



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 179 OF 2014

GANESH ENGINEERING WORKS LIMITED.....1ST PLAINTIFF

BANSONS HOLDINGS (KENYA) LIMITED.....2ND PLAINTIFF

BHANDERI ENTERPRISES LIMITED.....3RD PLAINTIFF

DIPAK BHANDERI.....4TH PLAINTIFF

VERSUS

YAMIN BUILDERS LIMITED.....DEFENDANT

JUDGMENT

This suit was initially filed in the Chief Magistrates court before being transferred to the High Court. In an amended Plaint dated 29th January, 2014, the Plaintiffs filed this suit seeking damages for breach of contract, a sum of Kshs. 7,081,975.37, interest, costs of the suit and any other relief this court deems fit. The Plaintiffs averred that there was a mutual agreement between the 1st, 2nd and 3rd Plaintiffs and the Defendant that the Plaintiffs would supply the Defendant with building materials, that the Plaintiffs supplied the building materials and have unpaid supplies worthy Kshs. 7,081,975.37.

The Plaintiffs further averred that there was a mutual agreement that the 1st, 2nd and 3rd Plaintiffs would use the defendant's rental premises at a monthly rent of ksh 50,000 but the defendant was to deduct the same anytime the supply was made. The 4th Plaintiff who is a director in the three companies was allocated the said rental house by the 1st, 2nd and 3rd plaintiffs as part of his house allowance and had lived there for 2 years and had accumulated Kshs. 1,200,000 in rent arrears which was due for deduction from the amount owed by the Defendant for the supplies made.

The Plaintiffs stated that sometimes in July/August, 2013, the Defendant in breach of the mutual agreement wrote a letter evicting the 4th Plaintiff from the rental premises and demanded payment for 24 months at Kshs. 70,000 per month which amounted to a total of Kshs. 1,680,000/=. For the fear of eviction, the 4th Plaintiff paid the said sum on 22/1/2014.

The Defendant filed an amended Defence dated 6th February, 2014 admitting that it contracted the 1st, 2nd and 3rd Plaintiffs to supply it with building materials which were paid for in full and therefore denied owing the sum of Kshs. 7, 081,973.37. The Defendant further denied that there was an agreement to offset rent from the payment for the building materials and averred that the monthly rent for the premises

occupied by the 4th plaintiff is Kshs. 70,000/= which is the same amount the Defendant claims in mesne profits from September,2013 until the 4th Plaintiff vacates. Further, it is contended in the Defence that, the suit is misconceived and there is no nexus between the 1st, 2nd and 3rd Plaintiffs' contract on the one hand and the tenancy agreement between the 4th Plaintiff and the Defendant on the other hand.

During the hearing of the case, the Plaintiffs called one witness, the 4th plaintiff, Dipak Bhanderi (PW1). He relied on his written statement in which he sought to explain how the monies claimed are owed to the three companies by the defendant. He referred to pages 10 to 61 of the Plaintiff's list of documents to show the amounts paid and balance owing to the 1st Plaintiff which stands at Kshs. 4,400,834.17 inclusive of VAT. That the 2nd Plaintiff is owed a balance of Kshs. 2,188, 600 as per the documents on pages 72 to 76 while the 3rd plaintiff is owed a balance of Kshs. 1,426,339.03 as per the documents on pages 81 to 97 of the plaintiff's list of documents.

PW1 further testified that there was a mutual agreement for the Defendant to offset the monthly rent in respect of the rental house leased to the 1st, 2nd and 3rd Plaintiffs contrary to which the Defendant issued an eviction notice and claimed monthly rent for 2 years at the rate of Kshs. 70,000/= per month instead of the agreed amount of Kshs. 50,000 per month, which the plaintiff paid for fear of eviction. The 4th plaintiff paid rent arrears and Auctioneers charges of Kshs. 435,000 which he believes ought not to have been incurred.

