



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 290 OF 2012
KILELE BUILDERS LIMITED.....PLAINTIFF
VERSUS
TKM MAESTRO.....DEFENDANT

JUDGEMENT

1. The plaintiff's claim against the defendant is for a sum of Kshs.5, 266,500.76. The claim is said to be the balance of money which the defendant should have paid to the plaintiff, after the plaintiff performed the installation of Base transceiver Stations at different sites within the Republic of Kenya.
2. The task was said to have been done between 6th September 2008 and 10th September 2010.
3. At the trial, the plaintiff called one witness, whilst the defendant did not call any witness.
4. The plaintiff's witness was **Mr. GEORGE MORARA MASESE**, who is a Director in the plaintiff company, **KILELE BUILDERS LIMITED**.
5. George testified that the defendant, **TKM MAESTRO LIMITED**, had been awarded a contract by **SAFARICOM LIMITED**. However, as the defendant did not have the capacity to perform the contract, it gave to the plaintiff, the task of installing Base Transceiver Stations at different sites in Kenya.
6. George said that the defendant awarded to the plaintiff a total of 19 Local Purchase Orders.
7. After the plaintiff had carried out the work set out in the LPOs, Safaricom Limited engineers inspected the work done.
8. The engineers would issue final certificates in respect to each site, after satisfying themselves that the work had been completed. However, as the Main Contractor was the defendant herein, the final certificates were issued to it.
9. According to George, there had been no complaints from either the defendant or from Safaricom Limited, concerning the work which the plaintiff had done.
10. George explained that the plaintiff used to prepare reconciliation statements in relation to the word

which it had done on behalf of the defendant. However, the defendant was accused of failing to settle the accounts even after reconciliation.

11. George testified that in August 2010 the defendant sent an email to the plaintiff, acknowledging that the defendant owed Kshs. 7,060,899/- to the plaintiff.

12. Thereafter, in June 2011, the plaintiff says that it met a representative of the defendant, and the parties reached an agreement that the debt owed by the defendant to the plaintiff was Kshs. 5,800,000.76.

13. However, after that agreement, the defendant is said to have paid Kshs. 533,500/- only. Upon receipt of that payment, the plaintiff claimed the balance of Kshs. 5,266,500.76.

14. The plaintiff also claimed interest on the said claim, together with the costs of the suit.

15. In its Defence, the defendant denied having been awarded several contracts by Safaricom Limited, for the installation of Base Transceiver Stations.

16. The defendant also denied having awarded to the plaintiff a total of 19 Local Purchase Orders.

17. Similarly, the defendant denies the assertion that the plaintiff carried out installation works as had allegedly been requested for by the defendant.

18. As regards the plaintiff's claim that the defendant failed to make payment for the services which the plaintiff rendered, the defendant points out that it was not indebted to the plaintiff because no invoices were issued.

19. On the other hand, if the plaintiff had issued invoices (*which fact was denied by the defendant*) the invoices were erroneous/fraudulent/deceptive or incorrect.

20. The defendant perceived any such invoices as aimed at denying it any contractual consideration.

21. Pausing there, for now the court observes that the assertion by the defendant, that the plaintiff aimed to deny or to deprive the defendant of the consideration it would have got out from the contract, is indicative of an acknowledgment that there was a contract.

22. As a further Defence, but which was in the alternative to the other lines of defence, it was the defendant's position that the plaintiff had not issued the defendant with complete invoices, with full fiscal support, so as to enable the defendant make an informed conclusion on the same.

23. Once again, one would ask why the defendant was talking about the failure by the plaintiff to issue complete invoices.

24. In my understanding, the defendant was saying that if the plaintiff had issued complete invoices, which were supported by appropriate supporting documents, the defendant would have made an informed decision.

25. The only reason why a party would talk about invoices which were not complete, is because the party had received some invoices, and also because the party expected to receive more invoices.

