; the hire of machines, payment of supplies and fuel, and the penalty sum allegedly incurred by the Defendant as a result of the alleged breach.

49. In that regard I find that as already observed any breach of Contract if any and/or delay was caused by both parties.

50. The upshot of all this is that the Defendant has not proved its claim in the Counter Claim and I dismiss it. The plaintiff has proved the sum as claimed herein. I find that the sum payable to the Plaintiff is Kshs 9,273,264 plus interest from the day of filing the suit to payment in full and the sum of Kshs. 5,109, 588 from the date of filing the suit to the date of payment. The sum awarded shall attract interest at the agreed interest rate of 16%. I award costs to the Plaintiff.

It is so ordered

Dated delivered and signed on this 23rd day of October 2017 at Nairobi

G.L NZIOKA

JUDGE

In the presence of:

Mr. Amunga for Plaintiff

Mr. Chimei for the Defendant

Teresia----------Court Assistant