



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
TAX AND COMMERCIAL DIVISION
CIVIL CASE NO 375 OF 2011
CHAPTER PROPERTY CONSULTANTS LIMITED.....PLAINTIFF
VERSUS
TANATHI WATER SERVICES BOARD.....DEFENDANT

JUDGMENT

INTRODUCTION

1. The Plaintiff's Plaint dated 29th August 2011 and filed on 1st September 2011 sought judgment against the Defendant for:-
 - a. **Kshs 13,416,393/= and V.A.T. being Kshs 2,146,623/=.**
 - b. **Costs of this suit and interest thereon and on (a) at court rates from 6/8/2010 until full and final satisfaction of the decree made herein.**
 - c. **Any other relief this Honourable Court may deem just to grant.**
2. Its List and Bundle of Documents, List of Witnesses and Witness Statement of Bernard Woie Kavivya (hereinafter referred to as "PW 1") were also dated 29th August 2011 and filed on 1st September 2011.
3. The Defendant's Memorandum of Appearance was dated and filed on 7th October 2011 while its Defence, List of Witnesses and List of Documents were dated and filed on 19th October 2011. The Defendant gave notice that it would supply its Bundle of Documents fifteen (15) days prior to the Pre-Trial Directions under Order 11 of the Civil Procedure Rules, 2010.
4. Subsequently, on 20th November 2013, it filed its Bundle of Documents and Witness Statements of Lamet Maika and Augustus Musili Nding'o (hereinafter referred to as "DW 1" and "DW 2" respectively) all dated 19th November 2013. On 27th May 2013, it filed another List and Bundle of Documents of even date.
5. The hearing of this matter was concluded on 20th May 2015 when this court gave directions on the filing of the Written Submissions. Unfortunately, the matter was not listed for Mention on 29th July 2015 before this court when it was to confirm compliance and give further directions.

6. This court was, however, transferred before it could render its Judgment herein. Upon the parties' written request to the Principal Judge High Court of Kenya which he approved on 9th November 2015, this court once again became seized of the matter for purposes of writing the Judgment herein which was based on the parties' respective Written Submissions that were not highlighted.

THE PLAINTIFF'S CASE

7. The Plaintiff contended that the Defendant awarded it a tender for provision of valuation services of all its assets located in Machakos, Makueni and Kitui Counties which was subsequently formalised by a written Contract Document on Valuation of Board Assets Tender No TAWSB/112/09-10 (hereinafter referred to as "the Contract") on 22nd April 2010.

8. It stated that it was a term of the said Contract that the Plaintiff would prepare and deliver the Valuation Report and thereafter submit its Fee Note based on the scales prescribed under the Valuers Act Cap 532 (Laws of Kenya). The Plaintiff delivered its Valuation Report and its Fee Note in the sum of Kshs 13,416,393/= plus V.A.T in accordance with the Valuers Act on 2nd and 6th August 2010 respectively.

9. It was its contention that the Defendant refused, neglected and/or failed to pay the aforesaid sums of money citing illegality of the said Contract. It was its averment that it had rendered the services in accordance with the said Contract and thus asked that this court to enter judgment as it had prayed for in its Plaint.

THE DEFENDANT'S CASE

10. On its part, the Defendant denied ever having awarded the Plaintiff the tender to value its assets as the Plaintiff did not qualify to do so. The Defendant also denied ever having entered in any written contract with the Plaintiff or receiving a Valuation Report and Fee Note as the Plaintiff had contended.

11. The Defendant averred that the Plaintiff was not entitled to any fees as it did not receive a Certification of Completion as was required by the Rules of the Defendant's Board of Directors and it could not therefore be paid for a job that had no valid contract and for a job that was not completed.

12. It was its further contention that if there was any contract with an arbitration clause, which it vehemently denied ever existed, then the matter ought to have been referred to arbitration as this court did not have jurisdiction to hear and determine the same. It therefore urged the court to dismiss the Plaintiff's suit with costs to it.

