



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE 765 OF 2008

RICH FIELD ENGINEERING LIMITED PLAINTIFF

VERSUS

SYNERESIS LIMITED DEFENDANT

JUDGMENT

1. The plaintiff is an engineering and building construction company while the defendant runs a paint and resins manufacturing company in Nairobi.

2. Sometimes in September 2006 the defendant contracted the plaintiff to do the following:

“i. Capacity enhancement of paint and resin production facility by construction of additional manufacturing line including related pipe works at the defendant’s factory.

ii. Establishment of a new and or additional raw material storage facility at the defendant’s factory.”

3. The parties further agreed that the defendant would provide materials to the plaintiff free of cost as well as a fork lift truck for handling the materials at the defendant’s cost. The plaintiff was to provide all the manpower, tools, tackles and cranes for the construction works.

4. The plaintiff averred that the agreed cost of works between the parties was as follows:

“(a) Cost of materials to be supplied by the plaintiffKshs.3,048,446/=

(b) Fabrication, erection and installation cost Kshs.3,200,000/=

Kshs.6,248,346/=

(c) V.A.T. thereof at 16% Kshs. 999,735/=

Kshs.7,248,083/=”

5. The plaintiff stated that the defendant agreed to pay a deposit of Kshs.1 million and the balance to be

paid within seven days of completion of the work. The work started in December 2007 and in the course of performance of the agreed works various modifications and amendments were made by the defendant to the original scope of work. The plaintiff had no objection to undertaking the additional works but that had the effect of increasing the agreed time for the completion of the contract, which was 45 days, the plaintiff added. The costs of performance of additional work also increased the contract sum.

6. The plaintiff further alleged that the defendant occasioned delay in completion of the work by, *inter alia*, delaying in making payments and supply of various materials. The defendant was constantly kept aware of the resultant delays but did little, if anything to alleviate the situation, the plaintiff alleged.

7. Sometimes in June 2008 the defendant terminated the contract. The plaintiff alleged that as at the date of termination of the contract nearly the entire contract including the changes made by the defendant had been performed and the value of the work done by the plaintiff was as follows:

“(a) cost of materials purchased by the plaintiff	Kshs.888,850.24
(b) Cost of work done in regard to the original scope of works	Kshs.1,712,000/=
(c) Costs of additional works done	Kshs.2,651,751/=
Total	Kshs.5,252,605.36
Less value of material deleted from the scope of supply	<u>Kshs.621,433.32</u>
Net amount due to the plaintiff	<u>Kshs.4,331,162.28.”</u>

8. The plaintiff averred that it is the defendant who breached the aforesaid contract and the particulars of breach were set out under paragraph 12 of the plaint.

9. The plaintiff now claims a sum of **Kshs.4,631,162.28** plus interest thereon at 17% per annum from 1st July, 2008 until payment in full.

10. On 4th March, 2009 the defendant filed a statement of defence and in very general terms denied the plaintiff’s claim in its totality. However, on 16th July, 2009 the defendant filed an amended statement of defence and a counter claim.

11. The defendant agreed having entered into a contract with the plaintiff on 3rd December, 2007 and added that the plaintiff had received and accepted all the requirements, specifications, structural drawings and all other necessary drawings for the performance of the contract.

12. The defendant denied having caused any delay in the completion of the project as alleged by the plaintiff and further denied that it was kept aware of any such alleged delay by the plaintiff.

13. The defendant alleged that the plaintiff did substandard work which was not completed within the agreed period of time. It had been expressly agreed that the plaintiff would complete the work on or before 15th January, 2008 but the plaintiff was unable to do so.

14. Further, it had been agreed that in the event of delay in performance of the contract there would arise certain penalties against the defaulting party.

15. The defendant further stated that it was also agreed that:

“(i) The plaintiff’s workmanship will be to the British standards especially in welding, joints, piping and wiring.

(ii) The plaintiff would draw a plan and adhere to it (taking into consideration holidays and elections).

(iii) The plaintiff will advise the defendant on the dates the plaintiff will require the plant to be cleared of inflammable materials to facilitate welding.

(iv) All fabrications would be carried out at the plaintiff's factory.

(v) The plaintiff will provide the defendant with the list of the plaintiff's personnel with their identities who would work during holidays."

16. The defendant admitted that it was agreed that the defendant will provide the materials necessary for the performance of the contract and averred that it did provide all such materials and where the plaintiff ordered or purchased any such materials reimbursement was made upon receipt of the plaintiff's invoices.

