



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

Civil Suit 69 of 2004

WALLY TRADING COMPANY LTD PLAINTIFF

VERSUS

ISIOLO COUNTY COUNCIL DEFENDANT

J U D G M E N T

The plaintiff, by a plaint dated 17. 8.2004, sought a judgment for a total sum of Kshs.3,490,000/= together with interest at 26% per annum from 7.3.2003 till payment in full. It also sought general damages for breach of contract and costs and interest on costs.

The plaintiff had, in plaint, averred that he was the successful bidder of a hauling and dumping murram contract with the defendant council. Under the contract the plaintiff was to dump murram along an eight kilometer stretch in the Shaba Game Reserve sometimes in 2002 for an agreed sum of Kshs.3,840,000/=. The defendant had given the plaintiff a Local Purchase Order No.7336. In part performance of its part of the contract the defendant paid to the plaintiff Kshs.350,000/= on 31.1.2003 as an initial payment to enable the defendant start the contract work. The plaintiff also averred that is was implied in the contract that upon satisfactory completion of the contract by the plaintiff, the defendant would upon the plaintiff raising the relevant invoices, pay the plaintiff the balance remaining of Kshs.3, 490,000/=. Plaintiff however further averred that on being served with the relevant invoices by the plaintiff after satisfactorily completing the contract works, the defendant refused or failed or neglected to settle the claim, forcing the plaintiff to file this claim. The plaintiff also claimed that although it has served the defendant with notice of intention to file this claim, the defendant ignored it.

The defendant was served with the summons to enter appearance on 18.8.2004 and there is an affidavit of service to that effect, but it entered neither appearance nor defence. As a result the plaintiff sought interlocutory judgment by its written application dated 16.9.2004 and the same was entered by court on 20.9.04. Plaintiff fixed the suit for formal proof on 10.11.2004 when the witness gave evidence to support the claim. Mr. Dahir Shariff, who gave evidence as PW2, on behalf of the plaintiff company, stated that he was an employee of the plaintiff and was directed to be in charge of the project. He was directed to oversee the hauling and dumping of the murram along the Shaba reserve, an 8-k.m stretch. He testified further that they started hauling murram on 5.12.2002 and completed on 10.2.2003. On completion, PW4, who was the Deputy Managing Director of the Plaintiff company, summoned Shaba Reserve Senior Warden to inspect the works and if satisfied issue a certificate. It was in evidence that the said Senior Warden, one Abdi Boru, inspected the works sometimes in February 2003 and having been satisfied, supplied a letter-dated 19.2.2003 – exhibit 2. The letter stated thus: -

“This is to confirm that Wally Trading Company Ltd,

contracted to haul and dump murram, has done so in

accordance with the specifications contained in the contract”

The letter was signed by the Senior Warden Abdi B.Dubah on the Isiolo County Council letterhead and it quoted the contract LPO No.7336. It was given to the plaintiff's Managing Director, Hussein Sharrif Ali, as PW1. PW2 stated further, that on completion of the contract, he moved away to Mombasa before being paid his salaries amounting to Kshs.160,000/=. Later he was paid Kshs.60, 000/= and Kshs.100,000/=still remains unpaid.

Abdikadir Sharif Abdirahman also gave evidence for the plaintiff as PW3. He said that he was a transporter. In the year 2002 he was contracted by the plaintiff to haul and dump murram by the Managing Director of Wally Trading Company ltd. He was to dump the murram along an 8-k.m stretch of road inside the Shaba Reserve. That he started doing the job in December, 2002 and completed the work in February, 2003. He had not been paid by the plaintiff yet on the ground that the company had not also been paid by Isiolo County Council. He had not filed any suit against Wally Trading Co. ltd., because the Managing Director is the witnesses's uncle.

The last witness who gave evidence for the plaintiff was Hussein Shariff Ali,PW1. He was the Managing Director of Wally Trading Co. ltd. When he saw an advertisement at the Isiolo County Council Board, he bid for the plaintiff and when the plaintiff's bid was successful and an L.P.O No.7336 was supplied to the plaintiff, the defendant as well made part payment of Kshs.350,000/= by cheque No.001946 dated 31.1.2003. They then used Mwangaza Hardware to excavate the murram, until the hauling and dumping was completed. The witness said he supervised the works and was satisfied that it had been done to the standards agreed with the council. Thereafter the supervisor of the defendant council inspected the job also and was satisfied of the performance. The supervisor therefore supplied to the plaintiff the certificate of completion dated 19.2.2003, exhibit 2. PW1 further testified that he then invoiced the defendant by invoice dated 7.3.2003 for Kshs.3,490,000/=. But PW1 testified that the defendant failed, neglected or refused to pay. Whereupon a demand letter from the Company's Lawyer – exhibit 4, was served. The defendant by its reply letter dated 27.4.2004 – exhibit 6 showed its unwillingness to settle, questioning the authorization of the contract performance. The dumping of the murram involved 1990 trips and that the plaintiff still owes Mwangaza Kshs.1062000/= which they had demanded by invoice No.1346 and a demand letter dated 5.3.2004 – both exhibit 7. The Plaintiff finally alleged breach of contract for which he sought damages. He also sought costs and interests.

I have carefully considered the evidence. The plaintiff's evidence as given by the three witnesses including the Managing Director is straightforward. PW1 produced an L.P.O issued by the defendant upon the plaintiff's successful bidding. He quoted the cheque number under which the company received part payment of Kshs.350,000/= an admissions of which would be presumed to be adverse to plaintiff's interest unless it was true. He produced a certificate of satisfactory performance written by the defendant on its own letterhead. He produced the defendant's letter denying proper performance of the same. He also produced an invoice and a letter of demand from Mwangaza Hardware which had been subcontracted. The defendant was properly served with summons to enter appearance. It failed to file defence, probably because it recognized the existence of the contract. The evidence from the plaintiff therefore goes unchallenged. The evidence itself is substantive and credible and proves the claim on the balance of probability.

For the above reasons, I am satisfied that the plaintiff is entitled to the unsettled sum of the contract amounting to Kshs.3,490,000/= which I hereby award to the plaintiff with interest at court rate from the date of filing the claim until full settlement. Costs of the same are to the plaintiff as well with interest thereon from the date of judgment.

The plaintiff also claimed general damages for breach of contract. It failed to demonstrate any extra loss or damage incurred as a result of the breach. Mere breach of contract in my understanding do not result into an award of general damages. Such damages have to be proven by evidence. They have not been so proven in this case. The claim for general damages is therefore dismissed.

DATED AND DELIVERED AT MERU THIS 15TH DAY OF SEPTEMBER,2005

D. A. ONYANCHA

JUDGE