



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL SUIT NO. 01 OF 2017

MALIA & LUCAS COMPANY LIMITED.....PLAINTIFF

VERSUS

THE COUNTY GOVERNMENT OF TRANS NZOIA.....DEFENDANT

J U D G M E N T

1. By its plaint dated 12th January 2017, the plaintiff prayed for Judgment against the defendant for;-

- a) Kshs 32,906,960/= together with costs and interest on commercial rates.
- b) Costs of the suit and any other relief that the court may deem fit to grant.

2. The basis of the Plaintiff's claim is the road works done on the following roads and in accordance with the tenders provided under paragraph 9 of the plaint, namely

- 1) Mwoki – Masengeli – Kapretwa Coffee factory – 3KM.
- 2) St Thomas – Kapretwa – 3.5 KM
- 3) Kiptoo Chepsari – 1 KM
- 4) Kapretwa Centre – Bianyi – 5 KM
- 5) Kapretwa Coffee – Matisi – 5 KM
- 6) Matisi Nyayo Tea Zone – Bwayo – 7KM
- 7) Kapretwa Coffee Factory to Sukwo via Kibenei Bamba

Fula – 6KM

3. The plaintiff averred that it did undertake the road works on the aforementioned roads on various dates and despite issuing the certificates of completion, the defendant refused and or failed to pay the various invoices. The failure has caused untold suffering on the plaintiff to the extent that it has been unable to service its liabilities and has been referred to Credit Reference Bureau.

4. The Defendant on its part did file its defence denying the plaintiff's allegations and went on to state that there was no formal contract between the plaintiff and the Defendant. It alleged that the whole process was a fraud as the plaintiff did not perform any works on the road and if it did, the same was shoddy and incomplete.

5. Both the Plaintiff and the Defendant relied on voluminous documents and called a single witness each to support its case. They adopted the statements already filed on record. Edna Kerubo testified on behalf of the plaintiff while Pius Munialo on behalf of the Defendant.

6. Without reproducing their evidence in court, it is clear that what is at stake and as rightly captured by the submissions by both counsels for the Plaintiff and the Defendant is whether there was a contract between the plaintiff and the Defendant.

7. Secondly, if there was such a contract was work performed or not? Whichever answer is arrived at, is the plaintiff entitled to the

payments?

8. Whatever the two witnesses stated on oath, all that they based their evidence was the documentary evidence already on record. Infact whatever documents produced by the defendant was already in the custody of the plaintiff.
9. In determining the first issue of whether there was a contract between the plaintiff and the Defendant, the same should as a matter of course be explained by the documents or exhibits.
10. There is no doubt that the plaintiff was registered as a Limited Company on 3/8/2011. PW1 stated that she was a Director of the Plaintiff Company . She said that the Company entered into contracts to work on the roads stated above. He relied on the various contracts on record.
11. The first contract is for road maintenance of Muroki – Masengeli – Kapretwa – Coffee Factory . There is a tender award dated 8th April 2014 by the Defendant and addressed to the Plaintiff signed by one J.T. Muindi on the said date. Its equally stamped with the Defendant's stamp.
12. Next to it is a contract document dated 28/7/2014 between the Plaintiff and the Defendant. The next page is however not signed.
13. There is a letter dated 20/6/2014 by the Defendant to the County Engineer requesting for the Inspection of the same road. Next document is the Local Service Order (LSO) No. 0968634 from the Defendant.
14. The next tender award is dated 8th May 2014 for Muroki – Masengeli Kapretwa – Coffee factory.
15. Next to it is a completion certificate dated 26/6/2014.
16. There is a tender award for St Thomas Kapretwa Tea Factory dated 8th April 2014. Its signed by one J.T. Muindi. Accompanying it is a contract dated 28/4/2014 between the Plaintiff and the Defendant.
17. A letter dated 20th June 2014 requesting for an inspection of the same road. An LSO No. 0968635 (undated) but signed by the Plaintiff on 16/5/2014 was issued. A completion certificate was issued on 26/6/2014 by the Defendant.
18. A tender award dated 8/4/2014 in respect to Kiptoo – Chepsari was issued to the Plaintiff by the Defendant. An agreement dated 28/4/2014 was signed by the plaintiff. Again an LSO was requested on 8/5/2014 and the same was prepared and acknowledged on 13th June 2014. A completion certificate was issued on 11th June 2014.
19. It appears that payment of Kshs 1,748,920 was paid in respect to this contract.
20. On 8/4/2014 tender award in respect to Kapretwa centre – Biayi was issued to the Plaintiff by the Defendant. A contract was signed on 28th April 2014 and an LSO issued. Infact a completion certificate was issued on 26th June 2015.
21. On the same vein a tender award for Kapretwa Coffee – Matisi was issued on 8th April 2014 to the plaintiff. Agreement was done on 28th April 2014. There was an LSO issued.
22. Matisi -Nyayo Tea Zone via Bwayo tender was awarded on 8th April 2014 to the Plaintiff and a contract signed on 28th April 2014. An LSO was equally issued as well as completion certificate.
23. Tender for Kapretwa Factory to Sukwo via Kibenei Bamba Fula was issued to the Plaintiff on 8th April 2014 by the Defendant. A contract was signed on 28th April 2014. An LSO was equally issued as well as a completion certificate dated 31/6/2014.
24. The thread running across these contracts is that they were signed on the same date, that is 28/4/2018. At the execution portion of the contract, its only Edina Kerubo that signed on behalf of the contractor Malia & Lucas Company Ltd. Joseph Temulo and Victor Okul signed as witnesses. There was no seal of the company affixed to the agreement.
25. More significantly, the defendant did not sign any of the contracts. It appear that the only nexus between the plaintiff and the Defendant in this contract is the Local Service Order and a letter to Executive member Finance by one Lucas Masakari Sitati (Engineer) from the Defendant Public works, Transport and Infrastructure advising that the plaintiff be paid. There was also a document called “Completion Certificate” dated various dateS and supposedly signed by the Engineer and verified by Procurement, Roads Inspector and Audit departments.
26. The Defendant has raised a defence that here was no valid contract between the Defendant and the Plaintiff capable of being enforced. The Plaintiff's on that other hand has relied on the findings of the Defendant adhoc Committee which found that at least some work was done on the roads.
27. The plaintiff further stated that the Defendant is estopped from rewnaging on the contract seeing that it infact paid part of the contract for instance in the case of Kiptoo – Chepsari road where it paid a total sum of Kshs 1,748,920/=.

