



**Fubeco China Fusion No. 1 Building Eng. Co. Limited v
Comat Trading Co. Limited (Commercial Case E064 of 2021)
[2024] KEHC 12378 (KLR) (Commercial and Tax) (4 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12378 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E064 OF 2021
MN MWANGI, J
OCTOBER 4, 2024**

BETWEEN

FUBECO CHINA FUSION NO. 1 BUILDING ENG. CO. LIMITED ... PLAINTIFF

AND

COMAT TRADING CO. LIMITED DEFENDANT

JUDGMENT

1. The plaintiff instituted this suit against the defendant vide a plaint dated 28th January, 2021 seeking judgment as follows -
 - i. The sum of Kshs.53,647,194.88 being the amounts due from the invoice issued which remains not fully paid;
 - ii. Interest accrued on the project amount of Kshs.22,261,459.20;
 - iii. Withholding Tax Certificate amounts of Kshs.6,966,721.35;
 - iv. Interest accrued from the date of filing this suit till payment in full at the rate of 1.5%;
 - v. Costs incidental to this suit; and
 - vi. Such other, further, incidental or alternative relief as the Honourable Court may deem just and expedient.
2. The plaintiff's case is that it was contracted by the defendant to complete the Montana Hotel & Mall project in Nairobi. The plaintiff provided the defendant with necessary drawings, a bill of quantities, and specifications, which were approved by the defendant. Upon completion, the plaintiff issued invoices totalling to Kshs.42,062,047.75. to the defendant. Additionally, the plaintiff



- claims entitlement to a retention amount of Kshs.11,585,147.13, making the total amount owed Kshs.53,647,194.88. The plaintiff claims that the defendant's failure to pay the aforesaid amount resulted in accrued interest of Kshs.22,261,459.20 and a Withholding Tax Certificate amount of Kshs.6,966,721.35, bringing the total claim to Kshs.82,875,375.34. The plaintiff asserted that the said non-payment caused the plaintiff significant harm, including legal troubles and the detention of one of its Directors in a police cell.
3. In opposition to the plaintiff's suit, the defendant filed a statement of defence dated 25th February 2021 which was subsequently amended to introduce a counter claim on 9th August 2021. In its statement of defence, the defendant denied all the averments in the plaintiff's plaint and averred that the plaintiff performed substandard and incomplete work and failed to rectify the issues within the defects liability period. It was averred that as a result, the defendant withheld payments for invoice certificates Nos. 14 and 15.
 4. In the counter-claim, the defendant stated that the plaintiff breached express and/or implied warranties or guarantees as to quality of work. That the Nairobi City County inspected the building and issued a Notice on 12th January, 2021, requiring rectification of defects and improvements that are within the scope of works executed by the plaintiff. The defendant stated that having been unable to fully comply with the said Notice, it was charged in a criminal Court and forced to shut down the building, terminate tenancies, and compensate tenants. The defendant claimed to have suffered losses amounting to Kshs.10,921,349.89 for rectifying dampness and flooding in the basement, and Kshs.4,385,670.00 per month for lost rental income. The plaintiff also claims Kshs.31,656,210.00 for compensation paid to tenants for termination of their leases.
 5. As a result, the defendant seeks judgment against the plaintiff for the said amount plus interest and costs. The defendant contended that the plaintiff was contractually obligated to rectify the defects and complete the work despite the lapse of the defects liability period, complete all incomplete works and to compensate the defendant for direct and consequential losses sustained as a result of breach of the plaintiff's obligations under the contract.
 6. This matter proceeded to hearing where the plaintiff called one witness in support of its case. The defendant on the other hand despite service of a hearing notice did not attend Court on the hearing date, thus the hearing of this suit proceeded in its absence.

Plaintiff's Case.

