



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NANYUKI
CIVIL SUIT NO. 3 OF 2016

**P. N. GICHOHO
 NGUGI.....PLAINTIFF**

versus

**THE COUNTY COUNCIL OF LAIKIPIA.....1ST DEFENDANT
 (DEFUNCT)**

**COUNTY GOVERNMENT OF LAIKIPIA.....2ND
 DEFENDANT**

THE HON. ATTORNEY GENERAL

PERMANENT SECRETARY, MINISTRY OF

LOCAL GOVERNMENT.....1ST 3RD PARTY

JACK M. MBUGUA.....2ND 3RD PARTY

JUDGMENT

1. **PETER NGUMI GICHOHO NGUGI** (the Plaintiff) entered into a contract with the County Government of Laikipia, then known as County council of Laikipia (the defendant) to undertake survey work over Ol Moran area within the Laikipia County. A dispute arose after the defendant terminated the said contract by its letter dated 10th April 2007. By that letter the defendant wrote:-

“The Ministry of Local Government examined and evaluated the tendering procedures followed in awarding you the surveying work contract and found out that, it was not in accordance with Procurement and Disposal of Goods and Services Act. They instructed the council to terminate the existing contract, which we hereby do.”

BACKGROUND

2. The defendant by a public notice dated 2nd June 2006 requested from the public for quotation for survey work, from surveyors, which work was to be undertaken within the Laikipia area. The public notice was as follows:

“COUNTY COUNCIL OF LAIKIPIA

NANYUKI 31513/31863

Correspondence to be

Addressed to the clerk of the council

P. O. Box 4

.....

NANYUKI

2nd June, 2006

PUBLIC NOTICE BOARDS

QUOTATION FOR SURVEY WORK

The council resolved in a recent meeting to hire private surveyors to

undertake various Council Survey work in the council trading centres and councils own properties.

Send your C.V. and capability statement indicating your qualification to carry out survey work in accordance with Ministry of Lands and Settlement Standards to:-

CLERK TO COUNCIL

COUNTY COUNCIL OF LAIKIPIA

P. O. BOX 4

NANYUKI

So as to reach on or before 23rd June, 2006.

Given that the survey work shall be done in the various parts of the district, state you area (Zones) of preference e.g. Laikipia East of West an preferable division. There are 7 administrative divisions in the district.

(Signed)

J. M. MBUGUA, OGW

CLERK TO COUNCIL

COUNTY COUNCIL OF LAIKIPIA”

3. The plaintiff is a practicing licensed surveyor registered under the Survey Act. He stated in evidence that he had practices since 1986.

4. The plaintiff respondent to the defendant’s public notice and offered his services as a surveyor by his letter dated 13th June 2006. He attached to that letter his C.V. and copies of his certificates and licenses. By that letter the plaintiff gave the area, in Laikipia, that he preferred to carry out the survey, that is Laikipia West Zone.

5. The defendant by its letter dated 1st September 2006 offered the plaintiff survey work at Ol moran Division. That letter is in the following terms.

“COUNTY COUNCIL OF LAIKIPIA

NANYUKI 31513/31863

Correspondence to be

Addressed to the clerk of the council

P. O. Box 4

Ref: FIN/108/8/JMM/swm

NANYUKI

1st September, 2006

P. N. GICHOCHO NGUGI

P. O. BOX 1100

NYERI

APPOINTMENT TO CARRY OUT SURVEY WORK

Following the Council's advertisement on 2nd June, 2006 seeking the services of Private Surveyor, I am pleased to inform you that you were successful and hereby appointed to carry out designated survey work in County Council of Laikipia.

You shall carry out all the survey work pertaining in OL MORAN Division. It is expected that you shall charge the survey fees in accordance with the Survey Act Cap. 299.

You shall soon further sign an agreement with this council that you shall discharge the said survey work faithfully and shall also undertake to pay the required professional fees without undue delay.

Write an acceptance letter so that a legal agreement can be drawn.

(Signed)

J. M. MBUGUA, OGW

CLERK TO COUNCIL”

6. Following that offer both parties signed an agreement dated 1st November 2006 where the plaintiff agreed to carry out survey work and the defendant agreed to pay for that work.

7. The defendant by clause 5 of the agreement agreed to remunerate the plaintiff. That clause is as follows:

“The fee chargeable by the service provider for the performance of his obligations under this agreement shall be in accordance with the scale of charges laid down in the Eighth schedule to the Act and shall be inclusive of Government value added to Tax deductible by the Employer for direct remittance to the relevant authority.”

