



**Mwangema t/a Mwangemi General Contractors v Attorney General & another  
(Civil Suit 155 of 2006) [2023] KEHC 17852 (KLR) (16 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17852 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL SUIT 155 OF 2006  
DO CHEPKWONY, J  
MAY 16, 2023**

**BETWEEN**

**HAGGINGTON MALINDI MWANGEMA T/A MWANGEMI GENERAL  
CONTRACTORS ..... PLAINTIFF**

**AND**

**THE ATTORNEY GENERAL ..... 1<sup>ST</sup> DEFENDANT**

**MOMBASA TECHNICAL TRAINING INSTITUTE ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By a Plaint dated 11<sup>th</sup> September, 2000 and amended by leave of court on 27<sup>th</sup> July, 2007, the Plaintiff, Haggington Malindi Mwangema T/A Mwangemi General Contractors sued the Defendants seeking inter alia, to be paid the sum of Kshs.3,818,975.00 together with interest thereon and costs of the suit. The Plaintiff also sought to be awarded general damages and any further relief that the court may deem fit to grant.
2. The claim arose out of a Tender No.29/93-94 awarded to the Plaintiff on 16<sup>th</sup> December, 1993 vide a letter of even date by the Ministry of Planning and National Development for the construction of students hostels at the Mombasa Technical Training Institute (the 2<sup>nd</sup> Defendant herein) at a cost of Kshs.8,650,000.00.
3. The Plaintiff avers that in the course of the construction works, a dispute arose between the project coordinators and the Ministry of Public Works and Housing (which was manning the implementation of the project) leading to the original contract being varied in a number of ways through the Provincial Works Officer, a consequence of which the project was unnecessarily prolonged. According to the Plaintiff, the quantity of work to be done under the contract was eventually increased although the extra work was not quantified for payment of corresponding valuation certificates issued in favour of the Plaintiff.



4. It is the Plaintiff's averment that in view of the foregoing, coupled with late payments of certificates issued in favour of the Plaintiff by the Ministry of Public Works and Housing, the Plaintiff stopped the works on the site waiting for the defaults to be rectified and more specifically, that the proper certification of the works be done and the payments of already issued certificates be made.
5. Nonetheless, it is the Plaintiff's case that the Defendants through the Provincial Works Officer, Coast region issued to it/him with a default notice vide a letter dated 28<sup>th</sup> May, 1997 purportedly hinged on Clause 27 of the Construction Contract. Thereafter, through the Chairman of the board of the 2<sup>nd</sup> Defendant's Governors, the Defendants wrongfully terminated the contract vide a letter dated 3<sup>rd</sup> April, 1998.
6. The Plaintiff now disputes the termination and avers that it was unlawful. That, and in any event, the Defendants never executed the contract under which the purported termination is premised. He also claims that as a result of the Defendant's actions, he lost the benefits expected by virtue of the said contract and the income he would have otherwise received. He thus seeks the court to award him damages for the loss although the particulars of the breach were not enlisted in the Plaint.
7. In a similar manner, the Plaintiff laments that the Defendants have, not only failed to issue the valuation certificates for the extra works carried out, but have also refused to pay for the works already done to date. Having so terminated the contract, it is averred that the Defendants blocked the entrance to the construction site thus denying the Plaintiff access to his valuable materials on the site which he now seeks to be compensated for. Specifically, the claim by the Plaintiff can be summarized as follows;
  - a. The value of work done by the Plaintiff.....Kshs.10,179,505.00
  - b. Work done by electrical sub-contractor.....Kshs.277,800.00
  - c. Value of the materials on site.....Kshs.52,850.00

TOTAL.....Kshs.10,510,155.00

Less the payments made .....Kshs.6,6991,180.00

Thus Balance due.....Kshs.3,818,975.00
8. The Defendants statement of Defence and Counter-claim was first filed on 21<sup>st</sup> February, 2000 and is replicated on the statement of defence to the amended Plaint filed on 4<sup>th</sup> December, 2018. It denied all particulars on any alleged breach and/or delay of the project owing to disputes with the Plaintiff or pleaded in the Plaint. Indeed, according to the Defendants, the project was delayed by the Plaintiff when he failed to commence the works on time. The Defendants added that the Plaintiff was fully paid for the works done and any payment that was not done is because the Plaintiff did not finish the work necessitating the Defendants to source for another contractor to complete the works hence the Plaintiff is not entitled to the sum of Kshs.3,818,975/= or any damages as sought.
9. In their Counter-claim, the Defendants pleaded that the suit offended Section 3 of the Public Authority Limitations Act. Also, it is pleaded that the case should be dismissed on the ground that the dispute being a contractual matter the Plaintiff should have had first resorted to other procedures of settling the dispute such as lodging the complaint to the supervisor instead of rushing to the court. The Defendants further averred that they suffered damages and costs of incomplete works and sought for Judgment to be entered as against the Plaintiff for:-
  - a. Liquidated damages @ Kshs.10,000/=per week as per the contract;
  - b. Kshs.1,230,129.00 being the costs of completing the work;



- c. General damages;
  - d. Costs incidental to the suit; and
  - e. Interest on (a) and (b) from date of determination of the Contract.
10. The Plaintiff filed a response to the defence and defence to Counter-claim wherein he averred that the same did not disclose any reasonable cause of action. The Plaintiff denies being liable to the Defendants in the sum of Kshs.10,000/= and Kshs.1,230,129.00 for completion of works as purported and has put the Defendants to strict proof thereof.

