



**LITELINE ENTERPRESIES ..... PLAINTIFF**

**VERSUS**

**PAN AFRICA BUILDERS & CONTRACTORS LIMITED ..... DEFENDANT**

**JUDGMENT**

The plaintiff instituted this suit against the defendant seeking for a liquidated claim of Ksh.11.555,902.80/- being the sum due to the plaintiff in respect of the electrical work done on the defendant's project at NSSF project in Kitisuru area between 1997 and 1998. The plaintiff is also seeking for interest, special damages and exemplary damages. The interest is in respect of the charges incurred by the plaintiff due to the defendants' failure to meet the obligations under the sub contract.

The defendant denied liability in particular and in specific terms of having contracted the plaintiff to do any work as a domestic contractor. It is alleged that the plaintiff was sub contracted by Come Cons Africa Limited.

This matter was heard by Mbaluto J who recorded evidence from Perminder Singh Parvesar (PW1) the managing director of the plaintiff. PW1 testified that the plaintiff was awarded a contract, as per the documents he produced as exhibits to carry out the electrification of a premises which were being developed by the defendant for NSSF within Kitisuru area in Nairobi. The defendant was the main contractor and the developer was NSSF.

According to minute No.28 dated 8<sup>th</sup> June 2003 in the bundle of documents, the plaintiff contended that it was duly appointed by the defendant pursuant to the letter addressed to them which gave the specific description of their mandate. They were to carry out electrical works on 40 houses. They were supposed to send certificates after the completion of the work in stages and be paid. The plaintiffs was also recognized by NSSF as domestic electric Engineers for the project. According to the proceedings, at some stage the parties recorded the following consent:-

- a) **What is due to the plaintiff in respect of the works carried out at Kitisuru Housing Development Project**
- b) **Who should pay the amount found to be due**
- c) **Who should pay the costs**
- d) **Is the plaintiff entitled to special damages and if so, how much.**

Further evidence was given by Mayank Singh (PW2) an Architect by profession who was appointed as the clerks of the work to supervise the project by NSSF which was being under taken by the defendant. PW2 was recording on a daily basis the work which was going on at the site. He confirmed the plaintiff was sub contracted to do electrical installations like conduiting, meter board fixing, cooker units fixing and consumer units. PW2 prepared the report when the plaintiff left the site. He confirmed the plaintiff did substantial work which is shown on page 37 of volume 2 of the exhibits.

Hardeep Panesar (PW3) also testified however his evidence was challenged because apparently he had sat in court throughout, when PW1 and PW2 gave their evidence. The judge observed that the evidence of this witness would be accepted and reasons would be given in the judgment. The reasons I can ascribe for admitting the evidence by PW3, is that he was a director of the plaintiff, and was involved in the sub contract work given by the defendant to the plaintiff.

After the evidence by PW3, the court directed the parties to agree on an Electrical Engineering Consultant who would evaluate the work done on the site and come up with a figure of the sum of money payable to the plaintiff for work done between November 1997 and May 1998. Unfortunately the parties did not agree on any names by consent, but by an order made by the court on 31<sup>st</sup> May 2002 the court directed that if the parties did not agree on a name, the chairman of the Kenya Branch of the Chartered Arbitrators should nominate an arbitrator.

That is when the chairman of the Architectural Association of Kenya appointed **Engineer Ikundo Muhoro** of Norkum Intakes (Electrical Consultants). This witness testified as (PW4) and produced the report he compiled pursuant to the instructions from the AAK. He held meetings with the parties; he also visited the site and compiled the work that was done by the plaintiff. He valued the work done by the plaintiff at Ksh.8,409,027.50. He also incurred costs amounting to Ksh.1.941,069.98 being the professional fees for the services rendered which has not been paid.

The defendant did not offer any evidence but counsel filed written submissions, I will carefully consider only the legal points raised in the submissions to guard against evidence being adduced by way of submission. Counsel for the defendant urged the court to find that the plaintiff had failed to prove the liquidated claim and also the claim for general damages. Counsel urged the court also to disregard the report by PW4 for lacking in credibility because the report contained many qualifications for reasons that PW4 did not see the material documents which included the contracts and designs.

Counsel made reference to the case of **Kenya Breweries Limited vs. Kiambu General Transport Agency Limited [2002] 2 EA 398.** In that case the respondent's case in the superior court was based on letters and conduct. In dismissing the suit the court of appeal held that the respondent's suit lacked factual and legal basis and criticized the respondent's director Njenga Karume for his cavalier attitude in the presentation of his claim that he threw figures to the court and wanted to be paid a whopping 240 million. Counsel drew a parallel to this case where the plaintiff was demanding a sum of 15 million which varies from the testimony of each of the witnesses.

Counsel for the plaintiff also filed written submissions and urged the court to find the plaintiffs' case was uncontroverted and proved to the required standard. The parties agreed the plaintiff was sub contracted as a domestic contractor, thus the matter for determination was the quantum. The issue was referred to a professional Engineer to assess and make a report of the amount payable for the work done by the plaintiff. A report was carried out and presented to court by PW4 and the court should enter judgment in favor of the plaintiff and also award the costs incurred by the Engineer.

Failure by the defendants to offer any evidence the plaintiff's evidence uncontroverted. Going by the consent recorded between the parties in the cause of these proceedings, it is evident that the issue for trial was the quantum. It was generally agreed the plaintiff was sub contracted as a domestic contractor to carry out the electrical conduits by the defendant at the NSSF complex in Kitusuru. It is also not in dispute the plaintiff did some work until a disagreement arose due to non payment and the plaintiff left the site.

There is evidence by the plaintiff's witnesses especially PW2 an independent witness that the plaintiff had done substantial work on the site. The trial judge referred this matter to independent electrical engineer to assess the value of the work carried out. Engineer Ikunda Muhoro testified how he visited the site, held meetings with the parties and prepared a report which shows that the work done by the plaintiff was worth Ksh.8.409,027.50. The fees for the consultant were supposed to be split between the plaintiff and the defendant who have not paid the fee note.

Going by the evidence on record which is uncontroverted, the plaintiff was able to prove its claim. The value of the work carried out is ascertained by the report of PW4 which was not at all challenged by the defendant. The defendant had a chance to controvert that report by bringing their own; they failed to adduce any evidence. Accordingly judgment is entered for the plaintiff in the sum of Ksh.8,409,027.50 with interests at court rates from the date of filing. Unfortunately the plaintiff did not prove the special damages of computed interest and bank charges which prayers are disallowed. The plaintiff shall also have the costs of this suit, including the costs of preparing the report by PPW4.

JUDGMENT READ AND SIGNED ON 30<sup>TH</sup> OCTOBER 2009 AT NAIROBI.

**M.K. KOOME**

**JUDGE**