



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL COURTS**

**CIVIL SUIT NO.416 OF 2009**

**SPECIALIZED ALUMINIUM RENOVATORS LIMITED.....PLAINTIFF**

**VERSUS**

**INFORM CREATIVE INTERIORS LIMITED.....DEFENDANT**

**JUDGMENT**

**A. PLEADINGS**

1. This case was commenced through a plaint dated 18<sup>th</sup> May 2009 in which the plaintiff alleged breach of contract by the defendant in that though the plaintiff and the defendant had entered into a contract for the plaintiff to execute an office fit out job for ZEP RE at ZEP RE Centre in Upper Hill, Nairobi; and the plaintiff had executed the same and carried out extra works, the defendant only paid the plaintiff Kshs.4,570,370.00/= leaving the balance of Kshs.2,438,135.00/= unpaid inspite of the fact that the works were handed over on 27<sup>th</sup> May 2005.
2. The plaintiff thus brought this suit for payment of the outstanding amount of Kshs.2,438,135.00 above, costs and interest at court rates.
3. In response to the plaint the defendant filed a defence on 16<sup>th</sup> July 2009 denying the allegations in the plaint and claiming that the defendant was a stranger to the contract, as well as amounts claimed. The defendant also denied being served with notice to sue.
4. Later, the defendant filed an amended defence after a request to strike out the original defence was filed. In the amended defence, the defendant stated that the plaintiff did not complete the works on time within 8 weeks from 7<sup>th</sup> February 2005, and also failed to follow directives and instructions specified in the design layout. It was also averred in the amended defence that any sums payable were to be forwarded to ZEP-RE and then transmitted to the plaintiff, strictly dependent on actual verifiable costs, and that any money due and owing to the plaintiff had been paid in full. The defendant further denied privity of contract with the plaintiff, and stated that since the plaintiff delayed in execution of the works, they should not be allowed to benefit from their failure to discharge its obligations within the specified period.
5. In response to the amended defence, the plaintiff filed a reply to defence and denied the allegations of the defendant on absence of privity, breach of contract and the particulars thereof. The plaintiff also denied that they had received payment in full, and further denied that they failed to discharge their obligations within the contractual time agreed.

**B. EVIDENCE OF THE PARTIES**

6. At the hearing of the case on 2<sup>nd</sup> September 2019 the defendant did not attend court though they had been served with hearing notice on 19<sup>th</sup> August 2019 and they stamped and signed copy of the hearing notice, and an affidavit of service was filed in court to evidence that service.
7. The plaintiff called one witness PW1 KAMALJEET SINGH SIHRA a director of the plaintiff company. He relied on the witness statement filed as well as the plaintiff's bundle of documents filed on 26<sup>th</sup> November 2011. He stated in evidence that on 5<sup>th</sup> February 2005, the plaintiff company was awarded by the defendant a contract to complete the new head office of ZEP RE at Upper Hill Nairobi at a cost of Kshs.5,078,194/= exclusive of 16% VAT. He relied on contract documents filed. According to his evidence, they were also awarded extra works for Kshs.88,450/= plus VAT of Kshs.14,152/=, totaling Kshs.102,602/=, and other contract variations in total amounting to Kshs.1,827,713/=. According to his evidence they were paid only Kshs.4,570,374/= leaving a balance of Kshs.2,438,135/= for the completed works, which they came to this court to claim. It was also his evidence that they wrote letters to the defendants on five (5) occasions, before filing suit in court. They were thus asking for the above amount together with costs, interest and any other relief. That was the close of the plaintiffs case.

### **C. SUBMISSIONS OF THE PARTIES**

8. Counsel for the plaintiff filed written submissions and relied especially on the case of **Zadock N. Danda vs Nyanza Sugar Company Ltd [2018]eKLR** in which the High Court held that though there cannot be an award of general damages in a case for breach of contract, the measure of damages would naturally flow from the contract itself.

### **D. CONSIDERATIONS**

9. In the present suit only one of the parties has tendered evidence. It is the plaintiff. The defendant has not tendered any evidence and did not attend the hearing. Though the defendant did not tender any evidence however, the burden was still on the plaintiff to prove their case or claim. This in my view is the meaning of the provisions of section 109 of the Evidence Act (Cap.80) Laws of Kenya which states as follows—

*109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.*

10. As this is a civil case the standard of proof is on the balance of probabilities.

11. The plaintiff has tendered evidence regarding the construction contract which has not been controverted by any contra evidence. The single witness PW1 KAMALJEET SINGH SIHRA of the plaintiff has relied on several documents that explain the contractual arrangements between the plaintiff company and the defendant for works on the headquarters of Zep-Re Centre at Upper Hill Nairobi as well as extra works carried out. The award of contract dated 5<sup>th</sup> February 2005 was signed by Martin Kyuma, as Managing Director of the defendant. The plaintiff's witness has testified on part payment made and the amount still outstanding from the defendant.

12. The only response on the record from the defendant to the plaintiff's claim are the averments in the amended defence and bundle of documents of the defendant. These are mere allegations as they were not supported by the evidence of any witness, who would at least adopt them. As such they remain mere allegations which cannot be considered by this court in determining this case. I thus find that the plaintiff has discharged its burden of proving that there was indeed a contract entered between them and the defendants and that the defendant breached the same.

13. I now turn to the issue whether the plaintiff is entitled to the relief sought. The plaintiff seeks specific damages for breach of contract. They seek a specific amount of Kshs.2,438,135.00/= as the contractual outstanding sum, which had not been paid to them, costs of the suit and interest on principal sum. In the submissions counsel for the plaintiff has also sought for VAT payment to make a total of Kshs.3,250,646.04.

14. Counsel has sought to distinguish what the plaintiff seeks herein and general damages which are not awardable in cases of breach of contract. I agree with the reasoning in the case of **Zadock N Danda vs South Nyanza Sugar Co. Ltd (2018) eKLR**, Migori High Court where the learned Judge restated what he had stated in the earlier case of **James Maranya Mwita vs South Sugar Co. Ltd – Migori HC Civil Appeal No.92 of 2015** – that there can be no award of general damages for a claim of breach of contract. However the claimant must be put as far as possible in the same position he would have been if the breach complained of had not occurred. The measure of such damages would naturally flow from the contract itself or as contemplated by the parties at the time the contract was made and that such damages are not at large but in the nature of special damages. No claim for general damages was made by the plaintiff, and as such that issue of general damages does not arise.

15. The principal amount pleaded as due to the plaintiff from the defendant is Kshs.2,438,135 as per the breakdown shown at paragraph 5 of the plaint. No request for payment of VAT was pleaded in the plaint. Counsel for the plaintiff has however asked me to take into account that the original contract sum was exclusive of VAT and that since VAT was Kshs.821,511.04, the actual amount owing is Kshs.3,250,646.04.

16. It is true that the contract was exclusive of 16% VAT. Since VAT is a tax targeting all those who render taxable services and the original contract was exclusive of VAT, I find that the VAT claim of the plaintiff, though not specifically pleaded, is justified as the tax authorities will be entitled to pursue them for payment of the said taxes.

17. As for costs, they will be awarded to the winning party, the plaintiff against the defendant.

### **E. DETERMINATION**

18. Consequently, I enter judgment in favour of the plaintiff against the defendant in the sum of Kshs.3,250,646.04 inclusive of 16% VAT. I award costs and interest as requested to the plaintiff.

**Dated and delivered at Nairobi this 6<sup>th</sup> February 2020.**

**GEORGE DULU**

**JUDGE**

**In the presence of -**

Court Assistant .....

For the plaintiff.....

For the defendant.....