



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**

**Civil Case 59 of 2005**

**UNLIMITED DIMENSION COMPANY LTD. .... PLAINTIFF**

**VERSUS**

**MOFFAT MUIHURI**

**NANYUKI EQUATOR SACCO LTD. .... DEFENDANTS**

**J U D G M E N T**

By a plaint dated 18<sup>th</sup> July 2005 and filed in this court on 20<sup>th</sup> July, 2005, the plaintiff claims as against the defendant's jointly and severally a sum of Kshs.3,344,983/=, costs and interest. The plaintiff's claim arises out of an alleged building contract entered into between the 1<sup>st</sup> defendant on behalf of the 2<sup>nd</sup> defendant and the plaintiff in which the plaintiff was called upon to undertake renovation and reconstruction works of a building in Nanyuki town for a consideration of Kshs.3,844,983/=. Acting on the terms of the alleged contract the plaintiff entered the site and within four weeks he had completed the works and surrendered the building to the defendants on 15<sup>th</sup> November 2000. Out of the agreed contract sum of Kshs.3,844,983/=, only a paltry sum of Kshs.500,000/= has so far been paid leaving a balance of Kshs.3,344,983/= the subject matter of these proceedings.

The Defendants in their joint statement of defence however deny owing the plaintiff the sum of Kshs.3,344,983/= or any other sum or at all. In their joint statement of defence dated 12<sup>th</sup> August, 2005 and filed in court on 15<sup>th</sup> August 2005, the defendants maintain that there was no such written contract between the plaintiff and the defendant and further stated that most of the works which the Plaintiff could have undertaken pursuant to the alleged contract actually were carried out by the defendants themselves prior to September 2000; and that only some finishing works were undertaken by the plaintiff at the request of the defendants and for which he was paid the sum of Kshs.500,000/= in full and final settlement.

In support of the plaintiff's case, only **Mr. Samuel George Gitonga**, a director of the plaintiff company testified and his evidence may be summarised as follows:

That sometimes in the year 2000, the first defendant approached him on behalf of the 2<sup>nd</sup> defendant to tender for renovation of a building in Nanyuki town. He was to convert it from a bar and lodging to a bank. He tendered for the project at a total cost of Kshs.3,844,983/=. Later he received a communication from the Defendants to the effect that his tender had been successful. According to his testimony, the contract was formally signed on 1<sup>st</sup> October, 2000 as per exhibit PW3. He thereafter commenced works

on 15<sup>th</sup> October, 2000 using his own workers from another site that he was developing. Though he had demanded for mobilization fee he never received a penny. Nonetheless he went on the works until completion on 15<sup>th</sup> November 2000 when he handed over the project to the defendants after the lead consultant had verified the works done. On 1<sup>st</sup> December, 2000, the Defendant's bank opened its doors. All these time the plaintiff had not been paid a single cent by the defendants on account of the contract sum. It was not until 1<sup>st</sup> May 2002 that he received a token payment of Kshs.,100,000/= and a further Kshs.400,000/= on 28<sup>th</sup> June, 2002. These payments were only effected by the Defendants following demands by the plaintiff with a threat of a suit hanging on their horizon. Under cross-examination by **Mrs. Ndungu**, learned counsel for the defendants, the plaintiff agreed that in accordance with exhibit 2 he was required to obtain revised bills of quantities, two sets of drawings, insurance policies for workmen and the building before he could commence the works. He further testified that the lead consultant, who in this case was defence witness No. 1 never gave him a completion certificate.

In opposing the plaintiff's claim, the Defendant assembled a total of four witnesses. Both D.W.1 and D.W.2 denied any written agreement and maintained that the bills of quantities which contained the plaintiff's hand written figures and which the plaintiff claimed was the written contract was subject to other conditions subsequent and was therefore just an offer. The two witnesses also maintained that save for the works approved by D.W.1 in a document dated 2<sup>nd</sup> February 2001 the plaintiff did not undertake any other works on the premises and that the said works were valued at Kshs.448,300/=. However the Plaintiff was nonetheless paid Kshs.500,000/= on the recommendation of D.W.1 to cater for the delay in paying the same and also the element of interest.

