



Riverbank Solutions Limited v County Government of Kisumu (Civil Suit 11 of 2019) [2024] KEHC 13298 (KLR) (25 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13298 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL SUIT 11 OF 2019
MS SHARIFF, J
OCTOBER 25, 2024**

BETWEEN

RIVERBANK SOLUTIONS LIMITED PLAINTIFF

AND

COUNTY GOVERNMENT OF KISUMU DEFENDANT

JUDGMENT

1. The Plaintiff impleaded the Defendant via a plaint dated 24th May 2019 seeking the following prayers: -
 1. Judgment in the sum of Kshs 50,988,949/= being debt owed by the Defendants.
 2. Costs of the suit
 3. Interest on (1) and (2) above at such rate and for such period of time as this honourable court may deem fit to grant.
 4. Any such other or further relief as this honourable court may deem appropriate.
2. In a defence dated 8th November 2019 the Defendant denied receiving any invoices for the amounts claimed and put the Plaintiff to strict proof thereof.
3. The matter proceeded for hearing on 27/2/2024 with Robert Bitengo Maoga the Plaintiff's director testifying. There was no evidence led on behalf of the Defendant.

Plaintiff's Case/ Evidence

4. The Plaintiff avers that on 24th February 2015 it entered into a tripartite agreement with the Defendant and KCB bank for provision of electronic revenue collection services. It is the Plaintiff's contention that Clause 7 as read with schedule 2 of the agreement stipulated an initial set up fee of Kshs



33,640,000/= to be paid in four tranches: 30% at the signing, 20% upon installation of the setup in the cloud, 30% on user acceptance and 30% upon the system going live.

5. Additionally, the Plaintiff affirms that it was entitled to 5% commission of the gross revenue, while KCB Bank was entitled to 2% of the revenue, with the Defendant catering for recurrent expenses like data bundles and paper rolls.
6. Pursuant to the agreement the Plaintiff asserts that it diligently carried out its obligations and raised invoices on a quarterly basis which the Defendant refused to pay despite numerous reminders.
7. Moreover, it avers that despite acknowledging the debt and promising to make part payment via a letter dated 5th July 2017, no amount has been paid necessitating filing of this suit.
8. It avows that even after termination of the agreement on 30th June 2018 it made numerous attempts to secure payment which came to naught.
9. The Plaintiff produced the agreement, extension of contract letter, demand letter and copies of the unpaid invoices among other documents.

Defendant's Case

10. Apart from filing the defence the Defendant did not lead any evidence in support of its case. On the 27th of February 2024 when the matter came up for hearing counsel for the Defendant indicated that the firm of Sala and Mudany wished to cease acting for the Defendant. Subsequently the firm filed an application to cease acting dated 12th March 2024 which was allowed by the court on 9th July 2024.
11. In the statement of defence, the Defendant denied breach of contract and averred that it never received the invoices as claimed by the Plaintiff.

Plaintiff's Submissions.

12. In its submissions dated 5th April 2024 the Plaintiff outlined the following issues for determination: -
 1. Whether there is a breach of contract and if so, who occasioned the breach.
 2. Whether it is entitled to prayers sought.
 3. Who should bear the costs of the suit.
13. On the first issue the Plaintiff submits that the Defendant was in breach of contract. It argues that the Defendant's claim of not receiving the invoices constitutes an admission of the existence of a contractual relationship between the parties herein.
14. The Plaintiff further submits that the Defendant's assertion of non-receipt of the invoices was merely an excuse for its failure to settle the outstanding amounts. In fact, the Plaintiff maintains that the Defendant did receive the invoices.
15. The Plaintiff cites the case of Attorney General of Belize et al v Belize Telecom Ltd & Anor (2009) which references Lord Person in Trollope Colls Ltd v North West Metropolitan Regional Hospital Board (1973) 1 WLR 601 at 609 to the effect that clear and express terms of a contract must be applied as is by the court even if the court thinks other terms would be more suitable.
16. The Plaintiff also relies on Curtis v Chemical Cleaning & Dyeing Co. Ltd (1951), ALL ER 631 where Lord Denning emphasized the sanctity of a signed contract in the absence of proof of fraud or misrepresentation.



