



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

Civil Suit 139 of 2004

GULF FABRICATORS LTD
PLAINTIFF

-VERSUS-

MUNICIPAL COUNCIL OF KISUMU
DEFENDANT

JUDGMENT

In this case, Gulf Fabricators Ltd, the plaintiff has sued the Municipal Council of Kisumu, the defendant seeking payment of Kshs 9,324,406/65 being the balance of the contract sum with interest.

The plaintiff averred in its plaint that by a contract made on 22nd August 2002, the defendant contracted the Plaintiff to undertake reconstruction, rehabilitation and major repair works upon the defendant’s trunk sewerage works located along Sekon Toure Road within Kisumu Municipality in accordance with the agreed engineering specifications and drawings then referred to in the original contract for a sum of Kshs 6,639,211/=. The plaintiff further averred that after the execution of the said contract, it commenced, the said works and it diligently reconstructed and repaired the said trunk sewer to the satisfaction of the defendant and that the contractual completion period was extended by mutual agreement between the parties to the said contract. It also averred that it was a term of the said contract that the defendant could vary the extent of the works whereupon the contractual sum would be increased as well as the contractual period extended. The plaintiff averred that the defendant indeed varied and extended the scope of the works during the construction such that the entire contract costs increased beyond the initial contract sum and at the same time, the defendant variously extended the contract period on account of the varied scope of the works. That it was also averment of the plaintiff that it was an express term of the said contract that in the event of the defendant delaying payments due to the plaintiff those delayed payments would attract an interest at commercial bank lending rates as would be applicable and prevailing at the time of the delay. The plaintiff averred that to date the defendant had paid a total of Kshs 4,381,928/= of the agreed contract sum and that the defendant is in breach of the said contract in that it has failed and/or neglected to pay the balance sum of Kshs 9,324,406/65 made up as follows:-

- a) Unpaid balances from initial contract Kshs 1,757,283.00
- b) Balance unpaid from variation Orders Kshs 3,013,763.50

1st Sub-Total Kshs 4,771,046.50

c) Add accumulated 1st sub-total accrued

interests Kshs - Kshs 2,132,202.15

2nd Sub-Total Kshs 6,903,202.65

d) Contract sum without contingency Kshs 6,139,211.00

c) Add unpaid balance plus V- OS(2nd sub-total) Kshs 6,903,202.65

f) New contract sum Kshs 13,042,413.65

g) Less payments received by

contractor Kshs 4,381,928.00

3rd Sub-Total Kshs 8,660,485.65

h) Add bond to be released Kshs 663,921.00

Grand total due to the plaintiff Kshs 9,324,406.65

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The defendant filed an amended statement of defence in which it admitted that by an agreement of 22nd August 2002, it contracted the plaintiff to undertake and carry out re-construction and repair works at the defendant's trunk sewerage works along Sekon Toure Road within Kisumu Municipality in terms of the agreed engineering specifications and drawings referred to in the original contract at agreed contract sum of Kshs 6,639,211/= as pleaded in paragraph 4 of the amended plaint. The defendant further averred that the subject works were duly commenced by the plaintiffs as pleaded but the defendant denied that the said works were re-constructed rehabilitated and repaired to the satisfaction of the defendant. The defendant further averred that the completion date was extended by mutual consent and that the said works were completed on 23rd March 2003. In the alternative, the defendant averred that if there was any extension of the contract period such extension was not sought and granted in terms of the said contract. It was further an averment of the defendant that the delay in completing the construction works by the plaintiff entitled the defendant to deduct the amounts prescribed in the contract as damages flowing from such delays from the plaintiff's dues. The defendant denied that it varied the scope of the works such that the entire contract costs increased beyond the initial contract sum. The defendant further denied that it variously extended the contract period on an account of the varied scope of works as alleged. The defendant further averred that if there was any such variation =s as pleaded, the same were not done in accordance with the contract and were not binding on the defendant and that if there were such variations, the same were occasioned by the plaintiff's default or breach of the contract in which event the additional costs were to be borne by the plaintiff. On the issue of the interest claimed by the plaintiff, the defendant

averred that the plaintiff had failed to do all or some of the works specified consequently the claim was premature and no interest was payable on it. It was also an averment of the defendant that the plaintiff had been fully paid and that if there is any sum which was stall due to it the same is payable by Kisumu Water and Sewerage Co.