17. The defendant asserted that it is the plaintiff who materially breached the contract in that it did not meet the completion period and also did poor workmanship. The particulars of the said breaches were stated under paragraph 11 of the statement of defence.

18. In paragraph 12 of the defence it was stated that:

"12. The defendant states that the consideration for the works to be undertaken by the plaintiff was the sum of Kshs.3.2 million, out of which the defendant made a down payment of Kshs.1 million and the balance was only to be paid out within seven days of the plaintiff's successfully completing the agreed works. The defendant maintains that the plaintiff materially breached the contract and did not complete the agreed work and is therefore not entitled to the balance of the contract sum or to any other sum whatsoever."

19. The defendant denied that it made any modification to the agreed scope of works as would materially change the contract.

20. The defendant denied that by 13th June, 2008 when it terminated the contract the plaintiff had completed the work or was so near completing the same. The defendant added that it had to employ other contractors to re-do the work and complete the same according to earlier specifications.

21. By way of a counterclaim the defendant asserted that it is the plaintiff who materially breached the contract and occasioned the defendant loss and damage being:

"(a) Loss of time

(b) Loss of material

(c) Loss of production time

(d) Loss of product

(e) Cost of redoing the work and completing it."

22. Regarding loss of time, the defendant stated that it could not utilize the production capacity of its reactors under fabrication and installation from 15th January, 2008 when they should have come on line to 13th June, 2008 when the contract was terminated and August, 2008 when a new contractor completed the work. The defendant claimed damages for lost time.

23. Regarding loss of material particulars, the defendant alleged that it had to re-work the reactors and produce additional materials in the sum of Kshs.2.5 million which it now claims from the plaintiff.

24. Regarding particulars of lost production time, the defendant stated that it did not manufacture from 15th January, 2008 to August 2008. The defendant claimed a sum of **Kshs.182,700,000/=** on account of lost production as shown under paragraph 5 of the counterclaim.
25. Regarding the claim for lost products the defendant alleged that it lost resin product by reason of the soft/mild/substandard steel installed on the interior of the reactors by the plaintiff. The cost of the lost product was given as **Kshs.1.2 million**.
26. The defendant also claimed the cost of re-doing the contract by other contractors being **Kshs.2.5 million**.
27. The defendant's total claim by way of special damages is **Kshs.188,900,000/=** plus general damages and interest thereon.
28. The plaintiff denied the defendant's counterclaim in its totality and added that if the defendant suffered any loss it was as a result of the unlawful termination of the contract on the part of the defendant. Such loss was too remote and not envisaged at all in the agreement between the parties.
29. The plaintiff denied that they had agreed to compensate the defendant in the sum of Kshs.182,700,000/=pleaded in paragraph 5 of the counterclaim or in any other amount or at all.
30. The plaintiff averred that the counterclaim is frivolous, vexatious and an afterthought and urged the court to dismiss the same.
31. All the witnesses who testified in these proceedings filed witness statements and chose to adopt the contents thereof as their evidence. Consequently, I will only highlight the main contents of the witness statements and the additional evidence adduced in cross-examination.
32. **Bharath Patel, PW1**, is a Mechanical Engineer by profession and was working for the plaintiff between 2005 and 2009. He gave a brief background of the contract that was entered into between the plaintiff and the defendant. PW1 was the project co-coordinator and is the one who signed the contract on behalf of the plaintiff.
33. He testified that from the first day the defendant's personnel started issuing verbal variation orders in the scope of works. He said that the verbal instructions for the variations came from **Mr. Mungai**, the defendant's contact person and **Mr. A. Devani**, the defendant's Chief Executive Officer.
34. Initially, the plaintiff accepted the verbal variation orders under the impression that they were going to be just a few changes but as work progressed the frequency of the verbal variation orders increased. The plaintiff requested that such variations be made in writing. But the defendant did not accede to that request.
35. The witness further testified that these variations led to delays as well as additional costs.
36. As a result of the plaintiff's insistence on being given written variations of the contract, which the defendant was not willing to do, there arose some friction between the parties. As a result on 29th March, 2008 the defendant through Mr. Devani instructed **Mr. Wambua**, the plaintiff's Project Engineer, to leave the site.
37. On 13th June, 2008 the defendant issued a letter to the plaintiff terminating the contract unilaterally. However, both PW1 and Mr. Mungai of the defendant established the status of the project and signed the closure document acknowledging the status of the project.
38. PW1 contended that as at the time of termination of the contract the value of the work done by the plaintiff amounted to Kshs.4,331,162.28. The signed document was attached to the statement of PW1 and is also contained in the plaintiff's bundle of documents. It showed the jobs that had been undertaken by

the plaintiff but there was no indication of any money that was due and owing.

