



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO.384 OF 1993

KASYI SURVITEX LTD PLAINTIFF

VERSUS

KITALE MUNICIPAL COUNCIL 1ST DEFENDANT

SAPAMO CONSULTANTS 2ND DEFENDANT

JUDGMENT

The Plaintiff claims against the Defendants a sum of Shs.573,400/- plus general damages, interest and costs.

The Defendant has denied the claim and has also filed counter claim in the sum of Shs.1,225,600/-.

The cause of action arises out of contract for work and services, entered between the Plaintiff and the first defendant wherein the 2nd defendant was acting as an agent overseeing the works.

There is no dispute as to the existence of the contract. However I find both parties confused as to what work was agreed to be done and what was the agreed payment.

The first defendant commissioned the plaintiff (upon the advise of second defendant) to carry out survey and subdivision of the Farm known as Plot 8813 Kitale, the intention being to convert the farm into an estate under the World Bank Urban Housing Project. It appears to me that the first defendant did not initially understand in detail what work was involved in the survey project. Apart from the identification of the farm, the subdivisions were to be identified according to the approved plan exhibit 6. I see many small plots and large plots marked for schools and other public facilities several roads are also demarcated. The contract was not contained in one document, but there were many letters exchanged between the parties regarding the execution of the obligations of each party (see the exhibits).

What I can see is that after some years the contract was terminated and the works given to another firm of surveyors. By the time the contract was terminated the Plaintiff says he was not fully paid his fees for the work he had done for which he had submitted fee notes to the Defendants.

On 22/3/1993 the Plaintiff's advocate wrote a demand letter for payment of Shs.573,4000/- set out as follows:-

- a) Balance of fee note No.K0160 amounting to Sh.149,000/-.

The original of this bill exhibit 9, is for "carrying out control survey network for LR.No.8813 containing 4908 subplots at an average of Shs.250/- each being 25% of fees for the smaller plots = Sh.1,227,000 dated 2/9/1987.

b) Unpaid sum on fee note K017 = Sh.287,000/- dated 21/8/1989.

This fee not is for –

“50% per plot on plots 457 @ 600/- = 274,200

6572 metre of road length @ 500/- for over 250m = 13,144

c) Unpaid sum on the fee Note K0246 which

states – fees for approved survey on 457

plots being 25% @1,200/- per plot i.e. 457 x 300

. (See exhibit 13) - = 137,000

The total of the demand is therefore Sh.573,400. At the hearing the Plaintiff's witness admitted having received from the Defendant already Sh.1,078,000/-. This amount covers the initial bill K0160 – 1,227,000/- leaving a balance of Shs.149,000/- unpaid. No evidence is shown by the defendants that the other two bills K0217 and K0246 have been paid.

Defendants have raised a counter claim based on the figures stated in the pleadings as to the number of Plots done which are not admitted. This is not reality. They do not dispute the Fee notes sent nor do they explain for what payments they made. They have simply looked at the pleadings and according to their interpretations come to the conclusion that there was overpayment. In his evidence the Plaintiff's witnesses explained that there was mistake in the preparation of the plaint. And that the correct number of plots he completed were 457. In fact the defendant admitted to have received work on 475 plots although they do not explain how they came to this figure.

The defendants' submission as to the inconsistency of the plaintiff's pleadings has been cured by the evidence which attributes these discrepancies to mistakes. I agree with him and also add that the remedy where provisions of Order 6 rule 6(1) is breached is by application to strike out the offending pleadings.

In the present case the defendants failed to make application to raise the matter at hearing and have only raised the issue in their submissions.

In any case the amount of Plaintiff's claim is not changed. In the circumstances I am of the view that the Plaintiff has proved its case on balance of probabilities. He is entitled to judgment as prayed in the plaint in the sum of Shs.573,400/-. No evidence supporting claim for general damages has been advanced, however in his submissions the counsel for the Plaintiff says the Plaintiff is entitled to general damages “given the inconvenience caused and all factors” This is not proof of damages suffered.

Upon the pleadings and hearing of the evidence of both parties I can say that no definite time had been thought about for the completion of the contract. The Plaintiff offered to execute work within 3 months – see Exhibit of Defence “D1” On 20/4/1987 the Plaintiff was talking of mobilization fees. The Defendants delayed payment causing delay of 6 months. The Defendants were also to supply Government approved plan for the sub-division. This was also delayed.

As I have said there is no evidence on which the court can base an award for general damages and this claim is therefore dismissed.

The upshot is that the count claim is dismissed with costs,. Judgment is entered for Plaintiff in the sum of Shs.573,400/- plus costs and interest at court rates.

Dated at Mombasa this 10th Day of May, 2001.

J. KHAMINWA

COMMISSIONER OF ASSIZE

Read in presence of Mr. Mutisya.

J. KHAMINWA

COMMISSIONER OF ASSIZE