



Monaco Enginnering Limited v Munywe Investment Limited (Civil Case 62 of 2019) [2024] KEHC 14213 (KLR) (Civ) (8 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14213 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL CASE 62 OF 2019**

AN ONGERI, J

NOVEMBER 8, 2024

BETWEEN

MONACO ENGINNERING LIMITED PLAINTIFF

AND

MUNYWE INVESTMENT LIMITED DEFENDANT

RULING

1. The plaintiff in this case, Monaco Engineering Limited(hereafter referred to as the plaintiff only) filed this suit vide plaint dated 4/3/2019 seeking the following orders against the defendant (Munywe Investment Limited)
 - i. The sum of ksh.29,964,789.60 being the agreed payment as at 31st August 2017.
 - ii. Interest on delayed payment as at 22nd November 2018 in the sum of kssh.4,326,438.04.
 - iii. Further interest on (i) above at Commercial bank lending rates as per the CBK in force from 22nd November 2018 until payment in full.
 - iv. In the alternative to (ii) above, interest on (i) above be calculated at court rates of 12% p.a from 31st August 2017 until payment in full.
 - v. The judgment amount referred to in clause 1 above be settled forthwith by the defendant failure to which the property known as maisonettes for Munywe Investments Ltd in Sigona on L.R. No. Sigona/422 (PART) – Kikuyu be attached and sold forthwith to satisfy the said judgment sum.



- vi. A permanent injunction restraining the defendant either by itself, its agents, assigns, employees or servants from whatsoever interfering with the plaintiff's whatsoever disposing of, selling leasing or charging the property known as L. R. No. Sigona/422(Part) – Kikuyu.
 - vii. Costs incidental to this suit.
 - viii. Such other, further, incidental or alternative relief as the honourable court may deem just and expedient.
2. The plaintiff avers as follows in the plaint dated 4/3/2019.
 3. That at all material times the Plaintiff was a contractor engaged in the business of building and construction works.
 4. That on 14th October 2013, the Plaintiff (a contractor) and the Defendant (a developer) herein entered into a contractual agreement for the construction of Maisonettes in Sigona on Plot LR. No. Sigona/422- Kikuyu ("the project"). The contractual agreement was contained in the standard form agreement prepared by the Joint Building Council (the "JBC").
 5. That the JBC Agreement provided inter alia that:
 - a. The contract price for the Builder's work was Kshs.151,738,428.27. This amount was based on a priced bill of quantities duly executed by the Plaintiff (as contractor) and the Defendant (as developer)
 - b. The Plaintiff was expected to be guided at all times in the construction process with, the priced bill of quantities;
 - c. The Architects for the project were Messrs AAKI Consultants whilst the Quantity surveyor for the project was Messrs Miaco Insight International.
 - d. The mode of payments to be made was provided for in the JBC Agreement
 - e. The date of Practical completion was set at 12th May 2015.
 6. That in relation to payment clause 34 of the JBC Agreement provided as follows:
 - a. The Plaintiff as the Contractor shall at agreed intervals submit to the Quantity Surveyor an application for payment giving sufficient details of the works done and the materials on site and the amounts which the Contractor considers himself to be entitled to;
 - b. After verifying the amounts, the Quantity Surveyor shall prepare within seven days an interim valuation of work done and materials on site during the relevant period and forward the same to the Architect.
 - c. The Architect shall issue an interim payment certificate within seven days from the date of receipt of the Quantity Surveyor's valuation.
 - d. The Contractor shall, on presentation of any interim payment certificates to the Employer (The Defendant), be entitled to payment thereof within 14 days.
 7. That in relation to the Practical Completion clause 41 of the JBC Agreement provided as follows:
 - a. 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.