39. In cross-examination PW1 stated that the plaintiff could not complete the contract within the stipulated time of 45 days because there was delay in supply of materials by the defendant and because of the numerous variations given by the defendant. PW1 also conceded that due to the 2008 post-election violence the plaintiff experienced shortage of manpower, which was an unforeseeable eventuality.

40. PW1 further stated that as at the date of termination of the contract the plaintiff had completed 90% of the work.

41. Regarding the defendant's counterclaim, PW1 denied that the plaintiff did substandard work. He also exonerated the plaintiff from the defendant's contention that the delay in completing the contract was occasioned by the plaintiff.

42. **Jitendra Brahmhatt, PW2**, is the Managing Director of the plaintiff and is also a Mechanical Engineer by profession. He corroborated the evidence of PW1 in all material aspects.

43. **Thaddeus Wambua, PW3**, is the plaintiff's Project Engineer. He also testified about the frequent oral variations of the contract that were made by the defendant. He further stated that the defendant refused to issue written instructions in respect of the said variations. The witness further denied the defendant's allegation that the plaintiff did substandard works and that the delay in completion of the work was caused by the plaintiff.

44. **Michael Mungai, DW1**, was the only witness for the defendant. He was employed by the defendant as the Maintenance Manager until 2008 when he became the Production Manager.

45. In respect of the contract between the plaintiff and the defendant, the witness stated that in order for the project to be completed in time it was agreed that the plaintiff would provide all the tools and cranes for lifting and installing tanks on site.

46. The witness further stated that on several occasions the plaintiff was unable to purchase materials due to cash flow difficulties and the defendant had to purchase materials on their behalf. He added that there were further delays when in the process of sending the crane to the site the same could not start as its hydraulic system was not working.

47. DW1 alleged that the plaintiff's workmanship was poor and as a result the defendant had to do most of the work on its reactors because mild steel welding rods had been used instead of stainless steel ones as had been agreed upon.

48. When the defendant requested the plaintiff to give a quotation of the additional works, he gave a figure of **Kshs.256,057.63** and the plaintiff issued **LPO No. 1561** to the defendant. The witness added that as per a statement sent by the plaintiff to the defendant, the balance that was due as at **28th February, 2008** was **Kshs.48,851.16**. The statement was produced together with various documents and statements as evidence of payments that had been made by the defendant to the plaintiff. The witness was surprised that the plaintiff was making a claim for payment of much more money than the amount of **Kshs.48,851.16** aforesaid.

49. Regarding the defendant's counterclaim, DW1 testified that the defendant suffered considerable loss because of the long closure of its operations occasioned by the plaintiff's inability to complete the contract within the agreed period of time.

50. The witness stated that for **reactor No. 8** the defendant lost **Kshs.8 Million**, **reactor no. 9** **Kshs.23,700,000/=**, **reactor no. 3** **Kshs.79 million**, total **Kshs.182,700,000/=**. No evidence was adduced in support of the alleged loss.

51. Further, DW1 alleged that the defendant lost raw materials worth **Kshs.1.2 million**. Again no evidence

was adduced in support of that claim.

52. In cross-examination, DW1 conceded that there were several variations that were demanded by the defendant. He agreed having signed Folio No. 16 showing the works that had been done by the plaintiff upto the date of termination of the contract.

53. The plaintiff and the defendant filed their respective submissions which I have carefully perused.

54. Counsel for the parties did not draw up a list of agreed issues for determination. From the pleadings on record the main issues are identified as follows:

1. Whether the plaintiff entered into an agreement with the defendant and if so the scope thereof.

2. Whether there were any variations to the said contract.

3. What the agreed contract sum was and whether the defendant paid the full contractual sum.

4. Whether the plaintiff is entitled to the sum of Kshs.4,631.162.28 as claimed in the plaint together with interest at 17% per annum from 1st July, 2008.

5. Whether the plaintiff breached the terms of the contract and if so in what particulars.

6. Whether the plaintiff rendered poor services.

7. Whether the defendant lawfully terminated the contract.

8. Whether the defendant suffered any loss as a result of the alleged breach of the contract on the part of the plaintiff and if so, the quantum thereof.