When the trial of this case eventually commenced, the plaintiff called as its first witness, Mr. John Onyango Kanyangweso, PW1. In his testimony, PW1 who is an architect by profession said that during the year 2002, the plaintiff won a tender to re-construct and rehabilitate a trunk sewer along Sekon Toure Road within the Kisumu Municipality, for which tenders had been invited from contractors by the defendant. He added that thereafter, the plaintiff engaged him as its Construction manager for the project and that on 22nd August 2002, a contract was formally executed by the defendant and the plaintiff for the project. He stated that by its letter of 23rd August 2002, the defendant authorized the plaintiff to commence work but according to PW1 mobilization of equipment to the site was undertaken first and on 17th September 2002, work commenced. PW1 indicated that it was then scheduled that the said work was to be completed on 16th January 2003 which was a period of 16 weeks. PW1 referred to a letter dated 8th November 2002 from the Project Engineer to the site Manager in which he complained of the delay in the work. According to PW1, the letter also gave instructions for additional works. PW1 said that in his reply contained in his letter of 20th November 2002 he had stated that there had been heavy rains which necessitated pumping out of water from trenches before construction could commence; that the sewer line they were working on was in use and they had to direct raw sewage before work could commence; that as the sewer which was being rehabilitated was lined 1950s there were trees which have since grown and buildings which have been constructed which were not indicated on the drawings which had combined to cause a delay. PW1 stated that under clause 30 of the contract document exhibit P-5 the Project Engineer was empowered to extend time and he did so in this case. By a letter dated 20/11/2002 addressed to the Town Clerk, PW1 said that they were seeking payment of Kshs 2,532,900/15 but the Project Engineer by his letter of 2/12/2002 recommended a payment of Kshs 2,257,331/70 under 1st certificate. PW1 claimed that on 13/12/2002, the plaintiff wrote to the defendant seeking payment of Kshs 2,124,000/= for the additional works done, so far as disclosed in the said letter and that by a letter dated 29/1/2003, the Project Engineer gave an extension of time. He added that the plaintiff was also asked to repair a broken sewer at Nyalenda Railway Quarters. PW1 also stated that in his letter of 25/2/2003, the Project Engineer further extended the time for completion of the work for another 2 weeks, and in his certificate of practical completion dated 8th April 2003, the Project Engineer certified that the whole section of the sewerage lines in contract and variations were then complete to his satisfaction and handed over on 8th April 2003. PW1 claimed that in a series of letters, the plaintiff complained to the defendant that the sum of Kshs 2,124,000/= for additional works was attracting interest at commercial rates as agreed and the balance of the original contract sum had not been paid. By 10/7/2003, the outstanding sum was Kshs 4,286,903/65 but by a letter of 22/9/2003, the Town Clerk claimed that the defendant's council had not met so as to authorize the take over and payment of the plaintiff's dues. PW1 added that by December 2003, the defendant had not made the payments due to the plaintiff and by its letter of 17/12/2003, the plaintiff intimated to the defendant that it intended to refer the dispute to arbitration under clause 39 of Exhibit P5, and it gave a notice of four issues for determination by arbitrators. PW1 claimed that the defendant did not respond to the said letter of the plaintiff. However, by a letter of 17/3/2004 addressed to the District Engineer, the defendant requested that the said works be inspected and be verified whether they were properly done. According to PW1 the District Works Officer went to the site and inspected the said works and in his letter of 25/3/2004 he informed the defendant that the contractor had done a perfect work. This witness stated that the Defendant's Town Clerk also requested the Provincial Local Government Officer for funds to finalize this project. According to PW1 the additional variations given to the plaintiff by instructions were made at site meetings of 20/9/2002, 11/11/2002, 5/1/2003 and 25/2/2003 and that those variations included constructions, excavations, cutting of trees, and procurement of additional pipes. A valuation report submitted by Engineer Ariga of Ministry of Local Government on the project was produced as Exhibit P-36. PW1 said that in that report, the variations were valued at Kshs 3,048,408/= and that the defendant in exhibits 36 and 37 which was admitted by letter of 25/8/2004 was Kshs 8,931,807/95. PW1 said that a sum of Kshs 2,132,156/15 being the sum retained with interest and Kshs 663,921/= performance bond which brought the total to Kshs 9,324,406/65 which the plaintiff claims, with costs and interest. When he was cross-examined PW1 said