- b. Within fourteen days of the issue 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 issue 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.
8. That the Plaintiff and Defendant are fully aware of the individual terms and conditions of the JBC agreement. At the hearing of this Application, the plaintiff shall refer to the JBC Agreement for their full meaning, tenor and effect.
9. That it is provided for in the JBC agreement that the Defendant pays the Plaintiff upon completion of the project and handing over the Certificate of Completion. The Certificate of Completion was issued/handed over on 31st August 2017.
10. That the Plaintiff on the basis of the Interim certificates proceeded to raise invoices for which VAT became immediately due and which the Plaintiff proceeded to pay to avoid late payment penalties being levied by Kenya Revenue Authority.
11. Payment of the certificates was not done in full as agreed in the JBC Agreement prompting the Plaintiff to work out a final account with the Defendant which had an amount outstanding of Kshs.29,964,789.60.
12. As agreed in the JBC Agreement, these outstanding amounts attracted an interest at the commercial bank rates as per the Central Bank of Kenya which amounted to Kshs.4,326,438.04.
13. THAT the Plaintiff's final account with the Defendant which includes interest on delayed payments shows a total amount outstanding of Kshs.34,291,227.68.
14. The Defendant has breached its obligation to the Plaintiff under the JBC Agreement.
Particulars of breach on the part of the defendant
 - (a) Failing to pay the Plaintiff sums rightfully due and owing to it.
 - (b) Failing to pay the Plaintiff sums rightfully due and owing to it within the time required under the JBC agreement.
15. On presentation of the demands for payment of these monies, the indebtedness was not denied by the Defendant. It was indeed unequivocally admitted with the rider that there were no funds to settle the amounts and that the Plaintiff should wait until the Defendants have secured buyers for the said Masionettes and forthwith pay the outstanding amounts. There is therefore no dispute between the parties on the sums due and owing to the Plaintiff under the JBC Agreement,
16. The Defendant has no other known asset save for the premises and it is imperative for the Plaintiff to take steps to secure its payment due from the Defendant and to that extent, exercise its proprietary lien over the property and seek permission of the court to dispose of the property to settle the sums due to it.
17. The Plaintiff dutifully and to the exclusive benefit of the Defendant carried out its obligations under the JBC Agreement without any complaint from the Defendant.



18. The Plaintiff's claim is for a combined sum of Kshs.34,291,227.68 being the amounts due from the payments certificates issued and which remains not fully paid plus interest accrued. The interest accrued continue to increase on daily basis until payment in full.
19. The Defendant has failed, refused and or neglected to pay the outstanding sums despite issuance of formal demand and Notice of intention to institute legal proceedings, thereby necessitating this suit.
20. The defendant filed a statement of defence dated 31/7/2019 denying the plaintiff's claim.
21. The hearing proceeded on 30/04/2024. The plaintiff called one witness (PW 1) who produced his written witness statement dated 4/3/2019 as his evidence in chief.
22. The witness(PW1), stated in the said witness statement that the plaintiff entered into a contractual agreement for the construction of maisonettes in Sigona Plot LR No. Sigona/422 Kikuyu.
23. The price for the builder's work was Kshs. 151,738,428.27 and the plaintiff was expected to be guided at all times in the construction process with the priced bill of quantities. It also provided that the quantity surveyor would prepare an interim valuation of the work then forward the same to the architect.
24. PW1 further stated that the architect would then issue an interim payment certificate within 7 days from the date of receipt of the Quality Surveyors for valuation. The contractor will then be entitled to be paid after submitting the interim payment certificates to the employer who is the defendant within 14 days. After completion when in the opinion of the contractor the work is practically complete, the contractor would give a written notice to the architect and within 14 days after receipt of such notice the architect would inspect the works. If in the opinion of the architect the work is practically complete he would then issue a certificate of practical completion.
25. PW1 indicated that the defendant was supposed to pay the plaintiff upon the completion of the project and handing over the certificate of completion. All the other stakeholders involved but the defendant followed the procedure stipulated in the agreement.
26. The plaintiff raised invoices but payment of the certificates was not done in full as agreed in the JBC Agreement. Out of Kshs. 151,738,428.27 the defendant paid 128,013,836.27. the outstanding amount attracted an interest that amounted to Kshs. 4,326,438.04 as of 22/11/2018 and therefore the plaintiff claims a total of 34,291,227 as the sum owed.
27. In cross-examination in court, PW 1 PETER MACHARIA stated that the final accounts were as submitted by himself since the quantity surveyor there was no agreement.
28. He said the quantity surveyor did not prepare the final accounts.
29. The defendant did not call any witness.
30. The parties filed written submissions as follows;
31. The plaintiff submitted that there existed a valid contract according to Article 2 of the Law of Contract that existed between the parties. The contract was for construction which provided for the mode and terms of the work and payment and was duly signed.
32. The plaintiff submitted that they completed their task on 31/8/2017 and the certificate of completion was issued. Payment of the certificates was not done in full as agreed in the contract as the defendant remained with an outstanding balance of Kshs. 29,964,789.60. The amount further accrued an interest of Kshs. 4,326,438.04 as of 22/11/2018 leading to a total claim of Kshs. 34,291,227.64.



