REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCCC NO. 488 OF 2011

DAVID ENGINEERING LIMITED……..……PLAINTIFF

VERSUS

EMIRATES NEON GROUP KENYA LTD…… DEFENDANT

JUDGEMENT

1. The claim by David Engineering Limited (David or the Plaintiff) against Emirates Neon Group Kenya Limited (ENG or the Defendant) is for the sum of Khs.42,992,279/=.

2. David says it is a market leader in steel fabrication in Kenya. Its' case is that sometime between January 2008 and March 2009, at the instance and request of ENG ,it agreed to design, fabricate and install billboards and benches of various specifications on sites in Nairobi and Mombasa. In consideration ENG would make payments as follows:-

i. 50% of the price on placement of the order.

ii. 44% of the price four months after installation.

iii. 6% retention amount on the expiry of 3 years upon installation.

ENG was to initiate the orders by delivering Local Purchase Orders (LPO), verbal communication and approving quotations either verbally or by written endorsement.

3. David avers that it was a further term of the contract that upon practical completion of the installation, the sites would be handed over by the Plaintiff to the Defendant via a Completion Certificate.

4. The claim by the Plaintiff is arrived at after giving credit of Kshs.49,324,069/= which has been paid out of a total sum of Kshs.87,195,843/=. To this amount is added another amount of Khs.5,120,506/= being an un-invoiced amount relating to 50% down payment. To these sums David seeks interest at commercial rates from the date of contract until actual payment and costs of the suit.

5. The claim is denied and through a statement of Defence dated 12th July 2012, ENG states that David materially breached the terms of the Contract and has set out the following particulars:-

i) Failing to deliver goods manufactured.

ii) Keeping the manufactured goods in storage instead of installing the same at various sites in Nairobi and Mombasa.

iii) Colluding with employees of the Defendant to acknowledge delivery of goods when indeed the same had not been delivered and or installed.

iv) Inflating the price of unipoles and sharing the difference in price with the Defendant's employee namely Sandeep Nehra.

v) Failing to install billboards removed and paid for from Mombasa to Nairobi full particulars which are within the Plaintiffs knowledge.

vi) Poor quality of unipoles and suburban signs owing to lack of powder coating which the Plaintiff failed to apply.

6. In respect to the LPOs, ENG denied that those could be communicated verbally and/or approved through endorsement on quotations.

7. On the part payment, the case by ENG is that it was made on the principle of *quantum meruit* (a reasonable sum of money paid for work done).

8. ENG further contends that the sum of Khs.42,992,279/= is the value of the goods that the Plaintiff has manufactured and/or fabricated and for which it is holding in exercise of its right of lien. The Defendant therefore argues that to make this claim is inconsistent in law with the right of lien already exercised. Another defence is that the Plaintiff's refusal to perform and/or deliver the finished goods amounted to anticipatory breach which went to the root of the contract so as to constitute a total repudiation of contract.

9. During the hearing each side called one witness. For the Plaintiff, Gary Bengera testified while George Oyoo Oruko gave testimony on behalf of the Defendant.

10. There was no agreement on issues and at submissions each side gave separate proposals. This Court bears those in mind and the pleadings herein and frames the following issues for determination:-

(i) Is this suit filed without authority?

(ii) Did the Defendant breach the contract?

(iii) If so, has the Plaintiff proved its claim for Kshs.42,992,279/= or any part thereof?

(iv) If so, is the Plaintiff entitled to an order of interest at commercial rates?

(v) What is the appropriate order on costs?

11. In its written submissions, ENG urged this Court to find that the proceedings were improperly commenced as David did not have a resolution of the Company under seal authorizing the presentation of these proceedings nor was there a resolution appointing its' advocates to act on its' behalf. It was further submitted that the witnesses of David (although there was just one witness) did not have authority of the Company to testify.

12. The Court observes that the question of lack of proper authority was not pleaded by ENG. Yet on the other hand in the verifying affidavit of 3rd November 2011 that accompanied the Plaint, Mr. Gary Bangera deponed that he was a Director of the Plaintiff Company and duly authorized to swear the affidavit in support of the claim. In the absence of specific challenge to that authority through pleadings, that deposition made on behalf of David was sufficient. In regard to authority to give evidence, David on 28th April, 2014 duly filed a Resolution of its Board of Directors of 25th April 2014 in which Gary Bangera was authorized to represent it in the proceedings and to swear all affidavits and take proceedings and necessary action(s) in relation to the matter. That would include authority to testify. That first issue is easily resolved in favour of David.

