



**Ateco Tank Technology Engineering Company v Prashanth
Projects Limited & another (Commercial Case 117 of 2018)
[2025] KEHC 5642 (KLR) (Commercial and Tax) (5 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 5642 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 117 OF 2018
JWW MONG'ARE, J
MAY 5, 2025**

BETWEEN

ATECO TANK TECHNOLOGY ENGINEERING COMPANY PLAINTIFF

AND

PRASHANTH PROJECTS LIMITED 1ST DEFENDANT

KENYA PIPELINE COMPANY LIMITED 2ND DEFENDANT

JUDGMENT

Introduction and Background

1. The facts giving rise to the present suit are common ground and straightforward. On or about the 23rd September 2014, the 1st and 2nd Defendants (“Prashanth” and “KPC”) entered into a contract agreement for the ‘Construction of Additional White Oils Storage Tanks and Accessories at Pump Station 10- Nairobi Terminal.’
2. Prashanth then subcontracted the Plaintiff (ATECO), a company incorporated in the Republic of Turkey, to supply it with four (4) Aluminum Dome Roofs and two (2) Aluminum Internal Floating Roofs (IFR), together with their associated structures and accessories, for a total cost of USD 700,000. This subcontract was governed by the Purchase/Work Order dated 18th February 2016 (“the Purchase Order”) which provided inter alia timeous that the Design and engineering was to be done within one week of the Purchase Order, two domes part shipment to be delivered within 4 weeks of approval of design and payment of advance and the balance of the 2 domes and IFR within 7 weeks of approval of the design.



3. The Purchase Order also provided that payments to ATECO were to be as follows; 25% (USD 175,000) advance upon approval of design against a bank guarantee and 75% (USD 525,000) upon completion of inspection before delivery. After the design was approved, Ateco provided a Bank Guarantee dated 19th April 2016 from ING Bank in favour of Prashanth for the advance payment of USD 175,000 to be made by Prashanth (“the Guarantee”).
4. The Guarantee provided that the Bank was to refund the advance payment upon the Bank’s receipt of a written demand and request for payment of the refund stating that Ateco has been in breach of its obligations under the Purchase Order. On or about 29th May 2017, Prashanth called in the Guarantee as it claimed that Ateco was in breach of its obligations under the Purchase Order.
5. This action by Prashanth precipitated the filing of this suit through the Plaint dated 23rd March 2018 as Ateco claims that it fulfilled its obligation by completing and delivering all the subject project materials but that Prashanth proceeded to fraudulently collect the Guarantee and refused or neglected to settle the balance of the project costs due and owing of USD 205,000 including supervision costs of USD 30,000. That Prashanth illegally and unlawfully collected the Guarantee despite being a contributor to the delay and despite clause 2 of the Purchase Order providing for a late delivery penalty of up to 5% of the total order value and that the Defendants both continue to enjoy continued use of the subject project materials to the detriment of Ateco.
6. Ateco further accuses the Defendants of making illegal profits by way of unjust enrichment and by making fraudulent increase in the costs owed by ATECO by inflating the invoice from USD 700,000 to USD 814,800 and still declining to pay the outstanding amount due to Ateco. Ateco thus contends that these actions amount to a breach of the Purchase Order and the terms of the Guarantee and as such seeks General damages, Special damages of USD 235,000.00, a Refund of USD 175,000 being the sum collected out of the Guarantee, Interest and Costs of the suit.
7. In response to the suit, the Defendants filed the statements of defence dated 17th April 2018 and 14th May 2018 respectively. They state that the Guarantee was valid until 17th June 2016 but was subsequently extended in favour of PrashantH and 4 weeks from the date of payment of the advance of USD 175,000.00 to the Ateco ended on or about 26th May 2016. That as at that date, Ateco had not supplied the 2 domes as set out in the Purchase Order as supplied the same on or about 23rd December, 2016, long after the period of 4 weeks after the approval of the designs. The Defendants urge that this was clearly in breach of the terms of the Purchase Order and that besides supplying the 2 domes very late, the said domes did not contain the critical node plates required for commencing the installation of the domes and ATECO refused and/or neglected to supply the missing domes therefore rendering the domes of no use.
8. The Defendants further complain that the second batch of the 2 more domes was delivered on or about 25th February 2017 again in breach of the timelines set by the parties and in addition to the lateness in the delivery, the domes were again incomplete. The Defendants state that Ateco did not provide 2 IFRs within 7 weeks of approval of design as agreed and that following this failure by ATECO to rectify the problems, Prashanth procured the manufacture and/or fabrication of the missing and/or misfitting components from 3rd parties to enable it complete the project without undue delay. That it called in the Guarantee on 29th May 2017 as a last resort to mitigate the failure by Ateco to carry out its part of the agreement. The Defendants thus urge the court to dismiss the suit against them.
9. When the matter was set down for hearing, ATECO presented its Commercial Manager, ARDA YILDIZEL as witness (PW 1). He relied on his witness statement dated 23rd February 2018 and produced the bundle of documents of the same date (PEXhibit 1-16). The documents include a copies



of the demand letter dated 11th December 2017, Purchase Order, Bills of Lading, Guarantee, Bank Transfer Form, Invoices dated 27th April 2016, 14th December 2016 and 5th January 2017; letters dated 13th June 2017 and 21st August 2017, certificate of dispatch of materials dated 24th November 2016 by KPC, invoice dated 14th November 2016 from Prashanth and email correspondences.

