



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 6 OF 2016

UNION TECHNOLOGY KENYA LIMITED.....PLAINTIFF

=VERSUS=

COUNTY GOVERNMENT OF NAKURU.....DEFENDANT

JUDGMENT

INTRODUCTION

1. The plaintiff filed this suit against the defendant seeking the following prayers:-

- a. The sum of Ksh.437,800,000/-
- b. Interest on (a) above at the prevailing commercial rates of interest from 3rd June 2012 until payment in full
- c. Costs of the suit together with interest thereon at court rates
- d. Any such other or further relief as this Honorable Court may deem appropriate.

2. The dispute herein arise from a project agreement dated 20th February 2007 where the plaintiff was contracted and authorized to install and/or erect street poles for purposes of lighting Nakuru town and beautification plus displaying advertisements in designated areas within municipal council of Nakuru.

3. The Agreement was to subsist for a period of twenty (20) years, which was renewable on the terms, and conditions set out in the agreement. However sometime in the year 2013, the Plaintiff alleges that the County Government fundamentally breached all the provisions of the Agreement. It enumerated the breaches as follows:

- a. Failure to maintain the designated street poles and replace all damaged poles as a result of accidents by vehicles within the agreed time of 48 hours
- b. In the alternative to clause (a) above, failure to compensate the Plaintiff for all replacement of damaged poles done by it.
- c. Competing with the Plaintiff and allowing Third parties to place adverts on the Plaintiff's designated street poles while collecting revenue from them at the expense of the Plaintiff.
- d. Renewing other advertisement contracts existing at the time of the signing the Agreement once they expired and during the subsistence of the Agreement
- e. Permitting the putting up of structures on which advertising is displayed to be erected so close to the designated street poles that the effectiveness of the message displayed in the advertisement on the said designated street poles by the Plaintiff adversely affected
- f. Authorizing the placing of posters. Placards, signs, announcements, stickers advertising, marketing or promoting of any form on the said street poles by third parties
- g. Failure to ensure that other contractors assigned works by the Defendant do not destroy the armored cables underground and thus destroying cables without replacing, thus disconnecting power

h. Failure to maintain and repair control pillars and fixtures and only done by the Plaintiff

i. Allowing other third parties to advertise on the Mburu Gichua roundabout on union technology frames/steel structures fabricated to beautify the roundabout.

4. The Plaintiff stated that as a result of the said breach, it suffered loss and damage, and particularized the same as follows:

a. Cost of the project and total value of the work – Kshs.72,228,000/-

b. Loss of business amounting to the sum of Kshs.364,800,000/-

5. In response, the defendant filed defence and counterclaim. The defendant denied plaintiffs claim and particulars of breach. In its counterclaim, the Defendant confirmed that the defunct Municipal Council of Nakuru, which was replaced by the County Government of Nakuru entered into an Agreement, dated 20th February 2007 with the Plaintiff. It stated that the Agreement was for purposes of the Plaintiff displaying adverts and remitting revenue earned at a rate of 35% to the Defendant. That the contract also stipulated that the Defendant was to cause the supply of lighting of the poles but the Plaintiff failed and/or refused to ensure payment of the incurred electricity bills, which put the Defendant into strenuous expenses.

6. The Defendant further alleged that the Plaintiff, since the execution of the agreement has never revealed the income and revenue generated and has never remitted the 35% share of revenue for the initial period of 10 years thereby subjected the Defendant to unprecedented loss.

CONSENT ON LIABILITY

7. Parties entered into negotiations and recorded consent on liability dated 1st August 2017 filed in court on 30th August 2017. Terms of consent are set out as hereunder:-

a. liability be apportioned at 30:70 in favour of the plaintiff against the defendant

b. compensation be based on the value of work, material and loss of income at the time of breach of contract

c. valuation to be conducted by both parties

d. valuation report to be used for the apportionment in 1 above

e. Each party to bear own costs

8. Parties agreed to proceed by way of filing report for the court to assess damages payable to the plaintiff. On 11th February 2019 Advocates for the parties herein orally submitted on valuation reports filed.