13. The evidence is that a written contract between the parties was drawn on 8th April, 2008 but only David executed it. That notwithstanding the existence of a contract is not denied by ENG. Its witness testified as follows:-

"*There was a contract*".

14. Orders for the works were raised by way of Local Purchase Orders (LPOs). On the Plaintiff's bundle of documents one finds the following LPOs:-

Page	Date	Amount
22	14th January 2008	14,495,360/=
25	17/04/2008	8,184,960/=
28	12/05/2008	15,409,760/=
30	15/05/2008	8,184,960/=
35	30/12/2008	7,264,500/=
39	06/8/2008	4,280,400/=
40	06/10/2008	791,120/=

On the face of each LPO are the following remarks:-

- 50% on order
- 44% after 4 months upon installation
- 6% retention payable 3 years upon installation and approved by Engineer.

The witnesses for both sides take a common stand that this was the agreed mode of payment.

15. In addition to the LPOs there are several quotations on the letterhead of David and received by ENG These are:-

Page	date
46	28th August 2008
49	28th August 2008
54	02nd December 2008

16. Mr. Bangera testified for David and explained as follows:-

> "*... though LPOs were raised in almost all jobs due to the good relationship that had developed resulting in trust we could sometimes undertake certain jobs where orders were made and sometime by endorsement of approval on quotations*".

17. Also in support of its' case, David produced the following installation and completion certificates:-

Page	date
23	01/03/2010
26	01/03/2010
29	01/03/2010
38	01/03/2010
45	01/03/2010

Although these certificates were signed by employees of ENG, the case for ENG was that David colluded with its employees to acknowledge delivery of goods when the same had not been delivered and/or installed.

18. The allegation by ENG was that David was in fact fraudulent and the Court agrees with the submissions of Counsel for David that this allegation needed to be sufficiently proved as required by law. In this regard the cited case of Eva Kimea & another vs. Nawal Abdulrahman Abdalla [2015] eKLR is a restatement of the law that allegations of fraud must be specifically pleaded and strictly proved on a standard beyond the usual standard in civil proceedings of balance of probabilities but not beyond reasonable doubt as required in criminal law. Other than mere allegations, no iota of proof in respect to the alleged collusion was provided by ENG. This Court is therefore unable to hold that the completion certificates are a work of fraud.

19. David asserted that it would raise two (2) types of invoices. Those for down payment and those after the completion of the works. The invoices are:-

Page	Date	Amount
24	25.2.2008	5,765,200/00
27	28.4.2008	4,081,335/30
31	16.6.2008	4,209,924/00
32	26.62008	8,599,197/32
33	6.5.2008	4,103,624/70
34	6.8.2008	8,554,880/68
36	6.8.2008	2,905,800/00

37	27.8.2008	2,905,800/00
41	6.8.2008	2,818,800/00
42	6.8.2008	316,448/00
43	6.5.2008	307,400/00
44	7.10.2008	11,724,502/80
48	6.10.2008	3,975,036/00
50	6.10.2008	3,314,700/00
51	6.10.2008	9,944,100
52	6.10.2008	316,448/
53	6.10.2008	6,607,360/
55	23.3.2009	307,400/
56	23.3.2009	4,826,760/
57	23.3.2009	1,452,900/
58	23.3.2009	158,224/

20. There is then the letter of 23rd November 2009 (P Exhibit page 59) by David to ENG in which after stating,

> "*We have not received any feedback from ENG Kenya Ltd regarding the same and it is now deemed that the following works have been satisfactorily completed by David Engineering Ltd and has been handed over to ENG Kenya Ltd*",
>
> David lists the works.

21. David contends that once payment was not received then it made demands on 23rd November 2009 (P Exhibit page 63) and again on 21st December 2009 (P Exhibit page 60).

22. What is the defence of ENG in this regard? It had pleaded that David had:-

> (i) Failed to deliver goods manufactured.
>
> (ii) Keeping the manufactured goods in storage instead of installing them on various sites.
>
> (iii) Inflating the prices of unipoles and sharing the difference in price with one of its employees.
>
> (iv) Failing to install billboards removed and paid for from Mombasa to Nairobi.
>
> (v) Poor quality of the unipoles and suburban signs.

