



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & TAX DIVISION
CIVIL SUIT NO. 223 OF 2013

TULSI CONSTRUCTION COMPANY LIMITED.....PLAINTIFF

VERSUS

WANANCHI GROUP LIMITED.....DEFENDANT

JUDGMENT

[1] The Plaintiff is a limited liability construction company incorporated in Kenya and having its registered office in Nairobi. It filed this suit herein on **31 May 2013** praying for Judgment in its favour in the sum of **Kshs. 6,759,238/=** plus interest at the prevailing commercial rates from the date the debt accrued, together with costs of the suit and any other relief that the Court may deem just. The claim was hinged on a contract dated **1 February 2010**, by which the Plaintiff was contracted by the Defendant, **Wananchi Group Limited**, to fit out its new offices at Tarea Plaza in Mombasa. The works were to be undertaken at the contract price of **Kshs. 35,380,560.60**; which works the Plaintiff contends it performed to the satisfaction of the Defendant. It was the contention of the Plaintiff that it was a term of the contract that payment would be made by the Defendant in tranches upon certification by the Project Architect, and on the basis of the Quantity Surveyor's valuations of the work done. Thereupon the Defendant would pay for the certified works within 14 days from the date of presentation of the Interim or Final Certificate, as the case may be.

[2] The Plaintiff averred that it completed its part of the bargain and obtained the Architect's Final Certificate of Completion; and thereafter handed over the completed project to the Defendant; but that the Defendant had refused to pay the balance of **Kshs. 6,759,238/=**. The Plaintiff consequently filed this suit claiming the balance of the sums due to it for the works, in the aforesaid amount of **Kshs. 6,759,238/=**, together with interest and costs.

[3] The Defendant denied the claim contending that the same is fatally defective and bad in law as it offends the mandatory provisions of the **Civil Procedure Act, Chapter 21 of the Laws of Kenya** and **Civil Procedure Rules, 2010**. The Defendant averred that the Plaintiff was filed without a resolution by the Plaintiff as mandatorily required by law, not only for the purpose of sanctioning the institution of the suit, but also authorizing the appointment of the law firm of **Karanja Kabugu & Company Advocates** to act for the Plaintiff in this matter. While conceding that it contracted the Plaintiff to carry out construction works on two of its projects, namely, **Tarea Plaza** and **Gateway Business Park**, the Defendant disputed the existence and/or validity of **Invoice No. TCL 10/02/002** dated **24 February 2010** for the sum of **Kshs. 6,759,238/=** which the Plaintiff has relied on herein to support its claim. According to the Defendant, none of the Payment Certificates filed by the Plaintiff support the aforesaid sum. Accordingly,

the Defendant prayed for the dismissal of the Plaintiff's claim with costs.

[4] By a Notice of Motion dated **9 February 2016**, the Plaintiff sought leave of the Court to amend its pleadings to correct the date appearing in paragraph 9 of the Plaint from **30 March 2010** to read "**24 February 2010**", and for leave to reconstitute its Bundle of Documents. That application was allowed on **18 May 2016** as prayed and Orders granted in terms of the prayers therein. Thus, the Plaintiff's Amended Plaint and fresh Bundle of Documents were admitted herein.

[5] Although a preliminary issue was raised by the Defendant at paragraphs 2 to 6 of the Defence, to the effect that the suit is fatally defective for lack of authority by way of a resolution by the Plaintiff Company to file this suit and for the firm of **Karanja, Kabugu & Co. Advocates** to act for it, this point appears to have been abandoned, as it was neither raised *in limine* or in the Defendant's evidence or final submissions. I have nonetheless considered the Verifying Affidavit and noted that it was averred by **Mr. Suryakantbhai Bhailalbhai Patel** that he was duly authorized by the Plaintiff to swear the affidavit. Since **Order 4 Rule 1(4) of the Civil Procedure Rules** is silent on whether such a resolution should be filed along with the Plaint, I would agree with the position taken by **Odunga, J.** in **Mavuno Industries Limited & 2 Others vs. Keroche Industries Limited [2012] eKLR** that:

"Nowhere is it stated that such authority or resolution must be filed. The failure to file the same may be a ground for seeking particulars assuming that the said authority does not form part of the Plaintiff's bundle of documents which common sense dictates it should...The mere failure to file the same with the plaint ... does not invalidate the suit."

[6] I presume this must be why the preliminary point was not taken by the Defendant in the first place. It is noteworthy too that at the Case Management Conference, the Defendant expressed the intention to rely on the Bundle of Documents filed by the Plaintiff, having filed no such bundle of documents of its own.