PLAINTIFFS SUBMISSIONS ON VALUATION

9. The plaintiff's counsel submitted that the plaintiff procured and installed poles within Nakuru but along the way, the contract was terminated and plaintiff evicted. He submitted that the plaintiffs claim has two limbs

a. Cost of purchase and installation of poles

b. Loss of revenue

10. In the first limb, counsel submitted the plaintiff procured 256 poles from out of the country and gave total cost for purchase and installation as Kshs.72,228,000.

11. He further submitted that the contract was for twenty years and the plaintiff had done business assessment and seen how much it was to gain for 20 years but were unfortunately ousted in the year 2012. He submitted that installation had been done in the whole of Nakuru town and advertisement had begun.

12. That after their eviction, advertisement contract was given to a third party and as at today there are advertisement on the streets as shown by examples attached and invoices from companies indicating charges for advertisement. He submitted that the aspect of maintenance of street light poles and power bills was on part of the defendant and plaintiff was not therefore in breach of the terms of contract.

13. Plaintiff's counsel submitted the plaintiff had invested a lot in the project to the extent of securing a bank loan and suffered immensely as a result of termination of contract; that the suffering included auctioning of its property, office being shut and director's children being out of school. Plaintiff sought judgement to be entered in its favour.

DEFENDANTS SUBMISSION ON VALUATION

14. The defendant relied on assessment and valuation report dated 20th July 2018.

15. Counsel for the defendant conceded that 256 poles were installed in the streets of Nakuru. He however argued that the cost of installation of the poles in entirety would amount to Kshs.15,786,496. He further submitted that the plaintiff breached the contract by failing to pay electricity bills and to repair 40 streetlights which was their responsibility as per the contract clause 5.13.

16. He submitted that there was corresponding responsibility to install, take charge and maintain the electricity poles. He argued that the poles broke down because they were not maintained. He said the breakage took place before the defendant took charge and damage was assessed.

17. Counsel further argued that in assessing revenue for 20 years, the plaintiff failed to factor in natural attrition, wear and tear, change of law governing administration of public service, depreciation of poles and unpredictable nature of broadcasting. He added that plaintiff has relied on third party's assessment and none of their own. He submitted that the loss has not crystallized to reach the figure claimed. That the claim is futuristic and it is a claim for special damages, which must be proved.

18. In a rejoinder, counsel for the plaintiff argued that from the partnership agreement it is clear that it was the duty of the defendant to maintain the poles. He said under clause 5.13, the plaintiff would only come in to replace the pole if defendant failed to replace within 48 hours and that replacement was to be done at defendant's cost. He added that from the documents filed, the plaintiff repaired the poles but was not reimbursed.

19. On documents referring to third parties, counsel submitted that they were only used for comparison and specific claim is pleaded in prayer (a) of the plaint and paragraph 11 of the plaint has particularized loss of business and earnings.

ANALYSIS AND DETERMINATION

20. Parties agreed to apportion liability at 30:70 percent in favour of plaintiff. They however failed to agree on assessment of damages and filed valuation reports to assist court in assessing damages. What is therefore left for courts determination is assessment of damages.

21. I perused and considered valuation reports filed by the parties herein. It is not disputed that the plaintiff installed 256 poles in the streets of Nakuru. The Plaintiff in its further list of documents filed in court on 6th December 2018 annexed the following documents.

- a. At Page 2 a copy of the invoice for purchase of the pole, lamp and its parts from Meiyi Road factory in China.
- b. At Pages 3-9, 13-14 are importation documents for the street poles.
- c. At Pages 23- 29 is a summary of the installation cost of the streets poles.
- d. Total for purchase and installation is a sum of Ksh.72,228,000/-

22. On the other hand, the defendant in its valuation placed a value of Ksh.61,666/- per 8m pole which will bring the figure to 15,616,000. It based the figure on the sum of tenders of similar nature done in Nakuru County and specifically the construction of non-motorized pathways under the Kenyan Municipal Program completed in 2017.

