



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL COURTS**

**CIVIL CASE NO. 18 OF 2005**

**SIGMA ENGINEERING COMPANY  
LIMITED.....PLAINTIFF**

**VERSUS**

**ATTORNEY GENERAL .....DEFENDANT**

**JUDGMENT**

1. The plaintiff was appointed on or about 14<sup>th</sup> November 1990 as an Electrical sub-contractor for the construction project of Ardhi House Offices in Kericho. The plaintiff was appointed by the Ministry of Lands Housing and Physical Planning who are herein after referred to as the “Client”. By a letter dated 4<sup>th</sup> April 1991 the director of housing handed over the site for the construction of the Lands Office in Kericho to Messrs Gachara Construction. A letter dated 27<sup>th</sup> June 1991, confirmed the terms of the contract. The plaintiff’s contract sum was for **Ksh.32,683,304.85/-** as confirmed by the Permanent Secretary Ministry of Lands and Housing. According to Engineer E.G.R.W. Thinga PW1, the plaintiff obtained a performance bond so as to comply with the terms and conditions of the agreement.

2. The plaintiff embarked on the construction and on 7<sup>th</sup> January 1992, they were issued with an interim certificate number one (1) by **Messrs Kaburu Okello and Patners** who were the consulting engineers. The certificate was for the payment of **Ksh.9,342,000.-/**. However the client did not settle that Interim Certificate within 14 days as was required. Instead the certificate was settled in several installments as follows:-

	Amount Kshs.	Date
First payment	1,800,000.00	19/6/92
Second payment	1,687,300.00	5/11/92
Third payment	900,000.00	17/12/92

Fourth payment	500,000.00	3/9/93
Fifth payment	3,000,000.00	31/12/93
Sixth payment	1,150,000.00	19/10/94
Seventh payment	<u>304,700.00</u>	
Total	<u>9,342,000.00</u>	

3. Meanwhile the plaintiff wrote several letters to the PS Ministry of Lands raising concerns over the late settlement of the first Certificate. He complained that the operations of the plaintiff were affected by the none settlement of the 1<sup>st</sup> certificate thereby forcing them to seek finances by securing expensive funds from the money market. In this regard, the plaintiff computed the losses based on interest rates for the periods that the certificate remained unsettled and projected it up to 30<sup>th</sup> June 1994. That projection indicated that the plaintiff was willing to accept compensation for the losses in order to bring the matter to an amicable conclusion. This letter which was claiming over twenty three million as compensation for the losses allegedly incurred by the plaintiff was forwarded to the director of Housing by the Permanent Secretary Ministry of Lands with a request that he should institute a technical evaluation and make provisions for their consideration.

4. By a letter dated 12<sup>th</sup> September 1994, the Director of Housing forwarded the minutes of the meeting of the consultants who were commissioned to evaluate the project being the construction of Kericho Ardhi House. The committee had recommended that there were no interest's payable under the 1970 edition of Government contracts for delayed payments. This committee recommended that the plaintiff can be paid an exgratia payment which payment should be considered at the discretion of the client. On 10<sup>th</sup> November 1994 the plaintiff forwarded a claim of **Ksh.23,114,761.60/-** as fair compensation for the losses incurred.

5. By a letter dated 16<sup>th</sup> January 1995 addressed to the PS Ministry of Lands and Settlement by the Director of Housing, it recommended that the plaintiff be paid the above claim which comprised of calculations based on foreign exchange rates, interest rates and inflation rates ruling at the time of submitting the claim. Payment vouchers were prepared but the payment was not effected as it would appear the claim was subjected to further evaluation by the office of the Attorney General and a host of other committees that visited the site including an audit that was undertaken by KPMG. The client required legal opinion as to whether the contractor would be entitled to payment of interests on the late payments. **Mr. D.K. Akeyo** a Senior Principal State Counsel gave his opinion on 8<sup>th</sup> October 1997, he recommended that although interest payment is not provided for in the contract, the state counsel posited that interest can be awarded to a contractor so as to avoid the contractor taking legal action against the client. He recommended the interest be paid.

6. It appears the matter continued getting more and more protracted and by a letter dated 29<sup>th</sup> May 2000, the Permanent Secretary Ministry of Lands while relying on a report by an inter ministerial special task force that evaluated Government's pending bills, he informed the plaintiff that its claim could not be recovered from the Government. It was stated in that letter that indeed the plaintiff was overpaid and the Government was expecting the plaintiff to submit a cheque of Ksh.10,060,000/- being the over payment made to the plaintiff. It would appear after the plaintiff got this letter, he filled this present suit in which it is seeking for payment of **Ksh.148,417,706.60/-** with interests thereon from 1<sup>st</sup> September 2002 at commercial rates until full payments.

