



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 631 OF 2012 (Formerly HCCC No. 2863 of 1996)

PAUL GACHANGA NDARUA ::: PLAINTIFF

VERSUS

KENYA POSTS & TELECOMMUNICATIONS

CORPORATION ::: DEFENDANT

J U D G M E N T

1. The Proceedings herein were commenced by way of a Plaint dated 17th October 1996 and filed in Court on 19th November 1996. Subsequently the Plaint was amended on 9th April 2001 and filed in Court the following day. In the amended Plaint the Plaintiff prays for judgment against the Defendant for:-
 - a. *The unpaid outstanding amount as per the invoices @ 30% p.a (shs.44,261,519.50) together with interest amounting to Kshs. 53,068,872.45/- as stated in paragraph 12 hereinabove from the date of each invoice to date of Judgment and payment in full.*
 - b. *Punitive and exemplary damages for late payment as this honourable Court shall determine.*
 - c. *Costs of this suit*
 - d. *Further interest @ 30% per annum from 20th June 1998 to date of full payment.*
 - (d) (a) *Alternatively and without prejudice, interest on the principal sum owed from date of each invoice to date of full payment at commercial rates prevailing throughout the period the debt was owing and not at court rates.*
 - e. *Any other relief or remedy this Honourable Court shall see fit and proper*
2. In reply to the amended Plaint the Defendant filed a Defence dated 18th June 2001.
3. The brief facts of the case are as follows. The Plaintiff was employed by the Defendant as a Project Co-ordinator/consultant for a period of two years with effect from January 1991 through a Letter of Appointment dated 20th May 1991. The Plaintiff accepted the appointment by countersigning the said Letter of appointment.
4. In the above contract the Plaintiff was to be remunerated for work certified to be done at the corporation's satisfaction. Further, the Plaintiff was to be paid at the rate of one and a half (1 1/2%) of the total cost of each project or assignment undertaken. It is averred in the Plaint that the

- Plaintiff subsequently rendered services to the Defendant.
5. It is further stated in the Plaintiff that by a letter dated 11th December 1992 the Defendant renewed the original contract with the Plaintiff for a period of one year from 2nd January 1993 to 31st December 1993. The terms and conditions were similar to those governing the previous contract. According to the Plaintiff, the Plaintiff rendered to the Defendant fee notes or invoices from time to time which the Defendant paid. However, the Defendant has failed to pay the sum of Kshs. 44,261,519.50 which is now outstanding.
 6. It is averred that the Plaintiff sent several reminders to the Defendant but there was no positive action. It is then that the Plaintiff instructed his advocates to write to the Defendant which they did on 13th August 1996. The Defendant did not reply and on 16th September 1996 the Plaintiff through his authorised agents served the Defendant with a statutory notice threatening to sue. When the notice period expired the Defendant had not yet paid the outstanding amounts hence the current suit.
 7. It is pleaded that since filing of the current suit the Defendant has admitted liability and between 26th September 1997 and 20th January 1998 the Defendant paid the principal sums to the Plaintiff. However, it is the Plaintiff's case that the Defendant has failed to pay interest due on the principal @ 30% per annum from the date of the invoice amounting to **Kshs.53,068,872.45/=**. The said amount is tabulated at paragraph 12 of the Amended Plaintiff.
 8. In the Defendant's amended Defence dated 18th June 2001, it is stated that by legal Notice 158 of 1999, schedule Part C. No. 576p. 3468 the suit is deemed to have been filed against Telkom Kenya Limited. In the said amended Defence the Defendant essentially denies that there are any monies due to the Plaintiff. It is also denied that the Plaintiff provided all the services as claimed.
 9. It is further denied that the Defendant admitted liability to pay the Plaintiff. It is the Defendant's case that the Plaintiff is not entitled to the interest claimed or any interest. According to the Defendant, the particulars of interest at paragraph 12 of the amended Plaintiff arose more than one year before the suit was filed that is in 1993. Therefore, it is the Defendant's case that the suit not having been filed within 1 year from 1993 all the claims are barred by section 109 (b) of the Kenya Posts and Telecommunications Act (Cap 411).

THE HEARING

10. The hearing commenced on 31st March 2014 with the Plaintiff giving evidence on his own behalf. He testified that he joined the Defendant Company as an employee in 1975 and retired in 1990 after attaining the age of 55 years. In his testimony the Plaintiff essentially reiterated the facts as stated in the Plaintiff and in his witness statement dated 20th December 2012.
11. The Plaintiff referred the Court to paragraph 18 of his witness statement in which he had computed how the interest arose. It was his testimony that the interest was computed at the rate of 30% per annum. It was further his testimony that before he filed the suit on 17th October 1996 none of the payments had been made. The principal sum was paid between 1997 and 1998 after he filed the claim in Court.
12. On cross examination, the Plaintiff testified that he filed the suit three years after he had raised his invoices. He further testified that though the agreement did not mention payment of interest, the practice was that interest was to be paid on delayed payments. It was his testimony that he used 30% to calculate interest as that was the rate applicable at that time. It was further his testimony that he had obtained a loan to finance the consultancy and he was paying interest at 30% per annum.
13. On re-examination the Plaintiff confirmed that all the invoices were raised when the consultancy still existed.
14. The Defendant called one witness, Lawrence Karanja, a legal adviser with the Defendant Company. In his examination in chief, DW 1 adopted his witness statement dated 20th August 2013 and filed in Court on 29th August 2013. In the said statement, DW 1 confirmed that indeed the Plaintiff was contracted by the Defendant between 1991 and 1993 as a contractor/project manager. He further stated that the Plaintiff made a claim for payment of Kshs. 44,261,519.50 for work allegedly done, which amount the Defendant disputed. However, the Defendant eventually paid the Plaintiff after without prejudice negotiations.

