



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 31 OF 2010

WESTON CONTRACTORS LIMITED.....PLAINTIFF

- V E R S U S -

KENYA FERRY SERVICES.....DEFENDANT

JUDGMENT

1. The Plaintiff filed this suit on 26th October 2010 claiming that between 2008 and 2009 it entered into oral contract with the Defendant for various construction works at the Defendant's request. That the contract was governed by the known custom in the construction industry.
2. The Plaintiff stated that it executed the construction works as agreed and payment certificates were issued by the Defendant's consultant but the Defendant failed to settle the payment certificates on time. That the Plaintiff continued to incur expenses and service bank loan advanced to it for the project at an interest until 19th February 2010 when the Defendant settled the principal sum of Kshs. 19,629,924.20 but failed to settle the interest amounting to Kshs. 8,157,328.90. The Plaintiff's claim is for the said interest of **Kshs. 8,157,328.90**.
3. The Defendant filed its Statement of Defence on 7th June 2011 in which it denied that there was a legally enforceable contract between it and the Plaintiff. The Defendant stated that being a state corporation, any contract it entered into had to be governed by the provisions relating to procurement of services under the Public Procurement and Disposal Act, 2005.
4. According the Defendant, since the provisions of the Public Procurement and Disposal Act, 2005 were not followed, any payments made to the Plaintiff were irregular.

The Plaintiff's Case

5. The Plaintiff called four witnesses. FRANCIS KAMAU KAHIU (Mr. Kahiu), the Plaintiff's Managing Director told court that through its letter dated 6th March 2008 (P. Exh. 1), the Defendant requested the Plaintiff for quotations for various construction works. That the Plaintiff did a quotation for Kshs. 20,107,382.00 which was accepted by the Defendant on 7th May 2008.
6. The witness told court that Nyange & Associates was appointed as quantity surveyors for the project and Otieno Adede & Associates as the architects. He testified that before the Plaintiff commenced work, it requested for a mobilisation or down payment of Kshs. 6,000,000.00 which was paid by the Defendant in two phases: Kshs. 5,000,000.00 on 8th May 20108 and Kshs. 1,000,000.00 on 15th May 2008.

7. Mr. Kahiu stated that the Plaintiff raised ten certificates for payment as follows:
- i. **Certificate No.1 for Kshs. 1,810,349.45 issued on 14/11/2008 and paid on 15/2/2010. There was a delay in payment of 458 days which attracted an interest at 32% of Kshs.726,917.30**
 - ii. **Certificate No. 5 for Kshs. 5,390,990.95 dated 22/11/2008 and paid on 15/2/2010. There was a delay of 450 days which attracted interest at 32% of Kshs. 2,126,856.70**
 - iii. **Certificate for Kshs. 2,303,750.00 issued on 4/2/2009 and paid on 15/2/2010. There was a delay of 376 days which attracted interest at 32% of Kshs. 759,416.90**
 - iv. **Certificate No. 7 for Kshs. 1,118,150.00 dated 18/3/2009 and paid on 15/2/2010. There was a delay of 334 days which attracted interest at 32% of Kshs. 327,418.80**
 - v. **Certificate No. 8 for Kshs. 2,090,000.00 dated 9/4/2009 and paid on 15/2/2010. There was a delay of 312 days which attracted interest at 32% of Kshs. 571,686.60**
 - vi. **Certificate No. 9 for Kshs. 1,368,862.45 dated 9/4/2009 and paid on 15/2/2010. There was a delay of 312 days which attracted interest at 32% of Kshs. 374,430.75**

 - vii. **Certificate for Kshs. 990,065.05 dated 9/4/2009 and paid on 15/2/2010. There was a delay of 312 days which attracted interest at 32% of Kshs. 270,816.70**

 - viii. **Certificate for Kshs. 2,694,340.45 dated 21/7/2009 and paid on 15/2/2010. There was a delay of 209 days which attracted interest at 32% of Kshs. 493,691.75**