[7] In support of its case, the Plaintiff called two witnesses, namely: **Mr. Suryakantbhai Bhailalbhai Patel (PW1)**, and **Mr. Edward Habwe (PW2)**. **Mr. Patel**, a Director of the Plaintiff, adopted his Witness Statement filed herein, dated **28 May 2013**, in which he affirmed that, sometime in early **February 2010**, the Plaintiff was invited to tender for a project to fit out the Defendant's new offices at **Taraa Plaza** in Mombasa; and that the Plaintiff's bid was successful, whereupon it was awarded the contract in the sum of **Kshs. 35,380,560.28**. A copy of the Contract, dated **1 February 2010**, was exhibited at pages 13-66 of the Plaintiff's Bundle of Documents.

[8] It was further the evidence of **PW1** that it was agreed, as is common practice in the construction industry, that payments to the Plaintiff by the Defendant would be made upon application by the Plaintiff to the Project Quantity Surveyor, **M/s Quantimax Consultants**, who would also submit therewith information on all the material purchase and amount of work completed. The Quantity Surveyor would then verify the application and forward the same to the Project Architect, **Image Consultants**, for the issuance of a Certificate of Payment and Practical Completion of Works; upon the presentation of which payment would be authorized and made.

[9] **PW1** testified that the project was successfully and satisfactorily completed, and that the Defendant has been in occupation since; and that during the contract period, the Plaintiff was issued with three Payment Certificates and a Final Certificate of Practical Completion. Copies of these documents were exhibited at pages 68-71 of the Plaintiff's Bundle of Documents. He added that each Payment Certificate was accompanied by a Payment Schedule indicating the amount of money payable to the Plaintiff as the contractor and each of the sub-contractors concerned. It was also the testimony of **PW1** that the Plaintiff presented all the Payment Certificates to the Defendant for payment and that all were paid except for the sum of **Kshs. 6,759,238/=**, which the Plaintiff has claimed herein. Copies of the relevant Invoice, Payment Schedule, reminders and demand notes in connection with the aforesaid sum were exhibited at pages 72-79 of the Plaintiff's Bundle of Documents.

[10] The Plaintiff's second witness was its Administrative Manager, **Edward Habwe (PW2)**. He similarly adopted his Witness Statement filed herein dated **28 May 2013**. He reiterated the evidence of

PW1 that the Plaintiff was contracted by the Defendant to fit out of the Defendant's new offices at **Taraa Plaza** in Mombasa at a total contract sum of **Kshs. 35,380,560.28**; and that the Defendant has since paid out the sums due to the Plaintiff save for the sum of **Kshs. 6,759,238/=**. **PW2** made reference to the Statements of Account produced herein at page 77 of the part of the Plaintiff's Bundle of Documents as well as the various reminders and demand notes issued by the Plaintiff in respect of that sum, as evidence of non-payment on the part of the Defendant.

[11] On the part of the Defendant, evidence was called from its Head Of Payables, **Ms. Priscilla Nthenya (DW1)**. She confirmed that the Defendant did contract the Plaintiff to carry out construction works on two of its projects, namely **Taraa Plaza** and **Gateway Business Park**. She however disputed the validity of **Invoice No. TCL10/02/002** dated **24 February 2010** for the sum of **Kshs. 6,759,238/=**. She further stated that, when the Defendant's representatives sought proof from the Plaintiff, the Plaintiff availed Statement of Account that curiously showed certain inconsistencies that the Plaintiff was unable to explain. For instance, she pointed out at the whereas the Plaintiff's invoice dated **1 September 2009** for the sum of **Kshs. 5,846,842** is claimed to have been for the **Taraa Project**, the Statement of Account indicates that this payment was for the **Gateway Business Park project**. She therefore urged for the dismissal of the Plaintiff's suit with costs.

[12] Thus, from the foregoing summary of the evidence adduced herein, there is no disputation that the Plaintiff was contracted by the Defendant to undertake some construction works and specifically fit out the Defendant's new offices at **Taraa Plaza**, Mombasa. A copy of the Agreement and Conditions of Contract was exhibited herein at pages 13-67 of the Plaintiff's Bundle of Documents. **Clause 2.5** of that Agreement further shows, and this too is not in dispute, that the Defendant agreed to pay the Plaintiff the total sum of **Kshs. 35,380,560/=** for the works. The contract was for a period of 8 weeks with effect from **2 February 2010**.

[13] There is further no dispute herein that the aforesaid contract price of **Kshs. 35,380,560/=** was to be paid in tranches, upon application by the Plaintiff to the Project Quantity Surveyor who would verify the works, prepare a valuation thereof, and forward the same to the Architect for certification. The Architect would then issue an Interim Payment Certificate on the basis of which the Plaintiff would be paid by the Defendant. The parties are agreed that the Defendant settled all the Certificates of Payment, save for the sum in dispute of **Kshs. 6,759,238/=**; and while the Defendant's contention is that he has fully paid the contract sum, the Plaintiff's posturing is that **Kshs. 6,759,238/=** is still outstanding. Thus, the single issue remaining for determination is whether the Plaintiff is entitled to the aforesaid sum of **Kshs. 6,759,238/=** that it has prayed for herein.