LEGAL ANALYSIS

13. Both the Plaintiff and the Defendant filed their joint Statement of Agreed Issues dated 4th September 2012 on 4th April 2013. The following were the issues that they both placed before the court for determination:-

- 1. Did the Plaintiff and the Defendant enter into the contract the subject matter hereof and was the said contract signed and sealed by both parties?**
- 2. Was the contract for the provision of valuation services by the Plaintiff in respect of all the Defendant's assets located in the Machakos, Makueni and Kitui Counties?**
- 3. Did the said contract provide that the Plaintiff would base its fee note on the scales prescribed under the Valuers Cap 532 (Laws of Kenya) and The Valuers (Forms and Fees) (Amendment) rules?**
- 4. Did the Plaintiff deliver the requisite Valuation Report to the Defendant and did the**

Defendant ever object to the same?

5. Was the Plaintiff required to obtain a certification of completion for services rendered and if so what were the consequences of the Defendant failing to give such a certification of completion?

6. Was the Defendant entitled to withhold the certification of completion so as not to pay the Plaintiff?

7. Did the Plaintiff give to the Defendant a fee note in the sum of 13,416,393/= and V.A.T. being Kshs 2,146,623/= or any fee note at all?

8. Was the Defendant entitled in law to deny the existence of the contract the subject matter of this suit and the arbitration clause therein and to also state that the dispute should proceed to arbitration?

9. Was the Defendant not at liberty to admit the existence of the contract and thereafter before or after the institution of this suit seek arbitration?

10. Was the Defendant indebted to the Plaintiff in the sum of Kshs 13,416,393/= and V.A.T. being Kshs 2,146,623/= or any sum at all?

11. Did the Plaintiff send to the Defendant a demand notice of its intention to sue prior to the filing of this suit?

12. Does this Honourable Court have jurisdiction to entertain this suit?

13. Who was to pay the costs and interest of this suit if any?

14. It did appear to this court that many of the issues could be merged and that the following issues were really what was in contention between the parties herein:-

1. Was this court seized of jurisdiction to hear and determine the matter herein?

2. Was there a valid and binding contract between the Plaintiff and the Defendant?

3. Did the Plaintiff render services to the Defendant and if so, was it entitled to the sum of Kshs 13,416,393/= and V.A.T. being Kshs 2,146,623/= or any sum at all?

4. On what amount was interest payable and from what date was it to accrue?

5. Who is to bear the costs of this suit?

15. The court deemed it fit to deal with the said issues under the separate heads shown hereinbelow.

I. JURISDICTION OF THE COURT

16. A perusal of the evidence that was adduced in court revealed that parties had abandoned the issue of whether or not this court had jurisdiction to deal with this matter. Suffice it to state that both parties submitted themselves to the jurisdiction of this court as no application was ever made by the Defendant to refer this matter to arbitration under the provisions of Section 6 of the Arbitration Act Cap 49 (Laws of Kenya).

II. THE CONTRACT

17. In his examination-in-chief, PW 1 relied on his Witness Statement in its entirety. He placed reliance

on the advertisement for Tender No TAWSB/112/09-10 that had been carried in the Daily Nation Newspaper of 30th October 2009 (hereinafter referred to as “the Tender”) and the aforesaid Contract.

18. On its part, the Defendant argued that the Plaintiff’s payment of the requisite application fees in the sum of Kshs 5,000/= did not mean that the Plaintiff had been awarded the Tender to offer its services. It contended that the Plaintiff was not awarded the tender as it did not undergo the due process of tendering so as to qualify for the second stage and consequently, the Contract entered into on 22nd April 2010 was tainted and marred by illegality. In its letter of 16th March 2011 which the Plaintiff relied upon, the Defendant denied having been aware of the said Contract.

19. In his evidence, DW 1 stated that he was the Defendant’s Procurement Manager. He confirmed that the Defendant received the Plaintiff’s response to the said Tender but that the Plaintiff was ranked tenth (10th) out of eleven(11) in the Technical Proposals thus disqualifying him from the Technical Stage.

20. He was categorical that the Plaintiff’s bid did not proceed to the Financial Stage, a fact that was re-stated by DW 2, the Defendant’s Community Development Manager. It was DW 2’s testimony that the Financial Proposals that his Committee opened did not include that of the Plaintiff and that the Plaintiff was not present when the said Financial Proposals were opened.

21. In its Written Submissions, the Plaintiff submitted that the Defendant did in its evidence during trial admit that there was a contract, that it received a Valuation Report and fee note but that the reason it did not pay the monies was due to the fact that it did not have any monies at the material time.

