



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 1095 OF 2003**

**SYNRESINS LIMITED .....PLAINTIFF**

**VERSUS**

**PRAVIN VORA T/A VORA CONSTRUCTION..... DEFENDANT**

**JUDGEMENT**

1. The plaintiff, Synresins Ltd, sued Pravin Vora T/A Vora Construction, the defendant herein, vide the plaint dated 23<sup>rd</sup> October 2003 in which it sought for judgement in the following terms:

- a. ***A declaration that the defendant abandoned/deserted the plaintiff construction site and that the plaintiff was entitled to engage another contractor;***
- b. ***Damages for breach of contract;***
- c. ***Kshs.5,328,566.75***
- d. ***Interest from 31<sup>st</sup> July, 2003.***

2. The defendant filed a defence to deny the plaintiff's claim. He also counter claimed and sought for judgment against the plaintiff in the following terms:

- a. ***Damages for breach of contract and demolition of storage sheds;***
- b. ***Kshs.7,301,683.50 being balance of the work already done by the defendant;***
- c. ***Cost and interest.***

3. When the suit came up for hearing, each side summoned a single witness. The plaintiff summoned Michael Mungai (P.W.1) who confirmed in his testimony the existence of a contract between the two parties. PW1 relied on his written witness statement, the brief oral testimony and the bundle of documents which were produced as exhibits 1 to 12. The plaintiff and the defendant entered into a contract agreement for the construction of an office block and a warehouse/factory. The defendant on its part agreed to complete the project within 22 weeks from the date of executing the contract.

4. Time was made of essence and the parties to the contract expressly agreed that in the event of an early hand over there will be a bonus of ksh.25,000/= per day payable by the plaintiff and similarly that if there is a delay in handing over, the defendant will pay a penalty of kshs.40,000/= per day.

5. It was also a term of the agreement that in case of any serious variation, the defendant would obtain prior order from one Arun Devani after presenting estimates and calculations. The agreement further barred the defendant from sharing extra expenses beyond those stipulated by the agreement without the express permission of the plaintiff. The plaintiff alleged that the defendant frustrated the agreement by failing to meet the timelines prompting the plaintiff to terminate the contract on 26.08.2003. It stated that

the expected completion date was 17<sup>th</sup> April 2003 there was therefore unexplained delay of over 130 days in completion by the time the contract was terminated. The plaintiff further averred that the defendant had vacated the site two weeks before the plaintiff opted to terminate the contract. PW1 informed this court that at the time of terminating the contract, the defendant had already been paid kshs.11,496,680/75. PW 1 also produced a letter dated 22.8.2003 indicating that the plaintiff had paid the defendant ksh.10,296,686/75. A valuation report by an architect put the value of the work done at the date of valuation at ksh.6,168,120/=. The plaintiff in the beseeched this court to order the defendant to refund to the plaintiff the amount paid for work not done and to pay the penalty for delay at a rate of ksh.40,000/= daily for 130 days.

6. I have already pointed out that the defendant filed a defence with a counter claim. The defendant summoned Everlyn Kahaki (D.W.1) to testify in support of his case. She told this court that Vora construction Co. Ltd was incorporated on 6<sup>th</sup> August 2003 hence it was wrongly sued as Pravi Vora T/A Vora Construction. DW1 Stated that the defendant's claim is based on a quantity surveyor's report on work done by 31<sup>st</sup> October 2003, two months after the defendant left the construction site. The quantity surveyor's report produced as an exhibit in evidence referred to work done by Vora Construction Company Ltd. The quantity surveyor's financial report indicated that most of the work was valued at more than the projected cost of each piece of work on completion. In cross examination D.W.1 explained why there was a variance in the prices in the quantity surveyor's report and the contract agreement on the basis that the same was provided for in the contract agreement which was in fact, not a fixed term agreement hence the price of materials could be revised according to market forces. DW1 referred to several meetings and correspondences confirming the various concerns raised by the defendant which concerns were never addressed by the plaintiff in total disregard to the contact agreement. She alleged that the plaintiff had failed to show proof of having paid the defendant directly the entire sum of ksh.11,496,686/75.

7. D.W1 accused the plaintiff of allegedly making payments to suppliers not party to the contract with no authority given for such payments therefore such payments are improper, null and void. The defendant further stated that the plaintiff had failed to prove that the construction works done by the defendant were valued at ksh.6,168,120/= to the required standards in civil cases. DW1 pointed out that no valuation report was produced and or receipts to verify the same. The defendant was of the view that the claim for ksh.5,328,566/75 and any other claim by the plaintiff was with no basis and an afterthought, having forcefully evicted the defendant before filing the suit to justify its unlawful actions.

8. After outlining the facts and the evidence of the case, the following issues arose for the determination of this court.