23. Defendant, however failed to annex any such tender document or report on the Kenyan Municipal Program to demonstrate to the court how the figure was arrived at. In the absence of any annexures, I find placing value of each pole by defendant uncorroborated. On the contrary, the plaintiff availed documents to demonstrate that it incurred cost of Kshs.72,228,000 in installing 256 poles. The further submitted that the poles were not available in Kenya at the time and sourced from china as shown on page 3 to 14 of the plaintiff's documents.

24. In respect of claim loss of advertising business, it is also disputed that the agreement entered into by parties herein was for a period of 20 years and that it was terminated prematurely. Plaintiff claim a total of Kshs.364,800,000/-

25. The defendant however argued that it was the plaintiff's responsibility to maintain the poles and the figure quoted for loss of revenue is futuristic; that it could have been affected by other factors, which include depreciation of poles, unpredictable nature of broadcasting and change of governing laws.

In **Cheshire, Fifoot and Furmston's Law of Contract, 13th Edition at Page 609** the authors observe as follows:-

“The question of what exactly it is that the plaintiff has lost is often a subtle one and for this purpose it is useful to use the terminology popularized by a famous American article and distinguish between expectation loss and reliance loss. Expectation loss is the loss that which the Plaintiff would have received if the contract had been properly performed. Of course, in a sense, the plaintiff has not lost this because he never had it but he expected to have it and the reports are full of statements that the plaintiff is entitled to be put into the position he would have been in if the contract had been performed. The most obvious expectation loss is the profit the plaintiff would have made on the contract. But the contract may be so speculative that it is unclear what, if any, profit it would have made. This does not mean that the plaintiff has suffered no loss, since he may have relied upon the defendant honouring his contract and incurred expenditure which was wasted as a result.”

26. In **Kilimanjaro Construction v The East African Power & Lighting [1985] eKLR** the court held as follows:-

“the innocent party is entitled to damages that will put him back to the position he would have been were the contract executed. Of course, the Plaintiff must have lost any profit he would have earned had the contract been completed as initially intended. The Plaintiff having not executed the entire contract, though for no fault of his, he cannot claim the entire balance of the contract sum since that would in my view amount to unfair enrichment. What this court would have expected the Plaintiff to prove is the profit he would have earned if the contract was fully executed. That is the opportunity value that the Plaintiff lost as a result of the breach of contract by the Defendant”

27. On perusal of the memorandum of agreement dated 20th February 2007, I note from clause 5.13 that it was the responsibility of the operator to repair and maintain all material for the advert frames but the lighting and poles belong to the municipal council and the council was to provide supervisory labour.

28. It further provided that in case of an accident, the council would replace the whole unit and charge the accident victim in accordance with municipal bylaws; further that the council would replace any unit in case of vandalism, riot or other natural calamities.

29. The agreement provided further that in case the Municipal Council failed to replace within 48 hours; the operator would replace and claim reimbursement to be paid within 30 days. Alternatively, cost deducted from agreeable Municipal Revenue agreed at 35%.

30. I note that it was terminated after 5 years 3 months. There is no doubt that the plaintiff had invested and had projection of profit for the remaining period of contract. I however agree with the defence counsel such expected earnings are likely to be affected by unforeseen factors.

31. Further, there is no doubt that the plaintiff would have been expected to incur expense in maintaining the project. It is also important to note that the plaintiff in lump sum, and may give better returns if reinvested unlike monthly or yearly earnings over a period 15 years.

32. The issue of inflation also has to be taken into consideration; value of the shilling in the next 15 years, will definitely be lower.

