



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

CIVIL CASE NO. 5 OF 2018

(FORMERLY MACHAKOS ENVIRONMENT & LAND COURT CASE NO. 174 OF 2014)

JAVISAPA ENTERPRISES LIMITED.....PLAINTIFF

VERSUS

NEEMA TRUST COMPANY LIMITED.....DEFENDANT

JUDGEMENT

1. The Plaintiff through a plaint filed on **18th November, 2014** sued the Defendant claiming the following reliefs: -

i. Special damages for breach of contract in the sum of Kshs. 58,313,091.00/-.

ii. Interest on (i) at commercial rates prevailing from time to time from the respective due dates until payment in full.

iii. Costs of the Suit.

iv. Interest on (ii) at such rate and for such period of time as this Honourable Court may deem fit to grant.

2. The Defendant upon being served with summons to enter appearance duly entered appearance and filed a statement of defence and counterclaim dated **16th December, 2014** and filed in court on **19th December, 2014**.

3. The suit had earlier been filed at the Environment and Land Court before it was transferred to this court. On the **6th June, 2018** this court gave directions that the pleadings earlier filed and exchanged between the parties before the said transfer be adopted. The Parties had already complied with the provisions of Order 11 of the Civil Procedure Rules. The parties were directed to proceed to take hearing dates and that they were granted leave to file and exchange further documents if need be.

4. The Defendant later filed a defence and counterclaim dated **5th October, 2018** wherein it denied the plaintiff's claim and stated that it was the plaintiff who upon taking over the construction site was to source funds from M/s Shelter Afrique while the defendant was to provide security. It was also pleaded that the plaintiff commenced construction works against the advice of the defendant and also failed to secure the funds as agreed. It was also pleaded that the loss suffered by the plaintiff is self- inflicted due to its failure to secure the project funding from M/s Shelter Afrique. The defendant also filed a counterclaim against the plaintiff wherein it claimed that the plaintiff failed to secure the project funds and that it has wrongfully held and refused to hand over the title deed to the property namely Mavoko Town Block 3/2104 to the detriment of the defendant. The defendant prayed for the dismissal of the plaintiff's suit with costs and that the plaintiff be ordered to surrender the title to L.R Mavoko Town Block 3/2104 to the defendant.

5. The plaintiff filed a reply to defence and counterclaim dated **31st October 2018** in which it maintained that the parties have already agreed on the dispute and a consent entered into and in which the plaintiff craved leave to produce the same. The plaintiff denied the allegations contained in the counterclaim and maintained that it has legal custody of the title documents that had been surrendered to it by the defendant upon mutual consent and for which a demand notice therefor has not been sent to it. The plaintiff further maintained that the defendant despite entering into a consent over the claim is out to get the title deed by hook or crook and thereby leave the plaintiff with nothing. The plaintiff therefore prayed that judgement be entered as prayed in the plaint and that the counterclaim be dismissed with costs.

6. The matter proceeded to hearing on the 26/1/2021. The defendant or its advocates failed to appear in court. The Plaintiff called one

witness. **Jackline Wambui Njeru (Pw1)** who testified and stated that she is a director of the plaintiff. She sought to rely on her verifying affidavit in support of the claim. She testified that she had been awarded a building works contract by the defendant which works were assessed at Kshs 186,046,227/20. She stated that the project entailed building of 3 bedroom bungalows on parcel Mavoko Block 3/2104 belonging to the defendant. She testified that the plaintiff started the exercise by constructing a perimeter fence, connecting a three phase electricity power to the site as well as constructing a security gate. She stated that she was also to drill a borehole before constructing the houses. She stated that the site was duly handed to her and she began the works in 2012 but before completing the perimeter wall a former contractor purported to enter the site but was denied entry by the defendant and which led to wrangles. She added that M/s Shelter Afrique later declined to release the project funds due to the said wrangles. She testified that she later entered into a memorandum of agreement with the defendant whereby she was to be paid a sum of Kshs 58,313,091/ and that she was to hand over the title deed plus the site upon payment. Finally, she stated that in 2018 the defendant entered into another agreement with her before an advocate where the defendant agreed to pay the plaintiff Kshs 99,423,820/ so as to hand over the site as the defendant had secured another contractor. She maintained that the current sums stood at Kshs 157,419,347/ and that she wants the amount paid plus costs.

7. As the Defendant offered no evidence, its case was ordered closed. Parties were then directed to file and exchange submissions. It is only the plaintiff's submissions dated 9/2/2021 that are on record. Learned counsel for the plaintiff submitted that the plaintiff duly performed its side of the bargain and that it should be paid the amounts sought by the defendant who is in breach of the contract. It was submitted that pursuant to the agreements entered into the defendant duly acknowledged being indebted to the plaintiff and which has now escalated to Kshs 157,419,322 as at the time of the closure of the plaintiff's case. Learned counsel urged the court to order the defendant to abide by the agreement as the court cannot rewrite contracts between parties. Reliance was placed in the case of **National Bank of Kenya Ltd V. Pipe plastic Samkolit (K) & Another [2001] KLR 112.**

8. I have given due consideration to the pleadings, documents, statements of witnesses as well as the evidence of the plaintiff's witness. I have also considered the submissions filed by the plaintiff's counsel. The following chronology of issues are not in dispute namely:

a) The parties herein entered into an Agreement and Conditions of Contract for Building Works as published by the Joint Building Council of Kenya dated 14th January 2010, for the Consideration and Conditions set therein where the Plaintiff agreed to carry out and complete the works in respect of 124 low cost housing units on property known as MAVOKO TOWN BLOCK 3/2014 along Kangundo-Nairobi Road.

