



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CIVIL CASE NO 6 OF 2017

(Formerly Naivasha HCCC No. 29 of 2015)

ATTICON LIMITED.....PLAINTIFF

VERSUS

NAROK COUNTY GOVERNMENT.....DEFENDANT

JUDGEMENT

INTRODUCTION

1. The original claim of the Plaintiff against the Defendant was for a sum of Kshs 19, 410,000/- arising out of a contract for the improvement and gravelling works on the Ngoswani-Ildungisho road, whose tender the Plaintiff won through a competitive tendering process. The Plaintiff claimed to have completed the project and as a result it demanded for payments.
2. In response, the Defendant filed its defence to the claim denying it.
3. During the pendency of the suit, the parties engaged in an out of court settlement.
4. The outcome of those negotiations for an out court settlement is that the Defendant paid to the Plaintiff Shs 19,410,000.00.
5. Thereafter the Plaintiff claimed that there was an outstanding sum of **Shs. 1,586,263.75** due and payable to it by the Defendant.
6. The Defendant disputes the Plaintiff's claim that it still owes the Defendant Shs 1,586,263.75. Instead it claims that this sum of Shs 1,586,263.75. is tax money, which the defendant claimed it paid to Kenya Revenue Authority (KRA) as taxes as a withholding agent.
7. It is this sum of Shs 1,586,263.75, that is contested and is the subject matter of this application.

The case for the Applicant/Plaintiff.

8. The Plaintiff through its director (Ms Emily Nkirote) deposed to a 21 paragraphs affidavit in support of the application. The following are the major averments in that affidavit.
9. She averred that the Plaintiff, who is an independent contractor was awarded a contract for the improvement and gravelling works on Ngoswani-Ildungisho road. The contract was for a sum of Shs 19,410,000.00. She has also averred that the Plaintiff completed its work and was paid Shs 19,410,000.00, leaving an unpaid balance of Shs 1,586,263.75.
10. She has further averred that the defendant has refused to pay the said sum of money claiming to have remitted the same to the relevant agencies as taxes, and/or withholding VAT.
11. She has finally averred that if the said amount was remitted as taxes, the said remittances would correspondingly reflect on the plaintiff's general ledger report.

The Submissions of the Plaintiff

12. Counsel for the Plaintiff's, Messrs Ombongi Kiptoo & Associates, have majorly submitted that as a matter of practice, once a contractor

has completed in performing the contract, the employer may retain withholding tax and value added tax (VAT) from the contract amount, which the employer is required to remit to the tax agency namely the Kenya Revenue Authority on behalf of the contractor.

13. Upon remittance of the tax by the employer, the same would reflect on the contractor's itax portal as a credit. The Plaintiff has reproduced its General Ledger generated from its itax portal covering the period between 2016-2019, which upon close review does not reveal the credit of Shs 1,586,263.75.; which the defendant alleges to have remitted to KRA on account of the Plaintiff.

14. Furthermore, counsel for the Plaintiff has submitted that its client has not received any withholding tax certificates against which the Plaintiff can make payments to KRA. Counsel has further submitted that the defendant has only served upon the Plaintiff system generated TRFS payment receipts, which do not indicate on whose account the alleged tax amounts were remitted.

15. Based on sections 107 and 109 of the Evidence Act (Cap 80) Laws of Kenya, counsel has submitted that it is upon the Defendant to prove that it remitted Shs 1,586,263.75. to KRA. Counsel also cited *Jennifer Nyambura Kamau v Humphrey Mbaka Nandi [2013] e-KLR*, which is for the proposition that the burden of proof is upon who alleges to prove the fact in issue to enable it have judgement in its favour.

16. Counsel for the plaintiff has also submitted that his client is also entitled to the costs and interest of the instant application and has therefore urged the court to grant the application with costs and interest.

The case for the Defendant

17. The defendant has through its county's secretary (Elizabeth Sanangoi Lolchoki) deposed to a 21 paragraphs replying affidavit in opposition to the application.

18. The major averments in that replying affidavit are as follows. She has tabulated all the disbursements to the Plaintiff less VAT retained (6%) and withholding tax (3%), with the result that the Plaintiff received net Shs 17,823,734.45. The Plaintiff acknowledged receipt of the immediate foregoing sum of money (Shs 17, 823, 734.45) but seems to argue that the sum of Shs 1,586,263.75. was never remitted to KRA and that the Defendant has retained this sum and should pay this sum to the Plaintiff.

