Reel Building & Construction Engineers v Ainushamsi Energy Limited (Civil Suit E084 of 2021) [2024] KEHC 16898 (KLR) (7 February 2024) (Judgment)

Neutral citation: [2024] KEHC 16898 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT E084 OF 2021

F WANGARI, J

FEBRUARY 7, 2024

BETWEEN

REEL BUILDING & CONSTRUCTION ENGINEERS ..... PLAINTIFF

AND

AINUSHAMSI ENERGY LIMITED ..... DEFENDANT

JUDGMENT

1. Through a plaint dated 30th August, 2021 and filed on 31st August, 2021, the Plaintiff sought for judgement against the Defendant for the following reliefs:
    a. Kshs. 17,630,488/= plus accrued penalties and interests;
    b. Kshs. 1,700,818 being the amount unlawfully deducted;
    c. Kshs. 95,285,156.61 for loss of business from 2017 to date;
    d. Interest on (a), (b) and (c) above at court rates from the date of filing till payment in full;
    e. Costs of the suit.
2. In addition to the plaint, the Plaintiff filed its list of witnesses, witness statements, list of documents, copies thereof and its list of agreed issues. Upon service of the pleadings on the Defendant, it entered appearance and filed its statement of defence dated 21st September, 2021 on 22nd September, 2021. However, it chose not to file any other document but opted to rely on the statement of defence.

Plaintiff's Pleadings

3. In its plaint, the Plaintiff averred that in October, 2014, it was contracted by the Defendant to construct a filling station within Mariakani Township. The initial contract sum was Kshs. 31,695,745/= but due to changes proposed by the Defendant, the contract sum raised to Kshs. 56,693,933/=. This sum

was paid at intervals until it was fully settled. The work was successfully undertaken and though full payment was made to the Plaintiff, Value Added Tax (VAT) which though reflected in all certificates was never paid.

4. On 13/4/2016, it is alleged that the Defendant deducted a sum of Kshs. 1,700,818/= from the Plaintiff's retention sum without it being notified and the same was remitted to Kenya Revenue Authority (KRA) as withholding tax. Based on this act, the Plaintiff averred that KRA issued it with a demand notice for Kshs. 9,071,029 on 7/3/2018 and the said sum had grown to Kshs. 12,255,890/= by the time it filed suit. It was averred the sum continues to attract penalties and interests. According to the Plaintiff, KRA deemed it to have received Kshs. 56,693,933/= inclusive of VAT but did not remit the same. In addition to the Plaintiff, its directors also received demands of Kshs. 2,687,299/= each and the same continues to attract penalties and interests.

5. The Plaintiff stated that despite having issued the Defendant completion certificates for each of the completed works inclusive of VAT, the Defendant refused to pay the same. Due to the penalty, it has been unable to obtain Tax Compliance Certificates since 2017 to date resulting in loss of income and business opportunities. The Plaintiff stated that it had been forced out of business since the year 2017 thus hampering its growth which was at a steady rise at the time the KRA issue arose. It thus demanded to recover the particularized claims from the Defendant.

Defendant's Pleadings

6. In its statement of defence, the Defendant admitted the existence of the contract as well as the contract sum including the variation. It equally admitted that the work was successfully done. On the issue of VAT, the Defendant indicated that it was a term or condition of the contract that the total sum payable to the Plaintiff was inclusive of working capital, labour, taxes including VAT and profit. The deduction of Kshs. 1,700,818/= was admitted save that its act of paying the amount to KRA as withholding tax was in compliance with the law which obligation the Plaintiff was well aware.

7. On VAT, the Defendant averred that it was the Plaintiff's legal obligation to pay all its taxes including VAT for the contractual sum it received from the Defendant and thus it ought to have paid the same to KRA or take the issue of payment of the said VAT with the relevant entity and not the Defendant. It was further averred that each payment made by the Defendant to the Plaintiff in respect of the contract was inclusive of all taxes including VAT. It was thus contended that the repercussions experienced by the Plaintiff for failure to pay VAT to KRA was of Plaintiff's own making and in no way occasioned by the Defendant.

