



REPUBLIC OF KENYA



Seyani Brothers & Company (K) Limited v Affiliated Business Contractors Limited (Civil Suit 178 of 2013) [2023] KEHC 3132 (KLR) (Commercial and Tax) (14 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3132 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 178 OF 2013**

A MSHILA, J

APRIL 14, 2023

BETWEEN

SEYANI BROTHERS & COMPANY (K) LIMITED PLAINTIFF

AND

AFFILIATED BUSINESS CONTRACTORS LIMITED DEFENDANT

RULING

1. The Notice of Motion dated November 3, 2021 was brought under Section 3A, 26, 27 (1), 44 and 94 of the *Civil Procedure Act*, Order 22 Rule 68, Order 51 Rule 1 of the *Civil Procedure Rules* for the following orders;
 - a. The Court to enter Judgment for the Plaintiff against the Defendant for:
 - (i) Interest for Certificate Number 2 at the rate of 20% p.a. from the date it became overdue until full payment.
 - (ii) Interest for retention sum at the rate of 20% p.a. from the date it became overdue until full payment.
 - (iii) Costs of the suit and costs of the Counterclaim.
 - b. The costs of this application be awarded to the Plaintiff.
2. The Application was supported by the sworn Affidavit of Stephen Kipkorir Bundotich who stated that Hon Lady Justice G L Nzioka delivered Judgment on August 15, 2017 on the following terms;
 - i. Judgment entered for the Plaintiff against the Defendant in respect of Interim Certificate Number 13 for Kshs 22,387,568.70 together with interest at the rate of 20%p.a. form the date it became overdue until full payment.



- ii. The Defendant ordered to facilitate the re-evaluation of the works and materials on site in respect of Interim Certificate Number 2 within fourteen (14) days from August 15, 2017 and failure to which the Certificate will forthwith be deemed to be valid and payable within fourteen (14) days as stipulated in the Agreement.
 - iii. The Defendant ordered to pay to the Plaintiff 50% of the retention sum and the balance of the retention sum be paid in accordance with Clause 42.8 of the Agreement.
 - iv. The party responsible for issuance of the Certificate of Completion of rectification be and is hereby directed to comply with the provisions of Clause 34.16 and 42.8 of the Agreement and issue the Certificate of Rectification within fourteen (14) days from August 15, 2017 and failure of which the entire retention sum be deemed due for payment.
 - v. The Plaintiff directed to cooperate and give all the required documentation for the separation of the Certificate of Rectification and if the parties do not agree, each one is at liberty to list the matter before the Court within fourteen (14) days of non-compliance for final determination.
 - vi. The parties directed to within fourteen (14) days of this order deal with the issue of final accounts as provided for under the relevant provisions of Clause 34.17 to 34.22.
 - vii. The parties agreed that the final statement of account has not been prepared and the Defendant testified that once done it will pay and the Defendant is hereby directed to take lead accordingly.
 - viii. The Defendant's Counterclaim be and is hereby dismissed.
 - ix. Interest shall be paid on the sums of money awarded under Certificate No. 13 and 50% of the retention sum and the interest on other pending issues shall await the outcome thereof and costs of the suit shall await the final determination of the matter.
 - x. That the suit shall be mentioned on October 10, 2017 for the determination of the pending issues and closure of the matter.
3. Further, the Applicant stated that the Defendant has refused and or neglected to comply with the Orders granted at Prayers (ii), (iv), (vi) and (vii) of the Judgment. In view of the Defendant's failure to comply, the Court is bound to enter final Judgment for the remainder of the claim.

Applicant's Case

4. The Applicant submitted that the Defendant did not cooperate in complying with the terms directed by the court and consequently as the directions were conditional, the court ought to enter final judgment as prayed for in Prayer 2 of the Application.
5. Further, the Defendant will not suffer any prejudice if the orders sought are granted as there is an order of stay of execution pending the hearing and determination of the Appeal filed by the Defendant.