19. The Defendant has shown on the said tabulation as per paragraph 12 of its replying affidavit; the amount of money retained as VAT (6%) as being Shs 1,003,865.55 and withholding tax (3%) as being Shs 582,000.00, which taxes covered the period between 2016 and 2019.

20. The deponent has averred that under the withholding tax regime, the Defendant is mandated to deduct tax at source from the payments made to the contractor in terms of section 35 of the Income Tax Act and the Withholding Tax Rules, 2001. In respect of withholding tax, regarding sums the defendant made to the Plaintiff, the Defendant is obliged to deduct at source withholding tax at the rate of three percent (3%). She also has averred that all county Governments, amongst other Governmental entities, are withholding VAT agents.

21. Furthermore, the deponent has averred in paragraph 15 (j) that: *"For seamless operations of both the National and County Governments, KRA intentionally integrated the iTax and Integrated Financial Management Information System (IFMIS) to enable both levels of government to process payments to their various suppliers, facilitate automated deduction of taxes and remittance of withheld VAT to KRA's Withholding VAT collection account at the Central Bank of Kenya;"*

22. In addition to the foregoing the deponent has averred that *"it is evident from the CBK remittances annexed herewith, it is clear that the manner in which the plaintiff was paid and the taxes ensuing therefrom were automatically processed through the IFMIS system. This means that no funds were first received by the Defendant and then disbursed to the plaintiff. What happened was that by processing the payment through the IFMIS system, the funds in the Defendant's consolidated account with CBK were debited, sums due to the plaintiff were transferred to its accounts and the taxes ensuing were retained for transmission to the KRA through the iTax system which is integrated with the IFMIS system."*

23. **The deponent has also averred in paragraph 17: *"THAT I am aware that for the plaintiff to ascertain the remittance of the said taxes, all it has to do is make a declaration of the remainder 10% balance of the VAT it still owes to KRA and submit the CBK remittances annexed herewith for processing to KRA. It is as simple as that! Similarly, by submission of the CBK remittance to KRA and thereafter accessing the iTax system, it would obtain the withholding certificates for the withholding taxes deducted and remitted."***

24. The deponent has averred that the Defendant is not liable to pay interest and costs. Interest cannot be paid due to a breach of a contractual obligation in which the Defendant was only obligated to settle a payment certificate fourteen days (14) after a joint inspection was done in respect of work done. The deponent has also averred that following advice from her counsel which she believed, there was never any joint inspection done. 25. This forced the Defendant to carry out a due diligence in accordance with clause 2.2 and 11.1 of the contract to ensure that the Plaintiff was only paid for work done.

26. Furthermore, the deponent has averred that the Plaintiff filed a case in court before the process of due diligence was completed, which was premature.

27. In respect of costs, the deponent has averred that this matter was settled amicably between the parties with the understanding that each party bears its own costs.

28. The deponent has averred that in assessing costs the court should take into account that despite the Defendant settling the Plaintiff and paying to it the contract sums less taxes in full as of 30th July 2019, the record will show that the Plaintiff has engaged this court and the Defendant in various acts of delay.

29. The deponent has averred that it is in the best interest of justice this matter be marked as fully settled.

The submissions of the Defendant

30. Messrs Kemboy Law, the advocates for the Defendant, have submitted that the **contract sum which remains in contention is Shs 1,586,263.75**. They have submitted that it is uncontroverted that the above sum of money constitutes an aggregated sum of 3% withholding tax and 6% withholding Value Added Tax; **which were remitted by the defendant to the Kenya Revenue Authority in its capacity as a VAT withholding agent in terms of section 25A of the VAT Act, 2013**. By virtue of these provisions all county governments are withholding VAT agents.

31. Counsel have also submitted that the withholding VAT agents are registered on the iTax online platform and their registration status can be verified using the Withholding Agents checker on the KRA Portal at www.kra.go.ke

32. Counsel have also submitted that for the Plaintiff to claim the remittance of paid taxes, all that the Plaintiff has to do is to make a declaration of the remainder 10% balance of the VAT it still owes to KRA and submit the CBK remittances for processing to KRA. Similarly, by submission of the CBK remittance to KRA and thereafter accessing the iTax system, it would obtain the withholding certificates for the withholding taxes deducted and remitted.

33. Based on the affidavit evidence of the deponent, counsel for the Defendant have submitted that due to the delay caused by the Plaintiff after full payment was made to it, the Plaintiff should be condemned to pay costs to the Defendant.

34. Counsel have therefore urged this court in the interest of justice that this matter be marked as fully settled.

Issues for Determination

35. I have considered the affidavit of both parties and the submissions of their Counsel. As a result, I find the following to be issues for determination.