### **Evidence at the Trial**

11. Hagginson Malindi Mwangemi, the Plaintiff herein testified as PW1 on 11<sup>th</sup> June, 2008. It was his evidence that he was awarded a tender for the construction of a students' hostel at Mombasa Technical Training Institute having bid for the same at Kshs.9,251,033.00 as the contractual sum. That upon the request of the Defendants, the Plaintiff allowed a discount of Kshs.641,030.00 and the consideration for the contract was settled at Kshs.8,650,000.00. The tender was eventually confirmed on 16<sup>th</sup> December, 1993 whereupon the Plaintiff handed over the Bills of Quantities. He was clear that he had been awarded the work by the Ministry of Public Works which was supposed to commence on 20<sup>th</sup>, December, 1993 and completed on 17<sup>th</sup> July, 1994. However, he could not commence the work as agreed because he had not been supplied with the architectural and structural drawing. The Defendants affirmed the position in their letter dated 7<sup>th</sup> February, 1994 which forwarded the drawings to the Plaintiff.
12. The Plaintiff averred that he finally received the structural drawings on 25<sup>th</sup> February, 1994 and established that the Bills of Quantity which had been presented to him were different from what was in the drawings. For example, the foundation size in the drawings exceeded what was presented in the Bills of Quantities, as the wall was 100mm<sup>2</sup> in the Bills of Quantity while in the drawings it was 150mm<sup>2</sup>. That the drawings showed more windows and an extra room causing him to use many materials than initially envisaged. In a nutshell, the drawings under which he proceeded contained much work than had been envisaged at the time of tendering and more than what he was supposed to do. He adds that he was given the site on 18<sup>th</sup> January, 1994 which was a bit later than agreed.
13. Further, PW1 testified that the contract governing their engagement was never signed by the Defendants and the purported termination on cause of delay cannot be pegged on the unsigned contract. In any event, besides failure to be supplied with drawings earlier enough, the Plaintiff testified that the delays in completion was as a result of failure to approve plumbing and electrical works. The Plaintiff avers that he however appointed Bahari Electrical on 1<sup>st</sup> August, 1994 as a sub-contractor to carry out the engineering works and accordingly notified the Defendants.
14. As regards his payments, the Plaintiff testified that the Ministry was to first issue Certificates in his favor after which the 2<sup>nd</sup> Defendant would make the payments. According to the plaintiff, he would receive the payments late in the day and sometimes fail to receive any payments hence causing more delays in completion of the project. He however admits that he was paid the sum of Kshs.6,691,180.00 before he was issued default notice by the Ministry dated 28<sup>th</sup> May, 1997. He was later issued with a notice to vacate the site although he was not accorded a chance to remove his equipment and materials.
15. On cross-examination, PW1 admitted that the tender document showed how the construction works would be done and having filled the prices in the Bills of Quantities presented, he knew what was to be done and the time frame for completion was curved under Clause 26 of the Agreement. That at the



time he had signed the contract he had seen the Bills of Quantities without the drawings, and it was impossible to proceed without the drawings. He added that the contract provided for a procedure for variation and the same was not adhered to when he realized he had to do more work than expected. None the less, as at the time he was issued with a letter not to continue work, most of the works were complete save for the septic tank. That as far as plumbing and electrical workers are concerned, the Plaintiff was expected to submit their names for the Ministry to nominate them. However, in this case the Ministry delayed leading to the Plaintiff's nomination of Bahari Electricals. The Plaintiff also acknowledged that the contract had an Arbitral Clause, but all prior negotiations had failed.

