



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURT

CIVIL SUIT NO. 418 OF 2010

CENTRAL MICROFILM OPERATORS (1990) LTD.....PLAINTIFF

VERSUS

THE TEACHERS SERVICE COMMISSION.....DEFENDANT

JUDGEMENT

1. By its plaint dated 18th May, 2010 filed on 16th June, 2010, the plaintiff herein seeks that:
 - (a) **Kshs 2,088,000.00.**
 - (b) **Costs of the suit.**
 - (c) **Interest on (a) above at commercial rates and on (b) at court rates until payment in full.**
 - (d) **Any other further relief this Honourable court may deem fit to grant.**
2. The cause of action according to the plaintiff, arose from a contract which was entered into between the plaintiff and the defendant in the year 2007 for the supply by the plaintiff to the defendant of microfilm back up services for filming 1800 copies of negative measuring 16mm x 30m at a consideration of Kshs 2,088,000 which contract was made vide a Local Purchase Order No. 0200502.
3. According to the plaintiff it was a term of the said contract that the Defendant would having place the reading/scanning equipment in good working condition and avail to the plaintiff workable copies of the microfilms in a fair condition for reproduction purposes.
4. However vide a letter dated 20th June, 2007 the defendant purportedly cancelled the said contract citing delay and in another letter dated 27th November, 2007 citing defects despite the fact that the parties had met over the issues affecting the project and it was revealed to the defendant that the problems affecting the delay were of the defendant's own making arising out of the defendant's defects which defects the defendant failed to remedy promptly or at all though the plaintiff was at all material times ready, able and willing to carry out the task.
5. It was pleaded that the defendant in a highly unfair trade practice gave a competitor who had tendered for the same contract and failed, the job of assessing the plaintiff's work and repairing the faulty equipment which was supplied by the same competitor. It was pleaded that the defendant's conduct was unfair and was meant to ensure the contract failed.
6. However the plaintiff in preparation of the contract entered into financial obligations amounting to