D.W.3 was the manager of the 2<sup>nd</sup> defendant. Her testimony was to the effect that most of the works incorporated in Bills of quantities was actually carried out by the 2<sup>nd</sup> defendant by way of direct sourcing, that is to say, the 2<sup>nd</sup> defendant would buy the materials directly and employ labourers to do the job. In support of this proposition the witness produced various receipts and invoices for the materials purchased and money paid out to various labourers and or workers. The evidence of DW3 received some backing from D.W.4 who was the foreman employed by the 2<sup>nd</sup> defendant at the material time. He testified that he was engaged by the 2<sup>nd</sup> defendant for purposes of supervising the demolition of a bar, lodging rooms and restaurant at a building in Nanyuki which was to be converted into banking facility by the Defendants. He was to demolish the shelves, counters, glass walls, grills and also paint and plant flowers. He produced petty cash vouchers to show how payments were made to various labourers who were involved in the works and whom he supervised. On specialized works such as electrical and security, it was the evidence of both D.W.3 and 4 that these works were done by independent contractors namely Nanyuki technical electrical sales and securicor Alarms Kenya Limited respectively. In doing his work D.W.4 relied on the plans given to him by D.W.1 who was the lead consultant. He commenced works on 8<sup>th</sup> September 2000 and he was done by 15<sup>th</sup> January 2001. He sourced the materials from **G.M. Githui** corner general shop. D.W.4 however conceded that at some point he actually saw the plaintiff's workers doing some finishing works in the managers office on the same premises.

From the foregoing it is common ground between the parties that the issues for determination by this court as can be gleaned from the pleadings, evidence and written submissions from respective counsel are as follows:-

- (1) Whether there was a contract between the plaintiff and the Defendants with regard to the renovation of a building in Nanyuki town on behalf of the defendants by the Plaintiff.**
- (2) If the answer to the above is in the negative, whether the plaintiff Nonetheless undertook some works on the premises at the request of the defendants?**
- (3) What was the scope of works undertaken by the plaintiff if at all.**
- (4) What was the scope of works undertaken by the Defendants if at all through direct sourcing?**

**(5) Whether the Defendant owes the plaintiff the sum of Kshs.3,344,983/= or any other sum or at all.**

**(6) Costs.**

As regards issue number 1, I agree with **Ms Mwai**, learned counsel for the plaintiff that it is trite law that an agreement is entered into between parties where there is a meeting of the mind by the parties. An agreement need not be in any particular format. It could be in writing or even oral I dare say. According to counsel, the plaintiff was invited to tender for the job. He did so successfully. According to the bills quantities tendered in evidence, both the plaintiff and the defendants signed the bills of quantities on 1<sup>st</sup> October 2000. The period of the works was stated therein and the date of taking possession of the site was also indicated. It is the submission of counsel therefore that the letter, together with signed bills of quantities constituted a binding contract between the parties. The provision of insurance policy or any other matters that I have already referred to elsewhere in this judgement as conditions subsequent were according to learned counsel not indicated in the contract and accordingly should be ignored.

The defence countered the argument by submitting that the bills of quantities were a mere quotation and or an offer. That exhibit 2 relied on by the plaintiff was conditional to the plaintiff meeting certain conditions therein and none were met by the plaintiff. That the bills of quantities were specific that an appropriate specific contract, priced bills of quantities and drawings, valuation of interim certificates and an extra or omitted works which may from time to time be ordered by the architect would have to be taken into account. **Mrs. Ndungu** finally submitted that the plaintiff never obtained the drawings before he commenced the alleged works.