8. By letter addressed to the clerk of the defendant dated 8th November 2006 the plaintiff informed the defendant that he had commenced the work. He stated in that letter:-

“CLERK TO COUNCIL

8th November 2006

P. O. BOX 4,

NANYUKI.

SURVEYING OF COUNCIL PROPERTIES AND TRADING CENTRES

Please refer to your letter Ref. FIN/108/VOL.11/41/JMM/SWM dated 2nd November 2006.

I have already commenced the above works and so far done data search and other preliminary work and I am ready to mobilize my survey field teams to carry out the required survey.

I am now requesting your council to pay me a sum of kshs.100,000 being a deposit to facilitate mobilization for field work in accordance with paragraph 10 of our agreement.

(Signed)

P. N. GICHOHO NGUGI

LICENSED LAND SURVEYOR”

9. The plaintiff was paid Kshs.100,000 being part payment of his fee.

10. By his letter of 4th April 2007 the plaintiff forwarded to the defendant his fee note totaling Kshs.11,532,909.20.

11. The defendant, as stated above, terminated the contract on the basis of non conformity with the procurement procedures. As a consequence the plaintiff filed this action praying for judgment of kshs.11,532,909.20 or in the alternative for payment on quantum meruit.

12. The defendant by its defence denied the plaintiff's claim for payment on ground that there was no valid agreement, that the then town clerk, who signed the agreement on behalf of the defendant, acted unlawfully and outside his scope of employment; and that the plaintiff's survey work was tainted by irregularities and procedural improprieties, which was calculated to plunder public funds.

EVIDENCE

13. The plaintiff in evidence narrated how he responded to the public notice of the defendant for survey work which he stated culminated with signing of the agreement dated 1st November 2006.

14. That between November 2006 and March 2007 he carried out survey work and compiled the necessary data ready for submission to the director of survey and to the Minister of Lands for checking and authenticating.

15. He raised a fee note which included the value added tax (V.A.T) payable.

16. On being cross examined the plaintiff stated that it was the defendant that supplied him with the physical development plan Ol Moran Town. That the said plan had no signature of the director of survey. This lack of signature he attributed to perhaps it being an advance copy.

17. In response to a question the plaintiff stated that it was not necessary to obtain the approved development plan because Ol Moran town was already a settled area. He confirmed that he would have obtained approval of his survey from the director of Survey after obtaining the final physical development plans. He however confirmed having pointed out the beacons to an official of the defendant and to that end he referred to the Beacon Certificate exhibited in this case.

18. Plaintiff further while under cross-examination stated that he was informed by the defendant that

termination of the contract was because of lack of procurement and not because he did not accomplish the survey work.

19. Plaintiff stated that his fees were based on the Eighth schedule of the Survey Act and that the law did not provide that he should not be paid because he had not obtained approval of his survey work from the director of Survey. He confirmed that he was entitled to be paid for his work because the defendant never complained about his quality of survey.

20. The defendant adduced evidence through three witnesses.

21. Josphat Mwendu Wasua (DW 1) is currently working as a physical planner as the county coordinating National Land Commission in Laikipia County.

22. It was his evidence that the law required a Surveyor intending to do survey work to use a physical development plan that has obtained approval from Minister of Lands (now Minister of Land and Physical Planning), and approval from the Director Physical Planning. Once that plan is approved by those two officers it would be forwarded to the local authority (now the County Government). He emphasized that survey work is done as per approved physical development plan. That if survey work is presented to the Director of Survey without an approved development plan it is returned to Sender (RTS).

23. DW 1 further stated that the only time a surveyor could base his survey on a draft plan was where the surveyor was assisting a physical planner 'site pick' that is pick existing developments.

24. In his evidence in his written statement DW 1 confirmed that the plaintiff presented to the defendant survey plan and worksheets done in respect to Ol Moran trading center but disqualified that work for having been based on un-approved development plan.

25. DW 1 on being cross examined however confirmed he was a physical planner and could not competently comment on the plaintiff's survey work.

26. Priscilla Njeri (DW 2) gave evidence on behalf of the Director of Survey based at Adhi House in Nairobi. She stated that she was a land Surveyor 1.

