



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE NO. 135 OF 2009

GITHAMBO GENERAL CONTRACTORS.....PLAINTIFF

VERSUS

KAY CONSTRUCTION CO. LTD.....DEFENDANT

JUDGMENT

Githambo General Contractors, the Plaintiff herein, filed an action against **Kay Construction Company Ltd.**, the Defendant herein, by way of the plaint dated 26th August 2009 in which he sought for judgment in the following terms:

- (a) General damages for breach of contract.**
- (b) Order of injunction to restrain the defendant from further interfering with the Plaintiff's sub-contract entered on 14th August 2007.**

The Defendant filed a defence to deny the Plaintiff's claim. When the suit came up for hearing, the Defendant did not attend Court, hence the suit proceeded for hearing exparte.

The Plaintiff's case was supported by the evidence of a single witness. Andrew Githinji Mwihuri (P.W. 1) told this Court that he is the proprietor of Githambo General Contractors, a firm which undertakes road constructions. He said Githaiga Muturi, the registered proprietor of Githambo General Contractors, sold the aforesaid firm after which he surrendered to him the certificate of registration before leaving for Southern Sudan to seek for greener pastures in business terms. P.W. 1 said he applied to the Defendant to award him a sub-contract using the name of Githambo General Contractors to do hand packing of stones along St. Mary's – Gitugu road. A copy of the application was produced by P.W. 1 as an exhibit in evidence. On 14th August 2007 the Defendant awarded the firm the contract and thereafter an agreement was executed. A copy of the agreement was tendered as an exhibit in evidence by P.W.1. P.W. 1 said he immediately mobilized his employees and machinery to the site to do the contracted work of hand packing stones. P.W. 1 explained in detail the nature of work required. The witness stated that he diligently performed his duty but was stopped by the Defendant after he completed 10 KMs of the road project. P.W. 1 claimed that the Defendant instructed him to only hand pack the base layer of 5 KMs of the road instead of two layers he did for the first 10 KMs where he had done sub-base and base layers. On 18th May 2009, P.W.1 said he wrote a letter of protesting breach of the agreement. The letter protest was produced as an exhibit in evidence. The defendant is said to have responded by a letter dated 21st May 2009 explaining that they were prompted by the Ministry of roads to terminate the agreement. The letter was produced by P.W.1 as an exhibit in evidence. P.W.1 claimed that he was thereafter thrown out of the site and replaced by another firm known as Diki Construction Co., Joseph Munuru Kanyugi, David Madhava and Agnes Muthoni. The quartet are said to have signed a

similar agreement with the Defendant to do the same work of excavation and hand packing stones. P.W. 1 produced a copy of the agreement executed by the new contractors with the Defendants given to him by Engineer Kamande, the road engineer. The agreement is dated 13th October 2009. P.W. 1 claimed that money due to the Plaintiff was paid by the Defendant to David Madhuva and Agnes Muthoni. P.W.1 produced payment vouchers showing that the Defendant made payments as follows:

Diki Construction Company.....	Ksh.756,192/08
Joseph Munyuru.....	Ksh.442,779/28
David Madhuva	
&Ksh.451,251/80
Agnes Muthoni	

It is apparent that the total payments made by the Defendant after kicking out the Plaintiff from the site was Ksh.1,650,223/04. It is the evidence of the Plaintiff that had the Defendant not terminated the contract, he would have received the aforesaid sum. In the end P.W. 1 urged this court to award him Ksh.7,000,000/= as general damages for breach of contract. He claimed he was denied a contract to hand pack stones for 20 KMs.

I have considered the evidence tendered by the Plaintiff and I think the following issues arose for my determination.

- (i) Whether or not there was an agreement between the Plaintiff and the Defendant?
- (ii) If the answer to (i) above is yes, then whether or not the same was breached?
- (iii) If there was a breach what is the quantum of damages?

Let me begin by determining the first issue. I have considered the evidence tendered and I am convinced there was a contract entered between the Plaintiff and the Defendant.

In the aforesaid agreement, the Plaintiff was to excavate and hand pack stones along St. Mary-Gitugu road. This fact is admitted by the Defendant in paragraph 4 (a) of the defence.

Having determined the first issue, let me now turn my attention to the second issue, that is to say, whether or not the contract was breached? It is apparent from the evidence that the Defendant breached the contract by terminating the Plaintiff's contract. The Plaintiff was kicked out of the site and replaced by other contractors who did the same work which had previously been given to the Plaintiff. In fact the Defendant admits in its defence that it terminated the contract due to the fact that the Ministry of roads changed the design of the road thus doing away with the hand packing of stones. With respect, I do not think this was the main reason. I say so, because, looking at the contract executed between the Defendant and Diki construction Co. & three others, the quartet were required to hand pack stones just like the Plaintiff was required. I find the Defendants to have willfully breached the contract.

The conclusion of the second issue brings me to the third issue as to what is the quantum of damage? The Plaintiff urged me to award it Ksh. 7 Million as damages. In assessing damages for breach of contract, the general rule is that the amount of damages recoverable is amount necessary to put the injured party in the same position as if the contract had been performed. The law also places a duty on the injured party to take reasonable steps to mitigate his losses. The Plaintiff stated that he anticipated to get Ksh.7,000,000/= had the contract been carried out to its conclusion. There is no challenge to the proposal. However, the above figure does not take into account the cost of labour, the taxes to be accrued and other consequent expenses. On my part, I think I must take into account the aforesaid factors. The law envisaged the award of damages to be the net profit which the Plaintiff did not establish. I will estimate that the Plaintiff would have spent 70% of the contractual sum to fulfill the execution of the contract. Hence I will award him 30% of Ksh.7 Million as the net profit plus costs. For the avoidance of doubt, I enter judgment in favour of the Plaintiff and as against the Defendant in the following terms:

- (i) **Ksh.2,100,000/= as general damages for breach of contract.**

(ii) Costs of the suit.

Dated and delivered at Nyeri this 23rd day of September 2011

J. K. SERGON
JUDGE

In open court in the presence of Mr. Mugambi as holding brief for Muthui for the Defendant and the Plaintiff in person.