7. Mr. Michael Weiran Shi testified as PW1. He stated that he is the Technical Director of the plaintiff company. He testified that the parties herein entered into a contract worth Kshs.677,670,999/=, wherein the plaintiff fulfilled its part by constructing a hotel and a mall in Nairobi's Central Business District, but the defendant failed to pay for the completed work. PW1 referred to Clause 3.4 of the contract, and explained that after construction, a Quantity Surveyor would evaluate the work and an Architect would issue interim certificates for payment. He referred to an email from the Project Architect dated 27th September, 2018, confirming that the plaintiff had handed over the completed mall area to the defendant.
8. PW1's evidence was that in accordance with Clause 41.1, the Quantity Surveyor notified the Project Architect of the completed work, leading to the issuance of interim certificates No. 14 & 15 for Kshs.24,417,701.53 and Kshs.17,642,346.22, respectively. He clarified that although certificate No. 15 indicated an amount of Kshs.27,018,84.22, the actual amount owed to the plaintiff was Kshs.17,642,34.22, which amount was intended to pay sub-contractors. Mr. Weiran testified that the defendant never paid the sums indicated in interim certificates Nos. 14 & 15. He refuted the



defendant's claim that non-payment was due to unsatisfactory workmanship, asserting that the said issue was never raised with the plaintiff.

9. He pointed out that a letter dated 5th March, 2019, which forms part of the defendant's documents, was written after the project was handed over in September 2018. He stated that the said letter which complained about sanitary fittings, poor flushing mechanisms, and incomplete plumbing, pertained to work done by Etsan Mechanical Engineering Limited, a sub-contractor nominated by the defendant. He also noted that a letter from Nairobi City County dated 12th January, 2021 was also written after the project's hand over. Additionally, PW1 stated that the defendant was responsible for paying Kshs.6,966,721.35 in Withholding Tax to KRA, after which the plaintiff would reclaim it.
10. He referred to Section 100 of the *Civil Procedure Act* to amend a prayer in the plaint from "interest accrued at 1.5%," to "interest at commercial rates" as per Clause 34.6 of the contract, which amendment this Court allowed.
11. Upon close of the plaintiff's case, and on application by the plaintiff, the defendant's case was also closed in view of its absence. Thereafter, the parties were directed to file written submissions. The plaintiff's submissions were filed by the law firm of Wachira, Gachoka & Company Advocates. The defendant did not file written submissions.
12. In the plaintiff's written submissions, Mr. Wachira, learned Counsel for the plaintiff's referred to the Court of Appeal case of Charles Mwirigi Miriti v Thananga Tea Growers Sacco Limited & another [2014] eKLR, and submitted that for a contract to be legal and enforceable in a Court of law, there has to be an offer, acceptance and consideration. He submitted that in this case, the plaintiff's witness confirmed that the parties herein entered into a contract dated 25th October, 2013 for construction of the Montana Hotel located in Nairobi along Gaberone Road for Kshs.97,670,990/=. He referred to the Black's Law Dictionary, 9th Edition at page 213 for the definition of "breach of contract". He submitted that the defendant breached the aforesaid contract when it refused to make payments of interim certificates No. 14 & 15.
13. Counsel referred to Clause 41 of the contract between the parties herein and contended that the provisions thereunder were followed to the letter before the Project Architect issued interim certificates No. 14 & 15 for payment. Mr. Wachira cited the Court of Appeal decisions in Capital Fish Kenya Limited v Kenya Power & Lighting Company Limited [2016] eKLR, and Kinakie Co-operative Society v Green Hotel [1988] KLR 242, and asserted that the plaintiff is entitled to damages so as to put it in the position it would have been if the contract would have been completed, and if both parties had performed their contractual obligations.

Analysis And Determination.

14. I have considered and analyzed the evidence adduced by the plaintiff's witness, alongside with the pleadings filed, together with the written submissions by Counsel for the plaintiff. The issues that arise for determination are -
 - i. Whether the defendant breached the contract between the parties herein; and
 - ii. Whether the plaintiff is entitled to the reliefs sought in the plaint.

