



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO.577 OF 2014

TULSI CONSTRUCTION LIMITED.....PLAINTIFF

VERSUS

TELCOM KENYA LIMITED.....DEFENDANT

JUDGMENT

1. M/s **TULSI CONSTRUCTION** Limited through a plaint dated 3rd December 2014 sued **TELCOM KENYA LIMITED** seeking judgment against the defendant for Kshs.20, 688,259.98 with costs and interest.

2. The defendant filed defence dated 20th January 2015 denying liability and sought the plaintiff's suit be dismissed with costs.

3. The brief facts of this suit is, that the plaintiff was contracted by the defendant to carry out refurbishment of its Exchange and the Data intelligent Networks centre along sports road, Westlands, Nairobi. The plaintiff agreed to conduct preliminaries on the proposed centre, carry out demolitions; create partitions and finishes; electrical installations; firefighting and security installations; air conditioning and mechanical installations; conduct structural cabling installations and the defendant would pay for the work done and certified by the project architects.

4. The plaintiff contention is, that although it performed its duties diligently and as per the specifications of the project architects, the defendant failed, neglected and/or refused to settle the amount due in the sum of Kshs, 20,688,259.98 with interest.

5. The defendant through a defence dated 20th January 2015 denies being indebted to the plaintiff to the sum of Kshs. 20,688,259.98 as pleaded. It denies entering into any contract with the plaintiff for the refurbishment of its exchange data intelligent Networks centre along sports road, Westlands, Nairobi, which are the works subject of the plaintiff's claim herein. The defendant contend in its defence, that no contract was signed between itself and the plaintiff for the works, the plaintiff is claiming payment; that it did not approve the works, that it did not issue any purchase order for the work, that no completion certificate was issued; that the defendant demanded the documents in vain and that the plaintiff did works and charged unilaterally without approval/authority.

6. At the hearing the plaintiff called two witnesses while the Defendant called one witness. **PW1** Suresh Patel, a director of the plaintiff company adopted his statement dated 7th September 2016 as his evidence in chief and three bundle of list of documents dated 6/9/2016 (**Exhibit P-1**) Supplementary list and bundle of documents dated 17/11/2017 (**Exhibit P-2**) and 2nd Supplementary of listed of bundle of documents dated 23/2/2017 (**Exhibit P-3**). **PW2**, Architect Fred Ngunjiri, of Business Axis Architect, adopted his witness statement dated 22nd July 2015 (**Exhibit P-4**) as his evidence in chief. The defendant on its part called **DW1** Bedan Nduati Mwangi, a property Manager Telcom Kenya Limited, who adopted his witness statement dated 14/11/2016 (**Exhibit D-1**) and list of documents (**Exhibit D-2**) dated 14/11/2016 and supplementary list of documents (**Exhibit D-3**) dated 17/11/2017 as his evidence in chief.

7. I have considered the pleadings in this matter, the plaint and defence, parties witnesses statement, evidence adduced before court, plaintiff's Advocates written submissions dated 10th December 2018 and the defendant's Advocates submissions dated 21st December 2018. The issues arising thereto for consideration are as I understand this matter as follows:-

a) **Whether the parties herein entered into a contract for refurbishment of the defendant's Exchange and Data intelligent Networks centre along sports Road, Westlands Nairobi?**

b) **Whether the sum claimed by the plaintiff of Kshs.20, 688,259.98 is payable by the defendant to the plaintiff with interest?**

A) **Whether the parties herein entered into a contract for refurbishment of the defendant's Exchange and Data intelligent Networks centre along sports Road, Westlands, Nairobi?**

8. The defendant contention in respect of the above issue is clearly stated in the defence and the evidence given by **DW1**, Bedan Nduati, that there was no contract/agreement nor purchase order for instructions to carry out works. The defendant further deny having given instructions or appointed M/s Axis Architect for refurbishment of the defendant's Exchange and Data intelligence Networks Centre.

