



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NUMBER 367 OF 2009

CIVICON LIMITEDPLAINTIFF

VERSUS

HOME OIL (K) LIMITED.....DEFENDANT

J U D G M E N T

1. This judgment is based on *ex parte* proceedings, the Defendant having neglected, declined or failed to fully participate therein. In those circumstances, explained in more detail later, the suit herein came for formal proof on 29th February, 2012. The Plaintiff is a Civil Engineering and Construction Company based in Mombasa. The Defendant at the material time was establishing a Margarine Factory in industrial Area, Nairobi. Sometime in March, 2003, the Defendant through its Project Manager, Mentor Management invited the Plaintiff to quote for the design, supply, fabrication and erection of ten (10) oil storage tanks and supply of two (2) additional tanks constructed by Chemtech International, also separately engaged in the Defendant's project. The contract price for the stated works was **Ksh. 23,020,360** inclusive of Value Added Tax (VAT). Mentor Management, on behalf of the Defendant, sent a confirmatory order for the works on 13th March, 2003. Payment was to be by monthly works certificates approved by Mentor Management and to be paid by the Defendant.

2. The Plaintiff proceeded to design and construct the tanks and delivered the works, fully performing the contract within the agreed period, by 15th July, 2003. The Defendant, upon receipt of certified invoices from Mentor Management, the Project Manager, paid **Kshs.18,795,152** leaving an amount of Kshs. 4,399,999 unpaid. The balance, it was claimed, emanated from some alleged defects in the supplied works, disputed by the Plaintiff. There was an exchange of correspondence for a period, then the Defendant thereafter maintained silence, until sued.

3. The Plaintiff filed its Plaint on 27th October, 2009, claiming the outstanding balance of the contract

sum, interest on that amount from 1st January, 2005 until payment in full, and costs of this suit.

4. The Defendant, through M/s Kiplenge and Kurgat, Advocates, filed its defence on 9th December, 2009. In the Defence, the Defendant admitted in Paragraph 3 having engaged the Plaintiff to carry out the works and avers that the Plaintiff failed to carry out the works to the required standards and specifications. At Paragraph 4, the Defendant avers that the design and drawing were to be provided by Chemtech International, but that upon inspection of the installed tanks, it was discovered that there were a myriad of problems that required rectification.

At Paragraph 5, the Defendant avers that the Plaintiff was advised of the errors but took no corrective action to remedy the situation.

At paragraph 6, the Defendant stated that payment for the installation services of the oil storage tanks was to be effected upon installation of the oil storage tanks per specifications, and given that the plaintiff breached the agreement, the Defendant was under no obligation to pay.

The Defendant denied owing Kshs. 4,399,999/=, or any amount, and put the plaintiff to strict proof.

5. There was no action in the suit thereafter, until 7th June, 2011, when the Plaintiff prepared and sent to the Defendant a statement of agreed issues for mutual approval with a request for out of court settlement. On 23rd June, 2011 the Plaintiff filed in court a bundle of documents containing its:

- Statement of agreed issues, unsigned by the Defendant.
- List of witnesses, containing their witnesses's name G.G Horsey.
- Completed Pre Trial Questionnaire under order 11, Rule 2
- Plaintiff's List of Documents
- Witness statement of Christopher Gordon Horsey, a director of the Plaintiff
- Bundle of evidential documents to be relied upon at the trial, Numbered page 1 to page 54.

6. On 11th July, 2011, M/s Kiplenge Kurgat, counsel for the Defendant filed a Chamber Summons application seeking to be allowed to withdraw/cease acting for the Defendant on the ground that they no longer had instructions to continue acting. In the supporting affidavit sworn by John Kiplagat Kurgat, he stated that he had come to learn that the Defendant Company may have been struck off the Register of Companies and annexed a Gazette Notice Number 11842 of 1st October, 2010, being a Notice of Intended Dissolution. The application was not contested and on 22nd November, 2011 an order was issued by the Court allowing counsel to withdraw, and ordering that the same be served on the Defendant and a return of service filed within 7 days.

7. On 1st December, 2011 an affidavit of service was filed by one Nelson Kusolei, who deponed that he had received an order issued by the Court from M/s Kiplenge and Kurgat and had sent the same by registered mail to the Defendants as their last known offices in Nakuru had been closed for a long time. The certificate of registration was annexed thereto.

8. On 13th December, 2011, the hearing was fixed for 29th February, 2012 and the Defendant was served through registered mail at the Defendant's last known address, and also through their previous counsel who declined to accept service; and a return of service was filed on 29th February, 2012.

9. The Court being satisfied that notice of the hearing had been duly served, and given the earlier indication by the Defendant's then counsel that the Defendant was under dissolution, the court heard the Plaintiff's case on *ex parte* basis for formal proof.

10. The Plaintiff's sole witness was Mr. Christopher Horace Gordon Horsey, who said he was a director of the Plaintiff Company. He stated that the Plaintiff was a turnkey construction company, and in 2003 had entered into a contract with the Defendant to design and build ten oil tanks for them, and an additional two tanks designed by Chemtech International but fabricated and transported by them to the Defendant's site off Airport Road in Industrial Area, Nairobi.

11. The witness gave evidence that the Defendant's project was managed by Mentor Management, and that he was dealing with one Peter Hartley of Mentor Management. Mr. Hartley was managing the entire factory project for the Defendants, and there were many other contractors involved besides the Plaintiff. He said that he raised the invoices on behalf of the Plaintiff, submitted them to Mr. Hartley of Mentor Management, and almost all were paid except for an outstanding balance of Kshs. 4,399,999. He said that the Plaintiff delivered the project on schedule, starting in March, 2003 and completing in August, 2003.