Whether the defendant breached the contract between the parties herein.

15. It is not disputed that the parties herein entered into a contract for construction of the Montana Hotel located in Nairobi along Gaberone Road for Kshs.697,670,990/=. Clauses 41.1 & 41.2 of the said contract provides as follows -



- 41.1 When in the opinion of the contractor the whole of the works are practically complete he shall give a notice in writing to the Architect to that effect. The notice shall be accompanied by an undertaking to complete any outstanding work within a reasonable time or within such time as the Architect may direct.
- 41.2 Within fourteen days of the issuance of such notice the Architect shall inspect the works and if in his opinion the works are practically complete, he shall issue the certificate of practical completion and the defects liability period shall be deemed to commence on the date of issuance of the said certificate. If the works are not practically complete he shall specify in writing to the contractor the work which in his opinion requires to be completed before the certificate can be issued.
16. From the record it is evident that the Project Architect issued interim certificate Nos. 14 & 15 for payment of Kshs.24,417,01.53 and Kshs.17,642,346.22, respectively. This means that the Project Architect on notification by the plaintiff inspected the works done and was satisfied that the works were practically done, thus he proceeded to issue the aforesaid interim certificates.
17. Upon perusal of the documents produced by the plaintiff, I note that there are letters dated 4th May 2018 and 14th December 2018 addressed to the plaintiff from the Project Architect by the name AAKI Consultants forwarding interim certificates No. 14 & 15 for Kshs.24,419,701.53 & Kshs.17,642,46.22, respectively, to the plaintiff and informing it that it should present the same to the defendant for payment within fourteen (14) days in accordance to Clause 34.5 of the contract between the parties herein. It is worthy of note that by the said letters, the plaintiff was reminded that any defects that may be detected after payment had been made, would be catered for at the plaintiff's cost. It is also evident that the Project Architect was satisfied that the plaintiff had completed its work since the certificates were issued.
18. The defendant does not dispute that the Project Architect issued interim certificates No.14 & 15 for Kshs.24,417,701.53 and Kshs.17,642,346.22, respectively. The defendant acknowledged receipt of the said certificates and contended that it retained the said payments since the plaintiff's workmanship for works done was not satisfactory. The said allegations were however not proved since the defendant's case was closed without the defendant calling any witnesses or producing any documentation in support of its allegation.
19. It is a long-standing principle of law that parties to a contract are bound by the terms and conditions thereof, and it is not the business of the Courts to rewrite such contracts. In the case of National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd [2002] 2 E.A. 503, the Court of Appeal at page 507 stated as follows -
- A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.
20. In Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd [2017] eKLR, the Court of Appeal further stated that -
- We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties, they are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.
21. In the premise, I am satisfied that by not paying interim certificates No. 14 & 15 the defendant breached the contract between the parties herein.



Whether the plaintiff is entitled to the reliefs sought in the plaint.