22. The Plaintiff submitted that the Defendant was bound by its pleadings and the issue of procurement could not be raised at the time of the hearing herein. It further argued that the Defendant was estopped from reneging on the contract it had entered into with it.

23. It placed reliance on the case of Kiwanuka & Co vs Walugembe (1969) E.A. 661 that dealt with the doctrine of estoppel. It also referred the court to the case of Bihange vs School Outfitters (U) Ltd (2000) I E.A 20 where it was held that a Managing Director had authority to sign a contract on behalf of a company, that courts do not concern themselves with the question of lack of consideration and that in the absence of the of fraud, duress, mistake, undue influence and misrepresentation, courts will enforce a contract.

24. Both DW 1 and DW 2, who also relied on their Written Statements in their entirety, did not refer to the said Contract. The court perused the same and noted that it was dated 22nd April 2010. It was executed by Eng Joseph M Nzesya, the Defendant’s Chief Executive Officer (CEO) and the Plaintiff’s Managing Director. In his cross-examination, DW 1 confirmed that the signature did belong to the said CEO but that he had already left by the time he saw the said Contract.

25. It was evident from the Defendant’s letter dated 15th June 2010 written under the hand of the said CEO that the Plaintiff was awarded the tender. The letter stated in part:-

“TO WHOM IT MAY CONCERN

This is to confirm that M/S Chapter Property Consultants Limited was awarded through a national competitive bidding process tender to undertake asset valuation of Tanathi Services Board...”

27. The fact that the said letter was a recommendation letter as was stated by PW 1 in his cross-examination and that it was not written on a “**without prejudice**” basis gave it more weight as it was not issued as a follow up of the said Contract but to a third party for totally different purposes.

27. It was noteworthy that DW 1 confirmed that the signature which appeared in the said Contract was that of the said CEO. The Defendant did not call the said CEO to deny that he ever wrote the said letter or

to adduce evidence that would have shed light to the circumstances under which he issued the Plaintiff with the said letter. The fact that he had left by the time DW 1 saw the said Contract was not a sufficient reason for this court to have found that the said CEO's attendance during trial could not be obtained.

28. Indeed, DW 1 could not now turn around and disown the letter that was written by the Defendant's CEO. He did not adduce any evidence that would have persuaded this court to find that it was another officer other than the said CEO who had no authority to bind the Defendant in its communications to third parties or that the said letter formed privileged communication.

29. It was also indicative from several letters by the Defendant to the Plaintiff that indeed, the said Tender had been awarded to the Plaintiff. Vide its letter of 20th May 2010, the Defendant acknowledged receipt of the Plaintiff's letter of 15th May 2010 in which the latter had requested for the logbooks and audited accounts.

30. In a letter dated 18th June 2010 that was written under the hand of one Jane Sein on behalf of the CEO, the Defendant forwarded to the Plaintiff, several logbooks for vehicles and motor cycles for Machakos Municipal Water and Sewerage Company, Oololaiser Water and Sewerage Company, Noi-Turesh Water and Sewerage Company, Olkejuado Water and Sewerage Company, Loitokitok Water and Sewerage Company, Loitokitok District, Nzaui District, Mukaa District, Kajiado North and Central Districts.

31. In yet another letter dated 30th June 2010, the Defendant, through the same Jane Sein, requested the Managing Director National Water Conservation & Pipeline Corporation to accord the Plaintiff all the assistance it would require. DW 1 acknowledged that these letters were written by the said Jane Sein.

32. Notably, the Defendant's case was hinged on the fact that the award of the Tender to the Plaintiff was flawed for failing to pass through all the stages of the tendering Process. However, as was rightly pointed out by the Plaintiff, a party aggrieved by the procurement process was at liberty to challenge the same before the Public Procurement Review Board (hereinafter referred to as "the Board") as the same was not within the jurisdiction of this court. Be that as it may, the court was, however, at a loss how the Defendant could have challenged the process at the said Board when it was the same one that had awarded the Plaintiff the said tender.

33. Indeed, a party that applies to compete in a tender and is awarded the same is not expected to enquire as to whether or not the procurement process has been followed or the circumstances leading to the awarding of such a tender. It would be onerous to expect an applicant to prove that the proper tendering process has been followed as he would not be privy to the internal mechanisms of such a party that invites tenders.

