



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
Civil Case 35 of 2008

WILTER ENTERPRISES LTD.....1ST PLAINTIFF

TOM OTIENO KEKE

KEVINCE OYUGI KEKE T/A

ROMBOTECH ENTERPRISES.....2ND PLAINTIFF

-VERSUS-

ORANGE DEMOCRATIC MOVEMENT.....1ST DEFENDANT

HENRY KOSGEL.....2ND DEFENDANT

PROF. ANYANG NYONG'O.....3RD DEFENDANT

OMINGO MAGARA.....4TH DEFENDANT

SAID S. KEITONY.....5TH DEFENDANT

TONY NJENGA CEGE.....6TH DEFENDANT

JOSEPH KIPWAMBOK BUNEI.....7TH DEFENDANT

MILTON MUGAMBI IMANYARA.....8TH DEFENDANT

(Being sued as the officials of Orange Democratic Movement)

J U D G M E N T

1. The Plaintiffs filed the suit in Court on **25th January 2008** against the Defendants for a sum of **Kshs. 7, 163,000/=** being the balance of the printing services rendered to the Defendants sometime in November 2007. The Defendants were served with summons to enter appearance dated **31st January 2008** as deponed in the affidavit of service filed in court on **20th February 2008**. The Plaintiffs filed a request for judgment dated **19th February 2008** for the sum of **Kshs. 7,163,000/=** plus costs and interest against the Defendants for failing to either file a Memorandum of Appearance or Defence within the stipulated period of time. Judgment was entered in favour of the Plaintiffs as prayed on the **3rd of March 2008**. Subsequently, a Decree was issued on **11th March 2008** and the Plaintiffs went ahead to execute the said Decree by obtaining Warrants of attachment and sale dated **14th March 2008**. The proclamation was made at the 1st Defendant's premises on the **17th of March 2008**.

2. Consequently, the Defendants herein, by way of a Chamber Summons dated **19th March 2008** and filed on the same day applied to this Court for orders that the ex-parte and/or default judgment and the subsequent decree issued against the Defendants on **11th March 2008** be set aside. The said application was opposed. The Plaintiffs filed a Replying affidavit dated **26th March 2008** and a further affidavit dated **9th May 2008**, both sworn by **WILFRED GITHUA MWETHERA**, a director of the 1st Plaintiff. By a ruling dated **27th June 2008**, the Honourable Justice Lesiit allowed the Defendants' application and set aside the ex-parte judgment in favour of the Plaintiffs. The Defendants were further given fourteen (14) days within which to file and serve their defence.

3. The Defendants filed their Statement of Defence on **9th July 2008** denying the Plaintiff's claim. The Plaintiffs filed a Reply to the Defendant's Defence on **17th July 2008** denying the allegations in the said Defence and reiterated the contents of their Plaint. Simultaneously with the Reply to Defence, the Plaintiffs filed a Notice of Motion dated **16th July 2008** seeking for orders that Judgment be entered for the Plaintiff against the Defendants as prayed in the Plaint. The application was filed on grounds that the Defence as filed by the Defendants was bare denials and there were no triable issues. The Defendants opposed the application by way of a replying affidavit sworn on **11th August 2008** by **JOSHUA KOWINO**, who is described as the finance director of the 1st Defendant. The Plaintiffs' Notice of Motion was dismissed by the Honourable **Justice Lesiit**, by a ruling dated **5th December 2008**. The Honourable Judge found that the Defendants' Defence disclosed a substantive triable issue for which unconditional leave to defend ought to be granted to the Defendants. Eventually, the parties herein set down the matter for hearing.

4. From the pleadings, the facts of this dispute may be summarized as follows: Sometime in November 2007, the Plaintiffs and the Defendants entered into some arrangement in which the Plaintiffs were to provide printing services of ballot papers for the parliamentary and civic nominations that were to be held on **16th November, 2007**. The said exercise was to cost **Kshs. 16, 853,000/=**. The Plaintiffs aver that part of the money was paid through two cheques amounting to **Kshs. 9,690,000/=**. The balance of **Kshs. 7,163,000/=** is what the Plaintiffs now claims.

5. The hearing of the suit commenced on **28th March 2012** with the 2nd Plaintiff providing the sole testimony on his behalf and on behalf of the 1st Plaintiff. The 2nd Plaintiff testified that the Defendants gave them a Contract to design and provide a sample for the ODM nomination papers on **5th November 2007**. The Plaintiff did a sample for both the parliamentary and civic ballots and took to the party, who made corrections thereon. On 6th November, after the Plaintiff made corrections, the Defendants confirmed the order for a total of 20 million ballot papers for both parliamentary and civic elections.

