County Government of Nyeri v Nabaki Africa Constructions (K) Limited (Civil Appeal E023 of 2021) [2024] KEHC 5810 (KLR) (17 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5810 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E023 OF 2021

MA ODERO, J

MAY 17, 2024

BETWEEN

COUNTY GOVERNMENT OF NYERI ..... APPELLANT

AND

NABAKI AFRICA CONSTRUCTIONS (K) LIMITED ..... RESPONDENT

JUDGMENT

1. Before this court for determination is the Memorandum of Appeal dated 10th June, 2021 by which the Appellant County Government Of Nyeri seeks the following orders:-

   (a) That this Appeal be allowed.

   (b) That the judgment and decree thereto of the lower court be quashed and set aside.

   (c) That the Respondent's suit in the lower court be dismissed and/or struck out.

   (d) That the Respondent herein to bear the costs of this Appeal and the costs in the lower court.

2. The Respondent Nabaki Africa Constructions (k) Limited opposed the appeal. The matter was canvassed by way of written submissions. The Appellant filed the written submissions dated 31st March, 2023 whilst the Respondent relied upon its written submissions dated 8th May, 2023

Background

3. The Respondent Nabaki Africa Construction (k) Ltd initiated this suit through the Plaint filed on 29th April, 2019 and Amended on 12th July 2019 in which suit the Respondent prayed for judgment against the Appellants for

   (a) Payment of the amount of Kshs. 13,003,547.80

   (b) Special damages of Kshs. 171,000

(c) Interest [In] (a) and (b) above

(d) Costs of this suit"

4. The Appellant entered appearance in the matter on 13th May, 2019 and filed an Amended statement of Defence dated 27th June, 2019.

5. The basic facts of the case are as follows. The Respondent claimed that on or about June 2014 they participated in a Tendering process in respect of Tender Reference No. NCG/200/2013-2014 for provision of landscaping services to the Appellant. That on 30th July, 2014 the Respondents were notified that their bid of Kshs. 20,865,732.00 had been accepted.

6. The Respondent state that on 7th August, 2014 they signed a form of Agreement with the Appellant and thereafter commenced works as required and on 30th October, 2014 the Respondent was issued an Interim Certificate No 1 totaling Kshs. 13,003,547.80.

7. That Respondents complained however the Interim certificate has never been certified and as such payment has never been approved.

8. The Respondents averred that they maintained constant communication with the Appellant but no payment was forthcoming. That in November, 2015 pursuant to several complaints from other contractors the Appellant constituted a Task force which was gazetted on 10th November, 2015 to look into unpaid claims to contractors.

9. The said Task Force released its report in 2016 which report approved the works done by the Respondent and computed the value of said works to be Kshs. 6,084,650/=. That the Task force report was tabled before the Appellant cabinet and was adopted and approved.

10. However despite waiting patiently no payment was made to the Respondent. The Respondent then engaged counsel and issued to the Appellant a Demand letter dated 30th January, 2015 followed by Reminder dated 6th July, 2015 in which they claimed for the entire amount owing being Kshs. 13,003,547.00

11. There being no response to their demand the Respondent filed a suit in the Nyeri Chief Magistrates Court, claiming for loss and damages occasioned by the Appellant's Breach of contract. The Respondents also claimed for special damages in the account of Kshs. 171,000.

12. As stated earlier the Appellants field an Amended statement of Defence in which they opposed the Respondents claim. The Appellant denied having entered into any contract whatsoever with the Respondent and specifically denied having issued a tender Reference No. NCG/200/2013-2014.

13. The Appellant also denied having signed any form of Agreement with the Respondent and refuted the Respondents claims that they commenced and completed any works in line with said tender.

14. The Appellant further denied knowledge of the existence of any Task Force Report, which allegedly computed the value of the works done by the Respondent to be Kshs. 6,084,650.