- Kshs 2,088,000 and turned on other jobs in order to carry out the contract hence suffered loss and damages in the said sum.
7. In support of the Plaintiff's case the plaintiff filed a statement by **Oliver John Mwalagho**, its managing Director who also testified as PW1. According to him, the Plaintiff received a telephone call from the Defendant at 4.30 p.m. on 5th January 2007 requesting for a quotation for duplication of the Defendant's 16mm negatives into positives and delivered the quotation to Procurement Dept. on 8th January 2007. Later, the Plaintiff was awarded the tender to duplicate the 1800 films at a cost of Kshs.2,088,000.00 as per LPO No.0200502 dated 26th January 2007.
 8. However, contrary to Pilot Scheme proposal contained in the Defendant's letter dated 29th January 2007, the Plaintiff was given only 4 negatives to duplicate and the Plaintiff immediately did the job. The witness, a **Ms. Matingi** and a **Ms. Virginia** checked the quality of the films through their Kodak DSV 3000 Reader Printer /Scanner and found the positives to be perfect. Later, on 12th February 2007, the plaintiff received a letter from a **Mr. Dahiye** of the Defendant informing the former that there was a "minor problem" in the retrieval of information on the Duplicate films which minor problem was not specified. Later the Plaintiff was informed by the said **Ms Virginia** and **Ms. Matingi** that the images of one film were not clear when printed and **Ms. Matingi** later allowed the plaintiff's agents to accompany her in her office where the Reader printer was to confirm the problem. The witness and the Plaintiff's Technician noticed few setbacks with their Reader / Printer which were that the images were not being scanned to the computer well; the lens magnification of 26x was being used instead of 32x; their films were microfilmed at 32:1 ratio; and the reader was going on and off.
 9. The Plaintiff then wrote a letter to **Mr. Dahiye** pointing out what they saw as the problem and advised them to acquire a bigger magnification lens. Later, towards end of February 2007 **Mr. Dahiye** requested in-charge of Microfilming Section **Ms. Matingi** and **Ms. Virginia** to call Central Microfilm Operations representatives and the Supplier of the Reader Printer, Records and Archives Management (K) Ltd (hereinafter referred to as RAMS) to resolve the problem. This time RAMS Technician could not print the copies as the equipment could not scan the microfilm images on to the computer prior to printing. However, the Technician of RAMS promised to see what was wrong with the Reader Printer after meeting held between the Plaintiff and a sub-committee of the tender committee on 26th February 2007 for Supplier / Buyer consultations.
 10. The witness however stated by early March 2007, their visits to the Microfilming Section became unbearable and they were were informed by **Ms. Virginia** that they were not allowed to get into **Ms. Matingi's** office but to wait outside until called in. At times, he stated they could wait for hours. One day in the month of March, after waiting for sometimes to see **Ms. Matingi** in her office, the witness was called together with the Plaintiff's technician and informed that she was rushing for a meeting but gave them an envelope which contained some papers as good printed copies of positives for them to see. They however realized it was duplication tests run by RAMS together with some correspondence in connection with the breakdown of their Reader Printer.
 11. Late during the month they managed to seek another meeting between them, RAMS Technician and the 2 Microfilming Section Officers during this meeting in **Ms. Matingi's** office where the Reader Printer was, they noticed that the RAMS Ltd technician was sabotaging their work as he could print un-forecast copy of positive. Sometimes he could interfere with the software of the machine. The Plaintiff's Technician who was conversant with such machine operations, could not however be allowed to retrieve a clear copy from one of the prints. Similarly, **Ms. Matingi** and RAMS representative could not allow the said technician to operate the machine, on the pretext that it was only RAMS which could handle the machine as it was still on warranty. According to the witness they realized the conspiracy between **Ms. Matingi** and RAMS to deny the Plaintiff to confirm the good quality of the work that had been done. When they suggested that a clear copy be obtained from the Reader Printer from Kenya national Archives the suggestion was turned down by the two.
 12. It was stated that the witness had previously worked with Kenya National Archives, from 1974 to 1990 during which period he worked in Microfilming Section and had a chance of mastering how to Microfilm, process microfilms, duplication of microfilms after training he had from various Archives Institutions in Europe and Africa.
 13. It was contended that the Plaintiff was determined to do this job of duplicating of positives and

