



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA IN NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL SUIT NO. 1830 OF 2001**

**GATHENGE ENGINEERS & ELECTRICAL LIMITED.....PLAINTIFF**

**VERSUS**

**POSTAL CORPORATION OF KENYA.....DEFENDANT**

**JUDGEMENT**

**INTRODUCTION**

1. The current suit was instituted by way of a Plaint dated 26<sup>th</sup> November 2001 and filed on 28<sup>th</sup> November 2001. The Plaintiff sought for Judgment against the Defendant for:-
  1. *Kshs. 3,507,409.85/-*
  2. *Interest at 30% per annum from 31<sup>st</sup> October 2001 until payment in full*
  3. *Costs and interest of the suit.*
2. In opposition to the Plaintiff's suit the Defendant filed a Statement of Defence dated 11<sup>th</sup> January 2002 on 14<sup>th</sup> January 2002.

**THE PLAINTIFF'S CASE**

3. The Plaintiff's claim against the Defendant is for Kshs. 3, 507, 409.85 being the amount due to it for work commissioned by the then Kenya Post and Telecommunication Corporation, and undertaken by the Plaintiff for electrical installation during the construction of Phase one of the Mombasa General Post Office and subsequent variations thereof. The said works were completed in April 1998 and on 21<sup>st</sup> September, 2000 a final account was rendered and agreed on by the parties. The Plaintiff avers that the Defendant made part payment of the amount due on the entire contract leaving the balance claimed herein. With regard to the rate of interest at 30%, the Plaintiff averred that the same was the contractual rate of interest.
4. The Plaintiff filed a list of documents and the witness statement of JOSEPH WARARI GATHOGA on 21<sup>st</sup> April 2015.

**THE DEFENDANT'S CASE**

5. The Defendant in its Defence denied being the successor in title of the now Defunct Kenya Post and Telecommunications Corporation in as far as the subject matter herein is concerned. It averred that it was not party to the said contract if any and it was therefore wrongly enjoined as a party to

- the suit. It was therefore the Defendant's case that it could not be compelled to pay a debt that was not due from it.
6. Despite filing a Statement of Defence the Defendant did not call any witnesses to give evidence on its behalf. Further, it did not attend the hearing of the Plaintiff's case and therefore there was no cross-examination of the Plaintiff's witness. Subsequently, the Defendant did not file any written submissions in support of its case.
  7. With regard to the Defence, the Plaintiff had requested the Defendant for the particulars of the same on 12<sup>th</sup> April 2013. However, the Defendant failed to provide the said particulars despite being served with the same and subsequently this Court on 17<sup>th</sup> February 2015 struck out the said Defence and directed that the matter proceed for formal proof.

### **FORMAL PROOF**

8. The hearing of the formal proof proceeded on 21<sup>st</sup> April 2015. Joseph Warari Gathoga, a Director of the Plaintiff Company, was the sole witness for the Plaintiff. He adopted his witness statement dated 20<sup>th</sup> April 2015 and filed on 21<sup>st</sup> April 2015 as well as his list of documents filed on even date as his evidence. He confirmed that the Plaintiff rendered electoral installation works to the Defendant. The Defendant only made part payment and the balance that remained was the claim in the Plaintiff herein.
9. The Court directed the Plaintiff to file written submissions which it did on **13<sup>th</sup> May 2015**.

### **ANALYSIS**

10. I have considered the pleadings on record, the evidence by the Plaintiff and the written submissions filed by Counsel for the Plaintiff as well as the authorities cited. Having done so, the main issue for determination by this Court is whether or not the Plaintiff is entitled to the sum of Kshs. 3,507,409.85/- as claimed in the Plaintiff.
11. In civil cases, a Plaintiff is required to prove a claim against the Defendant on the balance of probabilities. This position was clearly stated in the case of ***Kirugi & Ano. -vs- Kabiya & 3 Others [1987] KLR 347*** wherein the Court of Appeal stated that the burden was always on the Plaintiff to prove its case on a balance of probabilities, and that such burden was not lessened even if the case was heard by way of formal proof.
12. On the issue of the contract, the Plaintiff produced a copy as well as the original form of tender submitted by the Plaintiff to the then Kenya Posts and Telecommunication Corporation (KP&TC) tender committee in respect of the carrying out of the electrical installation works at the Mombasa Head Post Office. The tender was then awarded to the Plaintiff for the sum of Kshs. 6,462,495 vide the letter of KP&TC dated 22<sup>nd</sup> May 1997. It is therefore established that there was indeed a valid contract between the Plaintiff and the Defendant for the installation of the electrical works. In that case
13. The Plaintiff submitted that it proceeded to carry out 90% of the electrical installation works as per the Tender. Therefore, vide a letter dated 21<sup>st</sup> August 1997 it informed the Defendant of the said progress and requested for the issuance of the 1<sup>st</sup> Interim Payment Certificate. The previous day, that is 20<sup>th</sup> of August 1997, the Defendant had written to the Plaintiff requesting for the carrying out of additional work. The Plaintiff provided its quotation for the same and the Defendant instructed it to carry out the said additional works at the cost of Kshs. 398,000/=. (See Document NO. 6 of the Plaintiff's list of documents).
14. It is the Plaintiff's submission that it received the following payments from KP&TC in connection to the contract as follows:-
  - a. **Kshs. 2,322,898.20/=**
  - b. **Kshs. 1,484,073.85/=**
15. The payments totaled to Kshs. 3,806,964.05/= out of the total sum of Kshs. 6,861,395/= being the tender sum of Kshs. 6,462,495/= plus agreed additional works cost of Kshs. 398,900/= leaving a balance of Kshs. 3,054,430.95/=. The Defendant after taking over from KP&TC wrote to the