15. The Appellant denied being in breach of any contract with the Respondent and denied owing the Respondent the sum of Kshs. 13,003,547.80 or indeed any amount. Instead the Appellant accused the Respondent of fraud, illegality and / or forgery by tendering in court false documents in support of their claim. The Appellant prayed that the Respondents suit be dismissed in its entirety.

16. Following interpartes hearing at which each side called one (1) witness Hon. Wendy Kagendo, Chief Magistrate delivered a judgment on 2nd June, 2021 in which she found in favour of the Respondent

against the Appellant. The Court awarded the Respondent the sum of Kshs. 6,084,650 plus Kshs. 171,000 as special damages. Costs of the suit were also awarded to the Respondent.

17. Being aggrieved by this judgment the Appellant filed this Memorandum of Appeal dated 10th June, 2021, which appeal is premised upon the following grounds:-

(i) That the learned Honourable Magistrate erred in law and in fact in failing to find that the Respondent's case before the trial court was time barred pursuant to the provisions of Section 3(2) of the Public Authorities Act, Cap 39 of the Laws of Kenya as pleaded in the Amended Statement of Defence which had not been contravened.

(ii) That the learned Honourable Magistrate erred in fact and law in failing to appreciate that the burden of proof lay squarely on the Plaintiff who failed to give sufficient or credible evidence to prove its claim as per the Amended Plaint filed.

(iii) That the learned Honourable Magistrate erred in law and fact in finding that the Respondent was a pre-qualified supplier of the Appellant despite the clear evidence on record that the Respondent had not been prequalified by the County Government of Nyeri for provision of landscaping services.

(iv) That the Learned Honourable Magistrate erred in law and fact in finding that the Respondent tendered for the works, commenced, and executed the same to completion, handed over the site to the Appellant as required upon which an Interim Certificate was issued totaling a sum of Kshs. 13,003,547.80 without any proof on the required standard of proof and despite the evidence tendered by the Appellant to the contrary.

(v) That the Learned Honourable Magistrate erred in law and fact in finding that the work was done by the Respondent at the instance of the Appellant without any proof thereof and by ignoring the fact that the Respondent did not exhibit any invoices and receipts to demonstrate that it incurred any expenses either in form of materials purchased, labour costs in performance of the alleged Works.

(vi) That the Learned Honourable Magistrate erred in law and fact in relying on an alleged task force report despite the evidence that the same was not dated, the its source was not disclosed, it was not signed by the Appellant and without any proof whatsoever that either the report itself or its recommendations were ever adopted by the Appellant.

(vii) That the Learned Honourable Magistrate erred in law and fact in finding that the Respondent was entitled to remedies of Kshs. 6,084,650.00 by wholly placing reliance on the impugned task force report whose recommendation in respect of the Respondent was Kshs. 2,644,850.00 and not the sum awarded by the trial court.

(viii) That the Learned Honourable Magistrate erred in law and fact in finding that the procurement process specified in the Public Procurement and Asset disposal Act was duly followed and/or undertaken despite her clear finding in the same judgment that some crucial documents in the tendering process were missing.

(ix) That the Learned Honourable Magistrate erred in law and fact in failing to dismiss the Respondent's case by failing to find that failure by the Respondent to follow the right procurement procedures was sufficient to invalidate the purported agreement by terming such fatal error of the substantive law as procedural technicalities that can be excused under the provisions of Article 159 of the Constitution of Kenya.

(x) That the Learned Honourable Magistrate erred in law and fact in concluding that the Appellant should not be left to benefit from the acts occasioned by it in not following the full procedures specified under the Public Procurement and Asset disposal Act despite the Appellant's evidence that the alleged landscaping works was undertaken by a different contractor who was duly paid.

(xi) That the Learned Honourable Magistrate erred inlaw and fact in finding that there was a lawful, binding and enforceable agreement duly signed by John M. Maina on behalf of the Appellant thus ignoring and/or disregarding the Appellant's evidence pointing out the several glaring inconsistencies on the same including the failure by the Respondent to have the mandatory performance bond of 5% as indicated in the Respondent's impugned tender document.