16. On re-examination, he reiterated that he was not handed over the Bills of Quantities in December, 1993 as agreed and he started works on or around 4<sup>th</sup> February, 1994 after being presented with the drawings. He stated that further delays were caused by late payments and failure to quantify the extra works. It was his evidence that although at the time he had paused the works, he had engaged a Quantity Surveyor to quantify the same.
17. PW2 was Stephen Ndibui Kamau, a Quantity Surveyor based in Mombasa. He testified that during the construction, he was all along the Plaintiff's consultant. He stated that he valued the works done by the Plaintiff after he had complained that he was being underpaid and prepared a report on the works done by the Plaintiff, the sub-contractors and the amount of works not completed as at the time of termination. According to PW2, the Plaintiff had suffered a loss of Kshs.56,430,988.60 as a result of contractual breaches by the Government.
18. On cross-examination, PW2 conceded that in arriving at his concluded figures, he had altered the formula of calculation especially the indexes. He also confirmed that he was a close friend to the Plaintiff, and believed that the Plaintiff was duly owed by the Defendants.
19. The Plaintiff closed his case and the hearing closed with the Defendant not calling any witness. The parties were accorded an opportunity to file written submission in summing up their respective cases. The record shows that both parties complied with the directions with the Plaintiff filing submissions dated 2<sup>nd</sup> March, 2020 whereas the Defendants filed submissions dated 21<sup>st</sup> May, 2020. I have read through the said submissions and establish that they reiterate the summary of the parties' pleadings as reproduced above wish not reproduce the same here but taking them into consideration in the analysis and determination.

### **Analysis and Determination**

20. Having considered each of the parties' pleadings, documents adduced in support of the parallel claims and submission filed on behalf the parties, this Court is persuaded that the following issues stand out for determination: -
  - a. Whether the contract document entered into between the Plaintiff and the Government of Kenya for construction of student Hostels at Mombasa Technical Training Institute is enforceable;
  - b. Whether the Plaintiff's Claim is merited; and,
  - c. Whether the Counterclaim is merited
21. With regard to the first issue on whether the contract is enforceable, the sole question lies on whether a contract signed by only one party to the agreement is enforceable. On this point, it is trite law and that made beyond any doubt under Section 3(3) of the *Law of Contract Act* that a valid agreement enforceable in law is only operative upon its execution by the parties involved. A party cannot rely on provisions they had not taken in possession and in this Court's view, a contract signed by only one



party remains a draft agreement. The same can have contractual force but for it to be binding, it must be signed essentially to express the terms which the parties have agreed bind their subsequent conduct.

22. The persuasive English case on this position is by the Supreme Court of the United Kingdom, *RTS Flexible Systems Ltd –vs- Molkerei Alois Müller GmbH & Co KG (UK Production)* [2010] UKSC14, [45], where it was observed as follows:-

“The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded, or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement.”

23. Whereas this Court appreciates that the Contract Agreement annexed by the Plaintiff which had partially been executed can only have a contractual value but not binding effect, it is common cause and trite law that not all agreements need to be in writing. An agreement will be deemed duly formed and binding where there is consideration and acceptance has been offered. Therefore, where parties reach an agreement on all the terms of the contract they regard (or the law requires) as essential, a contract is deemed to have been formed.
24. Thus, on the facts surrounding the instant case, it is this Court’s view that the Government having invited offers for construction of students hostel at the Technical Training Institute of Mombasa, which the Plaintiff offered to undertake, the same at a contractual sum of Kshs.8,650,000.00, and the Government accepted by awarding him the tender, the necessary essentials of a contract were met and parties expressed their intentions to be bound in terms of the offer and acceptance. However, although the parties intended to reduce the terms of their agreement into writing, this court cannot proceed with the terms in the contract agreement since the document had no binding effect for failure to have the same signed by both parties. It then follows that the parties cannot seek to rely on clauses of the contract agreement which they had not yet owned.
25. On whether the Plaintiff has proved his case, it is trite law that in civil cases, the burden of proof is to the standard of balance of probabilities and based on evidence presented by both sides, the court is only mandated to decide on what cause is more probable than the other. In this case, the Plaintiff’s claim is partially for a liquidated sum of Kshs.3,818,975.00 allegedly being the sum for the unpaid works done and value of construction materials which the Plaintiff was not allowed to collect from the construction site. According to the Plaintiff he had done works valued at Kshs.10,179,505.00, the electrical sub-contractors had done works valued at Kshs.277,8000.00 and the value of the materials left on the site was Kshs.52,850.00. It is said that the Respondents had paid Kshs.6,691,180.00 leaving a balance of Kshs.3,818,975.00. The Defendant on the other hand argued that the Plaintiff was overpaid because the value of work done was Kshs.5,190,000/= whereas he was paid Kshs.6,691,180/= hence he is not entitled to the prayers sought.
26. It is a well-established rule of evidence that whosoever asserts a fact is under an obligation to prove it in order to succeed on it. The standard of proof determines the degree of certainty with which a fact must be proved to satisfy the court of the same. As earlier indicated in the preceding paragraphs, in civil cases



the standard of proof is on the balance of probabilities. In the persuasive case of Miller –vs- Minister of Pensions, Lord Denning had the following to say about the standard of proof in civil cases:-

‘The ...{standard of proof}...is well settled. It must carry a reasonable degree of probability.....if the evidence is such that the tribunal can say: ‘We think it more probable than not’ the burden is discharged, but, if the probabilities are equal, it is not.’