- had assigned 3 officers to assist the witness in this exercise which they could have finished within 30 days. According to him, the few duplicates they did were of good quality as per the quality of the negatives. Since 8th February up to the time they decided to seek legal help, they had spent a lot of valuable time trying to solve the problem but in vain and had to put aside some other jobs anticipating to finish this job first.
14. In his view there was a link between the Defendant and Rams to deny the Plaintiff this valuable work since operating a Reader Printer does not at all spoil the machine. The plaintiff was however not permitted to print a paper copy from positive they did.
 15. It was contended that RAMS was the Plaintiff's main competitor in this tender hence they were quickly given the job after the Plaintiff's LPO was cancelled. The witness reiterated that they could have done this work had there been no interference by **Ms. Matingi** and Rams. In his view, it was possible that RAMS spoiled the Reader Printer so that they could not be able to print their prints from the machine.
 16. It was explained that the purpose of printing a positive copy was to use it as a working copy instead of using the original negative on the Reader Printer and to help create a soft copy. The main purpose of the pilot project was to see that there were no inconveniences in the use of microfilms to solve some urgent cases and to was to enable the creation of a timetable on the exchange of films. The contract however had no conditions as suggested: to successful undertake a pilot project; The Plaintiff had no reader printer to confirm the quality of the films; and the back up exercise was a sole responsibility of the Plaintiff and Defendant.
 17. The plaintiff therefore felt that the contract was unfairly cancelled and hence the prayer for Kshs.2,088,000.00
 18. In his evidence before Court PW1 testified that it was agreed that in order not to interfere with the department's daily usage of the microfilms and effective working of the department, a pilot scheme would be devised in which 20 negative microfilms, 9 x 16mm roll positive films and 20 microfilm boxes would be picked up from the microfilms unit of the Defendant. However, the witness testified they only got one film. After confirming the quality of the film, the plaintiff proceeded with the work. However on returning the same, the Defendant claimed it had minor problems in retrieving the information in the duplicated film. However when the witness went to the Defendant's offices he found the film to be okay though the problem was caused by the magnification lens being used by the defendant which was 16x. The witness advised the defendant to change to 32x lens since the camera was reducing the size of the documents. On being given a printout he realised that the copy was not focused but was blurred and some figures could not be read and the words were not sharp enough. In his evidence the adjustment of the focus was the responsibility of the defendant's department. He said the defendant admitted the problem and changed the lens accordingly. It was however his evidence that since the plaintiff was not allowed to do the printing it was difficult for the plaintiff to verify the process. This denial, according to him was explained on the ground that there was a warranty on the machine hence only the vendor's agents could operate the same. The vendor, he disclosed was RAMS. In his evidence previously the defendant had another machine which was easy for anybody to read and print but they later acquired another machine from Kodak which was problematic.
 19. It was his evidence that their estimated time for finishing the job would have been 30 days had the defendant availed to the plaintiff 50 films a day. Thereafter the Defendant cancelled the contract vide a letter dated 20th June, 2007 on the ground that the plaintiff was unable to print out good qualities. According to the machine was capable of being manipulated.
 20. He testified that some of the chemicals they bought were capable of expiry and they did expire. As this was a big job, they could not take other jobs which they normally did.
 21. Immediately after the cancellation of the plaintiff's tender, it was averred that the tender was given to RAMS which was the other tenderer and was the company which was reading the films.
 22. In cross examination the witness testified that he worked in the record management of the Kenya National Archives for 16 years and was familiar with record management. Referred to the defendant's documents he confirmed that the companies which participated in the tender were the plaintiff, RAMS and Bureau Solutions though in this Country the number of companies which could do the job was 5.
 23. According to him, he did not participate in the tender for repair and service of the microfilms machine and related items or in the one for the supplies of microfilming. He however asserted that

- he could commit his company to a tender of 2 million shillings based on an LPO. According to him, he was no aware of any conditions attached to the contract since the plaintiff's job was just to print the films. He insisted that he was never given the 20 films as reed and that the plaintiff performed its part of the contract.
24. In re-examination he said that he received a call to submit his application. This procedure according to him was normal since microfilming is a very specialised line. Unlike 20 films which ordinarily would have required a gate pass, he testified that the one film that the plaintiff as just a small package. He however denied that the film was wrongly done on the incorrect side but asserted that the problem was that the wrong equipment was being used. Although the plaintiff was not allowed to operate the reader when they went later on another staff member allow them to use the reader at which point they found the film in order and was clear.
 25. On the part of the defence, they called, **Santau Ole Kamwaro**, the defendant's administrator.
 26. According to him, he was formerly a procurement officer with the defendant. In 2006 the defendant sought to duplicate their scans ad on liaising with Kenya National Archives 3 names of the companies were floated to them as Central Microfilming Corporation Ltd, Records and Archives Management Ltd and Bureau Solutions. On floating the quotations the plaintiff and RAMS responded from which they chose the plaintiff which was the lowest bidder at Kshs 2,088,000/- and issued to it an LPO.
 27. According to him, they expected the plaintiff to commence the job immediately on issuance of the LPO on 26th January 2007. However a complaint arose from the supplier section that the plaintiff was unable to duplicate 20 films and that the duplicated ones were defective since they were upside down and were completely dark. In his evidence these problems were not rectified and that the plaintiff was not competent in carrying out the exercise. In his evidence the plaintiff was making unnecessary inquiries on how to carry out the exercise.
 28. It was the case of the defendant that there were contradictions between the defendant and the plaintiff since the plaintiff did not duplicate the work to the plaintiff's satisfaction despite several communications to that effect. Despite being called to a consultation meeting the plaintiff was unable to correct the anomalies hence leading to the cancellation of the tender.
 29. In his evidence the plaintiff was supposed to use its own equipment and although the plaintiff said it could duplicate 60 copies per day it was given 20 films. It was his evidence that there was no conflict between the plaintiff and rams which was maintaining the machine since there was no way in which the two could interact.
 30. In cross-examination by **Mrs Matata**, he said that after duplicating the films the verification was to be done by the micro-filming department. However the procurement department where he was ascertained that they were acquiring services from a competent supplier. He said that the first twenty films were meant to gauge the plaintiff's competence as a pilot in order to determine whether further work could be given. In his evidence the first 20 films were duly given although they worked only on one where there was a problem. Referred to the report from TSC which indicated one film, he said that this must have been an error.
 31. He conceded that the plaintiff and RAMS were competitors since it was only the two firms which made quotation for the tender. He also conceded that the plaintiff was to take the film, work on it at its place and bring the same to the defendant's department for reading. Since the machine in the defendant's place could not read the films, the same was taken to the Kenya National Archives and this was the reason why the tender was cancelled. According to him, the taking of the film to the National Archives was at the plaintiff's initiative.
 32. The witness was however unaware that after the setting of the knobs the films could be read.
 33. Asked about the process of taking the materials he said that the same must have been recorded somewhere by the microfilming section though was not aware that the records were available.
 34. In re-examination, he said that the plaintiff had nothing to do with the micro-film department apart from bringing the document. He asserted that the plaintiff brought only one film which failed to produce the required results.
 35. DW2 was **Patrick Musyoka Mathambwa**, an administrative officer with the defendant.
 36. In 2007 he was stationed at the micro-filming unit of the defendant where he worked for 12 years. Following the bomb blast incident of 1998 the defendant decided to store the information in form of microfilms.
 37. According to him, the plaintiff was contracted to carry out the job f duplication the micro-films