(xii) That the Learned Honourable Magistrate erred in law and fact in finding that the Appellant's witness was not an employee of the County Government of Nyeri in the years 2013-2015 and could not therefore testify as to what was going on during the material time which finding is not based on the evidence on record.

(xiii) That the Learned Honourable Magistrate erred in law and fact in granting the Respondent a sum of Kshs. 171,000.00 in respect of Special Damages as found in the task force report and without strictly producing the evidence that the money was billable against the Appellant.

(xiv) That the Learned Honourable Magistrate erred in law and fact in granting the Respondent a sum of Kshs. 171,000.00 in respect of Special Damages contrary to the provisions of the Advocates Remuneration (Amendment) Order, 2014.

(xv) That the Learned Honourbale Magistrate erred in law and fact in disregarding the judicial authorities/precedents by the High Court binding on the court and cited to the trial court by the Appellant in its written submissions on similar facts holding that a supplier to a public entity has an obligation to carry out due diligence to ensure that the legal procedures are followed.

(xvi) That the Learned Honourable trial magistrate erred in law and on fact by not taking into account the submissions filed on behalf of the Appellant in the lower court."

Analysis And Determination

18. This is a first appeal, thus it is the duty of this court to re-evaluate andreview the evidence adduced in the lower court and to draw its own conclusions on the same. In Selle & Another -vs- Associated Motor Boat Company Limited & Others [1968] E.A 123, the court of Appeal held that;-

> " An appeal to this court from trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.
>
> In particular this court is not bound necessarily to follow the trial judge's findings or fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence of if the impression based on the demeanour or a witness is inconsistent with the evidence in the case generally....."

19. Similarly the same court in the case of Kiruga -VS- Kiruga & Another [1998] KLR 3h 8 observed that;-

> " An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong."

20. Therefore an appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand.

21. I have carefully considered the Appeal filed before this court, the record of Appeal as well as the submissions filed by both parties.

22. The first ground of appeal raised by the Appellants is that the Respondents suit was time-barred pursuant to the provisions of the

Public Authorities Act, Cap 39, Laws Of Kenya.

23. Section 3(2) of said Act provides as follows:-

> " No proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date on which the cause of action accrued [Own emphasis].

24. The Appellants submit that according to the Respondents own evidence the breach of contract complained of occurred on 30th October, 2014, being the date when the Interim certificate was raised.

25. Thus according to the Appellants the stated cause of action accrued in October, 2014, and as such the suit ought to have been filed within three (3) years of that date. Accordingly the Appellants submit that this suit which was filed in April, 2019 is statute-barred.

26. The Respondent however counters that the cause of action being the alleged breach of contract can only be said to have occurred when the Respondents having patiently waited for payment notified the Appellants of said breach through their demand letter dated 25th May,2017. A copy of the said Demand letter written by the Respondents Advocate S. Ndung'u & Company Advocates appears from pages 112-114 of the Record of Appeal.

27. I am inclined to agree with the Respondents. A breach of contract cannot be deemed to have occurred when the contract was signed or even upon completion of the works. This is because there may be certain process that need to take place before payment is made.

28. The breach can only be said to have occurred when the Respondents got tired of waiting for the payment which was not forthcoming and issued the Demand Notice to the Appellants. This was in May, 2017.

    thus Three (3) years would take us into May, 2020. This suit was filed in April, 2019 which fell well within the three (3) year period allowed by law.