27. In her evidence in Chief DW 2 stated that she had noted the Physical Development plan of Ol Moran had no signature of Director of Physical Planning and Minister of Land. That those two signatures are a requirement for a complete development plan and it is on the basis of such complete plan that a survey is undertaken which survey culminates in the issuance of titles. That it is from title survey that deed plan and registry index map are prepared.

28. That if the development plan did not have the requisite signatures, any survey done based on it would not receive approval of the Director of Survey. But that such survey, however, could be used for date.

29. DW 2 confirmed that the plaintiff's Exhibits 1 pages 33 to 38 was the drawing and working diagrams of survey. That it was mathematic for survey from which it would come up with computation file and survey plan which would be submitted to the Director of Survey. In this regard DW 2 stated that pages 33 to 38 of the plaintiff's exhibit 1 was what would be submitted to the director of survey for approval for data but not for issuance of title because of lack of requisite approval.

30. On being cross examined DW 2 stated that the defendant had a responsibility to submit the physical development plans to the director of Physical Planning and the Minister of Lands for approval.

31. Elijah Mburu Wanyoike (DW 3) previously worked for the defendant as its treasurer but was now retired. He said that he sometimes acted as the clerk of the defendant.

32. That he attended a meeting at Jogoo house in Nairobi on 22nd March 2007 which meeting resolved that the contract between the defendant and various other surveyors, should be terminated because the

procedure of procurement had not been followed.

33. That the same meeting also resolved that a local government officer was to inspect activities of the defendant. That on carrying out inspection the defendant was found to have committed financial irregularities which led to the termination of employment of the then town clerk Mr. Jack Mbugua.

34. In response to cross-examination DW 3 stated that it was the defendant's responsibility to supply the surveyors with data and records to enable them carry out survey.

35. DW 3 also confirmed that the Ministry of Local Government had no contractual relationship with the plaintiff in relation to the contract to do survey work over the Ol Moran town.

ANALYSIS AND DETERMINATION

36. From the reproduction of the evidence adduced before court it becomes abundantly clear that the defendant failed to prove some of the pleadings in their defence.

37. The defendant did not lead evidence to deny the contract between itself and the plaintiffs. There will not be an issue for determination on whether the then town clerk was authorized to sign a contract with the plaintiff. The contract dated 1st November 2006 was a valid contract.

38. The defence witnesses DW 1 and DW 2 confirmed that the plaintiff carried out survey work over Ol Moran town. The two witnesses only faulted that survey for relying on an unapproved physical development plan. The defence pleading that the plaintiff did not carry out survey work therefore is not an issue for determination.

39. The issues that present themselves in this matter are:-

(i) Was the defendant in breach of contract when it terminated; and

(ii) Is the plaintiff entitled to payment of Kshs.11,532,909.20.

40. On the first issue one needs to examine whether the defendant was entitled to terminate the contract.

41. The defendant by its letter dated 10th April 2007 terminated the contract on the basis that the procurement procedure was not followed.

42. The then operative law was The Public Procurement and Disposal Act 2005. **Section 2** of that Act provided the purpose of the Act. It states:-

“The purpose of this Act is to establish procedures for procurement and disposal of unserviceable, obsolete or surplus stores and equipment by public entities to achieve the following objective;

The objection of the Act inter alia are to maximize economy and efficiency; to promote competition; increase transparency; and to promote integrity.

43. From Section 26 to 28 of that Act public entities, such as the defendant, were required to adopt systems and procedures relating to procurement. Some of the procedures in Section 26 inter alia are to ensure procurement is within the approved budget; to have different offices handle procurement processing; and establish a tender committee.

44. **Section 27** of that Act provides:-

‘(1) a public entity shall ensure that this Act, the regulations and any directions of the Authority are complied with respect to each of its procurement.

(2) The accounting officer of a public entity shall be primarily responsible for ensuring that the public entity fulfils its obligation under subsection (1).

45. What is clear from the above provisions is that the responsibility of ensuring that the Act was complied with lay upon the defendant and much more on its accounting officer Jack Mbugua. It is Jack Mbugua who signed the public notice, above inviting surveyors to give quotations for survey work. If the said Jack Mbugua did follow procurement procedure can the plaintiff be blamed? Can the defendant seek to obtain benefit of its own default?

46. The following cases show that a defaulting party cannot rely on its fault.

ALGHUSSEIN ESTABLISHMENT v ELTON COLLEGE (1991) 1 All ER 267, it was held:-

“A party who seek to obtain a benefit under a continuing contract on account of his breach is just as much taking advantage of his own wrong as is a party who relies on his breach to avoid a contract and thereby escape his obligations.”