8. Lastly, it was averred that the Defendant had always reminded the Plaintiff that it is not responsible for the Plaintiff's failure to pay VAT to KRA either under the contract or by operation of the law and thus the responsibility lay squarely on the Plaintiff. The Defendant thus prayed for the dismissal of the suit with costs. The Plaintiff upon being served with the statement of defence filed its reply to defence dated 14th October, 2021 on 21st October, 2021. It reiterated its averments in the plaint and prayed that judgement be entered as prayed and that the Defendant's defence be dismissed. The matter having gone through the requisite motions, it was certified ready for hearing.

Summary of the Evidence

9. One witness testified in support of the Plaintiff's case. PW1, Zablon Otieno Owino, the Plaintiff's director herein adopted his witness statement and produced documents in a bundle. He confirmed that though the contract was varied, both the initial and the new one did not factor VAT. He confirmed

that the Plaintiff was a registered person under the Value Added Tax. Since he had his adopted his detailed statement and produced documents in a bundle, the witness was put to cross examination.

10. On cross examination, he stated that he had been in the construction industry for over 25 years and was one of the Plaintiff's directors. He stated that the only issue was that of VAT. He confirmed that the Plaintiff was a registered VAT agent and as such, the Plaintiff was mandated to collect VAT on behalf of KRA. He denied that the Plaintiff failed to pay VAT but that the Plaintiff was only to pay after collecting from the client in this case the Defendant. He confirmed that the Plaintiff billed the Defendant. He referred to several certificates to buttress the issue. On the handwritten parts, he denied that he was the one who wrote them. He confirmed that the Plaintiff's dispute was not about the contract sum but rather the VAT aspect.

11. He averred that the contract was executed in 2014 and that the Plaintiff had been tax compliant until after 2016 when it started having problems with KRA. He reiterated that if the Plaintiff was not compliant for the years preceding 2016, it would not have obtained Tax Compliance Certificates. When referred to the contract, he confirmed that the same was no signed.

12. On re-examination, he stated that the contract filed was not complete since it did not include the extra works done. He added that the fully executed contract was with the Defendant. He confirmed that the Plaintiff had been tax compliant and that prior to 2016, it had no issues with KRA. The witness stated that after the Defendant refused to pay VAT, it requested for Electronic Tax Receipts (ETR) which he generated and provided the Defendant. He reiterated that the Defendant did not provide for VAT and the Plaintiff's suit was only about VAT since they paid for withholding tax. He confirmed that KRA suspended the Plaintiff's personal identification number (PIN). That marked the close of the Plaintiff's case.

13. Considering that the defence did not comply by filing witness statements and documents to support its defence, its case was also closed. Parties opted to file written submissions.

Plaintiff's Submissions

14. They are dated 14th July, 2023. The Plaintiff identified five issues for determination as set out below: -

    a. Whether the payment to the Plaintiff for the work done was inclusive of Value Added Tax (VAT);

    b. Whether the Defendant was obligated to pay the Plaintiff VAT upon generation of ETR receipts;

    c. Whether the Plaintiff is entitled to recover the sums pleaded from the Defendant;

    d. What is the effect of defence case being closed without the Defendant tendering any evidence?

    e. What is the order as to costs?

15. The Plaintiff argued the first two issues together. It was submitted that there was no dispute as relates the existence of a contract and the contract sum. The only dispute was whether the contract sum had a VAT aspect and the effect of the Defendant withholding tax. The Plaintiff conceded that no validly executed contract was availed but at pages 43 to 46 of its documents, there was the initial unexecuted contract for Kshs. 31,695,745/= which was later varied to Kshs. 56,693,933/=.

16. The Plaintiff through PW1 gave evidence that where there is a variation of contract exceeding 15% of the initial contract, a new contract has to be executed. Reference was made to an email between one Charles Jaoko and PW1 at page 42. The Plaintiff further submitted that it did as per the email but their

copy was never returned. However, considering that the existence of the contract was not denied, it was the Plaintiff's view that its evidence was uncontroverted.

17. Submitting on VAT, the Plaintiff confirmed that it was a registered person as per section 5 of the *Value Added Tax Act*. VAT registration certification showing that it had been registered on 7/8/2008 was produced. As a registered person, the Plaintiff submitted that it was its duty to collect VAT from the Defendant in addition to the contract sum.