23. In the assessment of this Court the LPOs, quotations and installation and completion certificates speak to work done by David under the terms of the contract. Invoices then followed. There is no evidence that the issues and complaints now taken up by ENG were raised at the time the invoices were raised. Whether the issues are merely an afterthought was raised in cross examination of Mr. Oyoo. When asked about an allegation some billboards were to be relocated from Mombasa to Nairobi and Nakuru he testified:-

> "*There were emails exchanged. They are not here. Communication for relocation were done in writing. They are not in our bundle*".

24. On the question of inflation of prices and collusion with Mr. Sandeep Nehra, this quasi-criminal allegation was not followed through at all. It is an unproved allegation and would have required the joinder of Nehra to the proceedings.

25. On a balance of probabilities this Court finds that David has proved breach of contract the part of ENG. In respect to the quantum of the claim I accept the submission by ENG that the nature of David's claim is in special damages that required specific proof. This Court is asked to find that David has not discharged this onus. ENG submits that this argument finds support, not in the least, because ENG's request for

particulars of 12th July 2012 was not answered.

26. That request sought the following particulars:-

a) Who ordered for the goods worth Kshs.5,120,506/-?

b) What kind of goods and or services were to be rendered for the amount of Kshs.5,120,506/=?

c) Who signed the completion/installation certificate for the goods worth Kshs.5,120,506/=?

d) Statement of particulars of the works abandoned and the value of abandoned goods lying in their godowns?

e) When was the work abandoned?

f) Whether the Plaintiff notified the Defendant it had abandoned work.

But the assertion that the request was not attended to may not be entirely correct. In the Court file is an answer to the particulars dated 31st October 2012 and filed on the same day. This Court need not go into the details thereof.

27. I find that the documents already rendered by the Plaintiff which include the contract, LPOs, quotations, certificates, invoices and demands read together proved the Plaintiff's claim to the degree of required by law in civil proceedings ie. on a balance of probabilities.

28. In respect to the Claim for Khs. 5,120,506, David's witness had explained,

> "*That the total value of contract received is Kshs.104,400,649/= out of which Kshs.92,316,349/= is due and payable. However the invoices have been raised for Ks. 87,195,842/=. The difference of Kshs. 5,120,506/= has not been raised as the payments had been stopped putting the future of the contract in doubt*".

This Court has not understood this claim to be in respect to some separate distinct contract.

29. Other matters call for my consideration. The first is in respect to whether the retention sum of 6% ought to be payable to David. The evidence is that if no dispute had arisen then installation of the works ought to have been completed by at least the year 2010. Under the terms of the contract the retention sum ought to be released after 3 years of completion of installation. Whilst that period may not have lapsed when this suit was filed on 3rd November 2016, as at the date of writing and delivering the Judgment it would be way past. Having found that David was not to blame for non-installation, then the Court must hold that release of the retention sum is due.

30. The next issue is whether David's claim is undeserved because it exercised its right of lien over some of the products. On this, ENG does not seem to argue that the right of lien did not accrue. Instead it asserts that to claim the sum by way of a civil action is inconsistent with the exercise of that right. What is a lien? Black's Law Dictionary 10th Edition describes it thus,

> "*A legal right or interest that a Creditor has in another's property, lasting us. until a debt or duty that it secures is satisfied*".

Even if it is assumed that David was properly exercising a right of lien, the fact remains that the sums sought were due to it from ENG. There is nothing inconsistent about David holding the products until it receives full payment of its debt. David was not precluded from pressing for payment of the claim by way of this civil action.

31. On interest David seeks interest at commercial rates from the date of contract until actual payment. Interest antecedent to the filing of a suit is a matter of substantive law which must not only be pleaded but also proved (Highway Furniture Mart Limited vs.The Permanent Secretary & another EALR [2006] 2EA 94), David did not lead evidence as to whether antecedent interest was contemplated either by Trade usage or by terms of the contract. It cannot be granted. Neither can this Court order application of any other rate other than Court rates as no basis was laid for such other rate.

32. In the end I enter judgment for the Plaintiff against the Defendant for Khs.42,992,729/= and interest thereon at Court rates from the date of filing suit until payment in full. The Plaintiff shall also have costs of this suit as against the Defendant.

Dated, Signed and Delivered in Court at Nairobi this 5th day of April, 2019.

……

F. TUIYOTT

JUDGE

PRESENT;

Muiruri for Ochieng for Respondent

N/A for Plaintiff

Nixon – Court Assistant