26. And it is inconceivable that the defendant should be expecting the plaintiff to provide complete invoices, together with supporting documents, if the plaintiff had not provided services or goods, for the benefit of the defendant.

27. The defendant's defence also stated that there was no meeting between the parties, and that the defendant never admitted being indebted to the plaintiff.

28. Consequently, the defendant said that it was in breach of any agreement between the parties.
29. The defendant denied making any proposals to the plaintiff, concerning how the money allegedly owed to the plaintiff would be paid.
30. During the trial, the plaintiff's witness explained that whereas the parties did not enter into any signed agreement, the defendant gave LPSs to the plaintiff.
31. And during cross-examination, the plaintiff's witness said that the LPOs did indicate the fact that the defendant engaged the plaintiff for the work specified in the said LPOs'.
32. The witness, George Morara Masese (*henceforth "George"*) said that some of the LPOs were given to the plaintiff along with email instructions. The plaintiff provided the court with copies of the said emails.
33. George said that the plaintiff was required to quickly move to the respective sites, as each task was to be undertaken within a month.
34. In order to enable the plaintiff commence work, the defendant is said to have either paid deposits to the plaintiff's account, or it paid some cash to the plaintiff.
35. Thereafter, the defendant is said to have remitted some interim payments.
36. Finally, after each task, Safaricom used to verify the work done: And after that the defendant was supposed to pay the plaintiff.
37. George explained that it is only in instances where there were variations that the plaintiff issued invoices to the defendant. At all other times, the plaintiff did not issue invoices.
38. After the plaintiff closed its case, the defendant sought and was granted an adjournment.
39. Miss Muyai, the learned advocate for the defendant, indicated that she was unable to make contact with the defendant's witness.
40. Although Miss Kethi Kilonzo, the learned advocate for the plaintiff, opposed the application, the court granted the adjournment. However, the court made it clear that that would be the last adjournment, at the behest of the defendant.
41. On 8th March 2016 the trial was scheduled to proceed, with the evidence from the defendant.
42. However, the learned advocate for the defendant told the court that she was unable to reach her witness. Apparently, the witness had been in touch with the lawyer until the eve of the resumed trial. The witness promised to attend court, but he then failed to show up.
43. In the light of the fact that the defendant had not only failed pay the plaintiffs costs (*as it had been ordered to do*); but more so because there was no reason provided to explain the absence of the defendant's witness from court, I rejected the application for another adjournment.
44. The said decision was informed by the fact that on the previous court session, the court had already made it clear to the defendant that it was being given the last adjournment.
45. The defendant's advocate proceeded to close his client's case, without calling any evidence.
46. In the result, the only hurdle in the plaintiff's case was the Defence on record. In other words, there was no other evidence that was competing with the evidence tendered by the plaintiff.
47. However, the fact that the defendant did not adduce any evidence cannot lead, of itself, to the grant of

the reliefs sought. The plaintiff still has to lead evidence to prove its claim.

48. Having given due consideration to the evidence on record, together with the submissions made by the parties, I find that Safaricom Limited did award several contracts to the defendant.

49. The contracts were for the installation of Base Transceiver Stations at 19 sites, located at different parts within Kenya.

50. I also find that the defendant contracted the plaintiff to carry out the installations of the Base Transceiver Stations. The contracts were made up of the Local Purchase Orders (*LPOs*) which the defendant gave to the plaintiff.

51. The LPOs showed that the defendant assigned specific tasks to the plaintiff, which were to be done at the following sites;

a. Narok, Total;

b. Rakwaro;

c. Muluanda;

d. Luanda Katieno;

e. Siboti;

f. Mosonik;

g. Nakuru ASK Grounds; and

h. Indagalasia.

52. As I have said, the nature of the tasks to be undertaken at each site was specified on the LPOs. And at some of the sites, the defendant required the plaintiff to undertake more than one task.

53. Each LPO was issued on the defendant's Note-paper, which had signatures, presumably those of the defendant's officers.