29. In the case of South Nyanza Sugar Company Limited V Dickson Aoro Owuor MGHR HCCA No. 85 of 2015 [2017] eKLR the court held that;

> " There is no doubt in this matter that the parties entered into a contract and which contract was allegedly breached. What is for determination is when exactly the cause of action accrued since from that time the limitation period of 6 years starts running. I do not find that issue

difficult to decide on. I say so because when a party enters into a contract for a specific period of time, it does so in the understanding and belief that each of the parties to the contract will observe its part thereof until full execution of the contract. It is only when one of the parties happens to be in breach of the contract that a possible cause of action arises as at that date of the alleged breach and not at the end of the contract period." [Own emphasis]

30. I find that this suit was instituted within the period provided by statute and the same is not statue-barred.

31. The Respondents filed this suit alleging Breach of contract. As such certain pertinent questions must be answered:-

i. Did there exist an enforceable contract between the Respondent and the Appellant.

ii. Did the Respondent actually carry out the contracted works?

iii. If so did the Appellant commit any act in breach of said contract.

(iv) Was the Respondent entitled to the reliefs sought.

(1) Existence of a Contract

32. It is the contention of the Respondent that there was an open tender being Tender Reference No. NCG/200/2013-2014 for the provision of landscaping works at the town hall compound-Nyeri town and that the Respondent was successful in its bid. The Public Procurement and Asset Disposal Act No. 33 of 2015 provides for the above open tendering process at Section 96 as read with Section 33 via advertising that outlines the roles and responsibilities of a county government. Section 96 of the Act singles out the Accounting Officer as the one who acts on behalf of the county as it relates to open tenders.

33. Section 135 of the Act lists the duties of the accounting officer as well as denoting that the tender document is the foundational document of all procurement contracts. It states as follows;-

i. The existence of a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be signed by all the accounting officer or an officer authorized in writing by the accounting officer of the procuring entity and the successful tenderer.

ii. An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings.

iii. The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed the giving of that notification provided that a contract shall be signed within the tender validity period.

iv. No contract is formed between the person submitting the successful tender and the accounting officer of a procuring entity until the written contract is signed by the parties.

v. An accounting officer of a procuring entity shall not enter into a contract with any person or firm unless an award has been made and where a contract has been signed without the authority of the accounting officer, such a contract shall be invalid.

vi. The tender documents shall be the basis of all procurement contracts and shall, constitute at a minimum – (a) Contract Agreement Form; (b) Tender Form; (c) Price Schedule or

bills of quantities submitted by the tenderer; (d) Schedule of Requirements; (e) Technical Specifications; (f) General Conditions of contract; (g) Special Conditions of Contract; (h) Notification of Award.

vii. A person who contravenes the provision of this section commits an offence. [emphasis mine]

34. Under Section 135(4) of the Public Procurement and Asset Disposal Act No. 33 of 2015 (the Act), no contract could have been formed between the parties unless the same is reduced in writing and signed by the parties. The mandatory requirement of having a written contract also applies to goods or services sourced by way of direct procurement as is provided by Section 104(d) of the Act and that under section 72 of the Act, the Respondent has an obligation to comply with provisions of the Act.

35. At Section 72 the Act outlines the responsibility of the Respondent Or indeed anyone providing goods and services and uses the word 'shall' thereby denoting the mandatory nature of compliance to the Act.

It is unequivocal in nature and reads as follows;

> Contractors, suppliers and consultants shall comply with the provisions of this Act and the Regulations. [Own emphasis]

36. From the aforesaid provisions, it is clear that under Section 72 of the Act, there is a statutory responsibility on the supplier of services, to with the Respondent herein, to have complied with the Act and Regulations made thereunder. Further it is a requirement that the contract formed between the parties must be in writing signed by both parties. 37. PW1 Jane Wangari Theuri who is a Director with the Respondent Company told the court that the Respondent participated in tendering for a Tender Reference No. NCG/200/2013-2014 which tender had been advertised by the Appellant for supply of landscaping services.