18. Sections 2, 5 (4) and the first schedule of the VAT Act were cited in support. As to who was to prepare the interim certificates, the Plaintiff referred to page 46 of its exhibits to show that it was Charles Jaoko who appeared at page 42. The Plaintiff concluded that having been the Defendant's representative, he was aware of VAT aspect and as a way of illustration, pages 3, 6 and 7 of the Plaintiff's exhibits were referred to.

19. Making reference to the cross examination of PW1 in respect to the handwritten entries in the certificates, the Plaintiff submitted that the witness was categorical that it was Jaoko who made the handwritten entries. It contended that if there was any dispute, the said Jaoko should have been called to rebut that position and since that was not done, PW1's testimony could not be impeached. The Plaintiff submitted that at one point in time, the Defendant insisted that it generates an ETR receipt to justify the VAT payment. Though it did submit an ETR receipt, the Defendant refused to pay. Pages 10, 13 and 16 of the Plaintiff's exhibits were referred to.

20. Making reference to page 17 of its exhibits, the Plaintiff submitted that it was wrong for the Defendant to withhold tax yet it had not paid any VAT. The Plaintiff referred to section 36 of the *Income Tax Act* to buttress its position on how withholding tax is done. Citing section 36 (3) (A) of the *Income Tax Act*, the Plaintiff submitted that for one to withhold tax, it must have been appointed in writing by the Commissioner. Accordingly, there was no evidence that the Defendant had been appointed as such.

21. The Plaintiff further submitted that the *Income Tax Act* could not be read in isolation. It was submitted that the Act ought to be read alongside *Value Added Tax Act* since the responsibility to collect VAT was on the registered person who in this case was the Plaintiff. Having not paid VAT, there was no basis for the Defendant to withhold tax. Referring to a letter dated 31st August, 2017, the Plaintiff submitted that the issue of VAT had been taken up with the Defendant and that the Defendant was to shoulder all the statutory obligations arising from the contract.

22. The Plaintiff opined that its problems with the taxman emanated from the Defendant's actions to withhold tax it had not paid VAT. The Plaintiff submitted that as a result of the Defendant's actions, it could not be issued with Tax Compliance Certificates for the subsequent years and, therefore it could not secure any work without the Tax Compliance Certificate.

23. The Plaintiff then went on to submit on the various claims it made and sought to justify the figures. The case of Capital Fish Ltd v Kenya Power & Lighting Company [2016] eKLR was cited in support of special damages. It was submitted that loss of business is a special damage claim and as such, it required to be specifically pleaded and strictly proved. The Plaintiff contended that it had specifically pleaded loss of business at paragraphs 12 and 13 of its plaint.

24. To demonstrate that it was in business prior to the KRA issue, the Plaintiff produced offer letters for works awarded to it. On proof of loss of business, page 39 of the exhibits was referred to. The Plaintiff submitted that since the document was produced by consent, the amount pleaded was thus strictly proved.

25. On the fourth issue, the Plaintiff submitted that though the Defendant filed a statement of defence, it neither called any witness or produce any documents to support its defence. As such, it was the

Plaintiff's position that its case was uncontroverted. The case of Phelista Mukamu Makau v Elizabeth Kanini Mulumbi [2015] eKLR wherein the case of Janet Kaphiphe Ouma & Another v Marie Stopes International (Kenya), HCC No. 68 of 2007 was quoted, was cited in support of the Plaintiff's submissions. The Plaintiff urged the court to deem the statement of defence dated 21/9/2021 and filed on 22/9/2021 as mere allegations and in particular, paragraph 9 thereof.

26. Lastly on costs, the Plaintiff submitted that it had issued a demand notice before action and as such, it was entitled to costs as per section 27 of the *Civil Procedure Act*.

27. As noted elsewhere in this judgement, despite having sought for time to file its submissions, the Defendant chose not to comply and as such, there are no defence submissions on record.

Analysis and Determination

28. I have carefully considered the pleadings, the evidence tendered by the Plaintiff, the Plaintiff's submissions together with the authorities cited in support of the claim as well as the law and in my view, the following are the issues for determination: -

    a. Whether the Plaintiff proved its case to the required standards;

    b. If the answer to (a) above is in the affirmative, whether the claims under the various heads were justified;

    c. What are the consequences of failure to call witnesses?

    d. What is the order as to costs?