 - ix. **Certificate for Kshs. 754,315.55 dated 21/7/2009 and paid on 15/2/2010. There was a delay of 209 days which attracted interest at 32% of Kshs. 138,215.40**
 - x. **Certificate for Kshs. 650,254.00 dated 21/7/2009 and paid on 15/2/2010. There was a delay of 209 days which attracted interest at 32% of Kshs. 119,148.00**
8. Mr. Kahiu confirmed that all the principal amounts on the certificates were paid and the Plaintiff's claim is only for the accrued interest due to late payments which adds up to Kshs. 8,157,326.85 plus V.A.T of Kshs. 1,305,172.62.
9. The witness told court that the rate of interest he was claiming of 32% was based on the interest which the Plaintiff's bank, Consolidated Bank was charging the Plaintiff for the loan advanced to it towards the project. He however admitted on cross-examination that the 32% rate was penal rate rather than the normal lending rate of interest. The witness could not recall what the normal lending rate of interest the Plaintiff's bank was charging. He added that in construction industry, the law allowed the Plaintiff to charge interest if the amount is delayed beyond the stipulated time. He also stated that section 48 (a) of the Public Procurement and Disposal Act provides for the charging of interest at commercial bank rates on delayed payments. The witness further testified that the Plaintiff was guided by the standard contract by the Joint Building Council which allows for levying of interest if the amount due is delayed beyond the agreed time. He however could not confirm whether the parties had agreed to apply the Joint Building Council standard contract saying that it was a matter of practice that if one delays in making payments then the person should pay interest on the delayed amount.
10. The witness admitted on cross-examination that the Plaintiff did not have a written contract with the Defendant and that the contract was verbal. The witness also admitted that although the work to be done was contained in the relevant work orders, the period within which the payments were to be made was not specified in the work orders and was not agreed upon.
11. The witness further admitted that he did not factor in the advance payment Kshs. 6 million in calculating the amount due to the Plaintiff on account of accrued interest.
12. The Plaintiff's second witness was PETER WAMBUGU GICHUHI, the Plaintiff's accountant. He confirmed the ten payment certificates issued for the Plaintiff. He produced a tabulated details of

the delayed certificates and confirmed that the amount of interest due to delayed payments was Kshs. 8,157,328.85. He confirmed that all the principal amount on the certificates were paid by February 2010. The witness also confirmed that the 32% interest rate charged by the Plaintiff's bank was penal rate and not commercial interest rate. He further confirmed that the commercial bank interest rate kept on fluctuating in the relevant period but the fluctuations were not reflected in his tabulation of the amount due from the Defendant.

13. The Plaintiff's third witness, NYANGE ERIC MWANYUMBA (“**Mr. Nyange**”) was the Quantity Surveyor (Q.S) for the works done by the Plaintiff. He stated that his role in the project was to prepare bills of quantities for the works and valuation of the work done. He testified that he had valued the certificates of payment issued for the works done by the Plaintiff.
14. Mr. Nyange told court that under standard contract, once a certificate of payment is issued, it should be paid within 14 days and if not paid, it can attract interest at commercial bank rate. The witness did not however state the parties had agreed to apply the standard contract for the works in issue.
15. GEORGE OTIENO ADEDE (“**Mr. Adede**”) was the Plaintiff's fourth witness. He was the architect in charge of the Plaintiff's works. He confirmed that he issued the ten payment certificates for the Plaintiff based on valuations done by Mr. Nyange.
16. Mr. Adede also told court that once he issued a payment certificate, the same was supposed to be honoured within 14 days of presentation to the Client. He did not however state the basis of that assertion.
17. On cross-examination by the Defendant's counsel, Mr. Adede stated that the period within which payments are to be effected is guided by an agreement between the parties. He also stated that there is standard contract for building works such as the works done by the Plaintiff and that parties can agree to be bound by such standard contracts. He did not state whether he was aware that the parties herein had agreed to be bound by the standard contract.