38. The witness states that on 30th July, 2014, the Respondent was notified that their bid of Kshs. 20,865,732.00 had been accepted and they had been awarded the tender. A copy of a letter dated 30th July, 2014 authored by one S.W. Gachigi Secretary, Nyeri County Tender Committee appears at Page 138 of the record. The letter reads as follows:-

> " This is to notify that the process of tendering the above mentioned works has been completed and we are pleased to inform you that your bid of Kshs. 20,865,732.00 (Twenty Million eight hundred and sixty five thousand seven hundred and thirty two shillings only) was accepted and have been awarded to you....." [Own emphasis]

39. The Respondent further states that on 7th August, 2014 the parties signed a Form of Agreement under contract No. NCG/LH & PP/005/2013-2014 for provision of the works. A copy of the Form of Agreement which constitutes the contract between the parties appears at pages 57-65 of the Record. The Respondent then commenced the works and did the same to completion.

40. The Appellants on their part denied having issued any tender and deny having awarded any tender to the Respondent. The Appellant further denies having signed a Form of Agreement with the Respondent.

41. The Respondent did annex in their Documents a copy of the certificate of incorporation for Nabaki Africa Construction (K) Limited, Serial Number CPR/2014/135427 dated 13th March 2014 (Page 21 of the Record of Appeal). They have also annexed their Memorandum and Articles of Association (Page 24-39 of the Record of Appeal)

42. Despite the Appellants denials the Respondent did avail a copy of the relevant tender Reference No. NCG/200/2013-2014 which is under the Tender Name "Proposed landscaping works at the Town Hall Compound Nyeri Town' (Pages 40-59 of the Record of Appeal).

43. The form of Tender filled out by the Respondent on 8th July, 2014 for Kshs. 20,865,732.00 appears at page 84-97 of the record. It is duly signed (at page 97) for the Appellant by Wambui Kimathi, HSC County Secretary and by John Njogu for the contractor and bears the stamp of the County Secretary.

44. I have also noted that an Interim Certificate was issued by the Respondent for a sum of Kshs. 13, 0033,547.80. The same is dated 30th October, 2014 (Page 163 of the Record).

45. The above documents are all clear indications that a contract existed between the Appellant and the Respondent. The form of Tender was duly signed by the County Secretary who was the Accounting Officer for the Appellant as well as by a Director of the Respondent. I am therefore satisfied that contract was reduced into writing as required by section 135(4) of the Act.

(ii) Were the contracted works performed by the Respondent Whilst the Respondent asserted that they carried out the landscaping works as per the contract, the Appellant denied this and insisted that the works were undertaken by a different entity /contractor. The Appellants did not call any evidence to prove that a different supplier carried out the landscaping works.

46. On the other hand the Respondent availed a copy of an Interim Certificate issued to them by the Appellant confirming that Nabaki did carry out the landscaping work. The Respondent also availed copies of project photographs Pexh 8 to show the nature of the works carried out. (pages 144-153 of the Record)

47. Finally on this point the Task Force commissioned by the Appellants in their report satisfied themselves that the Respondent did carry out the contracted works. On the basis of the above I am satisfied that the Respondents did in fact carry out the landscaping work in terms of the contract.

(iii) Whether there was any Breach of contract by the

Appellants.

48. The Respondents claim that the Appellants failed to pay them the agreed amount upon completion of the landscaping works. The Appellants retort that no work was done thus no payment was due to the Respondents. PW1 told the court that following their persistent demands for payment the Appellant set up a Task Force to review alleged unpaid claims due to contractors and suppliers of the County Government of Nyeri. The Task Force was set up vide Gazette Notice No. 8507 of 13th November, 2015. A copy of that Gazette Notice appears at Page 198 of the Record of Appeal.

49. Upon conclusion of its mandate the Task Force prepared a copy of Report which runs from Page 199 to 238 of the Record of Appeal. The Task Force Report was signed at Page 199 by all the members for the County Executive Committee Member for lands and Infrastructure. Thus the denial by the Appellants witness that a Task Force was set up to look into claims by contractors is blatantly false.

50. Amongst the entitles whose claims were considered by the Task Force was Nabaki Africa Construction Limited (the Respondent herein).