- using its own machines for duplication and testing after which they would submit clear micro-films. The plaintiff stated that they could duplicate up to 60 microfilms a day and were given 20 microfilms initially to duplicate.
38. However after some time the plaintiff brought back only one defective micro-film which contrary to the expectation was inside out and despite being given an opportunity to rectify the problem, the plaintiff never brought back the film. After termination of the contract another supplier was contracted to do the work. In his view the plaintiff's staff were incompetent as **Mr Nzuvi** could not handle the machine. The plaintiff denied that the defendant's machine was defective since it was being used to retrieve documents. He denied that the defendant was relying on another party to assess the quality of the work as they knew how to retrieve the information and store the same.
39. In cross-examination by **Mrs Matata**, DW2 the witness admitted that 20 films would be placed in a box. However according to him, they were operating on trust. He admitted that RAMS had also applied for the tender though it was won by the plaintiff since RAMS had won the tender for maintenance. However it was a **Mr Osiako** of RAS who was verifying whether the films were correct.
40. Referred to the report, he confirmed that it was indicated that the plaintiff was given one film to duplicate. He however said that the product was inside out. Asked about the whereabouts of the film, he said the plaintiff went away with the same. Asked about the appeal, he said he was unaware of the same though there was an expression of an intention to do so.

Determinations

41. Having considered the pleadings, the evidence on record and the submissions filed, it is my view that the following are the issues for determination.

1. **Whether the Plaintiff fulfilled its part of the contract.**
2. **Whether the Defendant was entitled to cancel the contract.**
3. **Whether the Plaintiff is entitled to the award of damages.**
4. **Who should bear the costs of the suit?**

42. It was the plaintiff's evidence that contrary to the agreement that the defendant was to avail to the plaintiff 20 films for duplication in order to accommodate the fact that the same films were in use, the defendant only availed one film which was duly processed and duplicated and returned to the defendant. Whereas the parties concentrated on the issue of the number of films which were availed, in my view the central issue is whether the plaintiff delivered the film according to what was expected by the defendant.

43. According to the plaintiff the film which was delivered was clear and was proper and that it was the settings of the machine which was being operated by the plaintiff's competitor, RAMS that was defective. In the plaintiff's view, when the same film was taken to the Kenya National Archives for testing the same was found to be clear.