29. At the onset, the following issues are not in dispute:

    i. The Plaintiff entered into a contract with the Defendant for the construction of a filling station;

    ii. The work was done and duly completed to the Defendant's satisfaction; and that

    iii. The revised contract sum was paid;

30. The only point of divergence is whether Value Added Tax ought to have been paid to the Plaintiff in addition to the contract sum. To justify this position, the Plaintiff led evidence to the effect that it was a going concern until the Defendant remitted a sum of Kshs. 1,700,818/= as withholding tax to Kenya Revenue Authority.

31. Its contention was that immediately thereafter, KRA rejected its application for 2017 Tax Compliance Certificate. It was thereafter served with a letter dated 13/2/2018 wherein KRA informed the Plaintiff that it had business transaction payments made by the Defendant amounting to Kshs. 56,693,933/= which showed inconsistencies in the system. The Plaintiff was thus invited to furnish evidence that the said amounts were declared and taxes paid.

32. This was followed by default assessment notices upon the directors dated 5/3/2018 and tax arrears notice against the Plaintiff dated 7/3/2018. It is a principle of law that whoever lays a claim before the court against another has the burden to prove it. Sections 107 and 108 of the *Evidence Act* provide as follows: -

    107 (1) 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.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

33. Halbury's Laws of England, 4th Edition, Volume 17 at paragraphs *13* and *14* describes it as follows: -

> " ...The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.
>
> The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence..."

34. Therefore, it was the Plaintiff's duty to prove that the Defendant was required to pay VAT in addition to the contract sum. In this case, the Plaintiff lays blame on the Defendant for remitting withholding tax. In Kenya Revenue Authority v Republic (Exparte Fintel Ltd) [2019] eKLR, the Court of Appeal addressed itself on the issue of withholding tax and observed as follows: -

> " ...Needless to say, withholding tax is where the tax payer of certain incomes is responsible for deducting tax at source from payments made and remitting the deducted tax to the revenue body, in our case, the appellant..."

35. The operative statutory provisions in this regard are sections 10 and 35 of the *Income Tax Act*, Cap 470, Laws of Kenya. Section 35 (3) provides as follows:

> " Subject to subsection 3A, a person shall upon payment of an amount to a person resident or having a permanent establishment in Kenya in respect of: -
>
> a. ....
>
> b. ...
>
> c. ...
>
> d. ...
>
> e. ...
>
> f. Management or professional fee or training fee, the aggregate value of which is twenty – four thousand shillings or more in a month..."

36. The Act defines management or professional fee to mean payment for work done in respect of building, civil or engineering works. As per paragraph 3 of the plaint dated 30th August, 2021, there is no doubt that the work carried out by the Plaintiff fell into this category as indeed confirmed by the Plaintiff in its submissions. Did the Defendant commit any mistake in withholding the sum of Kshs. 1,700,818/= and remitting it to KRA? From a technical point of view, there was no error in doing so as this was in compliance with paragraph 5 of the Third Schedule of the *Income Tax Act* which sets out withholding tax rates as follows: -

    i. ....

    ii. In respect of contractual fee the aggregate value of which is twenty – four thousand shillings in a month or more, three percent of the gross amount payable.

37. A simple calculation of 3% of Kshs. 56,693,933/= gives a sum of Kshs. 1,700,817.99/= which when rounded off is Kshs. 1,700,818/= as withheld by the Defendant. To this end, the court finds no wrongdoing on the Defendant's end. However, as can be discerned from the certificates produced by the Plaintiff, each certificate was being paid for as and when it was raised. Each payment constituted a separate transaction and as defined by the Court of Appeal in Kenya Revenue Authority v Republic (Ex Parte Fintel) (above), the tax withheld ought to have been deducted from the Plaintiff on presentation of each certificate "upon payment."

38. Had this been done upon the presentation of the first certificate, the Plaintiff would have been notified of the deduction and perhaps the contract could have been renegotiated to factor in the deductions. I say so because if the Plaintiff was aware that the contract it entered into had deductions in the form of withholding tax, I doubt if it could have accepted to do the works with the figure of Kshs. 56,693,933/=. Similarly, when it signed the revised contract of Kshs. 56,693,933/=, there was no expectation from the Plaintiff that it would receive a figure less than what it had contracted for.