9. The plaintiff on its part called **PW1** and **PW2** to prove that there was a contract entered into between the plaintiff and the defendant. **PW1** in his statement was categorical, that the defendant contracted the plaintiff to carry out erection, refurbishment and completion of a Data centre of its Exchange and Data intelligent Networks centre along sports Road, Westlands, Nairobi referring to contract (**Exhibit P-1**) at pages 56 – 65. At page 63 under 2.2 it is clear the contract was for Erection, refurbishment and completion of Data Centre and on page 2.7 it is indicated "*the Architect*" shall mean Axis) consulting Architect and "*the Quantity Surveyor*" 2.10 shall mean "Kankan partnership. On page 65 the agreement is duly executed by the parties, David M, Opiyo signing for Telcom Kenya Limited (*employer*) and James M. Kihui for the Tulsu Construction Ltd (contract). The same is further supported by the defendant's purchase order (*see Exhibit P-1 at page 109*).

10. **PW2**, Fred Ngunjiri, in his statement, he confirmed that M/s Axis Consulting Architect were duly engaged by the defendant to provide consulting services and to be the Architect for works proposed for intelligent Networks centre and General Refurbishment at the defendant's Westlands Exchange Centre along Sports Road, Nairobi in which the plaintiff was the main contactor while the quantity surveyor was Kankan partnership.

11. During cross-examination of **DW1**, Bedan Nduati, he confirmed David Opiyo worked for the defendant but now is dead. Upon being shown the contract dated 12/11/2008 on pages 56 – 108 of (*exhibit P-1*), **DW1** admitted he had not seen it before but admitted it was for Erection and refurbishment and completion of the Data centre and that the plaintiff was the man contractor. He admitted the work was done as per contract and completed. He also admitted apart from the contract there were other works that the plaintiff did. He specifically stated the other works were at the intelligent Network and the works were done and completed. **DW1** confirmed that the plaintiff was contracted to refurbish the 3rd floor at the Exchange and Data intelligent Centre. He stated that the contract was in form of **LPO**. **DW1** testified that for any additional works there was no need of additional contract similar to the first contract because **LPO** is taken as a contract. He confirmed the works for exchange and Data intelligent Network Centre was done but the defendant did not pay. He further agreed there was variation of the contract to include Exchange and Data intelligent Network Centre and that as of now the defendant is using the facilities. **DW1** confirmed the Architect was paid for his services and informed court the plaintiff should also be paid. He further admitted the defendant was given final certificate and statement of final account. The amount shown as due and payable to the plaintiff was shown as 20,688,259.98. He concluded by stating that the defendant is ready and willing to pay the plaintiff only Kshs.9, 000,000/-.

12. There is evidence from the letter dated 12th November 2008 by the defendant's Architect, that as per site meeting No.7 of 11th November 2008, the defendant instructed the Architect to design an intelligent Networks Centre as an extension on the Data Centre to be located adjacent on the adjacent side and specifications were accordingly given. The letter was copied to the plaintiff amongst others. The minutes are at page 6 of **Exhibit P-3**. The people present included representative of the plaintiff. Item **SM7/2K8/4** clearly stated.

Variation orders

Reads

"4.1 instructed

The client instructed that the above works should be treated as a variation order for the existing Data centre and the consultative should prepare the necessary drawings and dimension urgently."

Thereafter (*on pages 8 and 9 of Exhibit P-3*) follows letter which are clear and unequivocal result of express instruction, to carry out the varied works and the quantity surveyors, by a letter dated 14th January 2009, at page 10, forwarded the Bills of Quantities for work, as per as page 11 to 169 of **Exhibit P-3**. By further correspondences found in **Exhibit P-3** and more specifically by a letter of 18th July 2009 at page 172 the plaintiff and the defendant expressed a desire to conclude the work, and by extension the closure of the amount for the work. From the above I have no doubt to hold and find that the work was accordingly originated by the defendant who gave instruction for variations.

13. From the site meeting of 11/11/2008, followed by instructions given in the meeting No.7 and commencement of the work on 22/9/2008, it follows the contract document was signed.

14. The defendant contended, that the contract for varied work was not executed by parties and that they did not issue any purchase orders for it and as such the plaintiff's claim should not be granted. There is evidence from **PW1**, **PW2** and **DW1** that the contract was a variation to which the defendant gave instructions at the site and commencement of the work by the plaintiff. The issue of whether the architect could authorize the variation, it should be noted the defendant owned the work, in which the defendant was represented and I find there was no consent that was required as the architect only confirmed the defendant's instructions. I find no inconsistency at all in the dictates of the land-lords for variation, from what the defendant ordered or directed its architect to have it done as a matter of urgency. The process required for carrying out variation were complied with. I therefore find that as the defendant ordered variation, and the same was minuted in presence of its agent and representative in presence of the plaintiff and both the Architect and Quantity Surveyor carried out what was expected of them followed by the defendant's approval, through its agent and representative; there was no need of the variation being signed. **PW2** through cross examination confirmed variation was signed by the defendant and confirmed the defendant issued variation through him. This was not controverted by the defendant in its evidence or documents. Secondly it is admitted by the defendant through purchase order **TKL/PO-001062** that it paid the plaintiff Kshs.5,900,000/- for refurbishment of the 3rd Floor which was part of variation without a signed contract. Looking at the main contract dated 12th November 2008 there is no provision for issuance of the purchase order as regards variations.