At Page 226 of the Record is an Affidavit dated 8th January, 2016 sworn by Jane Wangari Githinji (PW1) a Director of the Respondent company in which Affidavit the Respondent stated that they were owed Kshs. 6,284,850.00 for landscaping works undertaken at the Town Hall compound.

51. This claim by the Respondent was duly considered by the Task Force who in their Summary of Findings and conclusion (Pages 209- 210 of the Record) at Item No. 31 found that the amount due for payment to Nabaki was Kshs. 6,084,650.00.

52. This was the finding and conclusion of a Task Force which had been set up by the Appellants themselves. The members of the Task Force were officials of the County Government. Their finding that this amount was due and owing to the Respondents could only have been arrived at on the basis of work done by the Respondent. There is no way that the Task Force would have made a finding of this nature if as alleged by the Appellant no works had been undertaken by the Respondent.

53. The Appellant have denied entering into a contract with the Respondent and have denied that their officers executed the relevant documents.

In fact the Appellants allege that the Respondent relied on fraudulent forged documents to support their claim.

54. However it is not enough for the Respondents to merely allege that fraudulent documents were used by the Appellants. Fraud is a serious allegation which must be specifically pleaded and proved.

55. In the case of Vijay Mojaria -VS- Nansingh Madhusingh Darbar & Another [2000] eKLR. Hon. Justice Tunoi T/A (as he then was) stated as follows –

> " It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleadings. The acts alleged to be fraudulent must of course be set out and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from the facts" [Own emphasis]

56. The standard of proof required to prove allegations of fraud was set out in the case of Kinyanjui Kamau -vs- George Kamau [2015] eKLR as follows:-

> " .....It is trite law that any allegations of fraud must be pleaded and strictly proved..... since the Respondent was making a serious change of forgery or fraud the standard of proof required of him was obviously higher that that required in ordinary civil cases, namely proof upon a balance of probabilities but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases"

57. Therefore the Respondents cannot merely allege that fraud and/or forgery was involved and then sit back and leave it to the court to search for proof of those allegations of fraud or that such proof be inferred from the facts. The Respondents must plead fraud in their defence. They must specify exactly which documents were forgeries.

They must go on to specify who committed the forgeries and must go further and prove that the alleged fraudulent acts actually occurred.

58. The Appellants did not meet the above standards in proving their allegations of fraud. As such the allegations of fraud/forgery remain unproven allegations.

59. I therefore find that in the absence of any proof of fraud and/or forgery of the documents relied on by the Respondents, it has been proved that a valid and enforceable contract existed between the parties herein.

60. The evidence on record shows that the contract was signed on behalf of the Appellants by one Wambui Kimathi, the County Secretary whose stamp is affixed on the Agreement. There was no evidence adduced to prove that either the signature of the stamp were forgeries.

The Appellants did not bother to engage a document examiner to scrutinize the documents and no report was produced in court.

61. The Tender was awarded to the Respondents on 30th July, 2014 and the Agreement / contract was signed on 7th August, 2014 after the award had been made. The Respondent tendered into evidence the prequalification documents PExhb 4 and were therefore deemed to be prequalified suppliers.

62. At page 139 of the Records is the copy of a letter dated 3rd July, 2014 written to the Respondent by the Director, Supply Chain Management Services of the Nyeri County Government which letter reads as follows;-

> " Dear Sir/Madam
>
> RE: Pre-qualification For Landscaping Works
>
> This is to inform you that you have been pre-qualified by County Government of Nyeri category NCG/LH6PP/2013-201 (prequalification for landscaping works....."
>
> This letter is proof that the Respondents were prequalified suppliers of Works. I reiterate that the blanket allegations of forgery made by the Appellants have not been proved.

63. The Respondents asserted that the contracted works were done and completed and they asserted that the Appellant owed them Kshs.13,003,547.80 for said works. The Respondents were issued With an Interim Certificate totaling a sum of Kshs. 6,084,650.

