



**Pindoria Holdings Limited v Tyl Limited (Commercial Case 416 of 2015)
[2025] KEHC 861 (KLR) (Commercial and Tax) (4 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 861 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 416 OF 2015
JWW MONG'ARE, J
FEBRUARY 4, 2025**

BETWEEN

PINDORIA HOLDINGS LIMITED PLAINTIFF

AND

TYL LIMITED DEFENDANT

JUDGMENT

1. It is common ground that the parties executed a contract dated 10th May 2010 (“the Contract”) for the construction of a residential premise at the Defendant’s property known as LR. No. 214/626 Muthaiga at a consideration of Kshs.96,214,669.00/=. By a Plaint dated 27th August 2015, the Plaintiff filed this suit against the Defendant claiming that it carried out, completed and maintained the works in accordance with the Contract and to the satisfaction of the Defendant and handed over the premises to it. However, that the Defendant breached the Contract as it defaulted in payment of part of the Contract price certified by the Project Architect and which sums now stand at Kshs.52,629,527.78/ = as at 2nd June 2015 and that the same continues to accrue contractual interest at the rate of 18%. As such, the Plaintiff seeks this sum together with the claimed interest and costs of the suit.
2. In response to the suit, the Defendant filed the statement of defence dated 23rd September 2015. It states that the Plaintiff’s claim has no legal basis as there is no contract between the parties, that the Contract is not legally valid, is unenforceable, baseless, incompetent and misconstrued and that the suit is malicious and filed only with the aim of extorting and harassing the Defendant. As such, the Defendant states that the suit is premature, fatally defective and that the same ought to be dismissed with costs to it.
3. When the matter was set down for hearing, the Plaintiff presented a total of six witnesses. It called its director, Premji Valji Vindoria (PW 1) who relied on his witness statement dated 27th August 2015 and



- produced the Plaintiff's List and Bundle of Documents filed on 31st August 2015 (PExhibit 1) which included the Contract, the Interim Certificate No.20 dated 11th December 2012 and invoice prepared by the Plaintiff, the Statement prepared by the Plaintiff on account of the works performed for and on behalf of the Defendant, the Demand Letter dated 20th July 2015 and Certificate of Postage of the Demand Letter.
4. PW 1 also produced the Supplementary List and Bundle of Documents filed on 26th February 2018 (PExhibit 2) which included the Letter dated 7th September 2011 from Asahi Consulting Limited addressed to Copy Cat Limited, Architect's instruction No.60 dated 8th September 2011, the Agreement dated 8th September 2011 between the Plaintiff and Copy Cat Limited, Statement dated 9th July, 2015 from Copy Cat Limited, Letter dated 8th September 2011 from the Plaintiff addressed to Copy Cat Limited, Interim Certificate No. 18 dated 5th July 2012 issued by Symbion Kenya Limited, Email dated 3rd May 2010 from Symbion Kenya Limited addressed to the Plaintiff, Letter dated 30th April 2010 from Symbion Kenya Limited addressed to the Plaintiff, Letter dated 24th January 2011 from Asahi Consulting Limited addressed to Intersee Technical (K) Limited, Architect's Instruction No. 29 dated 28th January 2011, Certificate of Partial Practical Completion dated 12th January 2011, Minutes of the meeting held on 24th June 2015 by the Plaintiff and subcontractors' representatives and the Project Quantity Surveyor, Architect's instructions No. 41 dated 14th February 2011, Letter dated 9th February, 2011 from Asahi Consulting Limited to Gilfillan Air Conditioning Limited, Architect's Instructions No. 13 dated 20th September 2011, Architect's Instruction No. 25 dated 3rd December 2010 and the Architect's Instruction No. 1 dated 22nd June, 2010.
 5. PExhibit 1 also included the Architect's Instruction No. 28 dated 28th January 2011, Letter dated 24th January 2011 from Asahi Consulting Limited addressed to KK Security Limited, Architect's Instruction No. 59 dated 16th August 2011, Letter dated 15th August 2011 from Asahi Consulting Limited addressed to KK Security Limited, Architect's Instruction No. 52 dated 26th May 2011, Letter dated 20th May 2011 from Asahi Consulting Ltd addressed to Star Electronics Limited, Architect's Instruction No. 46 dated 15th March 2011, Letter dated 4th March 2011 from Asahi Consulting Limited addressed to Computer Technics Limited, Architect's Instruction No. 42 dated 14th February 2011, Letter dated 9th February 2011 from Asahi Consulting Limited addressed to Mantrac (K) Ltd, Contract agreement between the Plaintiff and Jupiter Electrical and General Contractors Limited, Contract agreement between the Plaintiff and Yogi Plumbers Limited, Contract agreement between the Plaintiff and Gilfillan Air Conditioning Ltd, Contract agreed between the Plaintiff and Star Electronics Limited, Contract agreement between the Plaintiff and K.K Security Ltd and the Contract agreement between the Plaintiff and Green Team Innovations Ltd.
 6. The Plaintiff further called Angeline Omenda (PW 2), the Credit Control and Collection Manager at Copy Cat Limited and she relied on her witness statement dated 19th February 2018; Lawrence Gatitu Mbugua (PW 3), a Quantity Surveyor, who relied his witness statement dated 26th March 2019; Job Nyamodi Obiri (PW 4), the Financial Manager with Gilfillan Air Conditioning Ltd who relied his witness statement dated 7th February 2018; Dickson Murage Mumbi (PW 5), the Project Manager of Yogi Plumbers Limited who relied on his witness statement dated 9th February 2018 and; Andrew Wahome Mwaniki (PW 6) an Engineer with Asahi Consulting Limited who relied on his witness statement dated 30th June 2019. On its part the Defendant called one witness; Boniface Nguyo Mwaura (DW 1), its Head of Security and Administration Manager, who relied on his witness statement dated 8th November 2023. In addition to their pleadings and evidence, the parties have also filed written submissions in support of their respective positions and I will make relevant references to the same in my analysis and determination below.