The Defendant's Case

18. The Defendant called one witness, its Company Secretary, ELIJAH KITUR (“**Mr. Kitur**”). He told court that the work orders were awarded to the Plaintiff irregularly and the payments made to the Plaintiff did not comply with the provisions of the Public Procurement and Disposal Act because there was no open tendering for the works.
19. Mr. Kitur told court that the Plaintiff was paid a total of Kshs. 42,389,665.95 as at 2008 against the Plaintiff's work order for Kshs. 32,977,014.40, an excess of Kshs. 9,412,652.35. He produced the following payment vouchers to support his evidence:
 - i. **Cheque Payment Voucher No. 20611 for Kshs. 5,000,000.00**
 - ii. **Cheque Payment Voucher No. 20657 for Kshs. 1,000,000.00**
 - iii. **Cheque Payment Voucher No. 20836 for Kshs. 4,089,558.80**
 - iv. **Cheque Payment Voucher No. 20938 for Kshs. 3,167,509.80**
 - v. **Cheque Payment Voucher No. 201012 for Kshs. 1,480,080.30**
 - vi. **Cheque Payment Voucher No. 21226 for Kshs. 2,832,205.40**
 - vii. **Cheque Payment Voucher No. 21432 for Kshs. 4,105,946.00**
 - viii. **Cheque Payment Voucher No. 21436 for Kshs. 2,448,914.00**
 - ix. **Cheque Payment Voucher No. 21437 for Kshs. 852,545.50**
 - x. **Cheque Payment Voucher No. 21587 for Kshs. 5,505,819.00**
 - xi. **Cheque Payment Voucher No. 21812 for Kshs. 8,053,552.20**
 - xii. **Cheque Payment Voucher No. 22031 for Kshs. 1,600,000.00**

20. The Defendant's witness told court that he could not trace documents relating to the Kshs.

19,000,000.00 which the Plaintiff claimed it was paid.

21. He testified that for any payment of interest there ought to have been a contract that had provision for late payment. The witness stated that parties can decide what provisions of the standard construction contract they want to apply to them. That such inclusion or exclusion is guided only by the contract between the parties which must stipulate when the contract starts and when it would end as well as provisions on late payment. He stated that general provisions of standard contract do not apply automatically and if there is no written contract, it would mean that the terms of the standard contract do not apply. The witness told court that although under the provisions of the Public Procurement and Disposal Act, interest may be paid, if there is no contract for payment of interest, then the same cannot be paid.
22. Mr. Kitur told court that the Defendant's officers who had made the irregular payments to the Plaintiff had been either interdicted or demoted. He told court that the payment of Kshs. 19 million made to the Plaintiff were made during the tenure of one Mr. Kamau who was the Defendant's Managing Director and who retired in May 2014. The witness did not however clarify how he knew the payments were made during Mr. Kamau's tenure yet he had testified that he did not trace any documentation regarding the payment.
23. On cross-examination by the Plaintiff's counsel, Mr. Kitur admitted that according to the available documentation the Plaintiff had rendered the services in issue. He also admitted that the letter dated 6th March 2008 was written by the Defendant requesting the Plaintiff to quote for works and added that Mr Kalu, the author of that letter has since been demoted. He further admitted the existence of the work orders given to the Plaintiff by the Defendant.
24. The Defendant's witness testified that although, the payments made to the Plaintiff were irregular, no refund had been demanded. He stated that the Defendant did not file a counter-claim for the amount paid although the same should have been filed.
25. Mr Kitur admitted that it is the Defendant's officers who failed to follow the procurement procedures in awarding the Plaintiff the contract for the construction works, a possible indication that the Plaintiff was not to blame for the non-compliance with the law.
26. Mr. Kitur position was that it cannot be said that there was delay in payments when there was no contract which stipulated when the payments were due.
27. The Defendant's witness testified that it was the Plaintiff's responsibility to raise funds for the work and therefore the penalty interest charged by the Plaintiff's bank should not be transferred to the Defendant.