7. PW1 gave evidence in support of this claim that was in respect of electrical works that the plaintiff undertook as per the bill of quantities. The entire contract amount was for an agreed sum of Ksh.32,683,304/-. PW1 confirmed that they laid the electrical works up to the ground floor of the proposed construction of Ardhi House in Kericho. The entire project was for a ten storey building. However the project stalled all together at the ground flour slab level due to lack of funds by the client. From the several site meetings that were held a joint measurements of the project was done and the report shows that materials worth Ksh.977,373/- were stolen from the site. However the plaintiff had been paid 4,514,125/- for the materials. It was also noted that materials off the site were worth Ksh.3,009,152/-. The report found that the work done by the plaintiff was worth Ksh.9,429,899/- and

therefore recommended a refund by the plaintiff. This report was objected to by the plaintiff who insisted that they should be paid interest for the losses incurred as a result of late payments.

8. This claim was denied by the defendant in total and in very specific terms. It is contended that the main contract was for the construction of a ten storey building for the use by the client which was never completed by the main contractor in time or at all and the whole building works was wholly and totally abandoned in April 1993. As a result of the abandonment of the project, the plaintiff could not undertake electrical installations works, the plaintiff was however paid for the partial work which it executed. Later on, the client instituted an audit of the work carried out by the plaintiff and it became clear that the plaintiff had been over paid. This suit was also challenged by the defendant on the grounds that it is statute barred under the provisions of the Public Authorities Acts. 9. Several witnesses gave evidence on behalf of the defendant **Joram Kimemia DW1** the Principal Land Registrar gave evidence that he was among the team of experts who visited the site to verify the works that was done by the plaintiff. He took photographs of the project. The contract was for a ten storey building but it was abandoned at the slab level. The client also engaged the services of **K.P.M.G** a firm of auditors who verified the work that was done by the plaintiff against the payments made to the plaintiff under the first certificate. The firm of **KPMG** carried out an audit and recommended that the plaintiff was liable to refund a sum of Ksh.955,101.00/-.

9. **Geoffrey Mbinga DW2** a Quantity Surveyor who used to work with the client gave evidence. The matter of the pending bill was referred to him to verify the value of the work done by the plaintiff and other contractors as at the time when the project stalled due to lack of funds. The entire contract for the electrical works was to cover the installation of all the ten floors. DW3 visited the site and found the plaintiff had laid the conduit for wiring the building which was still at foundation level. The team comprising also DW1 and 2 and others were supposed to value the work done.

10. They evaluated the costs of the work done by the plaintiff and the materials that were on site and made a report dated 17<sup>th</sup> May 2001. According to their report, the plaintiff is supposed to refund a sum of Ksh.955,100.00/- to the Government. According to DW2 as at the time they carried out the inspection the value of the work on the site was Ksh.415,937.00/-. Materials that were stolen were valued at Ksh.965,440.00/-. He contended that it was the responsibility of the contractor to secure the material on site and off site through a bond. **Reuben Wanjia Kahara DW3** an Electrical Engineer working with the Ministry of works also testified. He visited the site on 2<sup>nd</sup> March 2001 as part of the team that carried out the valuation of the work done by the plaintiff. They valued the work done on the site as Ksh.415,937.00/- and materials off site that were stolen at ksh.977,373.00/-. They also queried the payment of Ksh.10,380,000.00 which was paid to the plaintiff. DW3 also visited the suppliers stores where the plaintiff said he had stored materials off site and found materials that were valued at Ksh.3,970,660.00/- . These materials comprised of cables and electrical conduits which the plaintiff had been paid for

11. Both counsel for the plaintiff and the defendant filed written submissions in support of their respective prepositions. The parties had also agreed on a statement of agreed issues on the matters to be determined by the court. They have raised 19 issues which can be summarized as whether the defendant agreed to pay Ksh.23,144,762.00 to the defendant, whether the plaintiff's contract was conditional upon the main contract being completed, and whether the plaintiff's claim is time barred.

12. This is an interesting matter that torch on Government contracts and to a large extent exposes gross mismanagement, lack of accountability of Government resources in project management, or what I would term total waste or theft of public resources. The plaintiff together with other contractors were contracted to construct a ten storey Lands offices at Kericho. This is evidenced by a letter dated 27<sup>th</sup> June 1991 written by the PS Ministry of Lands and Housing. I took over the conduct of this matter from Azangalala J who had recorded some of the evidence from the plaintiff but I have not see the contract other than what is contained in the correspondence. The letter which is addressed to the contractors and other contractors reads as follows:-

“Dear Sirs,

KERICHO LAND/ SURVEY/ HOUSING/PHYSICAL PLANNING OFFICES

I am pleased to inform you that your tenders for the above project have been approved. Appended here below is the summary of the contract sums:

G.G. Gachara

P.O. Box 43989

**NAIROBI** Ksh.269,933,000.00

Sigma Engineering Co. Ltd.

P.O. Box 14745

**NAIROBI** Ksh.21,129,090.00

Kooltech Engineering Co. Ltd

P.O. Box 48189

**NAIROBI** Ksh.3,972,074.00

You are expected to liaise with the Director, Housing Department for all aspects concerning the works and supervision to whom your fee notes will be forwarded for evaluation before payment is effected.