During cross examination, the witness could not explain why the 4 pieces indicated on page 62 of the delivery note and invoice number 32 on page 54 do not tally. With respect to the 1st Plaintiff, PW1 testified in cross examination that only invoice no. 94 on page 13 and no. 89 on page 14 were not paid. On invoice number 96 of Kshs. 4,400,834.17 an ETR receipt is attached to the invoice.

In respect to the 2nd Plaintiff, PW1 was referred to invoice no. 112 on page 80 for an amount of Kshs. 933, 800 which he stated was not paid. Invoice no. 113 on page 78 is also for the same amount of Kshs. 933,800 which the Plaintiff denied having been paid, however, there is an ETR receipt processed in respect of the 2nd Plaintiff. PW1 testified that supply of murram was done per truck and each was Kshs. 5,000/= PW1 could not satisfactorily explain invoices 22 and 113 which did not have corresponding delivery notes. In total DWI produced delivery notes for 64 trips and could not account for 330 trips.

In respect to the 3rd Plaintiff, PW1 produced invoice number 844 for the sum of Kshs. 2,723,021.68 which was indicated as paid and invoice number 845 for Kshs. 2,723,071.68 but he did not produce delivery notes for the two invoices the Defendant had paid in advance for the sum of Kshs. 3,000,000 and he clarified that he was claiming Kshs. 1,426,339.03.

In reference to the rent, PW1 stated that the amount was to be deducted from the outstanding balances but the same was not deducted.

The Defendant called one witness Winfred Makandi (DW1), the administrative manager who referred to her written statement dated 22nd May, 2015. DW1 produced a bank statement which was not certified by the bank. She testified that as per page 1 of the List of Documents a total sum of Kshs. 900,000 and Kshs. 232,936 was made to Bhanderi Enterprises Limited on 9/3/2011. On page 3, that cheque number 4145 for Kshs. 1,065, 954.30 was made to the 3rd Plaintiff and cheque number 004061 for Kshs. 1,536, 068.55 to the 1st Plaintiff Ganesh Engineering works Limited by way of RTGS. On page 4 cheque no. 00435 of Kshs. 1,000,000/= to Bhanderi Enterprises and on page 6 cheque no. 003375 for Kshs. 3,166,800 to Bhanderi enterprises.

In cross – examination, DW1 was referred to a set of documents which she admitted were the same documents on pages 6 and 18, pages 23 , pages 8 and 25. She further stated that according to the documents produced in court there was no evidence that payments of the total sum of Kshs. 5,334,634 was made contrary to what is claimed in the statement of DW1.

The parties filed written submissions. In their submissions dated 17th February, 2017, the Plaintiffs formulated a comparison table to show the amount the defendant had paid and what had not been paid. They further submitted that they raised invoices after the supplies were made to the Defendant. The Plaintiff, in order to show that a supplier cannot raise an invoice before supplies are made, relied on the case of **Midado Communications Limited V Total Kenya Limited (2016) eKLR** where the court held that , “ *the appellants conduct in invoicing Kengen for the amount of fuel that was supplied by the Respondent implies that the fuel was part of the supply pursuant to the tender won by it*”

On the invoices which had ETR receipts, the Plaintiff submitted that it is legal to issue invoice with ETR receipt and submitted on **section 24 of the Value Added Tax Cap 479** which envisages what would happen if the tax paid is not reimbursed. This section states that,

“where a registered person has supplied goods or services and has accounted for and paid tax on that supply but has not received any payment from the person liable to pay the tax, he may after a period of three years from the date of that supply or where that person has become legally insolvent apply to the commissioner for refund or remission of the tax involved and subject to the regulations the Commissioner may refund or remit tax.”

The Defendant filed written submissions dated 18th April, 2017 and submitted that some of the invoices the Plaintiffs are claiming are doctored as there were no delivery notes for some of the invoices which were produced in Court. The Defendant further submitted that the Defendants did not enter into any agreement with the 1st, 2nd and 3rd Plaintiffs to offset any sums owed to it with rent for the premises occupied by the 4th Plaintiff. The rental agreement was between the 4th Plaintiff and the Defendant and therefore there was no privity of contract between the Defendant and the Plaintiff companies in respect to the rental premises. On this doctrine of privity of contracts, the Defendant relied on the case of **City Council of Nairobi V Wilfred Kamau Githua T/A Githua Associates & Another (2016) eKLR** as well as the case of **Savings & Loan (K) Limited V. Kanyenje Karangaita Gakombe & Another (2015) eKLR** where it was stated that the doctrine of privity of contract is that a contract cannot confer rights or impose obligations on any other person rather than the parties to the contract.