17. The Plaintiff firmly submits that in the absence of fraud or misrepresentation the Defendant is estopped from denying the validity of the agreement.
18. On entitlement to the prayers sought the Plaintiff cites non-payment of the amounts due. It references the schedule of paid and unpaid amounts, the formal demand letter, the letter from CEC Finance and Planning acknowledging debt and promising payment.
19. On the strength of this the Plaintiff submits that he is entitled to Kshs.10,092,000/= as 30% of the initial set up fees and Kshs.40,896,949/= as 5% commission inclusive of recurrent expenses.
20. Finally, the Plaintiff submits that it is entitled to recover costs, having successfully proven its case on a balance of probabilities.

Determination

21. After a careful analysis of the pleadings, the testimony and the evidence my considered opinion is that this suit turns on whether the Plaintiff has proven its case to the required standard.
22. The Plaintiff's claim is based on Clause 7 and Schedule 2 of the agreement. Sub-clause 7.1.1 stipulates an initial setup fee as outlined in Schedule 2. Specifically, Clause 2 of Schedule 2 specifies a service setup charge of Kshs 33,640,000. Additionally, Clause 3 of Schedule 2 provides for a payment of 5% of the total revenue collected to the Plaintiff.
23. To support its claim, the Plaintiff has submitted two letters dated June 27, 2017, and July 3, 2018, demanding payments of Kshs 30,022,128 and Kshs 40,834,754, respectively. The Defendant, in a letter dated July 5, 2017, acknowledged a part payment of Kshs 4.4 million, leaving a balance of Kshs 25,674,625. Furthermore, the Plaintiff has provided invoices totalling Kshs 50,980,509 and a summary statement indicating outstanding commissions and setup fees amounting to Kshs 50,988,949.
24. All this evidence was uncontroverted. The defendant's defence contained mere disavowals and denials that the invoices were ever received. It is trite law that assertions in pleadings without evidentiary support remain just that. This was the holding of the court in Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 citing the decision in Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997 that: -

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence”.
25. The consequences for failure to adduce evidence was also considered by the court in. In Karuru Munyoro v. Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988 where Makhandia J (as he then was) held:

“The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon.”



26. Additionally, the Supreme Court has lent its voice to this debate in Presidential Election Petition No. 1 of 2017 between Raila Amolo Odinga & Another vs. IEBC & 2 Others (2017) eKLR where it states as follows: -

“(132) Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and remains constant through a trial with the plaintiff, however, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.

(133) It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce ‘factual’ evidence to prove his/her allegations of breach, then the burden shifts and it behoves the respondent to adduce evidence to prove compliance with the law.....

27. In the absence of evidence in rebuttal from the Defendant, it follows that the Plaintiff has proven his case on a balance of probability.

28. The next step is to determine whether the amounts claimed by the Plaintiff have been substantiated. The Plaintiff seeks a total of Kshs.40,896,949 in outstanding commission and Kshs.10,092,000 in outstanding setup fees.

29. The Plaintiff has provided an invoice for the outstanding setup fees, which was received by the Defendant on 15th September 2016, as evidenced by the stamped date. Consequently, the Plaintiff is entitled to this amount.

30. Regarding commission the Plaintiff has produced a total of nine invoices amounting to Kshs 34,758,510/=. It is also entitled to this amount.

31. A further invoice of Kshs 6,130,000/= has been raised by the Plaintiff for provision of paper rolls. Clause 4.1.10 of the agreement provides as follows: -

“The solution provider will supply POS consumables including; Printing Rolls and Data Bundles. These shall be billed to the County Government of Kisumu on a monthly basis.”

32. From the foregoing clause it is clear that the Plaintiff is entitled to the Kshs.6,130,000/= for provision of paper rolls.

33. The upshot of the foregoing is that the Plaintiff’s case is allowed in the following terms.

1. Kshs 50,980,510/= as debt owed
2. Interest on (1) above from the date of filing suit till payment in full
3. Costs of the suit to be borne by the Defendant.



Orders accordingly.

DELIVERED, SIGNED AND DATED AT KISUMU THIS 25TH DAY OF OCTOBER 2024.

MWANAISHA S SHARIFF

JUDGE