that his employment by the plaintiff was limited to the managing the said project. He added that by a letter of 23/8/2002, the defendant gave the plaintiff 2 weeks for mobilization but the plaintiff commenced work in 9th September 2002 having moved on the site by 1/9/2002. According to PW1 there were 4 instances of extension of time granted to the plaintiff by the Project Engineer due to variations of the contract the net value of which were more than 15% of the contract sum. PW1 claimed that the Project Engineer and the defendant were the same and that after all variations the total contract sum was Kshs 13,042,413/05 less Kshs 4,351,925/= paid to the plaintiff left a balance of Kshs 9,324,406/65. He denied that the plaintiff was to hand over the project to the Kisumu Water and Sewerage Company. He also said he was not aware of the payment of Kshs 1,699,589/= made on 5/3/2003. He also denied to have seen a letter dated 14/10/2003 from M/s Otieno Yogo & Co. Advocates. He also said that the parties to exhibit P-5 were the Municipal Council of Kisumu defendant and the Gulf Fabricators Ltd, the plaintiff and that the Project Engineer throughout the duration of the project was the General Manager, Kisumu Water and Sewerage Co. who was Mr. Agumba. PW1 confirmed that the delay to the construction was caused by several factors which included delay in receiving drawings and specifications; heavy short rains forced the plaintiff to be pumping water from trenches and work was on line sewer and raw sewage had to be directed as explained to the Project Engineer. PW1 said only Kshs 4,381,928/= as confirmed by Engineer Ariga was paid to the plaintiff and that variations caused the extension of time the last one being the one given on 25/2/2003. PW1 contended that exhibit P-5 provided that the interest on the unpaid balance was to be commercial lending rates applicable at the time and that the plaintiff adopted 30% as that was an average of 27% and 36% then charged by banks and that there was no objection to it by the defendant.

Engineer Moses Agumba Orot testified as PW2 and stated that currently he works under the name of Nascent Consulting Engineering. He told the Court that in the year 2001 and 2002 he was working with Kisumu Municipal Council as the General Manager in charge of Water and Sewerage Company. PW2 recognized exhibit P-5 as a contract document for the construction of the sewerage line within Kisumu Municipality which was entered into by the Municipality Council of Kisumu and Gulf Fabricators Ltd. He was the Engineer for the Project representing the Municipal Council of Kisumu and that on page 7 of it his name is endorsed as the Engineer for the council. PW2 stated that as a Project Engineer, he identified the area where work had to be carried out, prepared drawings, specifications bills of costs and tender documents and that upon the tender being awarded to the Plaintiff it was his duty to monitor and supervise the work on daily basis and that he was to certify payments due for payments due payments as the work progressed. He added that it was his duty to convene and take minutes of site meetings in which both the contractor and the employer were represented. PW2 produced all his letters to the site Engineer, memos exchange and the minute of the site meetings as exhibits. PW2 admitted that by exhibit P8 ABC he had raised on behalf of the defendant a complaint on the slow progress of work and that he was satisfied by explanations given by the plaintiff and he found that the defendant had underestimated the period the project was to take. PW2 admitted that he prepared exhibit P-12 for payment of Kshs 2,257,331/70 to the contractor and that by Exhibit P-15 he instructed the plaintiff to inform the owners of households near the sewer to apply to be connected to the sewer. He added that under minute 3.4, of 7/1/2003, the plaintiff was contracted to add manholes to the sewer and that at that time 65% of the work had been completed and the time for completing the work was extended by 7 more weeks. PW2 also admitted that he was the author of Exhibit P-17 in which a further extension of 4 weeks was made as agreed in minute 3.2 of the site meeting. PW2 said that he prepared exhibit P-19 dated 25/2/2003 which indicated that additional works were at the cost of Kshs 3,454,252/20 over and above the initial contract sum of Kshs 6,639,211/=, and that in terms of exhibits P-17 (b) the contract was to be completed on 28th February 2003. He stated that in Exhibit P-20 he asked the contractor to carry out additional works which required that time for completion was to be further extended for another 2 weeks with effect from 1st March 2003, and that thereafter the Project was completed within time. PW2 said that in Exhibit P-32A, he gave a certificate of practical completion of the work to his satisfaction on 8th April 2003 and that he completed a certificate of handover on the same day. PW2 also produced exhibit P-35 which listed the variations to the contract issued on 25/2/2003 signed by him which increased the contract sum to Kshs 9,962,211/= and added that the project was satisfactorily carried out and it was completed in time and he was fully satisfied with it. When he was cross-examined he admitted that when Kisumu Water and Sewerage Department was transformed into Kisumu Water and Sewerage Company he became Acting Managing Director up to June 2003 when a new Managing Director was appointed and he continued to act as the Technical Manager until May 2004, when he was confirmed as the Technical Manager of the

Company but since then he has left the Company. He admitted that the value of the variations he approved after being agreed to at the site meetings amounted to Kshs 1,124,000/+ and that exceeds 0.01% of the value of the contract. He agreed that the time for completion of the project was extended at the said site meetings where the defendant was represented and later on the defendant was advised by communications. PW2 added that he was the Agent of the Employer in respect to the said Project.