54. I find that the said LPOs constituted offers by the defendant to the plaintiff.

55. I also find that the plaintiff undertook the tasks entrusted to it in the LPO's; and that by performing the tasks, the plaintiff accepted the defendant's offers.

56. The terms of each contract were embodied in the LPOs, which were prepared by the defendant. Therefore, by carrying out each of the tasks, the plaintiff was deemed to have accepted the terms specified in the LPOs. In effect, I find that there were contracts entered into between the plaintiff and the defendant each time the defendant gave an LPO to the plaintiff, and the plaintiff carried out the tasks set out in the said LPO.

57. But in a few instances, the plaintiff sought to vary the terms of the contract. In those instances, I find that the revised terms were inserted into the invoices which the plaintiff raised.

58. Further proof of the instructions given by the defendant to the plaintiff can be found in the emails which the defendant sent to the plaintiff.

59. For instance, on 8th September 2010, Mr. Roy Kieti of the defendant sent an email to Mr. George Masese, in relation to the **ASK** task. The email stated that the plaintiff had been assigned that job.

60. On 20th August 2010 Kieti sent an email to Joshua Kiptoo, with a copy to George Masese. That email was in relation to Mosonik site, which was awarded to the plaintiff.

61. By an email dated 24th August 2010, the plaintiff's George Masese wrote to Tony Monda of the defendant. George wrote about a meeting which he had held with Engineer Tony Monda, Director Mutua Kathendu, and later with Financial Director, Albert.

62. According to George, the meeting had noted that the defendant owed Kshs. 7,060,899.46 to the plaintiff.

63. On the next day, the plaintiff's George Masese sent another email to Mutua Kathendu, with a copy to Roy Kieti. The email made reference to a meeting which the plaintiff and the defendant had held on the morning of 25th August 2010.

64. The email detailed the agreement on how the defendant was to settle the debts owed to the plaintiff.

65. Whilst the plaintiff's email was sent at 12.45; the defendant responded to it at 12.54 p.m, saying;

“It's a good arrangement, let's keep our end of the bargain”.

66. On 26th August 2010, the defendant's Albert Mukabi received an email from the plaintiff's George Masese, making one correction to the contents of the plaintiff's email of 25th August 2010. The correction was only in relation to the fact that the first installment was payable by 5th October 2010, as opposed to 5th September 2010.

67. Upon receipt, Albert Mukabi wrote back to the plaintiff, simply saying;

“Agreed. Thanks”.

68. Clearly, from that exchange of emails, it is obvious that there were not only meetings between the parties, but also agreements about the fact that the defendant owed Kshs. 4,277,131.00 as at 26th August 2010.

69. And by an email from the defendant's Janet Mbogua, dated 8th June 2011, the defendant said that the outstanding debt owed to the plaintiff was Kshs. 5,800,000.76.

70. Subsequent to that email from the defendant, the plaintiff was paid Kshs. 533,500/-.

71. By my calculations, that left an outstanding balance of Kshs. 5,266,800/76, which is the sum claimed in the plaint.

72. On the basis of the evidence tendered, I am satisfied that the plaintiff has proved its claim against the defendant.

73. The said balance was payable in 2011. Therefore, as the defendant has failed to remit payment since then, the defendant has deprived the plaintiff the opportunity to use the money. For that reason, I find that the plaintiff is entitled to interest at court rates, from 8th May 2012, when the suit was filed in court.

74. The plaintiff is also entitled to the costs of the suit.

75. In a nutshell, I now enter judgement in favour of the plaintiff for Kshs. 5,266,500/76, together with interest thereon at Court Rates, from 8th May 2012, until payment in full. I also award to the plaintiff, the costs of the suit.

DATED, SIGNED and DELIVERED at NAIROBI this 28th day of September 2016.

FRED A. OCHIENG

JUDGE

Judgement read in open court in the presence of

Miss Mwathane for Ms. Kethi Kilonzo for the Plaintiff

Miss Muyai for the Defendant

Collins Odhiambo – Court clerk.