15. DW 1 went ahead to state that the Defendant did not agree with the Plaintiff on claims of interest for delayed payments. It was his statement that there was no provision for payment of interest on any delayed invoices in the letter of offer dated 20th May 1991. It was further his statement that the Plaintiff's claim for interest was time barred since it was brought one year from the date the cause of action is alleged to have arisen. This is contrary to section 109 (b) of the Kenya Posts and Telecommunications Act (now repealed).
16. On cross-examination, DW 1 confirmed that the payments to the Plaintiff were delayed and that the principal sum was paid only after the suit was filed. When referred to the Defence dated 9th January 2007, he confirmed that it was the Defendant's position that the Plaintiff's claim for the principal sum was time barred. However, it was DW 1's testimony that the Defendant paid the Plaintiff the said sum after some negotiations on a without prejudice basis.
17. It was further his testimony that he was aware that when the Plaintiff accepted the payment he reserved his right to claim for interest as per his letter dated 29th August 1997. (See page 10 of the Plaintiff's list of documents).
18. The parties herein filed their written submissions as directed by the Court which I have considered in coming up with this judgment. Both parties filed their submissions on 2nd May 2014.

ANALYSIS

19. The contention by the Defendant that some work was not done does not arise at this point since the Defendant has already paid the outstanding principal sum of **Kshs. 44,261,519. 50**. By doing so, the Defendant in essence admitted that the Plaintiff had provided services for that amount.
20. The facts as stated above and the evidence given before this Court are clear and I wish not to repeat them. It is plain that what is in issue is the interest due for the late payment of the aforesaid Principal sum. The Plaintiff is claiming a total interest of **Kshs. 53,680,872.45** which computation he has clearly outlined under paragraph 18 of his witness statement.
21. It is submitted for the Defendant that in view of the defence of limitation as anchored in section 109 (b) of Kenya Posts and Telecommunications Act, Cap 411 (now repealed), the Plaintiff is not entitled to any interest. The said section stated as follows:-

“Where any action or other legal proceeding is commenced against the Corporation for any act done in pursuance or execution, or intended execution, of this Act or of any public duty or authority, or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority, the following provisions shall have effect -

(a)...

(b) the action or legal proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or, in the case of a continuing injury or damage, within six months next after the cessation thereof.
Underlining supplied

22. The Plaintiff's claim for interest as submitted by Counsel arose on the date of the last payment of the principal amount being made. The last payment on the principal sum was apparently made on 20th January 1998. In that case, according to the above provision, the Plaintiff should have brought his claim for interest before 20th January 1999. However, the Plaintiff brought the said claim vide its Amended Plaint dated 9th April 2001. Therefore, the claim for interest herein is time barred.
23. Counsel for the Plaintiff referred to **section 23 (3)** of the **Limitations of Actions Act**, in submitting that the claim for interest was not time barred. The said section states thus:-

“Where a right of action has accrued to recover a debt or other liquidated pecuniary claim, or a claim to movable property of a deceased person, and the person liable or

accountable there for acknowledges the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgement or the last payment”

24. In response to the above, I will make reference to **section 13 (2)** of the repealed Act which stated as follows:-

“(2) Subject to this Act. the powers conferred by subsection (1) shall include all such powers as are necessary for the purposes of the Corporation, and in particular, but without prejudice to the generality of the foregoing, shall include power -

(a) to enter into such contracts as may be necessary for the purposes of the Corporation or otherwise for carrying into effect the provisions of this Act;

(b) to establish, acquire, construct and maintain post offices, telephone offices, telegraph offices, radio communication offices, buildings or any other necessary works required for the purposes of the corporation;

25. From the above provisions it is clear that the Contract(s) between the Plaintiff and the Defendant Corporation then, were subject to the said Act. In light of the said provisions and **Section 109** of the repealed KPTC Act, **section 23 (3)** of the **Limitations of Actions** Act cannot apply.

26. Therefore, the suit brought by the Plaintiff herein through the Amended Plaint dated 9th April 2001 is incompetent and cannot lie. (**See Langat v Kenya Posts and Telecommunications [2000] 1 EA 147**)

27. It is not of any relevance that the corporation chose to pay the Plaintiff the principal amount despite the fact that the claim for the said amount was time barred.

28. The issue of limitation is a preliminary issue which goes into the jurisdiction of the Court. Having determined the issue of defence of limitation in the affirmative, it is evident that this Court has no jurisdiction to hear the claim herein. Therefore, I see no reason to delve into the merits of the claim.

29. In the upshot, the Plaintiff’s claim as stated in the amended Plaint dated 9th April 2001 and filed in Court on 10th April 2013 is hereby dismissed. The costs of the suit shall be for the Defendant.

DATED, READ AND DELIVERED AT NAIROBI

THIS 20TH DAY OF JUNE 2014

E. K. O. OGOLA

JUDGE

PRESENT:

M/s Makori holding brief for Kethi Kilonzo for Plaintiff

Gathoni holding brief for Murugara for Defendant

Jason – Court Clerk