34. It was therefore immaterial that the Plaintiff did not tender in evidence a letter inviting him to go and sign the said Contract. The burden of proof could not be shifted to it to demonstrate that it did not qualify in the Financial Evaluation process as was contended by DW 2 for the reason that the several letters by the Defendant adduced in evidence by the Plaintiff were sufficient to demonstrate that the Plaintiff had indeed been awarded the said Tender.

35. The formalisation of the said Tender was further buttressed by the fact that there was a duly executed and sealed Contract. When PW 1 produced the original Contract showing that the same was duly sealed, the Defendant did not contend that its Seal was obtained fraudulently. It was onerous for the Plaintiff to have known or expected to have known who stamped the said Contract on behalf of the Defendant, a line of argument that the Defendant appeared to advance during PW 1's cross-examination.

36. Evidently, the execution of the said Contract by both the Plaintiff and the Defendant and subsequent letters to third parties confirming the award of the said Tender to the Plaintiff were sufficient to have led this court to come to the firm conclusion that there was indeed a valid and binding contract between the Plaintiff.

37. Accordingly, in the absence of any vitiating factors, the court found and held that the Plaintiff and the Defendant were legally bound by the said Contract, terms and conditions therein.

III. PROVISION OF SERVICES

38. Part of the express terms of the aforesaid Contract were as follows:-

“The objections of the assignment are:-

- 1. To determine the total net assets value of all fixed water and waste water assets belonging to TANATHI Water Services Board;**
- 2. To survey, beacon and determine the value of land and developed assets; and**
- 3. To determine the value of machineries, motor vehicles, trade fixtures, fittings, furnishings, equipment and all other tangible assets over to the water services providers.**

Description of the assignment

The consultant will prepare a detailed inventory of the assets owned by the Board, establish their condition and performance profile, among other characteristics, (sic) in order to ascertain the present value. The consultant shall also establish the extent of the liabilities outstanding for the assets developed.

2. Term

The consultant shall perform the Services during the period commencing on 23rd April 2010 and continuing through to 22nd June 2010 or any other period(s) as may be subsequently agreed by the parties in writing.

3. Payment

A. Ceiling

For this assignment, the Client shall pay the Consultant *the total amount arrived at in accordance to* (sic) *professional scale fees provided under the Scale Fees, Valuers Act Cap 532 of the Laws of Kenya* including any tax obligation that may be imposed on the Consultant...”

39. It did appear from the executive Summary dated 31st July 2010 annexed to the Plaintiff’s Bundle of Documents that the assignment did not commence and conclude as was envisaged in the said Contract. According to Clause 4.0, detailed inspections and asset identification started on 10th May 2010 and continued through to 23rd July 2010 while Clause 4.1.0. showed that the Report writing and Researching on Valuation started simultaneously on 24th May 2010 and continued through to 23rd July 2010. No complaint was made about this.

40. The Reports were forwarded to the Defendant in two (2) volumes vide under the cover of the Plaintiff’s letter dated 2nd August 2010. It also forwarded a Fee Note to the Defendant on 3rd August 2010 with an amended Fee Note in the sum of Kshs 13,160,464/=being sent to the Defendant vide its letter dated 6th August 2010. The Plaintiff wrote several reminders with the Defendant writing to it on 16th March 2011 denying obligation to pay the said sum as the procurement process was not concluded due to its failure to secure anticipated funds.

41. The court did not have the opportunity of seeing the said Report. However, there was a letter indicating that the said Report was forwarded to the Defendant. In their respective cross-examination, both DW 1 and DW 2 stated that they was not in the Committee that received the said Report and they were also not aware whether or not the said Report was given as had been contended by PW 1. Further, DW 1 also stated that since the work was done, he would have no problem if the monies were paid.

42. Accordingly, having considered the oral and documentary evidence, the Written Submissions and the case law that were relied upon by the respective parties, the court found and held that in the absence of any evidence to the contrary, the Plaintiff's evidence that the said Report was delivered to the Defendant as was contended by PW 1 and that it was entitled to the aforementioned sum of money was not rebutted by the Defendant.