The Issues for Determination

28. Having gone through the pleadings herein, the documents produced in court and the evidence of the witnesses, I am of the view that the 14 issues identified by the parties are adequately addressed by the following main issues the Court shall determine, which are as follows-

- i. **Was there a contract for the subject construction works?**
- ii. **If yes was it a legal contract?**
- iii. **Whether the Plaintiff is entitled to the amount claimed on account of accrued interest?**

29. On the first and second issue the one thing that needs to be made clear is that the Defendant by its letter dated 6th March 2008 instructed the Plaintiff to quote for repairs that occurred to its premises following Post Election Violence of the year 2007/2008. I will reproduce the Defendants letter to be able to understand what the Defendant required the Plaintiff to carry out:-

“MD/P&S/1 6th March 2008

Westcon Contractors

P.O. Box 87556-80100

MOMBASA

Dear Sir,

RE: QUOTATION FOR POST-ELECTION DAMAGE REPAIRS – URGENT

Please prepare quotation, inclusive of all labour and material cost for repairing the mainland side PSV infrastructure works, which were damaged in the Post-Election period.

The works are categorized as follows:-

- 1. 50 No. kiosks on the mainland side;**
 - a) Repair kiosks with panel material supplied by KFS,**
 - b) Electrical wiring with fittings,**
 - c) Plumbing works where necessary,**
- d. Quantify all materials with labour costs**
- 2. Toilets**
 - a) Fitting new plumbing fittings where necessary**
 - b) Fitting new doors where necessary**
 - c) Fitting electrical wiring with fittings**
 - d) Renew all window louver glasses**
 - e) Replace damaged tiles**
 - f) Quantify all materials to be used with labour costs**
- 3. Light posts**
 - a. Renew all damage/vandalized electrical cables**
 - b. Fit new light fittings where necessary**
 - c. Quantify all material used with labour cost.**
- 4. Perimeter wall**

This is for stopping pedestrian from the shops near the office restaurant.

- 5. Road gates – Two (2)**

These are needed on the Shelly Beach road and at the entrance to the PSV terminus.

Attached is a detailed survey of the 50No. PVS/Vinyl stalls after the destruction.

Please submit your quotations to the undersigned on 28th March 2008.

Yours faithfully,

For: KENYA FERRY SERVICES LTD

M. Kalu

Purchasing & Supplies Officer

For: MANAGING DIRECTOR.”

30. As required the Plaintiff quoted for those works by its letter of 24th March 2008.
31. The Defendant has argued that the contract alleged by the Plaintiff which was partly in correspondence and partly oral was illegal because it failed to be in writing. The Defendant also submitted that it cannot be given effect because it failed to follow the provisions of Section 88 of the Public Procurement and Disposal Act 2005 Cap 412A (**the Act**).
32. The Plaintiff submitted that the Act under Section 74 permitted an entity to directly procure for services. The Plaintiff was of the view that the subject contract was such a direct procurement.
33. The Defendant confirmed through its witness that the writer of the letter dated 6th March 2008 Mr. Kalu which was reproduced above was still in its employment. If that be so it is not clear why Mr. Kalu was not called to testify and clarify which procedure the Defendant followed when it invited the Plaintiff to undertake the construction. The Defendant's witness confirmed in evidence that he was not in the Defendant's employment when the Plaintiff was invited to quote for the construction. He therefore was not able to assist the court to determine that the Defendant sought to procure for the Plaintiff's services through quotation.
34. Although the Defendant submitted that whether or not the procedure followed in the procurement of Plaintiff's services was either direct procurement as provided under Section 74 of the Act or procurement by quotation as provided under Section 88 would fail because the contract had not been reduced in writing as required by Section 68 I respond to that submission that Section 68 is under Part V of the Act which is entitled to open tendering. That requirement that a contract be in writing does not seem to include a direct procurement under Section 74.
35. On the whole having considered the Defendant's written submissions I do find that the Defendant failed to satisfy the burden of proof which legally ought to have been borne by it. The Defendant was the one that made the offer to the Plaintiff by its letter dated 6th March 2008. Even if there is an obligation on the Plaintiff to ensure that the provisions are complied with the Defendant needed to prove that the Plaintiff did not ensure that the provisions of the Act were complied with. The Defendant apart from the copies of the cheques of payments made to the Plaintiff did not exhibit any other document relating to the transaction. Whether that failure to so produce those documents and the failure to call Mr. Kalu were deliberate on the part of the Defendant with the view to tarnishing the Plaintiff and the contract this Court does not know. It is for that reason that I reject the invitation by the Defendant to find that the contract between it and the Plaintiff was illegal. The Defendant failed to prove it. The Defendant chose to rely upon its witness Mr. Elijah Kitur the Company's Secretary who on his own admission joined the Defendant's establishment after the subject contract was entered into and was performed. On the other hand Mr. Kalu was there at the initial time of the contract he infact invited the Plaintiff to quote for the works but the Defendant chose not to call him. Why? Was it because the evidence he would have tendered would have been adverse to the Defendant? This Court is left with no option but to assume the latter.
36. I do find that the Plaintiff was requested by the Defendant to directly procure for the works contained in the letter of 6th March 2008. Although the Defendant paid the principal sum for those works there is no dispute that those payments were delayed.