12. The witness stated that after the Defendant failed to pay, the Plaintiff threatened legal action, and that was when the Defendant first made its allegations that the works were not done to specifications. The witness produced a bound bundle of documents marked **P Exhibit 1** in support of the Plaintiff's claim.

At page 6 of **PExh 1**, was a letter by the Plaintiff to the Project Manager quoting for the two tanks which

were to be designed by Chemtech International.

At Page 26A **P Exh 1** was the Plaintiff's detailed ledger/statement of account for the whole project showing all invoices raised and payments received from 1st April, 2003 to February, 2005. The invoices including Value Added Tax (VAT) amount to a total of Kshs.23,195,151. Of that amount, the payments received by Plaintiff amount to Kshs.18,795,152. The difference is Kshs.4,399,999/= which is not paid. At Page 26 **PExb 1** is a Statement of Account for unpaid invoices amounting to Kshs.4,399,999/=. Copies of the individual invoices sent to the Defendant, but unpaid, are at pages 27-39, namely, Invoices Numbered as follows:

		<u>Date</u>	<u>Amount in Kshs.000</u>
1.	9057	8 th July 2004	350,000
2.	9108	27 th July, 2004	350,000
3.	9121	3 rd August, 2004	350,000
4.	9134	10 th August, 2004	350,000
5.	9141	17 th August, 2004	350,000
6.	9148	24 th August, 2004	350,000
7.	9157	31 st August, 2004	350,000
8.	9165	7 th September, 2004	350,000
9.	9216	21 st September, 2004	350,000
10.	9226	28 th September, 2004	350,000
11.	9246	5 th October, 2004	350,000

12.	9255	12 th October, 2004	350,000
13.	9281	21 st October, 2004	<u>350,000</u>
			4,550,000
	Less Payment CDD0 2015	23.2.2005	<u>150,001</u>
	Total Outstanding		<u>4,399,999</u>

13. Mr. Horsey also took the court through a letter dated 22nd October, 2003 from Mentor Management **PExb 40-41** showing all the contractors involved in the project, including the Plaintiff to whom a copy was sent apologising for the delays in payment.

At pages 42-48, **PExb 1** is an exchange of correspondence between the Project Manager and the Defendant copied to the Plaintiff concerning the outstanding payments.

14. The witness explained how the Defendant disputed the Plaintiff's compliance to specifications in their letter **PExb 12** dated 10th September, 2005, about two years after completion of the works. The Logistics Manager of the Defendant, Simon Mbuva, wrote to the Plaintiff raising a number of questions that required answers. The Plaintiff replied on 17th October, 2005 demanding payment of the outstanding amount, and threatening legal action. On 1st November, 2005 the Defendant again wrote to the Plaintiff as follows:

“With reference to your letter of 17th October, 2005, we herewith attach a copy from the Plant commissioning Engineering of Chemtech International Limited indicating the tanks were not made to specifications provided. We await your response.”

Annexed to the letter was a three page “snag list” that is, a list of inspected defects requiring remedial action. Mr. Horsey answered all the issues raised through his email of 16th November, 2005, also attached, to Mentor Management, Project Manager, isolating those items of work done by others and those done by the Plaintiff. The Email was annexed at **PExb1** Page 17-18.

15. According to the documentation availed, the Defendant's valuation of remedial works as against the Plaintiffs, shown at **PExb 1** page 24 was Kshs.370,608.00. Mr. Horsey denied this, and estimated remedial works at no more than Kshs.40,000/= to 50,000/= but had nothing to support the estimate. The remedial works amount is made up as follows:

“Tank reinforcement (Spie) **Kshs. 290.308.00**

Handdrill and Tank ladder (Spie) **Kshs. 80.300.00**

Totals **Kshs. 370.608.00**

The witness’s Email of 16th November, 2005 on the issue remedial works states in part:

“2. Ladder installation. The drawing shows 200mm for the tank shell. This is a drawing error and Chemtec draftsman failed to take into consideration the curvature of the tank and the width of the legging. In any case a very easy repair job.

Base details

a)...

b) Bottom flange of chair undersized. Yes we made a mistake. Top flange of foundation chair is correct.”

Given the above documented admissions by the Plaintiff, and given the witnesses admission that an estimated Kshs.50,000/= or thereabouts would be required to correct the defects, I am prepared to accept defects at about 50% of the amount demanded by the Defendant that is, $370,608 \div 2 =$ Kshs. 185,304/=. This will account for Plaintiff’s understatement and Defendant’s overstatement of the valuation of remedial works.

16. I am satisfied that the Plaintiff has proved its case on balance and will award the full amount claimed less Kshs.185,304/= for defects. Thus the award will be for Kshs.4,399,999 – 182,304 = Kshs.4,214,695/=.

17. The Plaintiff also seeks interest on the said amount at court rates from 1st January, 2005 to date of payment in full. I have noted that all the unpaid invoices were dated between July and October, 2004, so I do hereby allow interest at court rates commencing 1st January, 2005 to the date of payment, as prayed.

18. The Plaintiff shall also have the costs of the suit.

Orders accordingly.

Dated and delivered this.....21st.Day of March ,2012

R.M. MWONGO

JUDGE

Read in open court

Coram:

1. Judge: Hon. R. Mwongo

2. Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

- a)

- b)

- c)