39. It is thus the court's view that though statutorily done, the Defendant's conduct of waiting until the work was done to withhold tax was not done in good faith. It had made staggered payments based on various certificates presented and as such, a consolidated payment at the end of the transaction when it was obvious that the Plaintiff had not received a lump sum was clearly not what the parties had envisaged at the beginning of their relationship. Perhaps this explains the tone manifested in the letter dated 30th August, 2017. From the letter, the agreement the parties had was one of non-disclosure of each other's information.

40. Though no contract was produced in court, there was no contest that indeed there was a contract. The Plaintiff made reference to an email at page 42 of its documents and this court has no reason to doubt that indeed, a contract was executed and the Defendant was to avail a copy of the same to the Plaintiff upon execution. PW1 led evidence that a copy of the duly executed contract was not availed to it and since this was not controverted, this court is prepared to accept the Plaintiff's testimony on this aspect.

41. Having found as above, the Defendant having withheld tax and remitted it to KRA, it led to an automatic demand of Kshs. 9,071,029 under the head of Value Added Tax (VAT). This is evidenced at page 30 of the Plaintiff's exhibits. In this case, KRA deemed the Plaintiff to have received a sum of Kshs. 56,693,933/=, failed to declare the same and never paid taxes as well. As a registered person under the *Value Added Tax Act*, it was the Plaintiff's duty to collect VAT.

42. In its response to the Plaintiff's demand letter dated 17th February, 2021, the Defendant through an email dated 23rd February, 2021 indicated that the Plaintiff was not registered for VAT and thus there

was no basis for it to charge for VAT for the construction work. This is exhibited at page 36 of the Plaintiff's exhibits.

43. Was the Plaintiff a registered person? The answer lies at pages 2 and 31 of the Plaintiff's exhibits. At page 2, there is a letter dated 7/8/2008 whose contents read in part as follows: -

> " Following receipt of your application for registration, we are pleased to inform you that you have been registered under the VAT Act, Cap 476, Laws of Kenya. You should start charging and collecting VAT as soon as you receive this Certificate..."

44. At page 32, under VAT, the certificate clearly confirms that the Plaintiff's VAT obligations became effective on 6/12/2008. As per its mandate, the Plaintiff was statutorily required to charge and collect VAT. Interim payment certificate 1 at page 3 of the exhibits discloses that in addition to Kshs. 5,506,430/=, the Plaintiff had factored a further sum of Kshs. 881,020.80/= as VAT.

45. At page 7, there are workings showing a deduction of a sum of Kshs. 1,203,735.71 and the amount without VAT was thus shown as Kshs. 7,523,348.17/=. On cross examination of who the author of the handwritten workings was, PW1 stated that it was Charles Jaoko who was the project manager (see page 46).

46. At page 9, there is a table showing value of work done and the VAT charged which totaled Kshs. 12,143,370.42. An ETR receipt accompanied this document. From PW1's testimony, despite having been asked to supply an ETR receipt to justify the VAT demand, and having so supplied, the sum was never paid. To demonstrate that it was not paid, PW1 referred to letters dated 16th October, 2015 and 29th February, 2016 (page 13 and 16). At the bottom of the two (2) letters, there was a caption "Pending VAT Etr certificate No. 5 amounting to Kshs. 1,674,946.54/=" Being a registered person, it was the Plaintiff's duty to charge and collect VAT.

47. Section 2 of the Value Added Tax defines a registered person as someone registered under section 34 of the Act. These are persons who have made taxable supplies or expect to make taxable supplies of more than Kshs. 5,000,000/= or more in a period of twelve (12) months. The Plaintiff demonstrated that it was a registered person and was thus obligated to charge and collect VAT.