9. Whether the defendant is entitled to the sum of Kshs.188,900,000/= together with general damages and interest as claimed in the counterclaim.

10. Whether it is the plaintiff or the defendant who should pay costs of the suit.

55. **ISSUE NO. 1**

Both parties produced the written contract that was executed on 3rd December, 2007. The contract was for **“addition of two reactors, modifications of reactors, 3 cooling tanks, boiler and other associated works. The scope of works was as per a document titled “scope document for expansion project at SL”**. That document was also produced by both parties. According to the contract the defendant was to provide to the plaintiff all the permanent materials free of cost. The defendant was also to provide at its cost forklift truck for material handling.

56. The plaintiff was to provide manpower, tools, tackles and crane for the construction works.

57. The plaintiff was supposed to complete the contract within 45 days from the date of commencement.

58. **ISSUE NO. 2**

There were several oral variations that were made to the initial contract by the defendant. That was not denied by the defendant’s witness, Michael Mungai. A schedule showing additional jobs was produced by PW1 and it bears the signature of both PW1 and DW1. The additional jobs entailed acquisition of more materials, additional labour charges and also prolonged the completion period, though the parties did not make any formal variations to the initial written contract.

59. ISSUES NOS. 3 AND 4

The agreed contract sum was Kshs.3,200,000/= plus V.A.T. which at the time was 16%. The defendant paid a deposit of Kshs.1,00,000/= and the balance was supposed to be paid within seven days of completion of the works and commissioning of the plant. However, in the course of performance of the contract and following the variations made by the defendant it was further agreed that instead of the defendant procuring all the materials that task would be undertaken by the plaintiff and the defendant would refund the cost of purchase of the materials within seven days of sending an invoice to the defendant. That was not denied by PW1.

60. The plaintiff alleged that the cost of materials purchased by the plaintiff was Kshs.888,850.24 and the cost of work that was done in respect of the original scope of work was Kshs.1,712,000/= while the cost of additional works done was Kshs.2,651,751 bringing a total of Kshs.5,252,605.36. After subtracting the value of materials deleted from the scope of supply which is Kshs.621,433.32 the net amount due is Kshs.4,331,162.28. The court must now determine whether these claims were proved by the plaintiff.

61. Apart from various spreadsheets or folios that were prepared by the plaintiff showing the details of the amounts claimed, no specific documents in support of the claims like local purchase orders, invoices, receipts, delivery notes, demand letters etc were produced in support of the plaintiff's claim.

63. However, the plaintiff produced a letter dated 4th December, 2007 (P.Exh. 3) addressed to it by the defendant's Managing Director which reads in part as follows:

“Further to Bharath’s visit to collect cheque and give revised costing of purchases items, we accept for Richfield to buy all items as per the quoted amount. To summarize that in addition to Synresins supplying parts and items committed, Synresins will pay Richfield Engineering Limited to add on all agreement to our plant.

1. Material list (i)	Kshs.2,464,068.00
2. Material list (ii)	Kshs.211,638.00
3. Total engineering list	<u>Kshs.3,200,000/=</u>
Total	<u>Kshs.5,875,706.00</u>

We have already paid him mobilization portion of 1.0 million.

May we suggest as, and when you buy material as per list 1 on weekly basis we pay you (you may buy everything this week and we pay you next week!!!)”

64. From the aforesaid letter there is no dispute that the plaintiff was expected to purchase a considerable number of items at a cost exceeding Kshs.2.5 million. DW1 testified that apart from the deposit of Kshs. 1 million the defendant had also paid the plaintiff other amounts of money as shown in bank statements that were produced. Some of the payments are as follows:

<u>Date</u>	<u>Amount</u>
21/12/2007	Kshs.925,000/=
21/1/2008	Kshs.1,228,416.80
18/2/2008	Kshs.729,138/=
15/4/2008	Kshs.500,000/=
27/5/2008	Kshs.500,000/=

On 28/2/2008 the plaintiff sent a statement showing the unpaid balance as Kshs.48,851.16. That was after

termination of the contract.