I observed DW1 as he testified and he struck me as a truthful and honest witness. He was the lead consultant on the project. He testified that much as he had brought on board the plaintiff, the defendants realised they did not have the money quoted by the plaintiff and opted to do some works by direct sourcing. The defendants also decided to reduce the scope of works to manageable size in terms of costs. When the plaintiff was told that the 2<sup>nd</sup> defendant may not have money readily to pay for the works he would have undertaken the plaintiff was reluctant to enter into a contract. That being the case, DW1 further testified that the defendants continued with the works on their own under his supervision. However since the plaintiff was also constructing elsewhere and had a lot of timber, the 2<sup>nd</sup> defendant requested him to renovate the managers office and store, to which he readily agreed. When the plaintiff finalised the work, it was evaluated in the form of revised and priced bill of quantities which came to Kshs.448,300/=. I have no reason to disbelieve or discount this testimony. It does go to show that if there was any original contract as claimed by the plaintiff such contract if at all was revised, varied or amended by subsequent events. DW1 was in my view a truthful and candid witness. Indeed he was professional witness and I can think of no reason why he could have hatched a plot to gang up with the other defence witnesses to falsely testify against the plaintiff. If indeed the plaintiff was owed the amount claimed based on the alleged contract, this witness would have said so. This is not to say that professional witness do not lie. They do it all the time. However, in the circumstances of this case, I was impressed by his testimony and disposition and I believe he was saying the truth as is borne out by subsequent events. What I have said about DW1 is also applicable to DW2. He was candid and truthful. He said under cross examination that he was saved and could therefore not lie. I believe him. His testimony was consistent and tallied in material aspects with that of DW1. I cannot understand how if indeed it is true that the plaintiff had a valid building contract with the defendants which he honoured and incurred the amount claimed, how on earth would the Defendants have deliberately refused to pay the colossal sum due to the plaintiff without, citing any or any valid reasons. The Defendants were even candid enough to admit and own up that they were unable to promptly pay the plaintiff the Kshs.448,300/= for the finishing works he undertook at their request and instance because they were in financial straits. Couldn't they have said so with regard to Kshs.3,344,983/= due to the plaintiff if indeed they had given him such contract!

The plaintiff did not strike me as a honest witness. One could easily tell that he was not bearing it out all in his testimony. It was as if there was something he was trying to hide from the court. That being the case I find it hard to believe that there was a valid contract between the plaintiff and the defendants. And

even if there was I doubt whether the plaintiff acted pursuant to the said contract. I do not think therefore that there was a meeting of minds between the plaintiff and the Defendants as would have resulted in a binding building contract as urged by counsel for the plaintiff

From the plaintiff's own admission pursuant to the alleged contract which can be inferred according to **Ms Mwai** from the letter informing the plaintiff that he had won the tender signed by the 2<sup>nd</sup> defendant through its chairman of the 1<sup>st</sup> defendant herein, as well as signed bills of quantities, there were subsequent conditions which he was to meet. He was for instance to obtain contractors and all risk insurance policy plus workmen's compensation policy. He was also required to obtain revised bills of quantities and two sets of drawings from the lead consultant. The plaintiff never sought and obtained any of the above documents. The plaintiff seem to have understood the need and importance of insurance cover for both the building and the workers for he testified that he moved his workers who were already insured from another site to work on the defendant's premises. However according to DW1 this was not acceptable and did not happen. If indeed the plaintiff, undertook the renovations, how could he have done so in the absence of drawings and no approved plans for the intended renovation. Further after he allegedly completed the works, he never sought and obtained certificate of completion as is the normal requirement in contracts of this nature. It is upon availing certificate of completion of works that the plaintiff could have been entitled to final payment. In the absence of surety undertaking form, security bond, foreman's details, Architectural drawings or certificate of completion which are necessary documents in contracts of this nature, can one really say that there was indeed a valid contract between the plaintiff and the defendants? I have my own doubts. I think what the plaintiff refers to as the contract was as correctly submitted by **Mrs Ndungu** a mere expression of interest in the job by the plaintiff and the bills of quantities on which both parties endorsed their signatures were mere quotations.