27. Therefore, in this case, the Plaintiff had the burden of proving the propositions that the amount outstanding from the Defendant was Kshs.3,818,975.00 as allegedly the unpaid amounts for work done and value of materials left on site.
28. To begin with, it is not in dispute that the agreed amount for completion of the whole project was Kshs.8,650,000/= and the Plaintiff conceded that at the time of termination of his employment as a contractor he had not completed the entire works as agreed. Indeed, he asserted that he had completed most of projects save for the septic tank. However, this Court was not presented with any evidence of material expressing the variance from the agreed sum of Kshs.8,650,000/= to the claimed amount of Kshs.10,179,505.00, notwithstanding that the envisaged works were not completed. The Plaintiff merely states that he ended up doing more work based on the drawings presented to him, for instance increasing the size of the wall, building an extra room and using thicker metal than was anticipated. The Plaintiff avers that such works were not quantified in the initial Bills of Quantities hence the extra expenses. However, the Plaintiff averred that he would be paid through certificates raised by the Ministry of Public works upon inspection of the works done on the site. In that regard, the Plaintiff has not shown that based on the inspections conducted, there were certificates which were undervalued in sense of the work done or outstanding as at the time of termination of employment as a contractor. In essence, this Court finds that the Plaintiff has not offered persuasive evidence to establish that he had actually done works totaling to Kshs.10,179,505.00, hence he has failed to discharge his burden of proof.
29. As regards the claim for works done by the electrical sub-contractor, the Plaintiff has also not tendered any evidence to affirm this assertion. It would not be enough for the Plaintiff to merely allege that he appointed a sub-contractor who undertook electrical works amounting to Kshs.277,800.00 and notified the Defendants of the same. The Sub-contractor was neither called as witness to confirm the claim nor did the Plaintiff present invoices, certificates or any other documentation confirming the electrical works that were done. Therefore, this Court is not persuaded that this prayer has been proved to the required standard.
30. Further, the Plaintiff alleged that it left materials on the site worth Kshs.52,850.00. Similarly, the plaintiff has failed to list the alleged material with specificity and the corresponding worth of any of them. Again, in this Court’s view, this prayer has also not been proved to the required standard.
31. As Regards the claim for general damages arising from alleged breach of contract, the position in law is as was laid down in the case of Robinson –vs- Harman in which Parke B said:-

“The rule of the common law is that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.”

32. Thus, to successfully claim damages, a Plaintiff must show that: (a) a contract exists or existed; (b) the contract was breached by the Defendant; and (c) the Plaintiff suffered damage (loss) as a result of the Defendant’s breach. The Plaintiff is not required to establish the causal link (between breaches of an agreement and damages) with certainty, but only to establish that the wrongful conduct was probably a



cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what could be expected to have occurred in the ordinary course of human affairs, rather than an exercise in metaphysics.

33. The test to be applied here is whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the Plaintiff. This implies that the Plaintiff has to make out a prima facie case, in the sense that there is evidence relating to all the elements of the claim. The court must consider whether there is evidence upon which a reasonable man might find for the Plaintiff. (See the case of Hyrdo Water Well (K) Limited –vs- Sechere & 2 Others (Sued in their Representative Capacity as the Officers of Chae Kenya Society) (Civil Suit E212 of 2019) [2021] KEHC 22 (KLR) (Commercial and Tax) (10 August 2021) (Judgment).
34. In the instant case, the court has already found that the contract agreement is not binding upon the parties and resorted to offer documents relied on by the parties. PW2 testified that the Plaintiff suffered loss due to inflation of dollar to the tune of Kshs.56,430,988.60 owing to the late payments. That since the Plaintiff would have been paid from treasury bills, it would call for compensation based on the inflation rate.
35. In the Court’s view, under common law damages to be recovered for a breach of contract must be shown with certainty, and not left to speculation or conjecture; and it is under this rule that profits are excluded from the estimate of damages in such cases. The court is inclined to believe that the claim for damages for losses arising from inflation by the Plaintiff herein is speculative, hence not awardable. The damages sought must be “a proximate consequence of the breach, not merely remote or possible.
36. Lastly, as regards the merit of the Counter-claim, it is worth-noting that the same was pleaded, the Defendant has called no evidence in support of the prayers sought therein and none is awardable without any supporting evidence.
37. In the upshot, it is this Court’s conclusion that the claims both in the Plaint and Counter-claim have not met the required threshold of proof in civil cases on balance of probabilities. Consequently, the claims both in the Plaint and Counter-claim are dismissed with no orders as to costs.

It is so ordered.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 16<sup>TH</sup> DAY OF MAY , 2023.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

No appearance for and by either party

Court Assistant - Mwenda

