



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL SUIT NO. 11 OF 2018

(Formerly Kisumu HCCC No. 62 of 2018)

TUFFS CONTRACTORS LIMITED.....PLAINTIFF

VERSUS

COUNTY GOVERNEMENT OF VIHIGA.....DEFENDANT

JUDGMENT

1. According to the plaint herein, the plaintiff is a limited liability company, while the defendant is a county government established under the Constitution, 2010.

2. The plaintiff's case against the defendant is that it won several tenders from the defendant for various works. There was one for renovation of the county referral hospital at Mbale, worth Kshs. 26, 812, 553.00; the other was for branding works in all health facilities within the Vihiga Sub-County, worth Kshs. 6, 647, 844.00. The plaintiff executed the relevant contract documents, and commenced the works. The company at some point sought extensions of the contract, which were granted, but the defendant began to delay payments. It is averred that the relevant organs of the defendant inspected the works and recommended that payments be made for the work done to that point. The branding contract was completed but no payments were ever made, while the renovation works at the referral hospital were done to 90% and no payments were made. The plaintiff avers that the defendant sought to award the renovation works to another contract. The plaintiff prays for a sum of Kshs. 6, 647, 844.00 for the branding contract, and Kshs 20, 812, 553.00 for the second contract, renovation works at the referral hospital. It also seeks costs and interests.

3. The defendant has filed a defence in which it denies the claims against it. It is denied that the plaintiff was prequalified to offer the services to the defendant, and, therefore, it could not offer the services offered successfully. It is denied that any contracts were signed, as such execution would have been contrary to public procurement regulations. It is averred that if any letters awarding the contracts were given, then the same were tainted with illegality, for failure to comply with the relevant procurement laws. It is further pleaded that if the plaintiff received any payments from the defendant then the same were in full and final settlement.

4. The parties complied with Order 11 of the Civil Procedure Rules, by filing their lists and bundles of documents, statements of the witnesses that they proposed to call, pre-trial questionnaires, and lists of issues.

5. The oral hearing commenced on 17th July 2019. The plaintiff, Amos Kilaho Amiru, national identity card number [...], was the first to take the stand. He was a director of the plaintiff. He stated that he saw an advertisement for the works the subject of the suit, applied and was notified that the plaintiff was successful. He produced the notification of the award, dated 16th December 2014, as his first exhibit. He then wrote a letter, dated 12th January 2015, accepting the award, for the renovation of the referral hospital, which he produced as his second exhibit. He was then called for a meeting to sign the contract, dated 16th January 2015, which he signed on behalf of the plaintiff, and he produced it as an exhibit. It was worth Kshs. 26, 812, 593.00. After that the plaintiff moved into site and commenced works. The plaintiff's works were evaluated by a technical committee of the defendant. The first one was done on 13th March 2015, he produced the committee's technical report dated 13th March 2015 as an exhibit. Another report was issued on 18th January 2017, showing that the plaintiff had done 70% of the works, and asked the plaintiff to wait for payments. He produced a copy of that report dated 18th January 2017 as an exhibit. He explained that the works ought to have been completed within six months but the plaintiff faced challenges, such as having to carry out the renovations while the hospital facility was still in use, bad weather over the period and failure by the defendant to honour vouchers. He also stated that another contractor was doing the roof and he caused them considerable delay of four months. The plaintiff was forced to seek for extensions, due to the delays, which were granted, and he produced documents to support the same. He stated that after that the plaintiff executed works of up to 90%, but the defendant never evaluated the works nor issued them with the relevant certificates. He stated that for that renovation contract they were paid only a sum of Kshs. 6, 380, 000.00. He said that the plaintiff was paid a further sum of Kshs. 1, 400, 000.00, but without proper advice as to what the payment was for. The money was just deposited into their account. He stated that the contract was never terminated, but he saw that the defendant re-advertised it in 2018. He stated that after that the plaintiff moved to court to get the defendant to inspect the works and issue a certificate of works, to restrain award of the contract to another contractor. The orders were granted, but the defendant ignored them and proceeded to award the contract to another contractor, who proceeded with the works. He said

that after that the defendant invited the plaintiff to negotiate. It was agreed that the plaintiff be paid Kshs. 28, 740, 577.00, but it did not amount to much, for no payment was made. He stated that would have been a payment for 90% of the works.