The County Works Engineer did confirm that the works were done. The report of the Task Force appointed by the Appellants to look into unpaid dues owed to contractors concluded that the Respondents were owed Kshs. 6,084,650.

64. DW1 who testified on behalf of the Appellants attempted to disown this Task Force Report and stated that he was seeing the Gazette Notice which set up the Task Force for the first time.

65. As was correctly noted by the trial magistrate DW1 was not an employee of the Appellant during the material period 2013-2015. As such this witness was not fully aware of all the facts of the case and her lack of knowledge of certain pertinent issues is not surprising. A copy of the Gazette Notice was exhibited in court [see page 198 of the Record] thus this defence amounts to a mere denial.

66. I am satisfied that the Respondents did carry out the contracted works as indicated by the Task Force Report. However I find that the Respondents failed to prove that the works carried out by themselves amounted to the claimed amount of Kshs. 13,003,547.80. Indeed in her judgment the trial magistrate commented that not all the documents pertaining to the amount due were availed. The Respondents have notNchallenged or disputed the finding by the Task Force that they were owed Kshs. 6,084,650. Further in their own demand letter to the County as well as the Affidavit dated 8th January, 2016 sworn by Jane Wangari Githinji the Respondents claimed that they were owed Kshs. 6,284,850.00 only (see page 226 of the Record). The Respondents can only be paid what they have asked.

67. Todate no payment at all has been made to the Respondent. The Appellants merely issued a blanket denial of the existence of any contract. They have not shown evidence of any payment made to the Respondents. In the circumstances I find that the learned trial magistrate was correct to find that the Appellant was in breach of the contract for supply of services entered into with Respondents.

Special Damages

68. The Respondent made a claim for special damages amounting to Kshs.171,000. It is trite law that special damages must be specifically pleaded and proved. In HAHN -VS- SINGH [1985] KLR 716 the court of Appeal stated that:-

> " Special damages must not only be specifically claimed (pleaded) but also strictly proved for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The Degree of certainty and the particularity of proof required depends on the circumstances and nature of the acts themselves"

69. At paragraph 15 of the Amended plaint dated 12th July, 2019 the special damages are particularized as follows

(I) Legal services by Waiganjo Wachira & Co - Kshs. 21,000/=

(II) Legal services by Magua Mbatha & Co - Kshs. 150,000/=

Total Kshs. 171,000/=

70. I have carefully perused the record of the trial before the lower court.

The Respondents did not avail to the court any document to support their claim of Kshs. 171,000 as special damages. All that exists is a receipt Serial Number 367 issued by Waiganjo & Co Advocates for Kshs. 21,000. No receipt from Magua Mbatha & Co has been produced. In the circumstances the Respondents have only proved their claim for Special damages to the tune of Kshs. 21,000.

71. In her judgment the learned trial Magistrate relied on the Task Force Report in awarding Special damages of Kshs. 171,000. In my view this was an error as the Task Force report was prepared by a third party and does not constitute direct evidence from the Respondents of their claim for special damages. Accordingly I set aside the award of Kshs. 171,000 made by the trial court and instead substitute an award of kshs. 21,000 as Special damages.

Conclusion

72. Finally I find that this appeal lacks merit as the Respondents did prove their claim on a balance of probability. I agree with and uphold the decision of the trial court in entering judgment in favour of the Respondent against the Appellants in the amount of Kshs. 6,084,650/=, I award special damages in the amount of Kshs. 21,000 plus costs and interest.

73. Based on the foregoing this Appeal fails. The award of Kshs.6,084,650/= is upheld whilst the award of Kshs. 171,000 is set aside and substituted with an award of Kshs. 21,000/=.

74. Costs of this appeal are awarded to the Respondents.

DATED IN NYERI THIS 17TH DAY OF MAY, 2024.

.....

MAUREEN A. ODERO

JUDGE