On 6th December, 2017, the Parties were summoned to make further submissions with regard to the invoices that were pending payment. The Plaintiff’s Counsel Mrs. Rotich submitted that Invoice No. 96 dated 28/8/2013 for Kshs. 4,400,834.17 was not paid to the 1st Plaintiff.

On the 2nd Plaintiff, it was submitted that there was an outstanding balance for invoice number 22 dated 19/4/2012 on page 79 which was for a total sum of Kshs. 2,320,000/= and out of that amount Kshs. 999,000 was paid on 24/4/2012, Kshs. 1,000,000 was paid on 5/5/2012 leaving a balance of Kshs. 321,000/=. Also invoices number 112 dated 5/08/2013 and invoice number 113 each of Kshs. 933,800 were not paid all making a total of Kshs. 2,188,600/= being the total sum claimed by the 2nd plaintiff .

With reference to the 3rd Plaintiff, it was submitted that the Plaintiff raised invoice number 845 on page 82 for the sum of Kshs. 2,723,071.68 and that the amount paid for that invoice is Kshs. 1,065,954.30 cents leaving an outstanding balance of Kshs. 1,426,339.

Mr. Kibera, Counsel for the Defendant, submitted that invoice no. 96 has an ETR receipt which is evidence that the same was paid. That there is no ETR receipt attached to invoice number 22 and their submission is that no deliveries were made with respect to that invoice. That there is an ETR receipt attached to invoice number 113 which was therefore paid. The counsel further submitted that on invoice no. 845 the plaintiff could not marry the invoice to the delivery note.

In a rejoinder, Mrs. Rotich for the Plaintiff replied that the attachment of an ETR receipt is not any proof of payment by the Defendant. That it’s a requirement that upon raising an invoice one should annex an ETR receipt for compliance which is a requirement under sections 24, section 12 (c), (d) of the VAT Act and regulation 4 (1) of the Act. On invoice number 113 which the Defendant claims to have paid, the Plaintiff averred that the Defendant has not shown when the payment was done. That the Plaintiff has not

denied any payment done and has gone to the extent of identifying every amount received for each invoice.

The plaintiff further submitted that they only supplied the delivery notes which were legible as some were carbon copies and hence not visible. That the deliveries for the 1st and 3rd Plaintiffs were not all provided as some were not legible as the originals were given to the Defendants and they were only left with carbon copies. It is the Plaintiff's submissions that the Defendant has not itemised and given a break down of the 5 million they said they have paid.

I have carefully considered the pleadings filed herein as well as the arguments and submissions of the both parties and the issue for determination herein is whether the Plaintiffs have proven their case as against the Defendant on a balance of probability. I will also seek to determine whether the attachment of an ETR receipt is evidence of payment.

The standard of proof required in civil cases is on a balance of probability.

In **Ignatius Makau Mutisya Vs Reuben Musyoki Muli [2015] eKLR** the court referred to the case of **Miller –vs.- Minister Of Pensions [1947]2 All ER 372**. Where **Lord Denning held**;

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘we think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally unconvincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

I have examined the Plaintiff's bundle of documents Vis-a-Vis the evidence of PW1. A comparison of the invoices on record with the statements of account provided by the Defendant does not disclose the exact corresponding payments for specific invoices raised. I have tried to sum up the total sum of the invoices for each Plaintiff and compare with the amounts in the statement of account for the entries where the names of the Plaintiffs appear and the revelation is that the invoice amount far much exceed the evidence of payment from the Statement provided by the Defendant.