Analysis and Determination:-

7. In making this determination, I am guided by the fact that the standard of proof in civil cases is on a balance of probability and that the burden of proof is on the party alleging the existence of a fact which he wants the Court to believe. This is anchored in section 107 (1) and (2) of the *Evidence Act* (Chapter 80 of the Laws of Kenya) which provides that “whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist” and that “When a person is bound to prove the existence of any fact it is said that he burden of proof lies on that person”. In *Miller .V. Minister Of Pensions 1947 ALL E.R. 372*, Lord Denning aptly summarized the application of the standard in the following terms:-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in criminal cases. If the evidence is such that the tribunal can say: We think it more probable than not; the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

8. The Court of Appeal in *James Muniu Mucheru v National Bank of Kenya Limited [2019] KECA 1058 (KLR)* simply put it that ‘Courts will make a finding based on which party’s version of the story is more believable.’ From the parties’ submissions, I find that the court is being called upon to resolve the following issues:-

- i. Whether the Defendant owes the Plaintiff the sum of Kshs. 52,629,527.78/=.
- ii. Whether the Plaintiff abandoned the works or whether it performed its part of the Contract to completion
- iii. Whether the Defendant is in breach of the Contract by failing or declining to pay the Plaintiff the balance of the Contract sum.

Whether the Defendant owes the Plaintiff the sum of Kshs. 52,629,527.78/=

9. To support its claim for the Kshs.52,629,527.78/=, the Plaintiff produced the Interim Certificate No. 20 and the Statement of Retention (pgs. 44 & 45 of the PExhibit 1) prepared by the Project Architect which indicates that the amount due by the Defendant as the Employer in the Project to the Contractor is Kshs.36,362,269.00/= . The Plaintiff also produced its interest computation on this amount (Pg. 47 of PExhibit 1) which PW 1 stated was at the rate of 18% as this was the prevailing overdraft rate in the year 2015. After computation of interest, the outstanding sum is stated to be Kshs.52,629,527.78/= and the Plaintiff submits that this interest is derived out of Clause 30.1(b) of the Contract which provides that “if a certificate remains unpaid beyond the period for honouring certificates stated herein, the Owner shall pay or allow to the Contractor interest on the unpaid amount for the period it remains unpaid at Commercial Bank Lending Rate in force during the period of default”