33. The plaintiff argued that the law is settled that a party seeking specific performance must demonstrate that he has performed all the terms of the agreement and that he has acted in contravention of the essential terms of the said agreement.

34. The plaintiff relied on the case of *Reliable Electrical Engineers Ltd v. Mantac Kenya Limited* [2006] eKLR where it was held that

“The jurisdiction of specific performance is based on the existence of a valid, enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable. Even where a contract is valid and enforceable specific performance will, however, not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even where damages are not an adequate remedy specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the defendant.”

35. On damages and interest the plaintiff argued that the interest is based on the defendants delay of making the payments on time like they were supposed to as was provided in the agreement herein.

36. Alternatively, the defendants be held liable for damages at an equivalent rate of 12% of the balance per annum from 31/8/2017 until the date of full payment of the debt.

37. On permanent injunction the plaintiff submitted that the proceeds of the property may be used to settle the money owed to the plaintiff and that if the property was sold the plaintiff would suffer irreparable loss. That in *Bandari Investments & Co Ltd v Martin Chiponda & 139 other* [2022] eKLR it was held that;

“Permanent Injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the Plaintiff in order for the rights of the Plaintiff to be protected. This Court has the powers to grant the Permanent Injunction under Sections 1A, 3 & 3 A of the Civil Procedure Code, 2010 if it feels the right of a Party has been fringed, violated and/or threatened as the Court cannot just seat, wait and watch under these given circumstances.”

38. The defendant alternatively submitted that the sum the plaintiff is claiming is false and based on the doctrine of *laissez faire*, when entered into freely and voluntarily, contracts must be held sacred and enforced.

39. The defendant further stated that there is no evidence that the Plaintiff actually made the claim for payment or that the provisions of section 34 of the JBC Agreement were complied with, there is no documentation produced before court in the form of an interim payment certificate issued by the architect, a valuation of the work done or a final account; which documents were prerequisites before the payment in the agreement was made.

40. As such, the defendant submitted that the claim by the Plaintiff herein lacks basis and is an affront to the provisions and spirit of the JBC Agreement.

41. The defendant submitted that whereas the Plaintiff willfully entered into the JBC Agreement with the Defendant, the Plaintiff has now declined and or neglected to follow the provisions of the said contract. The claim before court is based on a final account prepared by the Plaintiff himself contrary to the