6. The Plaintiff gave a quotation at 190 cents per ballot paper. On **7th November 2007**, the Plaintiff took the quotation to the Defendants and it was received. The Plaintiff also asked for a down payment. On **9th November 2007**, one Mr. Stephen Lubai called the Plaintiff to come and take up the cheques. They were given a first cheque amounting to **Kshs. 4,845,000/=** in the name of Rombotech Enterprises and the second cheque was given to Wilter Enterprises Limited for the same amount of **Kshs. 4,845,000/=** (**exhibit No. 5**).

7. It is the Plaintiffs testimony that Wilter Enterprises was to handle ballot papers for Western Province, North Eastern, Eastern and North Rift Regions while Rombotech was to print for Nairobi, Coast, Nyanza and South Rift. The 2nd Plaintiff states that the Defendants gave them a soft copy of the whole work on a flash disk. The disc contained the names of candidates, their constituents, addresses etc. The Plaintiff carried out the work and started deliveries on **11th November 2007**. The last delivery was on 14th November and the delivery was signed on 16th November 2007 (**Exhibit No. 6 and 7**). After 16th November, the Plaintiffs were asked to resend their invoices (**Exhibit No. 9-10**). The Plaintiff also issued a summary of printed ballot papers.

8. The 2nd Plaintiff further testified that, other than the 1st cheque they received, they had not been paid up to date. He stated that, on **11th January 2008**, there was a meeting by the 1st Defendant's officers, where they considered paying all creditors including the Plaintiffs (**Exhibit 11**). He also stated that, the Defendants, in a letter dated 9th November 2007, paid a deposit and promised to pay the balance later, which they had not done to date.

9. The 2nd Plaintiff denied the allegations in the Defence as lies and testified that they printed according to the specifications which they were given in a soft copy and any mistake in the soft copy was not their mistake. The 2nd Plaintiff concluded his testimony by reiterating the claim in the Plaintiff.

10. The hearing proceeded on **27th April 2012** with cross-examination by counsel for the Defendants. The 2nd Plaintiff reiterated his evidence as given in examination- in -chief. The 2nd Plaintiff confirmed that the date indicated on the Delivery notes for both the 1st and 2nd Plaintiff was **16th November 2007**. The Plaintiff then stated that they started delivery on **11th November 2007** but they did not have documentary evidence to that effect. The Plaintiff also states that not all nomination papers were delivered on **16th November 2007**.

11. During re-examination, the 2nd Plaintiff stated that they had never supplied the document referred to at page 12 of the Defendants' list of documents. He further stated that they delivered the nomination papers on **14th November 2007** but the Defendants were busy and the Plaintiffs were requested to come back on **16th November 2007**. The Plaintiff avers that the Defendants took delivery on **14th November 2007** and recorded the same in their register. The Plaintiff further avers that on **16th November 2007** all they did was signing of the delivery note and no deliveries were made.

12. The Plaintiff indicated that they had printed less than what was contracted because they later on found that there were no candidates in Central Province. The Plaintiff also indicated that they only invoiced for what they had printed. It is the Plaintiffs case that their work was not substandard and that their samples were approved by the Defendants.

13. The Defendants called one witness **MR. JOSHUA KOWINO (DW 1)** who testified that he was the Finance and Deputy Executive Director in the 1st Defendant's party. He began by describing his role in the party and stated that he was aware of the subject matter of the case at hand. He stated that the 1st Defendant never entered into an agreement with the Plaintiffs and that there was no written agreement. He went ahead to state that the letter dated 9th November 2007 was the agreement between the parties. This was rather peculiar as he had earlier stated that there was no agreement between the 1st Defendant and the Plaintiff. He testified that the said letter gave the specifications of the ballot papers and the

number of polling centers. The other term of the letter was that, delivery be, latest, 14th November 2007 as that was a strategic date. The nomination exercise was set for 16th November 2007. The witness averred that the 1st Defendant fulfilled its obligation to pay the deposit to both parties at a sum of Kshs. 4,845,000/= each to the Plaintiffs. The balance was to be paid once all the conditions were met, that is, printing 600 ballot papers per 17,000 polling stations on A6 paper, serialized, packed and delivered as per specifications.