33. Putting all of the above into consideration, I do assess damages as hereunder:-

a. At page 125 of plaintiff's document, earnings in the first 10 years for 100% booking is Kshs.189,696,000. The breach was occurred after 5 years in the initial 10 years period. The tabulation of the above amount has been subjected to 35% contribution to the council. I will therefore assess for the remaining 5 years and take into consideration the fact that there will not always be 100% booking for advertisements and running expenses. I will therefore reduce 50% of earnings for the 5 years. Thus, 5 years is 94,848,000 if all 256 poles are utilized. It is however unlikely that all poles would be utilized for the whole period I therefore reduce by 50%.

Kshs.94,848,000 less 50% (47,424,000).....47,424,000

b. Next 10 years 60% of total earnings was to go the operator and 40% to Municipal Council as per the agreement. Kshs.175,104,000 is arrived at if all the 256 poles were booked (100% booking). Due to unforeseen factors and running expenses, I find it appropriate to allow 30% for the second 10 years to cater unforeseen circumstance and for booked poles that may not be booked. I will therefore reduce by 70%.

Thus 175,104,000 less 70 % (122,572,000).....52,532,000

Total.....99,956,000

c. Defendant submitted that for the period the plaintiff operated, it never remitted 35% of its earnings as per the agreement. From the documents filed on page 41 of plaintiff's documents advertisement began in the year 2009. The plaintiff has not demonstrated remittance of payments made as per agreements attached to the defendant. At page 41 of plaintiff's document Kshs.253,000 is indicated as having been paid to the Council vide receipt number 583209 and maintenance cost from 2008 to 2013 is indicated as Kshs.985,528. I will therefore reduce Kshs.1,211,528.00 (253,000 + 985,528) 35% of the expected 94,848,000 which is 33,196,800.00. From Kshs.33,196,800.00 less Kshs.1,211,528.00, which brings net payable to defendant to a sum of Kshs.31,985,272

Thus (99,956,000-31,985,272).....**67,970,728**

Less 30% contribution.....(20,391,218.40)

Net.....**47,579,509.60**

Cost for purchase and installation of poles.....**72,228,000**

Less 30% contribution..... (21,668,400)

Net.....**50,559,600**

GRAND NET TOTAL (47,579,509.60+50,559,600)..... Kshs. 98,139,109.60

34. From the foregoing damages are hereby assessed at **Kshs.140,198,728.00** less 30 % (42,059,618.40) contribution comes up to **Kshs.98,139,109.60**

35. In respect of interest, the plaintiff at commencement of the agreement expended the installation cost. This is an amount which would have been put to other use if paid back to the plaintiff upon termination of the contract. If the same was obtained from a financial institution, it should have attracted interest. I have not however seen any document confirming it was borrowed from a bank and what interest it attracted yearly. It would however be unfair to deny the plaintiff use of the money and interest of the same. I will therefore allow interest on **Kshs.50,559,600.00** at courts rate from the time of filing this suit.

36. As concern future earnings, I rely on decision by Court of Appeal for East Africa in the case of **Mukisa Biscuit Manufacturing Company Limited Vs West End Distributors Limited [1970] EA 469**. Where the court held as follows:-

“...that while the judge had power to award interest from a date prior to judgment, where damages have to be assessed by the court, interest should only be given from the date of judgment.”

37. I therefore allow interest on lost earning of Kshs. **47,579,509.60** at courts rate from the date of this judgment.

FINAL ORDERS

- a. I hereby enter judgement for plaintiff against the defendant for a total sum of Kenya Shillings Ninety eight million, one hundred and thirty nine thousand and one hundred and nine shillings only (**Kshs.98,139,109.60**)
- b. Interest on **Kshs.50,559,600.00** being installation cost at court's rate from the date of filing this suit
- c. Interest on **Kshs.47,579,509.60** being lost earnings at court's rate from the date of this judgment.
- d. Each party to bear own costs of this suit.

Judgment Dated, signed and delivered at Nakuru this 9th day of April 2019.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Schola - Court Assistant

Mr. Kimondo - Counsel for Appellant

Miss Chanako - Counsel for Respondent