10. In its defence, DW 1 stated that the Contractor did not complete the works as it abandoned the site leaving the Defendant to hire casual workers to complete the same. He also stated that the Plaintiff did not issue the Defendant with a Certificate of Completion and as such, the Defendant is not supposed to pay the sums claimed by the Plaintiff. However, he admitted that the aforementioned averments were neither in his witness statement nor in its defence. He further admitted that Symbion Kenya



Limited was the Project Architect and that it directed all aspects of the construction Contract. I agree with the Plaintiff's submission that it is trite that parties are bound by their pleadings as was stated by the Court of Appeal in Independent Electoral and Boundaries Commission & another v Mule & 3 others [2014] KECA 890 (KLR) and that DW 1 could not give evidence on issues neither pleaded in his witness statement nor the Defendant's defence. DW 1's testimony was clearly at variance with the statement of defence and as such, it must be disregarded.

11. In any event, the Defendant did not produce any evidence to demonstrate that the Project works stalled or that the Plaintiff abandoned the site and that the Defendant hired other people to complete the works. PW4, PW5 and PW6 were emphatic and unshaken in their testimonies that the works were done and completed to the satisfaction of the Defendant and that it never complained to the Plaintiff about the works done. PW6 also stated that the Defendant took occupation of the premises and that the Project was handed over to its representative, Mr. JIMI WANJIGI. This handover is also evidenced by the Plaintiff's letter of 23rd February 2015 (pg. 48 of PExhibit 1).
12. The aforementioned evidence was not substantially challenged or rebutted by the Defendant and as such, it is my finding that on a balance of probabilities, the Plaintiff has been able to prove its claim that the Defendant owes it the claimed sum of Kshs. 52,629,527.78/=.

Whether the Plaintiff abandoned the works or whether it performed its part of the Contract to completion

13. As I have stated above, the Defendant never pleaded that the Plaintiff abandoned the works on the Project. In any case, I have found that there was uncontroverted testimony by the Plaintiff's witnesses that the Project was completed to the Defendant's satisfaction and there was no evidence that the Plaintiff ever abandoned the works or failed to complete the works.

Whether the Defendant is in breach of the Contract by failing or declining to pay the Plaintiff the balance of the Contract sum.

14. The Defendant admitted that it did not pay the Plaintiff as per the Interim Certificate presented for the misguided reason that the Project was not completed. The Contract, at Clause 30.1(a) provided that Interim Certificates ought to be paid within 14 days from the date of receipt by the Defendant. This court has always stated that failure to pay Interim Certificates within a reasonable or specified period amounts to a breach of contract (see Abdi Ahmed Abdi Kawir Trading as A. A. Kawir Building Contractors Company alias A. A. Kawir Building Contractors and Civil Engineering Company v County Council of Isiolo [2017] KEHC 6926 (KLR)). It is therefore my finding that the Defendant was in breach of the Contract for not paying the Interim Certificate presented to it within the specified period.

Conclusion and Disposition:-

15. In conclusion, it is my finding that the Plaintiff's has proved its case on the standard of proof required being on a balance of probabilities and enter judgment for the Plaintiff against the Defendant in the following terms:-
 - a. Judgment be and is hereby entered for the Plaintiff against the Defendant for the sum of Kshs. 52,629,527.78/=.
 - b. The Plaintiff is awarded interest on a) above at the rate of 18% from June 27, 2015 until payment in full.
 - c. The Plaintiff is awarded costs of the suit.



DATED, SIGNED AND DELIVERED VIRTUALLY at NAIROBI this 4TH DAY OF FEBRUARY 2025.

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

1. Ms. Maina holding brief for Mr. Osemo for the Defendant.
2. No appearance for the Plaintiff.
3. Godfrey - Court Assistant