*The House of Lords in the decision above, relied on a speech by Lord Diplock in **CHEALL v ASSOCIATION OR PROFESSIONAL EXECUTIVE CLERICAL AND COMPUTER STAFF (1983) 1 ALL ER** that:-*

“This rule of construction, which is paralleled by the rule of law that a contracting party cannot rely upon an event brought about by his own breach of contract as having terminated a contract by frustration is often expressed on broad language as “A man cannot be permitted to take advantage of his own wrong.”

47. It follow that the defendant could not rely on its failure to set up procedures for procurement, or its failure to ensure that its invitation for quotation from surveyors, and subsequent appointment of those surveyors, to terminate its contract with the plaintiff. It follows that this court finds that when the defendant terminated the contract it was in breach.

48. The second issue for consideration is whether the plaintiff is entitled to payment.

49. The defendant pleaded that the plaintiff was not entitled to a payment because in performing the survey work he failed to use physical development plans that was approved.

50. By the contract dated 1st November 2006 the plaintiff undertook to obtain approvals and consents where necessary and to prepare final subdivision plans and submissions of the same to the Director of Survey, amongst others.

51. The above notwithstanding the defendant’s witness DW 2 stated that the work of survey done by the plaintiff could be submitted to the Director of Survey to be used for data.

52. The plaintiff by his letter to the defendant dated 2nd April 2007 informed the defendant as follows:-

“CLERK TO COUNCIL

LAIKIPIA COUNTY COUNCIL

P. O. BOX 4,

NANYUKI.

SURVEYING OF COUNCIL PROPERTIES AND TRADING CENTRES –

OL MORAN TOWNSHIP

This is further to my letter dated 12th February 2007.

The survey of Olmorán Township was completed on 17th March 2007 and all the beacons have now been concreted and pointed out to your divisional officer.

Meanwhile I am compiling my report for submission to the Director of Surveys.

My fee note shall follow after the compilation in accordance with the Survey Act and Paragraph five (5) of our contract.

Yours faithfully

(Signed)

P. N. GICHOHO NGUGI

LICENSED LAND SURVEYOR”

53. It is clear that by the time the defendant terminated the contract, by its letter dated 10th April 2007, the plaintiff had not submitted his report to Director of Survey. The letter of termination was written 8 days after the plaintiff wrote his letter informing the defendant he was in the process of compiling his report.

54. The plaintiff, once the contract was terminated, could not be expected to proceed with the process of obtaining approval of Director of Survey. And since DW 2 stated that the survey carried out by the plaintiff would have been received by the Director of Survey for purpose of data, the defendant failed to prove that the plaintiff failed to comply with the contract. Again as stated before the defendant cannot be allowed to rely on their notice of termination of contract to allege the plaintiff failed to perform the contract. In any case Eighth schedule of the Survey Act sub-schedule 2(3) provides:-

“When a surveyor is unable, owing to his clients instructions, to complete either the survey or the plan, he shall be entitled to payment of the full value of the work completed.”

55. Further in consideration of issue (ii) above the plaintiff’s fee note which had items of travel and accommodation was subject of cross examination by learned counsel for the defendant. Eighth Schedule sub-schedule 5 provides that a surveyor is entitled to charge Kshs.80 per kilometer travelled and Kshs.40 per kilometer travelled to cover surveyor’s professional time. He is also entitled to reasonable subsistence allowance. On that basis alone the plaintiff is entitle to be paid for the amount claimed in his fee note for travel and accommodation.

56. It is this court’s finding that the plaintiff proved on a balance of probability his claim against the defendant.

57. Judgment is hereby entered for the plaintiff against the Laikipia county Government for Kshs.11,532,909.20 plus interest at court rate from the date of filing suit until payment in full. The plaintiff is also awarded costs payable by the Laikipia County Government.

DATED and DELIVERED at NANYUKI this 14th day of DECEMBER 2017

MARY KASANGO

JUDGE

CORAM

Before Justice Mary Kasango

Court Assistant: Njue / Mariastella

For Plaintiff:

For 1st Defendant:.....

For 2nd Defendant:

For 1st 3rd party:

For 2nd 3rd party

Judgment read in open court.

MARY KASANGO

JUDGE