28. As clearly discerned from the attached contracts, none of them has been signed by the Defendant or its representative. Even in the absence of the tender advertisement, tender evaluation and processing minutes from the respective Committee and a valid tender award, I find it, respectively, very difficult to believe that the attached contracts can be termed legally binding contracts.

29. This court has been unable to understand why the contracts were not signed by the procuring entity namely the Defendant. Even if they were signed on the same date without the tender process being followed, then it would have been prudent to have them signed and sealed.

30. The acceptance letter dated 8th may 2014 for various roads state in part;

“ We also request your good office to prepare an LSO for this road as we have already started the road works.”

31. Even if the LSO were prepared, what was the basis? Even the LSO produced were not signed by the Defendant.

32. The finding by the Audit General is instructive. His report dated 16/6/2015 found inter alia that;

“ 1.6.2. The then Head of Procurement Unit failed to maintain/avail approved prequalified contractors, minutes of tender evaluation awards and contracts between the contractors and the County Government contrary to Section 8(3) (a) of the Public Procurement Regulations of 2006. It was therefore not possible to establish whether the process was fair, adequate, transparent, competitive and cost effective as stipulated in Section 227 of the Constitution. These systematic issues resulted to poor contracts such as double awarding of contracts and irregular claims amounting to Kshs 35,743,882/= and Kshs 12, 191, 918/= respectively.”

33. The said report went ahead to note that there were

“ contracts not in the register as having tendered for prequalification and the LSO s were not duly authorized.”

34. I find the plaintiff's claim not sustainable for the simple reason that it did not comply with procurement rules. There was no evidence that it tendered for the works. Even if it tendered there was no evidence that there was a valid contract between it and the Defendant. The contracts produced does not stand the force of the law.

35. The provisions of the Law of Contract Act Cap 23 Section 3 thereof are imperative. The same states that;

3(1) “ No suit shall be brought whereby to charge the Defendant upon any special promise to answer for the debt, default or miscarriages of another person unless the agreement upon which such suit is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged there with or some other person thereunto by him lawfully authorized.

(2) No suit shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit ability, trade or dealings of any other person, to the intent of purpose that such other person may obtain credit, money or goods unless such representation or assurance is made in writing, signed by the party to be charged therewith.”

36. Without going into the other issues raised by the parties herein, I find that in the absence of valid contracts between the plaintiffs and the Defendant in respect to the various roads which were to be improved, the Plaintiff claim cannot succeed. Even if there was partial payment as claimed by the plaintiff, the same was premised on a wrong contract. It was not executed by the client. It was only signed by the contractor.

37. This in my view was the backbone of the contracts. The findings by the Auditor General was on spot. The rest of the adhoc committees finding in whatever format would not oust the fact that the Plaintiff did not execute any valid contract with the Defendant.

38. Even though perhaps some work was done as evidence by the voluminous exhibits including photographs produced by the Plaintiff, the principle of estoppel does not apply in this case. As stated earlier the LSOs exhibited were not signed and or stamped by the Defendant. As found by the Auditor General the same were suspect.

39. It would be futile, having reached the above conclusion to determine the rest of the issues. As for instance the Plaintiff was awarded the works based on the fact that it felt under the Youth Access to Government Procurement Opportunities (YAGPO) is for now a moot question.

40. Again whether it partially did the work or not in my view is equally moot. There was no Substratum to the contracts, namely legally binding agreement.

41. The upshot is that this suit must fail. The same is hereby dismissed with costs to the Defendant.

Delivered, signed and dated at Kitale this 3rd day of April, 2019.

H.K. CHEMITEI

JUDGE

3/04/19

In the presence of:

Mr. Wanyama for the Plaintiff

No appearance for the Defendant

Court Assistant – Kirong

Judgment read in open court.