- provisions of the JBC Agreement and is a clear and desperate attempt by the Defendant to rewrite the terms of the Agreement between parties.
42. It was the defendant's argument that the plaintiff's claim is for contractual payments for services allegedly delivered to the defendant and no evidence has been given to prove the same.
 43. That it is not in dispute that the amount claimed by the Plaintiff was not verified by the Quantity Surveyor as envisaged under the JBC Agreement, this position still remains to date. It is also not clear whether the services claimed by the Plaintiff were delivered at all.
 44. That the reason for the Plaintiff's noncompliance with the provisions of the JBC Agreement with regard to payments (Section 34) was brought out in PW1's cross examination that there was a disagreement between the contractor and the quantity surveyor, the same was not substantiated and no evidence has been tendered to support this claim.
 45. It is the duty of the plaintiff to prove their case to the required standard in civil cases which is on a balance of probabilities.
 46. The issues for determination in this case are as follows;
 - i. Whether the plaintiff is entitled to the sum of ksh.29,964,789.60 being the agreed payment as at 31/8/2017.
 - ii. Whether the plaintiff is entitled to interest in respect of delayed payment as at 22/11/2018 in the sum of ksh.4,386,438.04.
 - iii. Whether the property known as Maisonettes for Munywe Investment Ltd in Sigona LR No. Sigona/422(PARI) – KIKUYU should be attached to satisfy the judgment sum.
 - iv. Whether a permanent injunction should issue restraining the defendant and/or its agents, assigns, employees or servants from disposing of, selling, leasing or charging the property known as LR. NO. Sigona/1422 (PARI) Kikuyu.
 47. On the issue as to whether the plaintiff has proved its case, I find that the plaintiff's evidence was that when in the opinion of the Contractor the whole of the Works were practically completed, he would give a notice in writing to the Architect to that effect.
 48. The notice would be accompanied by an undertaking to complete any outstanding work within a reasonable time or within such time as the Architect may direct.
 49. The plaintiff further said that the parties agreed that within fourteen days of the issue of notice, the Architect was to inspect the Works and if in his opinion the Works were practically completed, he would issue the certificate of practical completion, and the defects liability period would be deemed to commence on the date of issue of the said certificate.
 50. If the Works were not practically completed, he would specify in writing to the Contractor the work which in his opinion required to be completed before the certificate can be issued.
 51. Further, that Payment of the certificates was not done in full as agreed in the JBC Agreement prompting the Plaintiff to work out a final account with the Defendant which had an amount outstanding of Kshs.29,964,789.60.
 52. I find that the plaintiff's evidence was not controverted by the defendant.
 53. It is not in dispute that the JBC agreement provided that the Defendant pays the Plaintiff upon completion of the project and handing over the Certificate of Completion.



54. The Certificate of Completion was issued/handed over on 31st August 2017.
55. In the case of Pius Kimaiyo Langat vs. Co-operative Bank of Kenya Ltd (2017) eKLR the Court of Appeal 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.”
56. There is evidence that the plaintiff did his part of the bargain and I find that the plaintiff is entitled to the payment of the final account with the Defendant as worked out by the plaintiff.
57. On the issue as to whether the plaintiff is entitled to ksh.4,326,438.04 in respect of delayed interest in respect of delayed payment, I find that there is no evidence that the parties agreed on the interest rate payable for delayed payment.
58. The plaintiff is therefore entitled to interest at court rates at the rate of 12% p.a from 31st August 2017 until payment in full.
59. On the issue as to whether property known as Maisonettes for Munywe Investment Ltd in Sigona LR No. Sigona/422(Pari) – Kikuyu should be attached to satisfy the judgment sum, again there is no indication the parties had agreed on any such arrangement.
60. It follows that the plaintiff is not entitled to the injunctive orders he is seeking against the defendant.
61. However, the plaintiff has proved that they completed their task on 31/8/2017 and the certificate of completion was issued.
62. PW 1 Peter Macharia stated that the final accounts were submitted by himself since the quantity surveyor did not prepare the final accounts.
63. The plaintiff is entitled to the payment for the work done since they completed the task.
64. I enter judgment in favour of the plaintiff against the defendant in the sum of Kshs. 29,964,789.60 being the agreed payment as at 31st August 2017 plus costs and interest at court rates at the rate of 12% p.a from 31st August 2017 until payment in full.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 8TH DAY OF NOVEMBER, 2024.

.....

A. N. ONGERI

JUDGE

In the presence of:

.....for the Plaintiff

.....for the Defendant

