



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL CASE NO 19 OF 2016

ANCHOR LIMITED PLAINTIFF

VERSUS

SPORTS KENYA.....DEFENDANT

COUNTY GOVERNMENT OF KISUMU..... THIRD PARTY

JUDGMENT

1. The genesis of this suit is a contract entered into on 4th June 2015 between **Sports Kenya** (the Defendant) and **Anchor Limited** (the Plaintiff) for the supply, installation, testing and commissioning of four 24-metre monopole floodlights at **Kisumu Moi Stadium** which facility belongs to the **County Government of Kisumu** (the Third Party). The agreed contract price was KSh. 30,470, 880/=. The duration of the contract was 13 weeks from the date of the execution of the contract. It appears that the Plaintiff carried out the works and was paid a sum of KShs.15,000,000/= by early 2016. However, the balance sum of KSh.15,470,880/= remained unpaid, and the Plaintiff having failed to receive payment despite several demands, filed the present suit to recover the balance, citing breach of contract by the Defendant.
2. The Defendant by its defence admitted having contracted the Plaintiff to carry out the subject works but denied owing any monies to the Plaintiff. The Defendant averred that any monies outstanding were owed by the County Government of Kisumu. The Defendant subsequently enjoined the said government as a Third Party. The Third Party filed its defence on 8th February 2018. Therein the Third Party denied being party to the contract between the primary parties herein, breach of terms thereof, or indebtedness to the Plaintiff.
3. During the trial **Samuel Mwaniki Ndiangui (PW1)** testified on behalf of the Plaintiff. The gist of his evidence was that the Plaintiff having entered into the contract with the Defendant executed the same as per the specifications; that the installed floodlights were tested and commissioned; that only a sum of KShs.15 million was paid by the Defendant leaving the balance claimed in the plaint; that there was no involvement of the Third Party in the contract although officials of the Third Party which was the end user did attend site meetings; and that only after the Plaintiff pressed for payment did the Defendant claim that the Third Party was liable for the outstanding balance.
4. On behalf of the Defendant, **Morris Nyaoke (DW1)** testified that the Third Party had pledged to contribute KShs.15,000,000/= to the project through a commitment letter dated 15/7/2015 and memorandum of understanding executed between the Defendant and the Third Party and that the Plaintiff was aware of this arrangement even though the works contract was between the principal parties. That the Third Party were partners in the project and its officials were members of the project management team and that the Third Party failed to meet its obligation to pay KShs.15 million towards the project. He stated that due to the requirement of a 3-phase power installation at the stadium, the testing and commissioning of the floodlights has not been done; that without such power installation, verification of the works carried out is not possible. Nor can a completion certificate issue or commissioning be done. According to the witness, the Third Party ought to pay the balance of the contract price pursuant to its commitment.
5. **Duncan Otieno (DW2)** is a Law Clerk in the Third party's Legal Department. He testified that the Third Party did not enter into any contract with the principal parties herein. He said he had never seen the letter of commitment pledging that the Third Party would pay a sum of KShs.15 million towards the contract sum. He also pointed out that the Memorandum of Understanding (hereafter MOU) between the Defendant and Third Party was not signed by the latter.
6. At the close of the evidence the parties filed their respective submissions. The Plaintiff, reiterating its evidence urged the court to find that the Defendant and Third Party are bound by the contract between the principal parties; that the Plaintiff having carried out its obligations is entitled to payment of the outstanding sums from the Defendant and Third Party.
7. On their part, the Defendants asserted that an MOU had been executed between it and the Third Party, by which the latter was bound to contribute a sum of KShs.15 million to the contract price. Relying on the doctrine of promissory estoppel as espoused in **Central London Property Trust Limited v High Trees House [1956] 1 ALLER 256** and **Combe v Combe (1951) 2 KB 215**, the Defendant submitted that the conditions precedent have been satisfied in the circumstances of this case and that the Third Party is liable to pay the outstanding contract sum of KShs.15,470,880/= to the Plaintiff and to bear the costs of the suit.

8. The Third Party submitted that it was not a party to the contract which is the subject of the suit and that the MOU relied upon by the Defendant was never signed by the Third Party. Further that the Third Party had never procured any services from the Defendant in connection with the contract. Citing Section 75(c) of the Public Procurement and Disposal Act, the Third Party argued that direct procurements by a public entity must be in writing to be enforceable. The Third Party urged the Court to dismiss the case against it.

9. The Court has considered the parties' respective pleadings, evidence, and submissions. Concerning the execution of the material contract between the Plaintiff and Defendant (the principal parties herein), there was no dispute. And though the Defendant attempted through its witness to introduce questions as to whether the Plaintiff had carried out its obligation under the contract, such disclaimer is not to be found in the Defendant's pleadings. The Defence by the Defendant was essentially an admission that the works under the contract had been executed by the Plaintiff but that the Third Party was liable to settle the outstanding sum of the contract price. Parties are bound by their pleadings and it was not open to the Defendant to adduce evidence contrary to its own pleadings. On the evidence before the court and the submissions of the parties, there is no dispute that a sum of KShs.15,470,880/= is outstanding to the Plaintiff on account of services rendered under the contract between it and the Defendant.