Even if I was to hold that indeed there was a contract, there are other issues that militate against such conclusion. There is clear and uncontroverted evidence that some works included in the bills of quantities and which the plaintiff ought to have undertaken in terms of the alleged contract were actually carried out by the defendants themselves. These include electrical works as well as installation of the security alarm which caused the Defendants Kshs.221,890/= and Kshs.88,416.40 respectively. There is also evidence of materials supplied by Nanyuki rural Timber and firewood seller valued at Kshs,115,000.00. There were other materials sourced from **G.M. Githui corner General shop** in the total sum of Kshs.448,200/= . These are substantial sums. The plaintiff never stated that he fitted the alarm or electrical works. Neither did he deny that the materials aforesaid and which were well documented were not used on the premises for the period he is alleged to have been in possession of the premises. Ordinarily one would have expected in the circumstances that the plaintiff would have given a set off for those amounts against what he alleges is due to him from the defendants. He did not and as it is he is claiming the entire contract sum including works that he was not responsible for. Can such witness be believed?

Finally I pose a question to the effect that if indeed the plaintiff was involved in the contract, how come he was unable to avail any of those workers of his that allegedly carried out the renovations with regard to the said building to come and testify on his behalf and support his testimony. What could have been easier than to avail such worker(s) and or his foreman if he had one, to come and say, yes we took possession of the building, did the following works and handed back the premises to the owner(s) on such and such a date. Yet this is a burden the defendants discharged quite admirably. Taking all the foregoing into account therefore, I would answer the first issue framed in the negative.

As for the 2<sup>nd</sup> issue, there is overwhelming evidence that indeed the plaintiff did carry out some works on the premises at the request of the defendants. The Defendants and all their witnesses admitted as much. The works involved putting up the manager's office and a store. As this involved use of timber and the plaintiff had plenty of it as he was also constructing elsewhere he was approached for the job. He accepted and upon completion, the works were valued and reduced in the form of revised and priced bills of quantities. The revised figure came to Kshs.448,300/= . However the plaintiff was paid Kshs.500,000/= instead by the Defendant on the advise of DW1 because of the delay in effecting the payments to the plaintiff. The extra or excess amount was necessary to take care of the element of interest. This was the scope of works undertaken by the plaintiff in respect of the Defendants' premises based on the evidence and material before this court. I believe these conclusion effectively disposes of

issue numbers 2 and 3 of the issues framed.

As regards issue number 4, the evidence is clear that the defendants undertook some works on the premises directly by way of direct sourcing. The testimony of DW1, DW2, DW3 and DW4 is very clear and attests to this fact. DW1 testified that he supervised those works. DW1 testified as to the works that were sourced directly by the defendants. DW3 testified as to the payments made with regard to the works so sourced. Finally DW4 who was the foreman testified as to works carried out on the building under his direct supervision. The details of the scope of works undertaken by the Defendants and how much it caused are found in the documentation tendered in evidence by the aforesaid defence witnesses. Suffice to reiterate that in my view save for putting up the managers office and store, the plaintiff did not carry out any other work on the subject building. The other works were undertaken by the Defendants by way of direct sourcing.

Is the plaintiff entitled to the sum of Kshs.3,344,983/= that he has claimed in the plaint. From what I have already stated, the answer to this issue should be fairly obvious; it is a resounding no. The plaintiff can only claim what is lawfully due to him and that is Kshs.500,000/= on account of putting up the manager's office and store. This amount has already been paid by the Defendants and the plaintiff has acknowledged receipt. There is no other sum of money due to the plaintiff from the Defendants jointly and severally on account of this project based on the purported contract.

As costs follow the event, and since the plaintiff's claim is for dismissal it follows that he will have to meet the costs of this suit.

In the end I hold that the plaintiff has failed to prove his case against the defendants jointly and severally to the required standard. Accordingly the same is dismissed with costs to the defendants.

***Dated and delivered at Nyeri this 22<sup>nd</sup> day of October 2007***

**M. S. A. MAKHANDIA**

**JUDGE**