65. In a claim for special damages the plaintiff is required to prove each and every item that is not admitted by the defendant. There is a plethora of authorities to the effect that special damages must not only be pleaded but must be specifically proved. See **HAHN v SINGH [1985] KLR 716**. In **ZACHARIA WAWERU THUMBI v SAMUEL NJOROGE THUKU [2006] eKLR**, Mutungi, J. stated as follows:

“If I were to explain, or define, special damages to a lay man, I would say “they are a reimbursement to the plaintiff/victim of the tort, for what he has actually spent as a consequence of the tortuous act(s) complained of”. This point cannot be overstressed: that the claimant of special damages must not only plead the claim, but also go further and strictly prove, usually by documentary evidence, that he has actually spent the sum claimed...I would further hold that an invoice would not suffice. Only a receipt, for the payment, will meet the test.”

66. The folios that were produced by the plaintiff’s witnesses do not amount to sufficient proof of the plaintiff’s claim in the absence of the appropriate supporting documents. The court expected to see the original or certified copies of the invoices referred to in the folios as well as the invoices that were raised by the plaintiff.

67. The folios were neither admitted by the defendant nor do they contain the defendant’s signature. They are computer generated documents without the signature of the maker thereof.

68. While I have no doubt in mind that the plaintiff purchased some material and did additional works on the instructions of the defendant, in the absence of a valuation report detailing the monetary value of the work done and the materials purchased it would be improper to hold that the plaintiff has sufficiently proved its claim, and particularly so when the defendant adduced evidence to show that it made much more payments over and above the Kshs.1 million.

69. **ISSUE NOS. 5 AND 6**

Although the defendant alleged that the plaintiff’s workmanship was poor, that allegation was not proved. According to the contract the plaintiff undertook to be responsible for all defects and workmanship and was to rectify any that would be pointed out by the defendant. However, the defendant did not cite any specific defect in workmanship which the plaintiff was required to rectify but failed to. The allegation that the plaintiff used mild and or substandard steel instead of stainless steel in the interiors of the reactors was not sufficiently proved. The contract that was produced in evidence did not specify the kind of materials that were to be used and it was therefore necessary that a technical report be produced in support of the defendant’s allegations of poor workmanship on the part of the plaintiff.

70. **ISSUE NO. 7**

The plaintiff alleged that the defendant unlawfully terminated the contract while on the other hand the defendant contended that it was perfectly entitled to do so because the plaintiff’s workmanship was poor and the agreed period of the contract had been exceeded. Due to the variations that were made to the contract and delays in payment by the defendant coupled with shortage of labour during the post election period, the plaintiff was unable to perform the contract within the agreed period of 45 days. I do not therefore agree that the plaintiff’s failure to complete the contract within that period of time amounted to sufficient reason to warrant termination of the contract.

71. I have already stated that the defendant did not adduce sufficient evidence to prove that the plaintiff’s workmanship was substandard. No written complaint was ever sent to the plaintiff regarding the quality of its work. In my view therefore, the defendant’s termination of the contract without any notice to the plaintiff was not warranted.

72. **ISSUE NOS. 8 AND 9**

The defendant alleged that he had suffered loss and damage due to the plaintiff's alleged breach of the contract. The monetary value of the defendant's loss was stated at **Kshs.188,900,000/=**. Just as I stated in respect of the plaintiff's claim, this claim by the defendant, being special damages, was not sufficiently proved. In its counterclaim the defendant alleged that it did not manufacture its products during the entire period that the plaintiff failed to complete the work as agreed and as a result the loss of production time caused a loss of **Kshs.182,700,000/=**. No documentary evidence was adduced in support of that allegation. The evidence of DW1 was totally insufficient and the court expected the defendants to produce documents showing specific amounts of material that are produced by each reactor, the cost of production of the products the price of the finished materials and the profit thereof. The defendant did not produce any statement of accounts to show what its annual sales over the years were so as to compare them with the sales for the year 2008. All in all, the defendant did not prove its claim on a balance of probabilities. I hold and find that the defendant is not entitled to the claimed sum of **Kshs.188,900,000/=**. The claim for general damages must also fail.

73. In my view, given the nature of the plaintiff's claim and the defendant's counterclaim this is a matter that ought to have been referred to arbitration as it usually happens in most building contracts. The parties failed to adduce sufficient evidence to support their monetary claims.

74. In view of the findings hereinabove, both the plaintiff's claim as well as the defendant's counterclaim are hereby dismissed. Each party shall bear its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF JUNE, 2012.

D. MUSINGA
JUDGE

In the presence of:

Muriithi – Court Clerk

Mr. Keyonzo for Plaintiff

Miss Kingi for Defendant