10. The sole question for determination is, who between the Defendant and/or the Third Party is liable for this sum. The Third Party has correctly maintained that it was not privy to the contract between the Plaintiff and the Defendant even though it stood to benefit therefrom. The fact that officers of the Third Party were members of the project management committee should come as no surprise as the facility in respect of which the tendered works were to be carried out belongs to the Third Party.

11. On the terms of the contract between the principal parties the Defendant was obligated to settle the contract payments once the works were completed. Evidently, the Defendant only paid a sum of KShs.15,000,000/= leaving a balance of KShs.15,470,880/= . In deflecting this claim, the Defendant has asserted that the Third Party had bound itself to pay the sum of KShs.15,000,000/= towards the contract price. That a letter of commitment and MOU were executed in this regard. The MOU produced by the Defendant as **D Exh 2** indeed related to the subject matter of this suit and pursuant to Article 11.1, thereof the Third Party was to contribute KShs.15 million in addition to providing access to the site for installation of the floodlights. However, and this is key, the Third Party did not sign the MOU. Only the signature of the Acting Director of the Defendant is appended on the document, and dated 1st February (or July) 2015. The document therefore is not binding on the Third Party as its Governor never signed his part to commit the Third Party.

12. Much has been made of the commitment letter authored by the Executive Member, Education, Gender, Culture and Sports in the Third Party. This letter (**D Exh. 3**), dated 15th July 2015 stated in part that;

“We wish to thank you and appreciate your spirit of developing stadia in the country and in particular, Moi Stadium Kisumu where you are contributing KShs.15, million for putting up floodlights in the stadium. We understand that the flood lights will cost an excess of KShs.30 million we therefore, wish to confirm and make a commitment that the County Government of Kisumu will meet the remaining cost of KShs.15 million.”

13. By the date of this letter the contract between the principals had already been signed. No further mutual document or contract was executed between the Third Party and the Defendant and **DW2** is justified in stating that no contractual relations had been entered into between the two entities for the procurement of any services on behalf of the Third Party through the Defendant from the Plaintiff. While the letter **D Exh. 3** amounts to a promise to the Defendant by the Third Party to shoulder half the costs of the project, it cannot be said that the Defendant, acting thereon entered into the contract with the Plaintiff. The contract had already been signed. In the **Central London property Trust Limited** case it was held that promissory estoppel will apply if:-

“a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made and which was in fact acted on.”

14. In my view, though the promise in **D Exh. 3** appears unequivocal, it does not amount in law to a promise intended to create legal relations between the Defendant and the Third Party. And perhaps the failure by the Governor of the Third Party to sign the MOU is indicative of the Third Party's reluctance. The letter at best represents a gentleman's promise that was not honoured by the promisor. In the circumstances of this case, the doctrine of promissory estoppel does not apply.

15. In **Katiwa Nguli v Bamburi Cement Limited [2015] e KLR**, the Court of Appeal considered the import of a discharge voucher signed by the Appellant therein, the Respondent's erstwhile employee, to the effect that a sum of money received by the said Appellant *“was in full and final settlement and discharge of all sums due to me and I acknowledge that I have no further claims against the company including claims for reinstatement”*.

The Court proceeded to state that:

“According to Halsbury's Laws of England 3rd Ed. Vol.15 at paragraph 344,

“When a party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the other who gave the promise or assurance cannot afterward be allowed to revert to their previous legal relations as if no such promise or assurance has been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced.”

14. It is in situations such as these that the doctrine of promissory estoppel applies to prevent an inequitable result. In such a case it is presumed that both parties understood the full implications of the undertaking and promise so given, and the promisor cannot thereafter be allowed to renege on his promise or undertaking. See **Central London Property Trust Limited V High Trees House Ltd [1947] KB I 30**

and **Silas Njiru and The Catholic Diocese of Meru v Andrew Kiruja [2010] e KLR.**

16. The Defendant in this case is unable to demonstrate how the promise or commitment by the Third Party induced it to act in any manner that led it to suffer detriment, having already contracted with the Plaintiff by the date of the alleged commitment of the Third Party . Secondly, it is doubtful, given the provisions of the Public Procurement and Disposal Act which bind the Third Party as a public entity, that a lawful promise in the circumstances of this case could be issued by the said entity in favour of the Defendant.

17. In the circumstances the court finds that the Plaintiff is entitled as against the Defendant to the sum claimed in the amended plaint with costs and interest at court rates from the date of filing of the suit until full payment. The court finds that the case against the Third Party has failed and will dismiss it with costs.

SIGNED AND DELIVERED ELECTRONICALLY ON THIS 10TH DAY OF DECEMBER 2020.

C. MEOLI

JUDGE