6. On the second contract, he produced documents to show that the plaintiff had been offered the contract to brand all the health facilities within the Vihiga Sub-County. It was for Kshs. 6, 647, 884.00. The agreement was signed on 28th January 2015. The plaintiff commenced works, and placed noticeboards in all the health facilities within the Vihiga Sub-County, nine facilities in all. There were also signs that he placed in all these facilities. He explained that there were delays caused by the rains. In other cases, he said, the plaintiff's employees would be chased away as there were issues on the ground, forcing the defendant to intervene to negotiate with those involved. He asked for extension at some point, which was allowed. A valuation was done at 90% of the works and the plaintiff was asking to be paid for the 90% works done. He said that he had received a Kshs. 1,000, 000.00 advance. He stated that the contract was done at 100%.

7. During cross-examination, he admitted that for the renovation works he only had documents to show that the plaintiff had done 70% of the works, although the plaintiff had executed beyond the 70%. On the branding, he testified that the report he had was for 90%. He stated that he tried to get the officers of the defendant to give the final report but they did not cooperate. He said that they were working on a consent of 90% for the renovation, and 100% for the branding. He conceded that the plaintiff did not complete the works within the six months period agreed, but explained the challenges.

8. The defendant called one witness, its legal officer, Stella Amisi Orengo. She conceded that the two parties had worked out a consent, but the same was not adopted as an order of the court, for reasons that she did not divulge. She stated that the works for renovation were at 70%, while for branding was at 90%. She said the defendant had no problem working out the figures, with respect to when and how to pay. During cross-examination, she stated that the defendant was aware that there were orders on *status quo*, but not one requesting for valuation reports. She stated that while aware of the orders the defendant went ahead and awarded the contract to another contractor. She stated that no valuation was done before the award to the second contractor. The valuation was to be done by one of the departments of the defendant but the department did not do it. She stated that there was no report to indicate that the plaintiff did works beyond the 70% reported earlier, saying that she could not say authoritatively that the works did not progress beyond 70%. On the branding, she said the report she saw talked of 90% completion. She conceded that she had seen the signboards fixed by the plaintiff.

9. At the close of the oral hearing, the parties filed written submissions. I have read through them and taken note of the arguments made.

10. The plaintiff makes a pitch for judgment based on the figures in the consent that the parties had filed in the matter on 23rd August 2018, dated 10th August 2018, which the defendant later asked the court not to adopt as an order of the court. It pleaded that the defendant was approbating and reprobating, and raised the question of estoppel. On its part the defendant submitted that the consent was not adopted as an order of the court, and, therefore, the same should not be a basis for determining the suit. For the renovation of the referral hospital contract, it is submitted that the last certificate was for works done up to 70% and that is what the court should consider ordering. For the branding contract, it was submitted that there was no proof of any report of the works done, and, therefore, there was no evidence at all that the contract had been performed to any degree. However, should the court find that the same was performed, it was submitted, then the amount received of Kshs. 1, 000, 000.00 should be factored.

11. The matter is fairly straightforward, in the sense that the contracts are not denied. The only fight appears to be on the degree of performance. In the defendant's submissions it is quite clear that it is ready to settle both contracts. That also came out clearly at the oral hearing, the witness stuck at 70% performance for the renovation contract, and 90% performance for the branding contract. In the submissions, the defendant stuck at 70% for the renovation, and appears to take the view that there might have been 100% performance on the branding contract, and was prepared to pay the total contract price less what had been received. I have seen the consent on record, which was not adopted as an order of the court, but it was duly executed by both sides.

12. Taking everything into account, the pleadings, the testimonies and the written submissions, I am persuaded on a balance of probability that the plaintiff has established a case that the renovation contract had been performed to the level of 90%, and the branding contract at 100%. In respect of the renovation contract, the plaintiff had received a sum of Kshs. 6, 380, 000.00 and later a sum of Kshs. 1, 400, 000.00, making a total of Kshs. 7, 480, 000.00, against the contract price of Kshs. 26, 812, 593.00, less 10%, which makes Kshs 16, 651, 334.00. For the branding contract, the total contract price was Kshs. 6, 647, 884.00. The plaintiff was paid Kshs. 1, 000, 000.00, leaving a sum of Kshs. 5, 647, 884.00.

13. I accordingly enter judgement for the plaintiff in the sum of Kshs. 22, 299, 768.00, plus interests and costs. There is a right of appeal to the Court of Appeal, within twenty-eight (28) days.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 9TH DAY OF APRIL, 2020

W. MUSYOKA

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic, and in light of the directions issued by His Lordship, the Chief Justice, on 15th March 2020, this ruling/judgment has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159 (2) (d) of the Constitution which requires the court to eschew technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 18 of the Civil Procedure Act, Cap 21, Laws of Kenya, which impose on this court the duty to use, inter alia, suitable

technology to enhance the overriding objective, which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

W. MUSYOKA

JUDGE