



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL CASE NO. 256 OF 2001

CLEMENT MWAURA KABINGU
.....**PLAINTIFF**

VERSUS

HON. ATTORNEY GENERAL DEFENDANT

JUDGMENT

1. The original claim by the plaintiff was for Kshs 4,060,102 being consideration for road construction works, retention monies withheld and interest of Kshs 2,546,253. There was also a claim for Kshs 50,275,655.50 being loss of earnings. The interest claimed had accrued at rates between 22% and 36% per annum from 4th August 1997 to 15th February 2001. The defendant was sued on behalf of the Ministry of Roads and Public Works and the District Commissioner, Meru North District. The plaintiff had been contracted to gravel Kunene – Mbeu road E 775/R3 and Maua – Ngawaeene road D 482 in Meru North District for a contract sum of Kshs 29,590,046. The plaintiff’s case is that after successful completion and expiry of the defect liability period on 5th December 1997, the defendant unlawfully withheld the retention monies until 21st December 2005. The plaintiff thus claims interest at 28% per annum as the principal sum from the date of decree until full payment.

2. The remainder of the suit is thus the claim on interest only. The parties agreed to proceed by way of written submissions. The plaintiff’s submissions are dated 20th February 2012. Those of the defendant one dated 6th February 2012. The principal defence is that the written contract between the parties did not provide for payment of interest. The court was thus urged to adjudicate the claim within the four corners of the contract. As the principal sums have been paid, the defendant prays that the remainder of this claim for interest be dismissed with costs.

3. I take the following view of the matter. The plaintiff abandoned his claim for Kshs 50,275,655.50 for loss of earnings on the further contract on Mbaikini-Kalaw road C 101/E7 13 Machakos District. To that extent, I agree with the defendant that it did not admit liability on all the principal claims in the plaint. What is common ground is that the remainder of the claim on the principal sums constituting retention have been paid. Payment was made on or about 21st December 2005. The plaintiff claims interest at the rate of 28% from that date till full payment. The crux of the matter then is whether the plaintiff is entitled to that interest and at what rate.

4. Parties are bound by the terms of commercial contracts they enter into. They must keep their bargain. See *Morris & Company Vs Kenya Commercial Bank* [2003] 2 E.A 605. It is also not the true province of the court to rewrite contracts for the parties. See *National Bank of Kenya Limited Vs*

Pipeplastic Samkolit and another [2001] KLR 112.

5. I have looked at tender number 15/95-96 dated October 1995 for the gravelling of Kunene Mbeu road E 775/R3 and Maua Ngaweene road D 482. I have also studied clause 60.3 of the general conditions of contract for works of civil engineering construction. The tender document is itself silent on interest for retention monies. Clause 60:3 of the conditions of contract I have referred to provides as follows;

“60.3 (a) Upon the issue of the Taking-Over Certificate with respect of the whole of the Works, one half of the Retention Money, or upon the issue of a Taking-Over Certificate with respect to a Section or part of the Permanent Works only such proportion thereof as the Engineer determines having regard to the relative value of such Section or part of the Permanent Works, shall be certified by the Engineer for payment to the Contractor.

(b) Upon the expiration of the Defects Liability Period for the Works the other half of the Retention Money shall be certified by the Engineer for payment to the Contractor. Provided that, in the event of different Defects Liability Periods having become applicable to different Sections or parts of the Permanent Works pursuant to Clause 48, the expression “expiration of the Defects Liability Period” shall, for the purposes of this Sub-Clause, be deemed to mean the expiration of the latest of such periods.

Provided also that if at such time, there shall remain to be executed by the Contractor any work ordered, pursuant to Clauses 49 and 50, in respect of the Works, the Engineer shall be entitled to withhold certification until completion of such work of so much of the balance of the Retention Money as shall, in the opinion of the Engineer, represent the cost of the work remaining to be executed”.

6. There is no mention of interest payable or the rate of interest on retention monies. The only reference to interest is at clause 60.10 which states;

“60.10 The amount due to the Contractor under any interim certificate issued by the Engineer pursuant to this Clause, or to any other term of the Contract, shall, subject to Clause 47, be paid by the Employer to the Contractor within 28 days after such interim certificate has been delivered to the Employer, or, in the case of the Final Certificate referred to in Sub-Clause 60.8, within 56 days, after such the Final Certificate referred to in Sub-Clause 60.8, within 56 days, after such Final Certificate has been delivered to the Employer. In the event of the failure of the Employer to make payment within the times stated, the Employer shall pay to the Contractor interest at the rate stated in the Appendix to Tender upon all sums unpaid from the date by which the same should have been paid. The provisions of this Sub Clause are without prejudice to the Contractor’s entitlement under Clause 69”.