48. The same section 2 defines taxable supply to mean supply other than exempt supply made in Kenya by a person in the course or furtherance of a business carried on by the person, including supply made in connection with the commencement or termination of a business. Section 5 (3) and (4) thereof provides as follows: -

> (3) Tax on a taxable supply shall be a liability of the registered person making the supply and subject to the provisions of this Act relating to accounting and payment, shall become due at the time of supply.
>
> (4) The amount of tax payable on taxable supply, if any, shall be recoverable by the registered person from receiver of the supply, in addition to the consideration. (Emphasis added)

49. Clearly, if indeed the Plaintiff was to pay VAT, it ought to, in addition to the sum of Kshs. 56,693,933/= to levy a further sum of Kshs. 9,071,029/= upon the Defendant. Had the Defendant complied by paying VAT, it would have saved the Plaintiff from the agony it has been undergoing. KRA only came to the fore upon the Defendant withholding and remitting tax. To this end, the court finds that the Defendant's withholding and remitting tax to KRA was the proximate cause of the Plaintiff's predicament. The standard adopted in civil cases is that of a balance of probabilities.

50. In William Kabogo Gitau v George Thuo & 2 Others [2010] 1 KLR 526, Kimaru, J (as he then was) observed as follows: -

> " ...In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred..."

51. Later on in Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another [2015] eKLR, the Court of Appeal quoted with approval Denning, J's sentiments in Miller v Minister of Pensions [1947] 2 ALL ER 372 on burden of proof where he held as follows: -

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

52. Having reviewed the pleadings as well as the evidence tendered, this court comes to the conclusion that the Plaintiff has proved its case to the required standard.

53. I now turn to consider the claims by the Plaintiff under the various heads. Under the first category, the Plaintiff sought for a sum of Kshs. 17,630,488/= plus accrued penalties and interests. These sums are pleaded at paragraphs 8, 10 and 14 of the plaint. As for Kshs. 12,255,890/=, the Plaintiff indicated that this was a demand against it as of 11th June, 2019. Was this sum proved? At page 33 of its exhibits, the Plaintiff produced a letter dated 11th June, 2019 wherein KRA made the specific demand of tax arrears. As for the sum of Kshs. 2,687,299/= levied against each of the two (2) directors, the Plaintiff produced default assessments dated 5th March, 2018 as well as a further letter dated 22nd February, 2019 (pages 26 to 29, 31). Sum total of the Plaintiff's and directors' demands comes to Kshs. 17,630,488/=.

54. The Plaintiff also sought for accrued penalties and interests. Under section 29 of the *Tax Procedures Act*, the law empowers the Commissioner General to make an assessment (referred to as default assessment) on a taxpayer who has failed to submit a tax return for a reporting period. Section 29 (2) recognizes late submission penalty and late payment penalty. Additionally, late payment interest. Section 29 (3) recognizes that an assessment under this section does not alter the due or original date when the tax was due. In the circumstances, the court finds that the sum of Kshs. 17,630,488/= is merited and that the figure shall be computed taking into account any accrued penalty and interest.

55. The next amount pleaded is Kshs. 1,700,818/= under the head of amount unlawfully deducted. The pleadings confirm that the contract sum was Kshs. 56,693,933. This was the amount the Plaintiff anticipated to receive in total at the conclusion of the work. However, the Defendant utilized part of this amount as withheld tax which it proceeded to remit to KRA. It therefore follows that the Plaintiff did not receive the entire contract sum. Indeed, the Defendant admitted to utilizing this amount at paragraph 7 of its statement of defence.

56. According to PW1, this sum had been retained by the Defendant as the retention (moiety) sum which was to be utilized to correct any defects at the conclusion of the work. The amount, according to PW1, is 10% of the contract sum. The Plaintiff having corrected all the defects within the first six (6) months' period, it was entitled to the full retention sum but according to PW1, the retention sum was remitted to it less Kshs. 1,700,818/= which the Defendant had utilized as withheld tax. It thus means the Plaintiff got a figure less than it had bargained for and I thus find the claim under this head well founded.

57. The next claim was a claim of Kshs. 95,285,156.61/= under the head of loss of business from the year 2017 to date. Loss of business and/or loss of earnings is a special damage claim. In Douglas Kalafa Ombeva v David Ngama [2013] eKLR, the Court of Appeal held as follows: -

> "...Loss of earnings is a special damage claim, and it is trite law that special damages must be pleaded and proved. Where there is no evidence regarding special damages, the court will not act in a vacuum or whimsically..."