1. Whether the sum of Shs 1,586,263.75. constitutes the aggregated VAT and Withholding taxes or is it the unpaid balance of the contract sum payable to the plaintiff by the defendant.
2. Who bears the burden of proof?
3. Who bears the costs of this application?
4. Who bears the costs of this suit?

Issue 1

36. I find as credible the ample uncontroverted evidence of the Narok County's Secretary (Elizabeth Sanangoi Lolchoki) that the Defendant as a withholding and VAT tax agent in terms of section 25A of the VAT Act, 2013, deducted at source the VAT and withholding taxes in respect of payments made to the Plaintiff.

37. I find that *"the funds in the Defendant's consolidated account with CBK were debited, sums due to the plaintiff were transferred to its accounts and the taxes ensuing were retained for transmission to the KRA through the iTax system which is integrated with the IFMIS system."* This evidence is not controverted and I find that it is credible.

38. I also find as incredible the affidavit evidence of plaintiff through its director (Ms Emily Nkirote) that if the disputed amount of Shs 1,586,263.75. was remitted as taxes, the said remittances would correspondingly reflect on the Plaintiff's general ledger report; in view of the affidavit evidence of the Narok County's Secretary (Elizabeth Sanangoi Lolchoki). Her evidence (the Narok County's Secretary) in this regard is that if the Plaintiff wanted to ascertain the remittance of the VAT and withheld taxes, it had to make a declaration of the remainder 10% balance of the VAT it still owed to KRA and submit the CBK remittances (the said taxes) for processing to KRA.

39. I further find that the Defendant's only statutory obligation was to deduct at source the VAT and withholding taxes and post them to the Plaintiff's account with CBK. The Defendant was not obligated to post the VAT and withholding taxes to the Plaintiff's General Ledger generated from its iTax portal covering the period between 2016-2019.

40. If the Plaintiff wanted to ascertain the remittance of the VAT and withheld taxes, all it had to do was make a declaration of the remainder 10% balance of the VAT it still owed KRA and submit the CBK remittances (the VAT and withheld taxes) for processing to KRA. I find in this regard that the plaintiff misapprehended the procedure of ascertaining its status in respect of the VAT and withheld taxes that had been paid on its behalf.

41. In the premises, I find as a fact that the disputed sum of Shs 1,586,263.75. constitutes the aggregated VAT and Withholding taxes. It is not the unpaid balance of the contract sum payable to the Plaintiff by the Defendant.

Issue 2

42. Counsel for the Plaintiff has submitted that it was upon the Defendant to prove that the disputed sum of Shs 1,586,263.75. was posted to

KRA. This is not the correct position in law. All that the Defendant was required to do was to deduct at source the VAT and Withholding taxes and the payments to the Plaintiff and post them to its CBK account.

43. It therefore follows that sections 107 and 109 of the Evidence Act and the decision in *Jennifer Nyambura Kamau v Humphrey Mbaka Nandi, supra*, are inapplicable in this case.

44. It is the duty of the Plaintiff to apply to KRA concerning its status in respect of the VAT and withheld taxes.

This is a civil matter and the Plaintiff is a duty to prove its case. It has failed to discharged its burden of proof on a balance of probabilities.

Issue 3

45. The Plaintiff has failed in its application. It therefore follows that the Plaintiff's application is hereby dismissed with costs to the Defendant

Issue 4

46. Counsel for the defendant has urged the court not to award costs and interest to the Plaintiff. The reason for this submission is that the suit was amicably settled out of court and that in such cases it is the practice not to award costs and interest. The second reason advanced by counsel is that counsel for the Plaintiff caused unnecessary delay in prosecuting this case after it was transferred from the Naivasha High Court registry to Narok High Court registry.

47. I find as a fact that Counsel for the Plaintiff caused unnecessary delay in prosecuting the suit after its transfer to Narok by seeking many and long unwarranted adjournments. In the premises, I find that the Plaintiff is only entitled to 50% of the costs, which I hereby award it.

48. The fact that the suit was settled outside court does not disentitle the Plaintiff from being awarded interest on the agreed settlement sum of money.

49. In the premises, I find that the Plaintiff is also entitled to interest at court rates.

50. The upshot of the foregoing is that the Defendant will have the costs of the instant application.

51. The Plaintiff is entitled to 50% of the costs and interest on the principal amount; with the result that the suit is hereby marked as have been settled.

Judgment signed, dated and delivered via e-mail at Kitale this 4th day of December, 2020 in the absence of the parties.

J. M. BWONWONG'A.

J U D G E

16/1/2020