The problem however is that there is no appendix to the tender documents and hence no contractual rate of interest. The plaintiff concedes that when he won a contract for the subsequent Machakos project, he expected to use the retention monies that are the subject of the suit to finance the Machakos project. When the defendant failed to release the retention monies, the plaintiff borrowed monies from Kenya Commercial Bank at the rate of interest between 22% to 36%. That is clear from the 7 letters produced by the plaintiff from 3rd September 1996 to 4th January 2002. Those letters were from Kenya Commercial Bank to the plaintiff. The plaintiff’s claim for interest is thus a commercial rate averaged at 28% per annum.

7. There is however no contractual basis for that claim. If there were an express clause for payment of interest on retention monies and a clear rate provided, the matter would rest. In the absence of such a clause, the plaintiff can only fall back on the powers of the court. Those powers are at section 26 of the Civil Procedure Act which provides;

“26. (1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to

such earlier date as the court thinks fit.

(2) Where such a decree is silent with respect to the

payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum”.

I also agree with decision of the Court of Appeal in New Tyres Enterprises Limited Vs Kenya Alliance Insurance Company Limited [1987] KLR 380 on the court’s discretion. At page 384, the court stated;

“The award of interest for any period prior to the filing of the suit is a matter of substantive law’ see Gulsmhuddrin Vs French Somali-land Shipping Company Limited [1959] E.A 25. Where a party has been deprived of land or movable property and receives a monetary award in compensation of the loss, the usual practice is to award interest from the date of such deprivation; (see Kimani Vs Attorney General [1969] E.A 502. In the present case the liability of the respondent to pay for the appellants’ loss was not determined until the date of judgment and that is the date from which interest should be payable. I am satisfied that the judge’s order is perfectly in consonance with the normal practice and was a proper and fair exercise of his discretion”.

8. I find that there is no contractual or legal basis for payment of interest on the retention monies or at the rate of 22% to 36% claimed by the plaintiff. The plaintiff would however be entitled to payment of interest under section 26, on the sum of Kshs 1,256,951.90 which was due at the time of the suit on the retention balance and Kshs 256,897.80 as unpaid works all totalling Kshs 1,513,849.70. That sum was paid by the defendant on 21st December 2005. I would thus grant the plaintiff interest on the sum of Kshs 1,513,849.70 at court rates from the date of filing suit on 23rd February 2001 to the date of payment on 21st December 2005. The contractual documents I referred to earlier clearly provided that the retention monies be paid within six months of issuance of a final certificate. The defect liability period ended on 5th December 1997. The defendant only paid those sums on 21st December 2005 long after filing of the suit on 23rd February 2001. I have thus awarded interest in the same manner as any other civil debt under the law as there is no contractual basis in the tender document or conditions of contract.

9. In the result, I would enter final judgment in favour of the plaintiff on interest as follows. There shall be interest to be paid by the defendant at court rates on the sum of Kshs 1,513,849.70 from 23rd February 2001 being the date of the suit till 21st December 2005 being the date when the principal sum was paid.

10. Costs would ordinarily follow the event. In this case, the plaintiff abandoned its claim for Kshs 50,275,655.70. I have said there was no contractual basis for payment of the remainder of claim on interest. No rate of interest was provided. The defendant paid the plaintiff the principal sum of Kshs 1,513,849.70 way back on 21st December 2005. I have granted the plaintiff interest at court rates from the date of suit in exercise of power and discretion under section 26 of the Civil Procedure Act. Under section 27 of the Civil Procedure Act, costs are at the discretion of the court. I think the interest I have awarded fairly compensates the plaintiff. And considering the history of the matter and the good faith demonstrated by payment of the principle debt by the defendant, I would order that each party shall bear its own costs.

It is so ordered.

DATED and DELIVERED at NAIROBI this 18th day of April 2012.

G.K. KIMONDO

JUDGE

Judgment read in open court in the presence of

Mr. Clement Kabingu (in person) for the plaintiff.

No appearance for the Defendant.