The sub-contractor's are required to confirm their willingness and readiness to under-take these works not later than 1<sup>st</sup> July 1991 which will facilitate possession of site by them on 14<sup>th</sup> July 1991.

The contract documents are being prepared and you will be advised when they are ready for signature.

Please note that on acceptance of the offer you are required to provide a performance bond equal to 7½ % of the contract sum and insurances for the works.

Yours faithfully,

J.K. SANG

**PERMANENT SECRETARY"**

13. According to the plaintiff, he accepted the letter of offer, obtained performance bond from an insurance company and carried out the work of laying electrical conduit up to the slab level when the whole contract stalled. The fact that the project was abandoned at the slab level is a common ground. It is evidenced by some photographs that were produced in evidence by DW1. The plaintiff claims that he was entitled to be paid as per the certificate Number one that was issued by **Kamburu Okello** the project contractors. The sum of Ksh.10,380,000.00 was supposed to be paid within 14 days but it was paid late and in installments. From the correspondence exchanged in this protracted matter no body seems to have raised the issue of incomplete abandoned work of the construction of the ten storey building, but instead, the focus turns on the losses incurred by the plaintiff whose payments for the first certificate was made late and was paid in installments.

14. The plaintiff made a claim for Ksh. 23,114,761.6/- which he claimed was for fair compensation for the losses it incurred as a result of late payments. Counsel for the plaintiff submitted that this sum was admitted as per the letter by the PS Ministry of Lands, the Director of Housing and the opinion rendered by the Attorney General. For some reason this payment was not made instead queries were raised on whether interest can be charged on government contracts which is not provided for under the Government procurement regulations or the building contract. This claim gave rise to a host of investigation by a team comprising experts from the Ministry of Lands and Housing, and the Ministry of Works who made a report after visiting and re-evaluating the work carried out at the site.

15. This was also followed by an audit commissioned as a result of a requirement that was issued by the Government requiring all bills be verified to weed off fake claims popularly referred to as cow boy contractors. The firm of KPMG visited the site and valued the work that was done by the plaintiff. Both the departmental team and the audit by KPMG established that the plaintiff's claim was indeed overpaid. The issue I have determined is whether by dint of a letter by the PS, the payment voucher prepared to pay the plaintiff compensation of over 23million being losses for the late payment, the letter by the director of housing and the opinion of the Attorney General was this an admission of liability that the plaintiff should be granted the orders sought.

16. On the onset this court is not any of the above parties, it is a court of law. Thus the plaintiff always has the onus of establishing his claim to the required standard that is he is owed by the Government of

Kenya, the amount of Ksh.148,417,706.60/-. I do not know how that claim was arrived at. I do not know whether it is the compounded interest for the late payment of the amount certified in certificate number one. No evidence was led by the plaintiff to show how he arrived at the colossal claim. However, as regards the claim of Ksh. 23,114,761.6/- should judgment be entered for the plaintiff in view of the above letters. The letter by director of Housing directed the Ministry of Lands and Housing to settle the claim. Payment vouchers were prepared but they were not paid because issues were raised regarding the validity of the claim.

17. This court cannot ignore those issues that were raised regarding the validity of the plaintiff's claim. It cannot also ignore the evidence by the defence witnesses who were members of a team of experts that visited the site and verified the work that was done by the plaintiff against the claim and the amount already paid to the plaintiff. It is evident from those reports that the value of the work that was done on the site was Ksh.415,937.00. It was also found that there was no justification for the claim of Ksh.2.879,723/- which the plaintiff presented for preliminary work. The value of the materials off site was also ascertained at Ksh.3.900,000.00/- and the plaintiff was found to have been overpaid. In view of the evidence on record, I am not satisfied that the plaintiff is entitled to the claim.

18. Before I penal off from this judgment and issue regarding the validity of this claim was raised by the defendant specifically the defendant contended that the plaintiff's claim is statute barred by virtue of the provisions of Section 3(2) of the Public Authorities Limitation Act Chapter 39 Laws of Kenya which state as follows:-

**“No proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date on which the cause of action accrued.”**

In response to this issue the plaintiff claim that his case was being considered by the client through the various correspondences meetings and minutes which culminated with the letter by the client dated 26<sup>th</sup> October 2004 which inform the plaintiff that the client was not willing to settle the claim. Thus according to the plaintiff the suit was filed within the period of one year. I am not satisfied with this explanation. The plaintiff's claim became due when the client failed to settle the first certificate. No notice was issued when the cause of action arose and no leave was sought to file this suit out of time. The law clearly provides the period of limitation which should be followed unless otherwise leave is granted. For this reason as well, I find the plaintiff's case lacking in merit.

I have no hesitation to order it dismissed with costs to the defendants.

JUDGEMENT READ AND SIGNED ON 28<sup>TH</sup> DAY OF JANUARY 2011 AT NAIROBI.

**M.K. KOOME**

**JUDGE**