15. I have perused the authority relied upon by the defendant's counsel, and have found the same can be distinguished in, that in the present

case, unlike those cases relied upon, there is a contract which has been produced and minutes produced in support of variations which the defendant had initiated and sanctioned. I find the authorities are not relevant to the suit.

16. In view of the aforesaid I find and hold that the parties entered into a contract for refurbishment of the defendant's Exchange and Data intelligent Networks Centre along Sports Road, Westlands, Nairobi through variation of the works; which variations the plaintiff carried out and completed the works.

B) Whether the sum claimed by the plaintiff of Kshs.20, 688,259.98 is payable by the defendant to the plaintiff with interest?

17. The plaintiff claims Kshs. 20,688,259.98 as sum due and payable to the plaintiff for erection; refurbishment and completion of the intelligent centre.

18. **PW2**, Fred Ngunjiri, the defendant's own Architect, in his statement confirmed issuing the final certificate of accounts (*Exhibit P-1 at page 7*), which was done after he had received measurement of works for final account from Kankan partnership appearing on (*page 3 of exhibit P-1*) and upon being satisfied by the quality of works and taking all measures into account, he issued the final certificate of accounts of the sums payable to the plaintiff being Kshs. 20,688,259.98 (*see exhibit P-1 on page 7*). He confirmed the amount certified therein is due and payable by the defendant to the plaintiff.

19. On the amount payable, it is provided under pages 2 to 5 of plaintiff's list of documents (**Exhibit P-2**) under clause 34.20 of the original contract) that the final account shall be agreed between the Quantity Surveyor, the contractor and the Architect and that if the contractor does not sign the final account within 30 days after being so requested to do, the Architect may issue the final certificate based on the final account prepared by the Quantity surveyor which final account shall be copied to the employer.

20. In this suit, the final certificate was issued on 28th June 2016 (*Exhibit P-1 page 3*) by Kankan and signed by the contractor on even date. The detailed analysis of how the same is arrived at is on page 5 exhibit P-1 referred to as Final Account sum. On page 6 (**Exhibit P-1**) is Quantity surveyor's letter dated 14/6/2014 indicating the amount due in full and final settlement as Kshs. 20,688,259.98 and in which it is stated issue of a certificate by the architect for the said sum is a confirmation that all works has been carried out in accordance with the contract. It should be noted that under clause 34.22 of the contract, the final certificate "*shall be conclusive evidence in any proceedings arising out of the contract (whether by arbitration under clause 45.0 of these conditions or otherwise) that the works have been properly carried out and completed in accordance with the terms of the contract and that any necessary effect has been given to all the terms of the contract which require an adjournment to be made to the contract price...*"

I have considered the submissions by the defendant and assertion that Architect did not issue any final certificate. I find the Architect **PW2** gave evidence and referred to the final certificate and find no reason to doubt that he did issue final certificate. I find the defendant was not truthful as all correspondence over the aforesaid subject matter were copied to it. The Architect in this matter was the mouth, ear and eye for the defendant including other defendant's representatives in various meetings. In **Green Concise Scots Law, Construction Law, Street and Maxwell, 1999, under Architect and the professional Team page 218, 7.08 it is provided:-**

"I think there can be no doubt that within the scope of his employment an architect is the proprietor's agent, and if the building contract provides that the work is to be done to the satisfaction of the architect, then any order within the scope of the contract which the architect may give is a sufficient authority to the tradesman to execute the work, because he is entitled to take the order of the agent as equivalent to the order of the principal. Of course there might be a different question if the order given by the architect was so opposed to the terms of the contract that the tradesman was not entitled to assume that he had authority; but where as in this case, the contract itself contemplates variations upon the specification, then such variations when ordered by the architect, if they fairly fall within the scope of the contract, are just as binding on the principal as if they had been ordered by himself."