Respondent's Case

6. In response to the Application the Respondent filed a Replying Affidavit dated June 23, 2022 and stated that in compliance with the order dated March 21, 2018, the Respondent paid the sum of Kshs 23, 999, 473.60 on July 20, 2018. This sum is the principal sum Kshs.22, 387, 568.70 plus interest at the court rate of 12% p.a calculated up to March 21, 2018 being Kshs 1, 611, 904.95.
7. The Respondent filed its Appeal in the Court of Appeal which is pending for hearing and determination. The Applicant also filed a Counter Appeal and it is therefore improper for the



Applicant to execute the judgment while there is a pending appeal as well as an order of stay of execution.

Issues for Determination

8. Having considered the Application and the response therewith; there is only one issue for determination;
 - a. Whether the Court should enter Judgment for the Plaintiff against the Defendant for failing to comply with the court's conditional order?

Analysis

9. The Applicant approached the Court to enter Judgment for the Plaintiff against the Defendant for:
 - (i) Interest for Certificate Number 2 at the rate of 20% p.a. from the date it became overdue until full payment.
 - (ii) Interest for retention sum at the rate of 20% p.a. from the date it became overdue until full payment.
 - (iii) Costs of the suit and costs of the Counterclaim
10. It was the Applicant's case that the Defendant has refused and or neglected to comply with the Orders granted at Prayers (ii), (iv), (vi) and (vii) of the Judgment delivered on August 15, 2017. In view of the Defendant's failure to comply, the Court is bound to enter final Judgment for the remainder of the claim.
11. The said prayers were in the Plaint dated April 22, 2013. It is noteworthy judgment was entered by Hon Lady Justice G. Nzioka dated August 15, 2017. The court in this judgment addressed the two Interim Certificates Number 13 for Kshs 22, 387, 568.70 and Interim Certificate Number 2 for Kshs.5, 747, 495.00.
12. In the said judgment, the court stated that Interim Certificate No 2 was not properly issued and was to be remitted for re-evaluation of the works and material on site as at the material time of the contractor's request. The order then issued the order that;
 - ii. The Defendant ordered to facilitate the re-evaluation of the works and materials on site in respect of Interim Certificate Number 2 within fourteen (14) days from August 15, 2017 and failure to which the Certificate will forthwith be deemed to be valid and payable within fourteen (14) days as stipulated in the Agreement."
 - iv. The party responsible for issuance of the Certificate of Completion of rectification be and is hereby directed to comply with the provisions of Clause 34.16 and 42.8 of the Agreement and issue the Certificate of Rectification within fourteen (14) days from 15th August, 2017 and failure of which the entire retention sum be deemed due for payment.
 - vi. The parties directed to within fourteen (14) days of this order deal with the issue of final accounts as provided for under the relevant provisions of Clause 34.17 to 34.22.
 - viii. The Defendant's Counterclaim be and is hereby dismissed
13. The Respondent herein sought a stay order against the above-mentioned judgment and on April 12, 2018 the court granted an order of stay of execution of the judgment pending the lodging, hearing and



determination of the Appeal against the judgment. The order of stay was conditional requiring the Respondent herein to pay the principal sum of Kshs 22, 387, 568.70 plus interest as well as costs.

14. There was partial compliance as the Respondent herein deposited Kshs 22, 387, 568.70 however, the interest was not deposited. The Applicant now seeks to have the final judgment entered as the Respondent did not cooperate in complying with the conditional terms directed by the court.
15. Further to the above, the Applicant herein seeks judgment against Interim Certificate No 2 which is also subject to Appeal as the judgment Appealed against the whole judgment of August 15, 2017.
16. It is the court's considered view that given the partial compliance with the court directions, the issue of interest should await the outcome of the Appeal. In the circumstances, it would be improper for the Applicant to execute the judgment while there is a pending appeal as well as an order of stay of execution.

Findings And Determination

17. For the forgoing reasons this court makes the following findings and determinations;
 - i. This court finds that the Notice of Motion dated November 3, 2021 to be devoid of merit and it is hereby dismissed;
 - ii. Each party to bear its own costs.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF APRIL, 2023.

HON. A. MSHILA

JUDGE

In the presence of;

Ikonye holding brief for Bundotich for the plaintiff/decree holder

No appearance for the judgment debtor

Lucy/Sarah-----Court Assistants