- i. **Whether there existed a valid contract between the parties and if so whether the same was breached and by who?**
- ii. **Whether the prayers sought by the plaintiff should be given?**
- iii. **Whether the counterclaim has any merit.**

9. On the first issue, the parties agreed that there was a valid agreement they executed to bind themselves. The agreement was entered between Syrensins Ltd and Pravin Vora T/A Vora Construction. The evidence presented by D.W.1 introduced into the scene the name of Vora Construction Co. Ltd. D.W.1 clearly stated that Vora Construction co. Ltd was incorporated on 6<sup>th</sup> August 2003 long after the agreement had been executed on 14.11.2002, it cannot therefore be said that Vora Construction Company Ltd is privy to the contract. Since the aforesaid company has no privity of contract with the plaintiff, it cannot therefore purport to state that it has been wrongly sued as Pravin Vora T/A Vora Construction Company Ltd. The parties to this suit have accused each other of breaching the agreement. According to the defendant, it is the plaintiff who was in breach for various reasons. First it is said that it had failed to give reasonable notice of termination. Secondly, the plaintiff is said to have failed to pay the defendant in good time for the work already done by withholding funds for the project.

10. Thirdly, the plaintiff is said to have unilaterally engaged another contractor before proper handing over by the defendant and demolishing the defendant's storage sheds.

11. Fourthly, by flagrantly making unauthorised payments to suppliers allegedly on the defendant's account. On the other hand the plaintiff is of the opinion that since time was made of essence in the contract, the defendant breached it when it failed to complete the construction within 22 weeks. I have carefully considered the accusations and counter accusations. It is clear in my mind that the plaintiff did not seriously controvert the defendant's accusations that the plaintiff basically frustrated the contract. The defendant presented evidence showing that there was a delay in obtaining the approval from the Nairobi City Council which stopped any excavation and construction until building plans were approved. The plaintiff did not resist nor contradict this piece of evidence. The defence also tendered evidence to show that the plaintiff was not paying the agreed sums when and due and at times preferred to pay suppliers of building materials who did not deliver the materials on site. This conduct by the plaintiff caused further delays. In my humble view, the defendant has presented credible evidence which depicted the plaintiff as the party which breached the agreement. Its conduct as explained hereinabove by the defendant frustrated the performance of the contract.

12. The second issue is whether the prayers sought by the plaintiff should be granted. I must state here that the plaintiff has failed to establish that the defendant actually breached the contract. The plaintiff asked this court to order the defendant to pay the plaintiff ksh.5,328,566/75 as a special damage. The plaintiff tendered general evidence in an attempt to establish this claim. To begin with, since this court has found the plaintiff to have been in breach of the contract, the penalty sum of ksh.40,000/= per day cannot be awarded. The plaintiff further did not lead any credible evidence in support of the claim for ksh.5,328,566/75. I decline to make the award.

13. The third and final issue is whether or not the counter-claim has any merit. The defendant is seeking to be paid ksh.7,301,683/50 as the amount unpaid for work done before termination, interest and costs of the suit. According to the plaintiff, the defendant had failed to tender evidence showing the percentage of work covered at the time of termination of contract hence he is not entitled to the claim. The plaintiff further pointed out that the quantity surveyor's financial report gave figures without any factual backing. It is averred that the report was in respect of work done by a company that was allegedly contracted by the plaintiff even before the inception of the company itself.

14. I have looked at the certificate of incorporation and it is clear to me that Vora Construction Co. Ltd was incorporated on 6<sup>th</sup> August 2003, about 20 days after the defendant was kicked out of the site. The plaintiff has correctly stated that it never entered into a contract with the aforesaid company. With respect, since there was no privity of contract between the plaintiff and Vora Construction Company Ltd, the claim cannot be sustained.

15. The other prayer which the defendant sought is damages for breach of contract. There is clear evidence that the plaintiff arbitrarily, unilaterally and without sufficient notice terminated the contract and evicted the defendant from the site. On this head the defendant beseeched this court to grant him ksh.5,000,000/=. I am convinced that the defendant is entitled to damages for breach of contract. In **Arch. Katerega & Another =vs= Uganda Posts Ltd (2012) UG COMMC70** the court stated *inter alia* that an award for damages for breach of contract is made to compensate for the inconvenience and hardship subjected to a party for failure to pay.

16. In **Kilimanjaro Construction =vs= East African Power & Lighting co. Ltd H.C.C.C no. 846 of 1982**, the court stated that where a contract is unlawfully determined, in principle a party is entitled to damages as could as nearly as possible put him in the same position as if the contract had been completed.

17. I am satisfied that the amount suggested by the defendant is reasonable. I grant him ksh.5,000,000/= as damages for breach of contract.

18. In the final analysis, the plaintiff's suit is ordered dismissed with costs to the defendant.

19. The plaintiff is condemned to pay defendant kshs.5,000,000/= for breach of contract. The defendant to have costs of the counterclaim.

Dated, Signed and Delivered in open court this 19<sup>th</sup> day of February, 2016

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendant