Kenya Medical Engineering Limited v Board of Trustee of Catherine Mcauley Nursing School & Mater Misericordiae Hospital & another (Commercial Case 62 of 2016) [2023] KEHC 18383 (KLR) (Commercial and Tax) (12 June 2023) (Judgment)

Neutral citation: [2023] KEHC 18383 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE 62 OF 2016

DAS MAJANJA, J

JUNE 12, 2023

BETWEEN

KENYA MEDICAL ENGINEERING LIMITED .... PLAINTIFF

AND

BOARD OF TRUSTEE OF CATHERINE MCAULEY NURSING SCHOOL & MATER MISERICORDIAE HOSPITAL .... 1ST DEFENDANT

SHAPA CONSULTING LIMITED .... 2ND DEFENDANT

JUDGMENT

1. The Plaintiff's case is set out in the Re-Amended Plaint dated 5th April 2016 (''the Plaint''). On 5th January 2016, it entered into a contract with the 1st Defendant to carry out works for a Medical Gases and Nurse Call Sub Contract for the sum of Kshs. 13,378,422.00 (inclusive of VAT and provisional sums and medical bed unit) (''the Contract''). The Plaintiff avers that despite completing almost 90% of the Contract works, the 1st Defendant refused to pay it despite a certificate having been issued as required.

2. The Plaintiff avers that it was contracted to install bed units, nurse call alarm system and medical gas terminal units and pipeline which it almost completed except the Bed Head units which were not locally available and had to be imported from an overseas manufacturer. It avers that despite having made great effort import the Bed Head units and to complete the works, the 2nd Defendant started interfering with the works by issuing threats, placing impractical deadlines for installation of the Bed Head units despite having knowledge that the Plaintiff had placed an order and was in the process of importing materials for the Bed Head units.

3. Despite making efforts to ensure that the last phase of the Contract was completed, the Plaintiff avers that the 2nd Defendant, in consultation with the 1st Defendant, maliciously and unlawfully terminated the Contract on 24th February 2016 thereby occasioning it great inconvenience, loss and damage. The Plaintiff therefore prays for a permanent injunction restraining the Defendants from awarding the Contract to third parties and or interfering with the Plaintiff's efforts to complete the project, payment of Kshs. 3,269,335.32 as per the interim certificate dated 18th February 2016 for the work already completed, special, general and aggravated damages and costs of the suit.

4. The 1st Defendant denies the Plaintiff's claim in its Statement of Defence dated 8th June 2018. It avers that it cannot be sued in the manner described. As regards the Contract, it avers that the award of the tender was tainted by manipulation, fraudulent and corrupt practices which it had reported to the relevant investigating authorities. It states that the employee involved in bid-rigging in collusion with the Plaintiff with the intention of granting the Plaintiff an unfair advantage, has been charged in Criminal Case No. 780 of 2018.

5. While the 1st Defendant denies that the Plaintiff substantially completed works as alleged, it avers that it paid for all completed work. It denies that the Plaintiff is entitled to any damages, special or general, as claimed. In response to the issue of termination, the 1st Defendant avers that the Contract period had lapsed hence there was no interference with the Contract and that due to the delicate and sensitive nature of service delivery, it had to engage a third party to complete the works. The 1st Defendant further avers that Plaintiff did not have the financial capacity to service the Contract having been involved in bid rigging.

6. Before pre-trial directions, the 1st Defendant filed a Notice of Preliminary Objection dated 22nd March 2016 where it objected to the suit on the ground that the 1st Defendant, initially sued as Mater Hospital, was neither a legal or juristic person capable of being sued as such. The court heard the objection and by a ruling dated 22nd April 2016 (Kariuki J.), held that indeed the 1st Defendant as then named could not be sued as such and that the suit as it was, ''illegal and thus null and void.'' The court did not strike out the suit having noted that the plaint had been amended and re-amended. Therefore, in so far as this judgment is concerned, the issue of 1st Defendant's capacity has been resolved.

7. After the suit was certified ready for trial and after a few false starts, the Plaintiff and the 1st Defendant recorded a consent dated 20th September 2022 as follows:

    1. The Plaintiff and the 1st Defendant mutually agree to rely on the pleadings filed and the documents on record to expedite the conclusion of the matter.

    2. That both parties proceed to file and exchange written submissions, with each party having thirty (30) days from the date of this consent.

    3. That parties will take a judgment date on 06.12.2022 when the matter comes up for mention.

8. The parties did file their respective documents and submissions which form the basis of this determination. The parties did not agree on facts or issues. The basic facts leading to this suit are not in dispute as they are a matter of documentation which I now turn to.

9. It is not in dispute that the Plaintiff was awarded a tender by the 1st Defendant by the letter dated 5th January 2016 which it accepted by the letter dated 6th January 2016. The Contract period was 7 weeks and the completion date scheduled for 22nd February 2016. From the documentation, it appears that the 2nd Defendant was the Lead Consultant of the Project. The Plaintiff wrote to the 1st Defendant by the letter dated 8th January 2016 confirming the work had commenced and since the Bed Head Units,

medical gas alarm, zone service units and nurse call alarm system would have to be imported and would take at least 3 to 4 weeks, it requested advance payment amounting to 60% of the Contract price to facilitate importation of those items.

10. By the letter dated 23rd January 2016 to the 2nd Defendant, the Plaintiff gave a progress report. More importantly, it informed the Defendants that it had ordered the Bed Head units from the manufacturer. At about the same time, the 2nd Defendant by the letter dated 22nd January 2016 referenced, "Notice of Omission – Part of Medical Gases and Nurse Call System" requested the Plaintiff to confirm, within 4 days, that certain items namely Bed Head Units, Gas Termination Points and Nurse Call Systems will be supplied and fixed by the completion date being 22nd February 2016.

11. The Plaintiff did not respond to the letter but its advocate, Muchangi Nduati and Company Advocates, by its letter dated 27th January 2016 replied and inquired why the 2nd Defendant was making demands on the Plaintiff yet the Contract was clear on the parties' undertakings. It accused the 2nd Defendant of interfering with the Contract and informed it that the Plaintiff had already tendered the progress report. The 2nd Defendant responded to the aforesaid letter by its letter dated 28th January 2016 informing it that the letter was based on the provisions of the Agreement and Conditions of Contract for Building Works, April 1999 Edition. The Plaintiff however submitted further progress reports dated 5th February 2016 and 19th February 2016. In the latter report, the Plaintiff informed the Project Architect that the Medical Gas Pipeline had been completed and pressure tested, the zone valve/area alarm system was 90% complete, the nurse call system was to commence the following week, the pipe labelling was in progress and the main pipeline installation was at 80%.

12. On 12th February 2016, the Project Architect issued an Interim Certificate No. 986287 in favour of the Plaintiff for Kshs. 3,269,335.32 whereupon the Plaintiff issued an invoice dated 22nd February 2016 for the same amount.

13. On 23rd February 2016, the 2nd Defendant wrote to the Plaintiff a letter referenced, ''Letter of Concern'' in which it complained that the Bed Heads units had not been delivered and that the time of delivery was uncertain. It also expressed concern that the Plaintiff had not provided any evidence to confirm that it had paid the UK supplier. It then informed the Plaintiff that it was taking immediate action without further reference to it.

14. On 24th February 2016, the Project Architects, Wanda Synergy Architects, issued Variation Order No. 1 omitting the Bead Head units. The Plaintiff protested this variation by the letter dated 26th February 2016 stating that it had already ordered the Bead Head units as earlier instructed by the Project Engineer and there was no basis to effectively terminate the agreement without any warnings and default notices. The Plaintiff also informed the Engineer that it had completed 90% of the project without any complaints or notice from the main contractor or employer.

15. From the pleadings and facts, I have outlined above, there are two main issues for determination. First, whether the 1st Defendant breached the Contract. Second and if so, whether the Plaintiff is entitled to damages.

16. On the first issue, it is not in dispute that the Contract was to be completed by 22nd February 2016. The Plaintiff admits that it completed only 90% of the total project works and had not delivered the Bed Head units by the completion date. Although it had ordered the Bed Head units and the manufacturer had indeed confirmed that manufacture was in process, the requirement in the Contract was that it would be completed by 22nd February 2016. The Plaintiff cited the decision in *Jeremiah Mucheru Ndibui v David Gichure* [2019]eKLR where the court held that, "A party cannot run away from the terms of the agreement. It has often been stated that the Court's function is to enforce contracts that

the parties enter into. The court cannot rewrite the party's agreements." I agree with this exposition of the law and hold that unless varied by the parties, the Plaintiff had already breached the Contract by failing to deliver on the Contract on time within the stipulated time. When it entered into the Contract, the Plaintiff bound itself to complete the project by the completion date which, by its own admission, it failed to do. The Defendant is also correct to note that it could not have breached the Contract by terminating it wrongfully or unlawfully as alleged by the Plaintiff because it lapsed on the completion date.

17. Even if I accept that the 1st Defendant is guilty of breach of contract, the next issue for consideration is whether it is liable for damages. In *Consolata Anyango Ouma v South Nyanza Sugar Company Ltd* MGR HCCA No. 53 of 2015 [2015]eKLR the court summarized the principles applicable in assessment of damages for breach of contract as follows:

> (15) The next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This is principle is encapsulated in the Latin phrase restitution in integrum (see *Kenya Industrial Estates Ltd v Lee Enterprises Ltd* NRB CA Civil Appeal No. 54 of 2004 [2009]eKLR, *Kenya Breweries Ltd v Natex Distributors Ltd* Milimani HCCC No. 704 of 2000 [2004]eKLR).The measure of damages is in accordance with the rule established in the case of Hadley v Baxendale (1854) 9. Exch. 341 that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see *Standard Chartered Bank Limited v Intercom Services Ltd & Others* NRB CA Civil Appeal No. 37 of 2003 [2004]eKLR). Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved (see *Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others*, NRB CA Civil Appeal No. 192 of 92 (UR) and *Charles C. Sande v Kenya Co-operative Creameries Ltd* NRB CA Civil Appeal No. 154 of 1992 (UR)).

18. The Plaintiff has pleaded and prayed for payment of Kshs. 3,269,335.32 being the value of the interim certificate dated 18th February 2016. This amount had been certified as due by the Project Architect. The 1st Defendant rebutted this claim by producing a computer generated Electronic Funds Transfer Confirmation Slip showing payment of Kshs. 2,911, 399.45 to the Plaintiff. This sum excluded the applicable withholding taxes. The 1st Defendant's evidence was not controverted. I also note that the Plaintiff did not issue a demand letter for this sum thus corroborating the fact that it had been paid.

19. The Plaintiff also claims, "special damages to be ascertained at the hearing of the suit." It is trite law that special damages must be pleaded and proved and the court cannot award any other damages unless they are pleaded with particularity and proved to the required standard. In its submissions, the Plaintiff claims that it lost Kshs. 13,738,422.50 since it was denied the opportunity to complete the Contract. As this amount was not pleaded in the Plaint, it cannot be awarded in view of the established principles. In this case, no other special damages have been pleading and none can be awarded. Likewise, the claim for general and aggravated damages, being damages at large, cannot be awarded for breach of contract (see *Dharamshi v Karsan*[1974]EA 41 and *Kenya Tourist Development Corporation v Sundowner Lodge Limited* [2018]eKLR).

20. From the totality of the evidence and submissions, I find and hold that the Plaintiff has failed to prove its case on the balance of probabilities. It is therefore dismissed with costs to the 1st Defendant.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF JUNE 2023.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Wachakana instructed by Wachakana and Company Advocates for the Plaintiff

Mr Mbugua instructed by Chiuri Kiriu and Rugo Advocates for the 1st Defendant.