b) By an Agreement of Irrevocable Guarantee dated 14th January, 2010 in consideration of the Plaintiff agreeing to the take over the works as per that Contract, the Defendant gave an irrevocable guarantee to the Plaintiff with a view of making the Contract of Building Works between the parties more binding.

c) Subsequently, by an Agreement of irrevocable Performance Guarantee dated 14th January 2010, the Defendant agreed to provide the funds towards the construction works and for which the Plaintiff gave an irrevocable performance guarantee to the Defendant with a view of making the Contract of Building Works between the parties more binding.

d) The Plaintiff commenced the works that formed substantial part of the obligations namely; the construction of a perimeter wall, connection of three phase electricity network and obtaining necessary National Environmental Management Agency (NEMA) approvals for sinking of a borehole among others under the Contract until it was stopped following wrangles over the property between the defendant and third parties.

e) After several meetings and consultations between the parties herein, an agreement was entered into dated 6/11/2014 whereby the defendant through its directors agreed to pay the plaintiff a sum of Kshs 58,313,091/ plus interest at 18% per annum.

f) Another agreement was entered between the parties dated 24/8/2018 whereby the defendant acknowledged owing the plaintiff a sum of Kshs 99,423,820/ and undertook to pay within two months thereafter and further undertook to give the plaintiff's advocates a professional undertaking so as to enable the plaintiff to release the title document in her possession to the defendant.

g) As at the hearing of the matter the defendant had neither paid up the monies nor offered the professional undertaking to the plaintiff.

9. After the foregoing deductions, I find the following issues necessary for determination:

i) Whether the defendant breached its obligations under the contract for Building Works,

ii) Whether the plaintiff is entitled to special damages as pleaded.

10. On whether the Defendant breached its obligations under the Contract of Building Works, the documents availed by the plaintiff show that the Defendant has on various instances admitted to owing the Plaintiff sums of money on account of the accomplished part of the Contract. By the Agreement and annexed schedule of works dated 6th November, 2014 between the Plaintiff and the Defendant, the Defendant's Board of Directors consciously agreed and executed the Agreement to pay the Plaintiff the sum of Kshs. 58, 313, 091/= plus interest at the rate of 18% per annum (produced as Index 5 of the plaintiff's list of documents). Further, the agreement between parties dated 24th August, 2018 produced vide the Plaintiff's supplementary list of documents clearly confirms that the Defendant acknowledged owing the Plaintiff a sum of Kshs. 99, 423,820/= which was to be paid within two (2) months of that date. That further, the Advocates for the Defendants were to give the Plaintiff's Advocates a professional undertaking to enable release of the original title document for **Mavoko Block 3/2014** which the Plaintiff held in lien. The Agreement made reference to the initial Agreement of 5th November, 2014 that highlighted the interest accrued.

It is noted that the defendant in its defence and counterclaim blamed the plaintiff for breaching the contract. However, the plaintiff's evidence together with the two agreements left no doubt that it is none other than the defendant who breached the contract. The defendant opted not to tender its evidence so as to controvert that of the plaintiff. I wish to add that even if the defendant had tendered evidence, the same could not have dislodged the documentary evidence of the defendant's admission of the debt due to the plaintiff. I am satisfied by the evidence presented by the plaintiff that the defendant breached the contract and hence it is liable therefor and should pay the amounts pleaded by the plaintiff. The court in the case of **Nakana Trading Co. Ltd vs Coffee Marketing Board 1990 – 1994 EA 448**, was faced with a similar situation of alleged breach of contract by one of the parties to a contract and held that:

"A breach occurs in a contract when one or both parties fail to fulfil the obligations imposed by the terms. Since the contract was in writing the court's duty was to look at it and determine whether it applies to the facts."

Going by the defendant's admission of the claim and its failure to make good the same, the plaintiff's claim that there has been breach of the contract must succeed. There is no evidence that the consents entered into were at any time vacated and or changed. The defendant has also not given evidence that the said consent had been obtained by way of fraud or coercion and hence the same are still binding upon the defendant to comply.

11. On whether the plaintiff is entitled to special damages, in view of the facts of this case I am satisfied that the Plaintiff has demonstrated that the Defendant breached clear terms of its obligation under the Contract for Building Works.

The Plaintiff in its plaint dated 18th November, 2014 has specifically pleaded and has in its evidence through PW1, specifically proved the special damages of Kshs. 58, 313, 091/= plus interest at the rate of 18% per annum. The two agreements dated 6/11/2014 and 24/8/2018 established the same. The Plaintiff's counsel has urged this court to award the sum of Kshs 157,419,322/ being the amounts owing as at the time of conclusion of the trial. Even though there was an agreement dated 24/8/2018 for the sum of Kshs 99,423,820/, I note that the plaintiff did not see it fit to amend its plaint to factor the same since all special damages must be specifically pleaded and proved. The plaintiff has to contend with what it pleaded namely Kshs 58,313,091/ which will attract interest of 18% per annum.

On whether costs should be awarded, the conventional rule is that costs follow the event. As the plaintiff has succeeded in its case, it follows that the costs hereof must be borne by the defendant.

12. The upshot of the foregoing observation is that the Plaintiff has proved its claim on balance of probability against the Defendant. Judgement is hereby entered for the plaintiff as follows: -

a) Special damages of Kshs. 58,313,091.00/= plus interest of 18% p.a. from 6/11/2014.

b) Costs of the suit.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 2ND DAY OF JUNE, 2021.

D. K. KEMEI

JUDGE