44. Section 107 of the *Evidence Act*, Cap 80 Laws of Kenya provides:

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

45. This being a civil case, the standard of proof was on a balance of probabilities. What this means is that in ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is more probable than not that the allegations that he made occurred. See **William Kabogo Gitau vs. George Thuo & 2 Others Nairobi (Milimani) HCEP No. 10 of 2008.**

46. The burden of proving that the plaintiff had fulfilled its part of the bargain was squarely on the plaintiff. In this case, it was contended that the film that was availed to the plaintiff and which the plaintiff returned was satisfactorily duplicated. However there was no evidence produced showing the status of the said film. The Defendant's contention was that the said film was given back to the plaintiff and that was the last time they saw it. One would have expected the plaintiff to adduce evidence showing that the film was in proper condition. It was further contended that the same film was tested at the Kenya National Archives and found to be in order. Neither a report to that effect produced nor was the person who carried out the test from the said Archives called to testify in this case to prove that fact. As was held by **Ringera, J** (as he then was) in **Gandhi Brothers Vs. H K Njage T/A H K Enterprises Nairobi (Milimani) HCCC No. 1330 of 2001:**

“a fact is not proved if it is neither proved nor disproved. It is therefore not proved”.

47. In this case, it is neither proved nor disproved that the film which the plaintiff returned to the defendant was satisfactory hence the allegation that it was satisfactorily duplicated is not proved.

48. Apart from that there was evidence that one of the plaintiff's agents, **Stephen Mule Nzuvi**, indicated that the problem with the film in question would be solved through “configuration of some software on the Commission's Reader Printer” and in reliance on this opinion, the defendant asked the plaintiff to work on the problem. The plaintiff contends that the said **Mr Nzuvi** had no expertise to arrive at such a conclusion. This person who the defendant contends was the plaintiff's technical person and who the plaintiff contends was just on standby to pick the films was for reasons unknown to the Court not called to give evidence. In Nairobi HCCC No. 72 of 2008 between **John M. Gaiko T/A Gaikonsult Quantity Surveyors vs. Triple Eight Construction (Kenya) Ltd** this Court expressed itself as follows:

“...in this case, the other document relied upon is the said letter dated 31st July 2007. The circumstances under which that letter was written have not been properly explained by either party. The letter is addressed “to whom it may concern”. Why it became necessary to write this letter remains a mystery. The defendant on the other hand could have assisted the court by calling the maker of the letter to explain the circumstances under which the said letter was written since it was admittedly authored by its agent. No explanation was given as to why the author was not called and in certain circumstances the court would be properly entitled to draw adverse inference on such failure.”

49. It is a well-known rule of evidence founded on section 119 of the *Evidence Act* that the failure by a party to call as a witness any person whom he might reasonably be expected give evidence favourable to him may prompt a Court to infer that the person's evidence would not have helped the party's case and would have been prejudicial to its case and that the witnesses may have technically avoided to testify to escape being embarrassed on cross-examination. See **Green Palms Investment Ltd vs. Kenya Pipeline Co. Ltd Mombasa HCCC No. 90 of 2003; Bukonya & Others vs. Uganda [1972] EA 549; R. Vs. Uberle [1938] 5 EACA 58.**

50. In this case the only person who could have explained the circumstances under which he wrote the letter dated 8th February, 2007 was the author thereof. Therefore the failure to call him or even avail any credible evidence independent of the evidence of PW1 such as a report from the National Archives, leads me to the conclusion that had these evidence been adduced they would probably have been adverse to the case as presented by the plaintiff.

51. That brings me to the issue whether the Defendant was entitled to cancel the contract. Since the plaintiff has failed to prove that it performed its side of the bargain, there would be no reason for the defendant to keep the contract alive especially after the plaintiff was notified to correct the mistakes noted and failed to do so. As was held in **Pius Nyambane vs. Kenya Posts and Savings Bank Nairobi Civil Suit No. 39 of 1999:**

“The evidence tendered on behalf of the Defendant which in my view the Plaintiff was unable to challenge, was that the Plaintiff was unable to meet the orders made by the defendant under contract. By reason of the foregoing, the defendant was clearly entitled to remove the Plaintiff's name from the list of suppliers and to cancel the contract. “

52. In the premises I have no doubt in my mind that the defendant was in the circumstances of this case entitled to cancel the tender which it had awarded to the plaintiff.