10. On their part, Prashanth called its General Manager, Santhanam Ayyappan who relied on his witness statement dated 31st July 2023 and produced the Bundle of Documents dated 16th March 2019 (DEXhibit 1-8). The documents include the Letter dated 16th March 2016 from KPC to PRASHANTH, RTGS remittance slips dated 29th April 2016 and 29th May 2017, email correspondences between PRASHANTH and Ateco dated 30th January 2017, 28th April 2017, 4th May 2017 and 24th May 2017, summary of expenses and a letter dated 8th December 2017 from Prashanth to KPC. KPC called its Senior Engineer, in charge of Infrastructure, Coast, Benson MUANGE (DW 2) who relied on his witness statement dated 29th March 2019 and produced KPC's Bundle of Documents dated 4th April 2019 (DW 2 Exhibit 1&2). The documents include the Contract between PRASHANTH and KPC and Certificates of payment dated 23rd June 2016 and 20th January 2017.
11. In addition to their pleadings and evidence, the parties have also filed written submissions in support of their respective positions which I have considered and I will make relevant references to the same in my analysis and determination below.

Analysis and Determination

12. 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 is 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.”
13. 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 ATECO’s submissions, it urges the court to resolve the following issues:-
 - i. Whether the Defendants are in breach of the Purchase Order.
 - ii. Whether Prashanth fraudulently collected the Guarantee.
 - iii. Whether the Defendants are liable to pay the Plaintiff USD 410,000, being the balance due under the Purchase Order, inclusive of supervision costs as well as accrued interest from 2016 until the date of settlement.



- iv. Whether the Plaintiff is entitled to general damages and costs.

Whether the Defendants are in breach of the Purchase Order

14. Ateco states that the Defendants have failed to make the remaining payment of USD 205,000, USD 30,000 in supervision costs and fraudulently collected the deposit paid of USD 175,000. It avers that while the deliveries were delayed, they were completed as soon as reasonably possible, furthermore, they communicated to Prashanth about the challenges that led to the delay. Further, that PRASHANTH received the domes and used them to complete the project, which estops them from claiming breach on the part of the Plaintiff.
15. Going through the evidence, I note that in the email of 4th May 2017 at 9.42 am, DW 1 complains that “...the material supplied are short though you have been paid for the entire dome supply amount”. On the same day at 2.41 pm, a representative of Prashanth also complains that “...you did not send the entire materials though you were paid....”. In another email dated 24th May 2017 at 12.38 pm from DW 1 to Ateco, further complains that “... despite having received the complete payment for the dome roof, you have failed to supply the material in conformity with the purchase order. In Prashanth’s letter dated 8th December 2017 to KPC, it states that “...the said M/s Ateco Tank Technologies have been paid in full for the value of the order placed on them”. In an email of 30th January 2017, Prashanth states that “We have given numerous opportunities to you to complete the dome roof erection to no avail. In the event we do not receive an immediate reply and action from your end we will be deploying others to get the work done at your risk and cost.”
16. Ateco did not challenge the contentions in the aforesaid correspondences that they had been paid full value for the domes supplied, that the domes supplied were not as per the Purchase Order, that the same were supplied outside of the timelines stipulated in the Purchase Order and that PRASHANTH sought the involvement of third parties to complete the delivery under the Purchase Order. I am in agreement with Prashanth’s submission that there is no evidence of its inaction that contributed to the delay in the supply. As Ateco did not dispute that it had received full value for the domes delivered, I find that the Defendants do not owe it any money as claimed by ATECO and they cannot be stated to have been in breach for reasons of a balance accruing from the supply.
17. Ateco also admitted that the domes were supplied outside the stipulated timelines and it did not deny that the same were not in conformity with the delivery items set out in the Purchase Order. This was an obvious breach of the Purchase Order that entitled PRASHANTH to call in the Guarantee. Therefore, it cannot also be stated that Prashanth fraudulently called in the Guarantee when Ateco was clearly and admittedly in breach of the Purchase Order.
18. It is thus my finding that the Defendants were not in breach of the Purchase Order, they did not fraudulently call in the Guarantee and therefore Ateco is not entitled to USD 410,000 as there is no balance due under the Purchase Order and consequently, it is not entitled to any general damages, interest or costs. Ateco’s suit collapses at this point.

Conclusion and Disposition

19. In the upshot, the Plaintiff’s suit is dismissed with costs to the Defendants. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 5TH DAY OF MAY 2025

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J.W.W. MONG’ARE



JUDGE

In the Presence of:-

Ms. Yieke holding brief for Mr. Mogire for the Plaintiff.

Ms. Chihaavi holding brief for Ms. Oele for the 1st Defendant.

Mr. Muiyuri for the 2nd Defendant.

Amos - Court Assistant