- Plaintiff seeking information regarding the contract. (See the letter dated 18<sup>th</sup> April 2000 at page 24 of the Plaintiff's list of documents). At this juncture it is clear that the Defendant's Defence that it was not a successor in title of the now Defunct Kenya Post and Telecommunications Corporation in as far as the subject matter herein is concerned cannot stand. Moving forward, the Plaintiff responded to the Defendants letter and after a meeting agreed on a final account amounting to 2,644,504.75/= to be paid by the Defendant. However, the Defendant did not honor the payment despite the Plaintiff sending several reminders on the same.
16. It is the Plaintiff's case that it demanded for the payment of Kshs. 2,644,504.75 together with interest thereon at 30% per annum, as the contract was a commercial one in nature. The interest was from 29<sup>th</sup> September 2000 to 31<sup>st</sup> October 2001 which amounted to 862,905.10. According to the Plaintiff, the Defendant did not object to the said application of interest.
  17. From the foregoing account, the Plaintiff has provided sufficient evidence to this Court by producing several documents to the effect that it did electrical installation works for the Defendant and that there are amounts due and owing to it. The Defendant having not defended this matter, the Plaintiff's evidence is uncontroverted. In the circumstances, the Court is satisfied that the Plaintiff has proved its claim on a balance of probabilities. In a letter dated 22<sup>nd</sup> October 2001, the Plaintiff itemized its claim of Kshs. 3,507,409.85/= to include the principal sum of Kshs. 2,644,504.75 as owed by the Defendant together with interest at the rate of 30% amounting to Kshs. 862,905.10/=. The principal sum is not in dispute. However as regards the issue of interest the Plaintiff has to establish how it arrived at the rate of 30%.
  18. The Plaintiff's justification for the rate of 30% was that the contract herein was commercial in nature and that the said rate was unchallenged by the Defendant. It is not in dispute that the contract herein was commercial in nature. However, the Plaintiff did not adduce any evidence as to how it arrived at the rate of 30%. It did not provide any documentation to show that this was the prevailing commercial interest rate as per the Banks at the time of the contract or at the time of default of payment. In any case the contract between the parties did not provide for any interest rates. In that case the interest rate of 30% has not been proved by the Plaintiff and this Court cannot rely on the same. Therefore, in the exercise of its discretion under **section 26 of the Civil Procedure Act**, this Court will resort to interest at Court rates which is at 12%.
  19. The Plaintiff has been kept out of its money for over fourteen (14) years now, money which it would have used to invest in one thing or another. For that reason, the interest rate of 12% will run from 31<sup>st</sup> October 2001 as requested by the Plaintiff until payment of the outstanding amount in full. The principal sum will be Kshs. 2,644,504.75/= as the interest rate of 30% between 29<sup>th</sup> September 2000 to 31<sup>st</sup> October 2001 amounting to Kshs. 862,905.10/= was not strictly proved by the Plaintiff.

### **DISPOSITION**

20. In view of the foregoing, I hereby enter Judgment for the Plaintiff against the Defendant in the following terms:-
- a. *Kshs. 2,644,504.75/-.*
  - b. *Interest at court rates of 12% per annum from 31<sup>st</sup> October 2001 until payment in full.*
  - c. *The costs of the suit shall be for the Plaintiff.*

That is the Judgment of the Court.

**READ, DELIVERED AND DATED AT NAIROBI**

**THIS 31ST DAY OF JULY 2015**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

M/s Chibole holding brief for Kibanya for the Plaintiffs

No appearance for the Defendant

No appearance for the Interested Party

Teresia – Court Clerk