[14] As provided for in **Clause 34** of the Agreement and Conditions of Contract, the contract sum was payable in tranches upon certification by the Project Architect. At **Clause 34.3** the parties agreed that:

"The Architect shall issue an interim payment certificate within seven days from the date of receipt of the Quantity Surveyor's valuation. The Payment certificate shall be copied to the Employer."

And upon presenting the Interim Payment Certificate to the Employer, the Contractor would be entitled to payment thereof within 14 days from the date of presentation. (see Clause 34.5 of the Agreement)

[15] The four Payment Certificates at pages 68-71 are explicit as to the works accomplished over the duration of the contract. Payment Certificate No. 1, dated **24 February 2010**, was for **Kshs. 9,032,733.69**, excluding VAT. The second Payment Certificate for **Kshs. 4,552,628.53** is dated **17 March 2010**. It took into account the cumulative effect of the amount of the previous certificate for purposes of accounting for the contract sum. Similarly, Payment Certificates No. 3 and 4, for **Kshs. 8,671,758.04** and **Kshs.1,522,470.04** were issued on **7 June 2010** and **2 September 2010**, respectively.

[16] As was explained by both **PW1** and **PW2**, the outstanding sum of **Kshs. 6,759,238/=** was the subject of the Payment Certificate No. 1, in respect of which a schedule was supplied at page 73 of the Plaintiff's Bundle of Documents. That the Certificate comprised of three segments, namely: the Main Contractor's

payment, as well as sums due to the sub-contractors for electrical cabling and installations and air conditioning and mechanical installations. These three components including VAT yielded the total sum of **Kshs. 10,477,971.08**, which is the equivalent of the total sum specified on the Payment Certificate No. 1. The Payment Schedule at page 73 further shows that, of the aforesaid sum set out in Payment Certificate No. 1, only **Kshs. 6,759,237.86** was payable to the Plaintiff.

[17] According to the Plaintiff, this amount has not been paid. The Plaintiff produced the Statement of Account at page 77 of the Plaintiff's Bundle of Documents) to buttress this contention. In addition, it relied on the email communicated dated **25 March 2010** (at page 74 of the Plaintiff's Bundle of Documents) by which an acknowledgement was made on behalf of the Defendant that the amount due to the Plaintiff vide Valuation No. 1 had not been satisfied. There is also the letter dated **8 May 2012**, which was written by the Plaintiff to the Defendant in connection with the outstanding balance. That letter was signed by **PW2** on behalf of the Plaintiff.

[18] The foregoing being the contention of the Plaintiff, the incidence of proof shifted to the Defendant to satisfy the Court that it had made the payment. Indeed, it was the contention of the Defendant that it had fully paid the Plaintiff. Instead, here is what **DW1** had to say in this regard:

"Payments would be made on the basis of delivery notes or invoices. Any sums over Kshs. 1 million are done by RTGS. I have not seen any document to show that the Defendant made a payment of Kshs. 9,033,239.94 to Tushi or the certified sum of Kshs. 10,477,971.08. I do not have any document here to prove the payment of Kshs. 6,759,238 that the Plaintiff claims in this suit...The only reason the Plaintiff was not paid is because we did not receive the invoice..."

[19] It is noteworthy that the Defendant opted not to file any documents, yet it had the opportunity to avail rebuttal evidence to disprove the Plaintiff's claim. Accordingly, **Section 107(1) of the Evidence Act, Chapter 80 of the Laws of Kenya**, would be pertinent in this situation. It provides that:

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

Further to the foregoing, **Sections 109 and 112 of the Act** recognize that:

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

...

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

[20] I would thus agree with and adopt the expressions of **Mabeya J.** in **Safarilink Aviation Limited vs. Trident Aviation Kenya Limited & Another [2015] eKLR**, **Mabeya, J.** that:

"...failure to rebut evidence tendered by one party leaves the court with no option but to draw an inference that the facts as presented are true..."

[21] Similarly, in **Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 Others [2012] eKLR**, which I find relevant and persuasive, it was held that where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the Court is entitled to make an adverse inference that if such evidence was produced, it would be adverse to such a party. Accordingly, in the absence of evidence to controvert the Plaintiff's claim as pleaded and proved herein, the Court is satisfied that the Plaintiff has shown on a balance of probabilities that it is entitled to **Kshs. 6,759,238/=** as prayed for in the Plaintiff.

[22] In the result, I would enter Judgment in the Plaintiff's favour in the sum of **Kshs. 6,759,238/=** together with interest at the prevailing commercial rates from the date the debt accrued, together with costs of the suit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF DECEMBER, 2017

OLGA SEWE

JUDGE