14. The witness contended that the specifications were not met and the 1st Defendant's nominations were bungled. Another condition was that delivery was to be made on **14th November 2007** but the same was done on **16th November 2007**. He testified that he was not aware of any delivery made before **16th November 2007** and he was also not aware of the quantities delivered by the 2nd Plaintiff. He also stated that he did not authorize any variation and the delivery notes were not prepared by the 1st Defendant. He concluded by stating that the Plaintiff's claim was baseless as they had breached the contract.

15. On cross-examination the witness testified that the money claimed by the Plaintiffs had never been paid owing to the breach of contract by the Plaintiffs. The witness confirmed that instructions to the Plaintiffs were by soft copy, whereby the Plaintiffs were to print as per the soft copy and deliver within time. The witness also testified that, **on 16th November 2007**, they held nominations in all provinces in Kenya including Central Province. The witness stated that they did not use the Plaintiff's ballot papers, save for 5,000 ballot papers and that they used exercise books and papers. He further stated that the ballot papers delivered on **16th November 2007** were delivered to all the polling stations all over the Country. He indicated that the 1st Defendant did not reject the ballot papers because they were desperate and they had paid for the same. The witness also confirmed that they received the deliveries and indicated that a delivery book is never deferred but is signed there and then.

16. On re-examination, the witness stated that they were not able to deliver the ballot papers to all the polling stations in the country. He added that the 1st Defendants overpaid the Plaintiffs as the payments exceeded the papers supplied.

17. According to the List of Issues filed by both parties, it seems that the following are the broad issues for determination:-

- a) **Whether there was an agreement between the Plaintiffs and the Defendants in which the Plaintiffs were to provide printing services of ballot papers for the 1st Defendant's parliamentary and civic nominations for an agreed price of Kshs. 16,853,000/=.**
- b) **Whether the Plaintiffs breached the said agreement.**
- c) **Whether the Defendants owe the Plaintiffs Kshs. 7,163,000/=.**

18. On the first issue, it is not disputed that, sometimes in **9th November 2007**, there was an agreement between the parties, in which the Plaintiffs were to print ballot papers for civic and parliamentary nominations for the 1st Defendant. It is also not disputed that the Defendants paid a total sum of **Kshs. 9,690,000/=** to the Plaintiffs.

19. On whether the Plaintiffs' breached the said agreement, it was DW 1's contention that the Plaintiffs did not meet the required specifications which included printing 600 ballot papers per 17,000 polling stations on A6 paper and serialized. It was also testified by DW 1 that, delivery of the ballot papers was to be made on **14th November 2007** but the same was done on **16th November 2007**. On the other hand, the Plaintiffs contention is that they made deliveries on **14th November 2007** but the Defendants were busy and they were requested to come back on **16th November 2007**. It is also their contention that the Defendants took delivery on **14th November 2007** and recorded the same in their register. However the Plaintiffs did not adduce any documentary evidence to support their claim. In my humble view, this being

a contract involving such a large amount of money, the Plaintiffs should have treated it with the seriousness it deserved. The least they would have done on the day they made the deliveries was to ensure that they left the 1st Defendant's premises with a signed document acknowledging the delivery.

20. There is no proof that the Plaintiffs actually made the delivery on **14th November 2007**. This was an important condition of the agreement as the 1st Defendant's nominations were to be held on **16th November 2007**. Therefore, failure to deliver in time amounted to a breach of the said agreement.

21. In addition, according to paragraph 12 above, it is clear that the Plaintiffs are not entitled to the entire amount of money they are claiming having acknowledged that they printed less than what was required. The Plaintiffs have also averred that they were paid part of the money to the tune of **Kshs. 9,690,000/=**.

22. It is trite law that the person who alleges the existence of certain facts must prove the same. **Section 107(1) of the Evidence Act, Cap 80** states thus:-

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

The Plaintiffs herein have not adduced sufficient evidence to the effect that delivery was made on 14th November 2007. On a balance of probabilities, the Plaintiffs have not proven their claim for **Kshs. 7,163,000/=**. This Court can only be bound by the evidence on record. The amount claimed by the Plaintiff of **Kshs.7,163,000/=** is not a small sum of money. There has to be some cogent evidence upon which an award such as this can be made. Certainly, it cannot be based on a disputed delivery whose record the Plaintiffs do not have. Delivery on **14th November 2007** having been a term of the contract, and the Plaintiffs having failed to prove that delivery was made on the said **14th November 2007**, this claim must fail.

In the upshot I dismiss the Plaintiff's suit with costs to the Defendants.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 18TH DAY OF SEPTEMBER 2012

E. K. O. OGOLA

JUDGE
PRESENT:

N/A for the Plaintiff

Mbaluto H/B for Makori for the Defendants

Teresia – Court Clerk