43. There was no evidence to suggest that the Defendant's Board ought to have issued the Plaintiff with a Certificate of Completion before payment could be made. In any event, a party that withholds such a certificate without lawful cause cannot seek to benefit from a defence that such a certificate has not been issued. Consequently, the Plaintiff could not be held at hostage by the Defendant if it withheld the said Certificate of Completion and if the Defendant did not object or raise issues regarding the said report. This court was thus more persuaded to find and hold that the Plaintiff was able to prove its case to the required standard.

44. However, the calculations by the Plaintiff in the sum of Kshs 13,416,393/= in the letter of 6th August 2010 appeared erroneous. The court did not find it prudent to award the Plaintiff the said sum in its entirety merely because the Defendant had not rebutted the same.

45. This court acted *suo moto* in re-calculating the Plaintiff's fees. Applying the Scale Fees prescribed under the Valuers Act, it found the Plaintiff to have proven its claim to the extent of the sum of Kshs 13,408,909.72 only made up as hereunder:-

Scale 1

1 st 400,000.00	@ 1.0%	Kshs	4,000.00
Next Kshs 600,000.00	@0.5%	Kshs	3,000.00
Residue Kshs 5,261,392,587.00			
Of the given value of			
Kshs 5,262,392,587.00	@0.25%	<u>Kshs</u>	<u>13,153,481.47</u>
Sub-Total 1			<u>Kshs 13,160,481.47</u>

Scale 5

1 st Kshs 2,000,000.00	@1%	Kshs	20,000.00
Next Kshs 3,000,000.00	@0.5%	Kshs	30,000.00
Residue Kshs 57,971,300.00			
Of the given value of			
Kshs 62,971,300.00	@0.25%	<u>Kshs</u>	<u>144,928.25</u>
Sub-Total 2			<u>Kshs 194,928.25</u>

Scale 6

1 st Kshs 200,000.00	@2%	Kshs	4,000.00
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Next Kshs 300,000.00 @1% Kshs 3,000.00

Residue Kshs 9,300,000.00

Of the given value of

Kshs 9,800,000.00 @0.5% Kshs 46,500.00

Sub-Total 3 **Kshs 53,500.00**

Total Fees (Sub-totals 1+2+3) **Kshs 13,408,909.72**

IV. INTEREST

46. Having said so, the Plaintiff claimed interest from 6th August 2010 which was presumably the date it sent its Amended Fee Note to the Defendant. The said Contract did not make provision for levying of interest on unpaid sums thus giving this court the discretion to award such interest at whatever rate and from such date as provided for under the provisions of Section 26 of the Civil Procedure Act Cap 21 (Laws of Kenya) depending on the circumstances of each case.

47. These periods of payment of interest until payment in full are :-

- a. **From any period before the institution of the suit;**
- b. **From the date of the filing of the suit; and**
- c. **From the date of decree**

48. It therefore follows that the interest herein could either have been chargeable from any of the dates stipulated hereinabove. However, the general principle is that interest is awarded from the date of filing suit as can be seen in the holding in the case of **Prem Lata vs Peter Musa Mbiyu (1965) EA 592** where it was held as follows:-

“The principle that emerges is that where a person is entitled to a liquidated amount or to specific goods and has been deprived of them through the wrongful act of another, he should be awarded interest from the date of filing suit.”

49. In all other instances, there must be justification why interest should be granted from the period before the institution of the suit. One such justification would be that there was a contractual obligation on a party to have paid interest at the time they entered into a contract that provided for such payment of interest. That was not the case herein. Interest will therefore run from the date of filing of the suit herein.

DISPOSITION

50. For the foregoing reasons, the upshot of this court’s decision was that judgment be and is hereby entered in favour of the Plaintiff against the Defendant for the sum of Kshs 13,408,909.72 together with interest thereon at court rates from the date of filing suit until payment in full.

51. As the Plaintiff did not tender in evidence a Value Added Tax (VAT) Certificate to show that it was registered for VAT, the court found that it had not properly supported its claim for the sum of Kshs 2,146,623/= being 16% VAT of the Scale Fees. Consequently, this claim is hereby dismissed.

52. The Defendant shall bear the Plaintiff’s costs for the suit herein.

53. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 15th day of January 2016

J. KAMAU

JUDGE