The Plaintiff has however provided a comparative table of the invoices raised and the payment from the Statement provided by the Defendant. The Plaintiff has also gone further to table payment received from the Defendant and the cheque numbers for the same which payments had not been provided by the Defendant. From the evidence on record, there are instances where the Defendant could pay in advance for goods to be supplied for instance the Kshs. 3,000,000 paid to the 3rd Plaintiff. Even though there is no acknowledgement that the payment was to be utilized for supplies to the 3rd Plaintiff, the plaintiff has acknowledged receipt of the money. This will illustrate that the parties were dealing with each other on mutual agreements without proper records.

Regarding the monies claimed by the 1st Plaintiff, PW1 testified that invoice number 96 for Kshs. 4,400,834.17 on page 11 of the Plaintiff's bundle of documents was pending payment.

The Defendant witness DW1 testified that invoice number 96 has an ETR receipt indicating that the requisite VAT tax had been paid as well as the invoice amount which claim was denied by the Plaintiff who submitted that he paid for the ETR with the intention of recovering the same from the Defendant. The Plaintiff referred to the provisions of **Section 24 of the Value Added Tax Act**. The provisions of this section envisages a situation whereby one pays for VAT and issue an ETR receipt in advance without having been paid for the supplies.

In a further Supplementary List of Documents filed in this Court, the Plaintiff provided 38 delivery notes

in respect to the 1st Plaintiff for the goods supplied to the Defendant. Even though the delivery notes are faint, for which an explanation has been given that they were carbon copies with the originals having been delivered to the Defendant, the defendant herein has not denied that the supplies were made. The Defendant's response was that the goods were paid for. The Defendant's Statement lacks particularity and there is no evidence of payment specifically for invoice number 96 for Kshs. 4,400,834.17 which the Defendant claims to have paid to the 1st Plaintiff. Therefore, and without evidence to the contrary, this Court finds that this amount is outstanding.

Moving on to the claim by the 2nd Plaintiff, it claims a total sum of Kshs. 2,188,600. However, the Defendant submits that no deliveries were made for invoice number 22. On invoice no. 113, it is the defendant's submission that the same was paid for as there is a receipt attached. In the further submissions, the defendant did not dispute invoice number 112 for the total sum of Kshs. 933,800. The evidence on record is that the 2nd Plaintiff produced delivery notes for a total number of 146 trips and the cost for a single trip was Kshs. 5,000 which gives a total of Kshs. 730,000/=. There being no evidence of payments made to the 2nd Plaintiff. I award the 2nd plaintiff a total sum of Kshs. 730,000/=.

The 3rd Plaintiff delivered stones and invoices were raised. With reference to invoices numbers 844 and 845, the 3rd Plaintiff admits to having been given an advance deposit of Kshs. 3,000,000/=. With regard to the same invoice the defendant submits that the Plaintiff could not marry the invoice to the delivery notes. The Plaintiff's submission to that was that the deliveries were faint and eligible and that is the reason why the Plaintiff did not produce them. The Defendant pleaded having given the 3rd Plaintiff a sum of Kshs. 3,000,000 in advance to deliver the stones. That being the case, the defendant cannot purport to contest the invoice basically because the delivery notes have not been married with the invoices. Therefore on a balance of probability, I find that the 3rd Plaintiff is owed the sum of Kshs. 1,426,339.03/=.

There being no evidence that there was an agreement to have the rent for the house occupied by the 4th Plaintiff offset from the amounts due, I find that the claim is not substantiated. In any case, the 4th Plaintiff was not privy to that agreement.

Therefore, the awards to the plaintiffs will be as follow;

- a) 1st Plaintiff - Kshs. 4,400,834.17
- b) 2nd Plaintiff - Kshs. 730,000/=.
- c) 3rd Plaintiff - 1,426,339.03/=
- d) Total 6,557,173.20 cts

The plaintiffs are awarded the costs of the suit.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 20th day of **December, 2017**

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L. NJUGUNA

JUDGE

In the presence of:-

.....for the Plaintiff

.....for the Defendant