

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL CASE NO. 82 OF 2002

ALLIANCE STEELWORKS LTD.....PLAINTIFF

VERSUS

MILLING CORPORATION OF KENYA LTD.....DEFENDANT

JUDGMENT

The Plaintiff, Alliance Steelworks Ltd, entered into a contract to carry out certain installation works at the Defendant's premises. The Plaintiffs were contracted to install degerminator beaters and M118 conveyor, among other works. The contract between the Plaintiff and the Defendant was entered into on the 11th of July 1996. According to the Plaintiff's Complaint, the total sum of the said contract was Kshs 1,225,536/= plus taxes. The Plaintiff averred that it was paid the sum of Kshs 300,000/= which was the initial deposit. It went to the site of the contract at the Defendant's premises and undertook the work and concluded the same as agreed in the contract. The Plaintiff averred that it was not paid the balance of the agreed contract sum. It was compelled to file the suit herein. The Defendant, when served, duly entered appearance and filed a defence. The said Defence basically denied all the averments made by the Plaintiff in its Complaint. Issues were agreed and discovery made.

On the 26th of April 2004 the Counsel for the Plaintiff and the Counsel for the Defendant fixed the hearing of this case by consent for the 4th of October 2004. On the 17th of September 2004, the firm of Omwega Omanwa & Company Advocates who are on record for the Defendant wrote to the Deputy Registrar of this Court, indicating that they would not be ready to proceed with this case on the said date fixed for hearing.

The reasons that the Defendant's counsel gave was that "*Mr Ndubi Advocate who has the conduct of the matter on behalf of the Defendant will not be available on that date due to unavoidable circumstances.*" When this matter came up for hearing before this Court on the 4th of October 2004, Mr Nyamwange who was holding brief for Mr Ndubi, informed the Court that he had instructions to ask for an adjournment on the grounds that parties were negotiating with a view to an out of Court settlement. On his part, Mr Okundi Counsel for the Plaintiff informed the Court that he was ready to proceed with the case as he had two witnesses in Court.

This Court considered the application for adjournment made by the Defendant and ruled that the case proceeds to hearing. The reason for the rejection of the application for adjournment by the Defendant is because the Defendant had not given any acceptable reason why the case should be adjourned. The contradictory reasons given in the letter written to the Court and the submission made to the Court did not help the Defendant's argument in support for an adjournment.

The Plaintiff called two witnesses. Mr Baldev Singh Rajput (PW 1), the General Manager of the Plaintiff, testified that the Plaintiff was instructed by the Defendant to undertake certain installation works at the Defendant's premises at Nakuru. The Plaintiff and the Defendant executed an agreement dated the 11th of July 1996. The total costs of the agreement was to be Kshs 1 225 536/= plus Value Added Tax. The said agreement was produced as Plaintiffs Exhibit No. 1. Out of the said agreed sum, the Defendant paid an initial deposit of Kshs 300,000/= which was paid vide cheque No. 73599 dated the 29th of June 1996. The copy of the cheque was produced as Plaintiff's Exhibit No. 2. PW 1 further stated that the Defendant later gave them an order for additional works. The said additional works costs Kshs 13 960/= plus Value Added Tax. The Plaintiff produced a statement reflecting the initial agreed amount and the additional works as Plaintiff's Exhibit No. 3. The total sum in the said statement was Kshs 1,237,970/=. The additional works were duly invoiced. PW 1 further testified that the Defendant was satisfied with the work done and wrote a letter to the said effect. He produced the letter as Plaintiff's Exhibit No. 5. PW 1

testified that after the work was completed and the Defendant indicating that it was satisfied with the work done, the Defendant failed to pay the balance of the contract sum agreed. To date, the Defendant has failed to pay the said amount for the work done by the Plaintiff. PW 1 testified that, it sent several demand letters to the Defendant be paid by the Defendant in vain. The bundle of letters sent to the Defendant demanding the payment of the sum owing was produced in evidence and marked as Plaintiff's Exhibit No. 6. PW 1 asked the Court to enter Judgment for the Plaintiff as prayed in the Plaint.

Nishhattar Singh (PW 2) testified that he was employed by the Plaintiff as a fitter. It was his testimony that after the contract had been entered between the Plaintiff and the Defendant, he was instructed by the Plaintiff to fit the screw conveyor, the hammer mill and the sieves at the Defendant's factory at Nakuru. PW 2 testified that he undertook the said task to the satisfaction of the Defendant. It was his testimony that he tested the equipment installed in the presence of the Defendant's agent who confirmed that it was in good working order.

I have read the pleadings filed by the parties in this case. I have also considered the evidence adduced on behalf of the Plaintiff by the two witnesses called by the Plaintiff. The issue for determination by this Court is whether the Plaintiff has established, on a balance of probabilities, that it entered into an agreement with the Plaintiff, undertook its part of the agreement and was not paid for the work done. PW 1, the General Manager of the Plaintiff testified that the Plaintiff entered into an agreement with the Defendant on the 11th of July 1996. The said agreement was entered between the Plaintiff and a sister company to the Plaintiff known as Eleven Services Ltd. The said agreement provided that the said works would be carried out by the Plaintiff. The total sum agreed for the said contract was Kshs. 1,255,536/= plus Value Added Tax. The said agreement was produced as Plaintiff's Exhibit No. 1. The Plaintiff paid the Defendant the sum of Kshs. 300,000/= being the initial deposit. The said cheque No. 73599 of Kshs 300,000/= was paid to Alliance Steel Works Ltd (the Plaintiff). Evidence was adduced how the Plaintiff in fulfilment of its part of the agreement installed Degerminator beaters, M118 conveyor, Hammer Mill and sieves to the satisfaction of the Defendant. The said installed equipment was in working order when the Plaintiff left the Defendant's premises after the conclusion of the work. The Plaintiff later undertook extra works at the request of the Defendant.

The Plaintiff then waited in vain to be paid the balance of the contract sum. The Plaintiff sent several letters to the Defendant demanding the payment of the balance of the sum due. The Defendant did not respond to the Plaintiff's demands. The said balance of the contract amount has not been paid to date. Having heard the evidence adduced by the Plaintiff and also having considered the documentary evidence adduced in Court, I am satisfied that the Plaintiff has proved its case on a balance of probabilities. The Plaintiff has proved that it entered into an agreement with the Defendant, undertook its part of the agreement, was paid an initial deposit by the Defendant and then failed to be paid the balance of the agreed sum. I have looked at the Defence filed by the Defendant. The said defence is a mere denial and does not raise any issues, which would make this Court have any doubt of the Plaintiff's case. The Plaintiff's evidence was uncontroverted.

In the premises therefore I do enter judgment for the Plaintiff against the Defendant for the sum of Kshs 1,237,970/40. Interest shall be applied to the said sum at the Court rates of 14% from the date the suit was filed. The Plaintiff shall have the costs of the suit.

DATED at NAKURU this 4th day of October, 2004.

L. KIMARU

AG. JUDGE