Aduma Joshua Owuor who was the Town Clerk for the defendant between February and October 2004 testified as PW3 and confirmed that he was the author of Exhibits P34 and 37. He also acknowledge receipts of exhibit P-31 dated 25/3/2004 written by the District Works Officer, Ministry of Works and Housing to the Town Clerk, Kisumu Municipal Council in which it was reported that the contractor had perfectly done the work. PW3 also admitted that he wrote exhibit 37 to the Managing Director Kisumu Water and Sewerage Company upon the official handing over of the project after the completion and that he confirmed the amount due to the contractor. When he was cross-examined, Mr. Aduma said that he commenced working for the defendant on 3rd February 2004 and he also confirmed receipts of exhibit P-29 and said that he was directly involved in the project. According to PW3 said the Council was expected to pay for the project and that when he received exhibit P-36 he wrote to the Kisumu Water and Sewerage Company which was responsible for payment.

Kenneth Ombogo Aranga, the current Deputy Town Clerk for the defendant testified as DW1 and said that the documents in his possession indicated that the plaintiff was awarded the contract for re-construction of a sewer by the defendant for a contract sum of Kshs 6,639,211/=. He stated that the contract was expected to be completed in 16 weeks but he claimed that it was not in time. DW1 said that clause 6 of the contract document created a position of 'engineer of the defendant who was also the General Manager of the Kisumu Water and Sewerage department of the defendant. He added that from the records in his possession the contractor did not proceed with the work diligently as agreed and that under clause 27.3 of exhibit P.5 it was provided that if the net value of all variations equals to 15% of the value of the value of contract the Engineer shall not issue any variation without the consent of the employer and under clause 27.14 it is provided that the Engineer shall not issue instructions requiring variation exceeding 0.01% of the contract price without prior approval of the employer. Dw1 claimed that exhibit P-8 (a) was not copied to the defendant and accordingly the defendant never gave instructions for variations of the contract which gave rise to the claim of Kshs 2,124,000/= made by the plaintiff, as the amount exceeded 0.01% of the contract sum. DW1 also denied that the defendant was made aware of the letter dated 20/12/2002 in which the contractor requested for additional pipes. DW1 also denied that the defendant received a letter dated 25/1/2003 in which the additional variations works valued at Kshs 3,484,252/20 were listed and he added that the defendant did not approve those variations. He also denied that the defendant approved variations indicated by a letter dated 13/3/2003 costing Kshs 781,000/= and the 4 instructions varying the contract arising from the recommendations of the site meeting of 7/1/2003 and issued by the Project Engineer. DW1 also contended that the defendant did not give consent to all the variations and the extensions of the time and that the claim that the contract was completed on 23/3/2003 was not within 2 weeks from 1st March 2003 as exhibit P-36 confirmed. DW1 claimed that payment certificates were not received by the defendant but he admitted that the delay in construction works was explained in exhibit P9 and P11 (a). DW1 further denied that clause 27.14 of exhibit P-5 could be finalized at a site meetings and that this request for construction of additional manholes resulted into an extension of time for completion of the contract. However, the witness admitted that as Deputy Town Clerk his views could be a basis to expect Kisumu Water and Sewerage Company to pay the plaintiff.

I note that only the plaintiff alone filed issues on 8/2/2005 which should be considered in determining this case. In the circumstance I proceed to look at the said issues one by one as the answers will determine the dispute between the two parties.

The question of whether the plaintiff is still engaged in the business of building and general construction is really not relevant to the dispute between the plaintiff and the defendant.

The next issue is whether the subject trunk sewerage works were reconstructed, rehabilitated and repaired diligently and to the satisfaction of the defendant. The contract document does not provide that

the work contracted to the plaintiff were to be reconstructed and rehabilitated to the satisfaction of the defendant indicated in the contract as the employer. The only party who was to be satisfied was the Engineer whose responsibility was to prepare and submit certificates to the employer for payments to the contractor. In the present case the Engineer who in his testimony admitted that he was an agent of the defendant during the construction of said works and that he was satisfied the reconstruction, rehabilitation and repairs of the trunk sewer along Sekon Toure road was satisfactorily carried out and completed. He also claimed that he issued a certificate of practical completion and handing over certificate on 8th April 2003.