22. The reliefs sought by the plaintiff against the defendant are in the nature of special damages. It is trite law that special damages must not only be specifically pleaded, but must also be strictly proved. The Court of Appeal in the case of *Richard Okuku Oloo v South Nyanza Sugar Co Ltd* [2013] eKLR observed that -
- ...a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of...
23. The plaintiff is claiming Kshs.53,647,194.88 being the amounts due from the invoice issued which remains not fully paid. Having found that it is not disputed that the Project Architect issued the defendant with interim certificates No. 14 & 15 for Kshs.24,417,701.53 and Kshs.17,642,346.22, respectively, which certificates have not been paid to date, with the defendant having failed to demonstrate why the said certificates have not yet been paid, this Court finds that the plaintiff is entitled to Kshs.42,060,047.80 being the payment due from the said certificates.
24. The plaintiff is also claiming a retention amount of Kshs.11,585,147.13, which is being retained by the defendant. No explanation and/or evidence was however tendered on how the defendant ended up retaining the said amount, whether or not the plaintiff paid the said amount to the defendant or not. For this reason, I am not satisfied that the defendant has proved this claim to the required standard of a balance of probabilities hence it is not entitled to the said claim.
25. On the issue of the interest due to the plaintiff for the outstanding payment, Clause 34.6 of the contract between the parties herein provides the following-
- If a certificate remains unpaid beyond the period for honouring certificates stated herein, the employer shall pay or allow to the contractor simple interest on the unpaid amount for the period it remains unpaid at the commercial bank lending rate in force during the period of default.
26. The plaintiff is claiming the sum of Kshs.22,261,459.20 as the interest accrued from the unpaid outstanding project amount. It based its calculation on the sum of Kshs.53,647,194.88 as the outstanding amount. Having found that the plaintiff has not proved its claim for Kshs.53,647,194.88, and that the outstanding sum due is Kshs.42,060,047.80, interest shall be calculated based on the latter amount. From the excerpt at Clause 34.6 quoted in paragraph 25 above, the amount of Kshs.42,060,047.80 shall accrue interest at commercial bank lending rate. Interim certificates No. 14 & 15 were forwarded by the Project Architect to the plaintiff on 4th May, 2018 and 14th December, 2018, respectively, and as such, the interest rate applicable shall be the commercial bank lending rate as at December 2018.
27. The claim for the Withholding Tax Certificate amount of Kshs.6,966,721.35 was not proved. Sections 107, 108 & 109 of the *Evidence Act* places the burden of proof on the party who wishes the Court to believe that a particular fact is true. In order for this Court to find that the plaintiff is entitled to the Withholding Tax Certificate amount, the plaintiff should have demonstrated that the amounts due to be paid on the basis of interim certificates No. 14 & 15 were less the Withholding Tax. In this case, the plaintiff did not produce any documentary evidence in support of the said claim, thus this Court finds that the claim for the Withholding Tax Certificate amount was not proved on a balance of probabilities.
28. In the counter-claim, the defendant alleges that the plaintiff breached express and/or implied warranties or guarantees as to quality of work, and as a result, the Nairobi City County inspected the



building and issued a Notice on 12th January, 2021, requiring rectification of defects and improvements that were within the scope of the works executed by the plaintiff. That the defendant being unable to fully comply with the Notice was charged in a criminal Court and was forced to shut down the building, terminate tenancies, and compensate tenants. As a result, the defendant sought judgment for Kshs.10,921,349.89 for rectifying dampness and flooding in the basement, Kshs.4,385,670.00 per month for lost rental income, and Kshs.31,656,210.00 for compensation paid to tenants for termination of their leases.

29. No evidence was however tendered by the defendant in support of its claims to warrant this Court to enter judgment in its favour as prayed in the counter-claim. The defendant did not therefore discharge its burden of proof by its failure to call any witness to support its case.
30. This Court finds that the plaintiff's suit against the defendant is partly successful, whereas the defendant's counter-claim is not merited.
31. Section 27 of the *Civil Procedure Act* provides that costs follow the event. I as such find that the costs of this suit shall be borne by the defendant.
32. In the result, I make the following orders-
 - i. I enter judgment in favour of the plaintiff as against the defendant in the sum of Kshs.42,060,047.80 being the amount due from interim certificates No. 14 & 15;
 - ii. The defendant's counter-claim is hereby dismissed with costs;
 - iii. The amount in (i) above shall accrue interest at the commercial bank lending rate in force as at December 2018 until payment in full;
 - iv. Costs of the suit are hereby awarded to the plaintiff; and
 - v. The plaintiff is awarded interest in (iii) above at Court rates from the date of judgment until payment in full.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 4TH DAY OF OCTOBER, 2024.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Omuyoma h/b for Mr. Wachira for the plaintiff

No appearance for the defendant

Ms B. Wokabi - Court Assistant.