53. That brings me to the issue whether the plaintiff is entitled to an award of damages as claimed. The plaintiff having failed to satisfy this Court on the balance of probabilities that its case which was hinged upon breach of contract by the defendant which the plaintiff itself had fulfilled, there is no basis upon which this Court can award the plaintiff the damages it is seeking. As was held in **Nabro Properties Ltd vs. Sky Structures Ltd & 2 Others 2 [2002] 2 KLR:**

“It is a maxim of law, recognised and established, that no man shall take advantage of his own wrongs and this maxim which is based on elementary principles, is fully recognised in courts of law and of equity, and indeed, admits of illustration from every branch of legal procedure. The reasonableness of the rule being manifest..., we may observe that a man shall not take advantage of his own wrong to gain the favourable interpretation of the law.”

54. Clearly therefore unless the plaintiff proves that it was not guilty of failure to fulfil its part of the bargain, there would be no legal basis to award it the damages it seeks.

55. The plaintiff contended it lost the tender sum amounting to Kshs 2,088,000.00. However, going by its own evidence it only duplicated one film. If it was in the business of duplicating micro-films as it contended, one would have expected it to take the necessary steps to mitigate its losses. As was held by the Court of Appeal in **African Highland Produce Ltd. vs. Kisorio Civil Appeal No. 264 of 1999 [2001] KLR 171; [2001] 1 EA 1:**

“It is the duty of the plaintiff to take all reasonable steps to mitigate the loss he has sustained consequent upon the wrongful act in respect of which he sues, and he cannot claim as damages any sum which is due to his own neglect. The duty arises immediately a plaintiff realises that an interest of his has been injured by a breach of contract or tort, and he is bound to act, as best as he may, not only in his own interest but also in those of the defendant...He is however under no obligation to injure himself, his character, his business, or his property, to reduce the damages payable by the wrongdoer. He need not spend money to enable him minimise the damages, embark on dubious litigation and the question what is reasonable for the plaintiff to do in mitigation of his damages is not a question of law, but one of fact in the circumstances of each particular case...”

See *Halsbury's Laws of England* 3rd Ed. Vol. 11 at 289, 1995.

56. I therefore associate myself with the holding in **Pius Nyambane vs. Kenya Posts and Savings Bank** (supra) where the Court expressed itself as hereunder:

“I must start by stating that the plaintiff's evaluation of the damages he suffered is based on a misconception that the goods he bought were a total loss to him. My view of the matter is that upon cancellation of the contract, the Plaintiff had in his possession all the goods which he claimed to have purchased. He claims to be in the business of general supplies with individual and corporate clients. Given that position he should have had no difficulties in disposing the items he claims he had purchased for the defendant. It is also true that no attempt was made to mitigate the damages...it would therefore appear to me that what the plaintiff says he did amounts to an act of utmost folly and I would not have awarded him a penny even if had succeeded in proving breach of contract by the Defendant.”

57. It is therefore similarly my view that even if the plaintiff had succeeded it was under a duty to show attempts, if any, which it made in light of the fact that it alleged that it had to forego other contracts to concentrate on this one, to mitigate its losses. Accordingly the plaintiff has not proved that it incurred losses to the tune of Kshs 2,088,000.00 as claimed.

58. That brings me to the issue of the order which this Court ought to make. The plaintiff having failed to prove its case on a balance of probabilities, it would follow that its case must fail.

59. Consequently, this case lacks merit and is dismissed with costs to the defendant.

60. It is so ordered.

Dated at Nairobi this 16th day of March, 2015

G V ODUNGA

JUDGE

Delivered the presence of:

Mr Mwihuri for Mrs Matata for the plaintiff

Mr Ng'arwa for Mr Anyuor for the Defendant

Cc Richard