On 17th March 2004, the defendant requested the District Works Officer Kisumu to inspect the said sewer line and advise it. In his report dated 25th March 2004, the District Works Officer described whether the works carried out were as prescribed by specifications and he readily saw that the same were done perfectly. In his conclusion the Works Officer stated that the contractor did a perfect and commendable job. On 20th April 2004, the defendant requested the Provincial Local Government Officer seeking an authority to the Council to issue a certificate of completion to the contractor. That request led to evaluation of the said Project Engineer N. N. Nyariki of the Department of Urban Development of that Ministry, which recommended that the works were complete and in use and that a completion certificate be issued immediately. In those circumstances, I hold that the subject trunk sewerage works were reconstructed, rehabilitated and repaired to the satisfaction of the defendant.

When the contract the subject of this case was entered into on 22nd August 2002, the contract period was given as 16 weeks and that there was no mention of 8th January 2003 as completion date.

Both PW1 and PW2 separately stated in their testimony in this Court that the said works were substantially completed by the plaintiff on 23rd March 2003. The only witness who appeared to differ with the two witnesses was DW1 who was not working for the defendant at the time and all he was relying was documents. It is that DW1 did not pin point any particular document on record he relied on this claim. I would therefore hold that said works were substantially completed by the plaintiff on 23rd March 2004.

The Project Engineer is given power to extend the time for completion of the Project under clause 30 of the contract. At the site meeting of 7th January 2003, the Town Clerk was the chairman and under minute 3r 6.2 the extension of time was discussed and the time within which the contract was to be completed was extended for 7 weeks. On 1st March 2003, the Project Engineer authorized another extension for another 2 weeks and that that was subject to a further confirmation. According to Engineer Nyariki, there was no extension of time over the extended contract period.

In his testimony in this Court PW2 claimed that he issued a practical completion certificate on 8th April 2003 and a handing over certificate for payment to the Engineer and copy it to the Employer. This cannot be a condition precedent as the Engineer has to prepare interim valuation of work done and materials on the site.

In my view it was the duty of the Project Engineer to prepare an interim valuation of the work and any materials on the site to accompany a certificate for payment. That duty is not conferred upon the plaintiff and it was not bound to procure it before it could be paid. Under clause 28.1 of the contract all the contractor does is to submit an application for payment giving the necessary details of work done and materials on the site and the amount it considered it is entitled.

Clause 28.6 stipulates that if a certificate remains unpaid beyond the period of honouring certificates the Employer shall pay to the contractor simple interest on the unpaid amount for the period it remains unpaid at the Commercial Bank lending rates in force during the period of delay. The Engineer is given authority to assess the amounts to be included in the interim certificate as the interest due for the delay.

From the record to-date the defendant only paid Kshs 4,381,928/= being portion of the contract sum

and that the sum of Kshs 9,324,406/65 still remains unsettled.

In terms of clause 28.14.3 of the contract, it is the plaintiff which has to be paid for provision of performance burden under clause 13.1 of the said contract and not the Insurance Company.

The question whether the sum due to the plaintiff is payable by Kisumu Water and Sewerage Company Ltd does not rise as the contract entered into and executed on 22/8/2002 was made between the defendant and the plaintiff. The said Kisumu Water and Sewerage Company Ltd was not a party to it. In any case the plaintiff has not sued that Company.

The original contract sum was Kshs 6,639,211/= but due to the variations brought about by the instructions of the Engineer, the new contract sum is Kshs 13,042,413/65 as set out in paragraph 9(f) of the plaint.

The claim of Kshs 6,903,202/65 set forth in paragraph 9(e) of the plaint includes the claim of Kshs 1,757,283/= set out in paragraph (a) of the plaint. This sum of Kshs 1,757,283/= remains outstanding balance of initial contract sum of Kshs 6,639,211/=.

Yes the sum of Kshs 3,013,763/50 is the unpaid costs of variation orders which Engineer Nyariki found to be contractual. The delay for payment for the done by the plaintiff was caused by the defendant. The last payment it made was on 17/1/2003 when it paid Kshs 332,010/= and that brought the amount it paid for the contract to Kshs 4,381,928/=.

The accumulated accrued interest as at the time this suit was filed was Kshs 2,132,202/15.

The defendant's various averments in its defence were not proved to the required standard.

In the result, I would enter judgment for the plaintiff against the defendant in the sum of Kshs 9,324,406/65 with costs and interest as prayed.

Dated and delivered at Kisumu this 30th day of March, 2006.

BK Tanui

JUDGE