21. The defendant contends, the final certificate as pleaded at paragraph 6 of the plaint at page 7 of **Exhibit P-1**, has alteration that are not signed against by the marker. It shows issue date as 28/6/2010 and contract as 13/11/2010 and sum of Kshs.33, 118.112. **PW2** admitted there was an error on their part and the same was not countersigned. He pointed out that the error was on the date and clarified the amount due is Kshs. 20,688,259.98. He pointed out that the final accounts are prepared by Quantity surveyor as per **Exhibit P-1** at page 3 with column for Architect to sign explaining he did not sign as he issued final accounts. I find that **PW2** was supposed to issue final accounts after Quantity surveyor had prepared final account, which was done. The statement by Quantity surveyor has not been challenged and apart from an error of date which I do not find fatal to the certificate as per Quantity surveyor certification was proper and not challenged and sum due is the same, I find not basis to find and hold that final account certificate was not issued as required by **PW2**. I find no merit in the defendants objection as, what is in the certificate is a clerical mistake or error in dating the document arising out of accidental slip at the time of issuing the certificate and there is no other error. **PW2** explained the occurrence of the error and stated the sum claimed is correct. I find **PW2's** explanations reasonable, as to man error are common without intent. I accept **PW2's** the certificate by **PW2** as final certificate and as duly issued by the authorized person.

22. In **Keating on Construction Contracts Ninth Edition by Stephen Furst, QC, B.A (Hon.) LL.B (Hon) B. Architect's** certificate, under type of certificate provides as follows at page 145;

"In any event, minor immaterial errors will not invalidate a certificate if no one is misled."

In view of the above, I find the error on the face of the Architect certificate or Final Accounts to be minor and do not misled anyone and as such, I find the minor error not substantial to the extent of invalidating **PW2's** Final certificate issued on page 7 of **Exhibit P-1**.

23. On the issue of interest the plaintiff in its plaint has prayed for interest on the sum of Kshs. 20,688,259.98. The awarding of interest in a suit is at the discretion of the court as per **section 26 of the Civil Procedure Act**. Clause 34 of the contract provides where a certificate

remains unpaid beyond the period of honouring certificate, the defendant would pay simple interest on unpaid amount at commercial bank lending rate in force during the period of default. Further clause 34.7 stipulates that payment does not absolve the defendant for its obligation to honour the payment certificates. I note in this matter no evidence or document was produced on the Commercial Bank lending rate as at the time of issuance of certificate, the plaintiff seeks interest at a rate at 15%. I also note the final certificate was issued on 28th June 2010 and remained unpaid upto the date of suit. Under clause 34.5 of the contract the plaintiff was entitled to payment of interim certificate within 14 days from presentation. Thus from 12th July 2010 to the date of filing the suit thus 9th December 2012. I find by awarding such interest that would be enforcing the parties contract to the letter and would amount to uphold commercial transaction and entrenching seriousness of commercial transaction to the parties. That depriving a deserving party its entitlement does not pay and there is a penalty for depriving the party who is entitled to payment in time.

24. In **Dinesh Construction Limited vs Bamburi Cement Limited (2018) eKLR**, Hon Lady Justice Sewe dealing with a similar facts had the following to say:-

"If a certificate remains unpaid beyond the period for honouring certificates stated herein, the Employer shall pay or allow the Contractor simple interest on the unpaid amount for the period it remains unpaid at the commercial bank lending rate in force during the period of default. The Quantity Surveyor shall assess the amount to be included in an interim certificate as the interest due for the delay and if an interim certificate is issued after the date of any such assessment, the amount shall be added to the amount which would otherwise be stated as due in such a certificate."

25. I find the plaintiff has proved its claim on balance of probability and I proceed to enter judgment in favour of the plaintiff as follows:-

a) **Kshs. 20,688,259.98;**

b) **I am satisfied that this having been a commercial transaction, the plaintiff is entitled to interest on the claimed sum of Kshs. 20,688,259.98 from 12th July 2010 (14 days after the date of the certificate until payment in full at 15% per cent.**

c) **Costs of the suit together with interest to the plaintiff.**

Dated, signed and delivered at Nairobi this 14th day of March, 2019.

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J .A. MAKAU

JUDGE