37. On the third issue I respond in the affirmative. Having made a finding that the Defendant directly procured for the services of the Plaintiff the Defendant as provided under Article 10 of the Constitution of Kenya was under a duty to abide by this country's national values and principles of governance. One such national value and principle is the value of equity. Equity is defined in the Black Law's Dictionary and is said to be as follows-

“1. Fairness, impartiality; evenhanded dealing – the company’s policies require managers to use equity in dealing with subordinate employees. 2. The body of principles constituting what is fair and right; natural law.”

The Learned author proceeded to explain further by saying that equity is equivalent to natural justice.

38. Having procured the Plaintiff's services fairness required that the Defendant would pay for those services when the Certificates were issued by the Defendant's own appointed Architect and confirmed again by the Defendant's own appointed quantity surveyor. It was unjust to delay such payment and to refuse to pay interest for the delayed payments. I found it arrogant for the Defendant to state that the Plaintiff was expected to have its own money to carry out the construction and that accordingly the Defendant cannot be liable for the late payments that the Plaintiff had to make to its financiers due to the Defendant's late settlement of the Certificates that were issued.

39. The Plaintiff did however fail to prove its entitlement to the claim of interest at 32%. The Plaintiff did not provide documentary evidence to support that claim. Doing the best that I can I will order the Defendant to pay the Plaintiff interest at Court rate for the delayed payments.

40. In conclusion therefore there shall be judgment for the Plaintiff as follows-

- a. **The Defendant shall pay to the Plaintiff interest at Court rates on the amount of Kshs. 1,810,349.45 for 458 days.**
- b. **The Defendant shall pay to the Plaintiff interest at Court rates on the amount of Kshs. 5,390,990.95 for 450 days.**
- c. **The Defendant shall pay to the Plaintiff interest at Court rates on the amount of Kshs. 2,303,750.00 for 376 days.**
- d. **The Defendant shall pay to the Plaintiff interest at Court rates on the amount of Kshs. 1,118,150.00 for 334 days.**
- e. **The Defendant shall pay to the Plaintiff interest at Court rates on the amount of Kshs. 2,090,000.00 for 312 days.**
- f. **The Defendant shall pay to the Plaintiff interest at Court rates on the amount of Kshs. 1,368,862.45 for 312 days.**
- g. **The Defendant shall pay to the Plaintiff interest at Court rates on the amount of Kshs. 990,065.05 for 312 days.**
- h. **The Defendant shall pay to the Plaintiff interest at Court rates on the amount of Kshs. 2,694,340.45 for 209 days.**
- i. **The Defendant shall pay to the Plaintiff interest at Court rates on the amount of Kshs. 754,313.55 for 209 days.**
- j. **The Defendant shall pay to the Plaintiff interest at Court rates on the amount of Kshs. 650,254.50 for 209 days.**

k. For the avoidance of doubt the above amounts will attract further interest at Court rate from the date of this suit until payment in full.

- The Plaintiff is awarded the costs of the suit.

DATED and DELIVERED at MOMBASA this 20TH day of NOVEMBER, 2014.

MARY KASANGO

JUDGE