58. To succeed on this claim, the Plaintiff was required to plead this amount specifically and strictly prove it. A review of the plaint dated 30th August, 2021 reveals that loss of income and business opportunities was pleaded at paragraphs *12* and *13* and the specific figure pleaded at paragraph *14*. The court is thus satisfied on the first limb. Was this figure proved? The Plaintiff led evidence in the form of tenders it had been awarded by various entities prior to the KRA issue and this evidence is contained at pages 40 to 71 of the Plaintiff's documents which were produced as exhibits.

59. The totality of the tenders confirms that the Plaintiff was a going concern prior to its tax predicament. As how the figure was arrived at, page 39 of the Plaintiff's exhibits is a summary of the projects the Plaintiff had undertaken between the years 2010 and 2015. PW1 gave a detailed explanation of how the figure claimed was arrived at.

60. As was held by the Court of Appeal in Nkuene Dairy Farmers Co-op Society & Another v Ngacha Ndeiya [2010] eKLR, the Defendant having not questioned the figures at page 39 of the Plaintiff's exhibits, it must be taken to have accepted the figures as representing the correct earnings of the Plaintiff. However, the court notes that the amount sought did not factor in the tax element which as per paragraph 1 of the Third Schedule to the *Income Tax Act*, the rate is 30% for any amount above Kshs. 388,000/=. The amount so pleaded shall thus be discounted by 30%. This leaves a figure of Kshs. 66,699,609.63/= as the loss of business.

61. On the third issue, I am alive to the fact that even if the case proceeded undefended, it is not automatic that judgement shall be entered in favour of the Plaintiff. The Plaintiff is still required to prove its case to the required standards. In Karugi & Another v Kabiya & 3 Others [1983] eKLR, the Court of Appeal held as follows: -

> "...The burden on the plaintiff to prove his case remains the same, though it is true that, where the matter is not defended, or, as here, validly defended that burden may become easier to discharge...The plaintiff has therefore to prove his case. To do so he calls evidence, such evidence before the court, the court may consider it unchallenged and proceed upon it, unless it is clear that it is intrinsically unreliable. No court will believe that the noon is actually the sun however unchallenged that statement may be..."

62. In the present case, though the Defendant filed a statement of defence and even cross examined the Plaintiff's witness, the Plaintiff's case was not shaken and it thus remained uncontroverted.

Considering the large outlay sought by the Plaintiff, it behooved the Defendant to take the matter with the seriousness it deserved. As has been demonstrated above, the Plaintiff claim was not an idle one.

63. On costs, it is settled that the same follows the event. However, the court retains discretion whether to grant them or not. Furthermore, this discretion must be exercised judiciously and courts should not deprive a plaintiff/defendant of his or her costs unless it can be shown that they acted unreasonably. The Halsbury's Laws of England, 4th Edition (Re-issue), [2010], Vol.10. para 16, notes as follows: -

> " The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice"

64. Any departure from this trite law can only be for good reasons which the Supreme Court in Jasbir Singh Rai & Others vs Tarlochan Rai & Others [2014] eKLR noted includes public interest litigation since in such a case, the litigant is pursuing public interest as opposed to personal gain. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In Morgan Air Cargo Limited v Everest Enterprises Limited [2014] eKLR the court noted as follows: -

> " The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that ''Costs follow the event'' was driven by the fact that there could be no ''one-size-fit-all'' situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case."

65. There was no evidence led to show that the Plaintiff was guilty of any misconduct to be deprived of costs and as such, I award the Plaintiff the costs of the suit.

66. Following the foregone discourse, the upshot is that the following orders do hereby issue: -

a. Judgement is hereby entered in favour of the Plaintiff against the Defendant as follows; -

i. Kshs. 17,630,488/= plus accrued penalties and interests from the time of demand (due date) until payment in full;

ii. Kshs. 1,700,818= being the amount unlawfully deducted;

iii. Kshs. 66,699,609.63/= being the loss of business;

iv. The sums in (i), (ii) and (iii) shall attract interest from the date of filing suit till payment in full.

b. Costs of the suit to the Plaintiff.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 7TH DAY OF FEBRUARY, 2024.

.....

F. WANGARI

JUDGE

In the presence of;

N/A for the Plaintiff

N/A for the Defendant

Barille, Court Assistant