



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO. 395 OF 2017**

**A. A. BAYUSUF & SONS LIMITED .....PLAINTIFF**

**VERSUS**

**NOTHERN WATER SERVICES BOARD.....DEFENDANT**

**R U L I N G**

1. **A. A. BAYUSUF & SONS LIMITED**, the Plaintiff, is an incorporated Company under the Companies Act. It engages in the construction industry.

2. **NORTHERN WATER SERVICES BOARD**, the Defendant, is a Water Service Board established under the provisions of the Water Act 2002.

**BACKGROUND OF THIS MATTER**

3. The Defendant under the Ministry of Water and Irrigation of The Government of Kenya, undertook the project of development of Garissa Sewerage. The Government of Kenya received a loan from the Arab Bank for Economic Development in Africa (BADEA) and Opec Fund for International Development (OFID) towards the costs of that project.

4. The Defendant was implementing the project. It invited sealed bids from eligible bidders for the construction of Garissa Sewerage Project-Phase 1. The Plaintiff submitted its bid dated 15<sup>th</sup> December 2008 for the contract price of Kshs. 1,007,657,703.

5. The Defendant by letter dated 23<sup>rd</sup> March 2009 issued the Plaintiff with a letter of accepting the Plaintiff's bid for the award at the amount of Kshs. 711,782,486.76. The Plaintiff by its letter of 19<sup>th</sup> March 2009 unconditionally accepted the offer. This culminated with both parties executing contract agreement for rehabilitation and augmentation of Garissa sewerage project. The contract was for a period of 24 months.

6. The Defendant by its letter dated 12<sup>th</sup> May 2009 appointed Wanjohi Consulting Engineers to perform the supervision of the project.

7. The Plaintiff has filed this claim against the Defendant which claim is broken down as follows:

*i. Costs arising from Court injunction 1 and 11 – Kshs. 16,862,104.00*

*ii. Extension of time related costs Kshs. 3,498,578.69*

*iii. Delayed certified interim payments Kshs. 56,256,451.57*

*iv. 2<sup>nd</sup> half of moiety/retention Kshs. 29,620,838.33*

**TOTAL Kshs. 106,237,972.59**

**APPLICATIONS**

8. There are two applications for my consideration. The two applications are considered together for reasons that will become clear.

## **APPLICATIONS**

9. The Defendant on being served with the Summons and Plaint, and after filing Notice of Appointment of Advocate, filed a Notice of Motion application dated 22<sup>nd</sup> November 2017.

10. By that Notice of Motion the Defendant seeks the following prayers:

- i. *That there be a stay of proceedings.*
- ii. *That the parties be referred to Dispute Resolution Expert (DRE).*

11. That application is supported by the Affidavit of Abdikadir N. Osman the Defendant's Chief Executive Officer (CEO). That affidavit is very scanty on information why the Orders sought should be granted. This is what Defendants CEO in part deponed:

- i. *I have read and understood the Plaintiff's Plaint dated 31<sup>st</sup> August 2017.*
- ii. *That I aver that there is a valid Alternative Dispute Resolution agreement.*
- iii. *That I aver that the Plaintiff is bound by the contract.*
- iv. *That I aver that the Plaintiff has not exhausted the Alternative Dispute Resolution.*

12. The dispute resolution clauses in the contract that the CEO referred to in his affidavit are:

***“If any dispute arises between the Employer and the Contractor in connection with, or arising out of, the Contract or the execution of the Works whether during the execution of the Works or after their completion and whether before or after repudiation or other termination of the Contract, including any disagreement by either party with any action, inaction, opinion, instruction, determination, Certificate, or valuation of the Engineer, the matter in dispute shall, in the first place, be referred to the Dispute Review Expert (‘DRE’).”***

Sub-Clause 67.3.1 Arbitration Proceedings

***“Any dispute in respect of which Recommendation, if any, of the DRE has not become final and binding shall be finally settled by arbitration in accordance with the rules of procedure designated in Sub-clause 67.3.2 below. The arbitral tribunal shall have full power to open up, review and revise any decision, opinion, instruction, determination, Certificate, or valuation of the Engineer and any Recommendation(s) of the DRE related to the dispute.”***

13. The Plaintiff opposed the Defendant's application by Replying Affidavit of its Managing Director, namely Abdulhakim A. Bayusuf. By that Replying Affidavit, the Plaintiff denied that there was a dispute that could be referred to the alternative dispute resolution in respect to its claim.

14. The Plaintiff's application is by Notice of Motion dated 16<sup>th</sup> March 2018. By that application, the Plaintiff seeks Orders:

- i. *There be entry of summary judgment for the Plaintiff against the Defendant for liquidated sum of Kshs 106,237,972.59.*
- ii. *In the alternative to (1) above, there be entered judgment on admission against the Defendant for the sum of Kshs. 16,862,104.*

15. The Plaintiff deponed that its claim in this suit was not disputed by the Defendant but that there is another disputed claim that had been referred to arbitration.

16. The Plaintiff, in respect to its claim for Kshs. 4,381,784 stated that the Defendants appointed Engineer, Wanjohi Consulting Engineer; by his letter dated 25<sup>th</sup> May 2012 approved that amount. That letter of the Defendant's Engineers approval is annexed to the Plaintiff's application. this is what the Engineer stated in part:

***“Hence, the contractor's (reads Plaintiff) claim for the 1<sup>st</sup> Court injunction lasting from 27<sup>th</sup> January 2010 to 2<sup>nd</sup> March 2010 amount to Kshs. 4,381,784 is recommended for approval.”***

17. The Defendant's CEO namely D. N. Shem Nderi wrote to the Plaintiff a letter dated 21<sup>st</sup> June 2012, viz:

***“Ref. No. NWSB/WP/7 VoL.XII/(74)***

***DATE: 21<sup>ST</sup> June 2012***

***The Managing Director***



**SUB: REIMBURSEMENT OF COSTS DUE TO 2<sup>ND</sup> COURT INJUNCTION**

*Reference is made to your claim for 2<sup>nd</sup> Court Injunction and recommendations from the consultants.*

*This is to inform that we have approved the payment of Kshs. 12,480,320.00 (Kenya shillings Twelve Million, Four Hundred Eighty Thousand, Three Hundred and Twenty Only) as the reimbursement due to 2<sup>nd</sup> Court injunction.*

*You should therefore prepare a Certificate for the same.*

(Signed)

*Eng. D. N. Shem Nderi*

**FOR: CHIEF EXECUTIVE OFFICER**

**Copy to: The Managing Director**

**Wanjohi Consulting Engineers**

**P.O. Box 21714-00505**

**NAIROBI –(Attn. Eng. F. G. Muriithi)**

**The Resident Engineer**

**GARISSA SEWERAGE PROJECT**

**The Site Engineer**

**GARISSA SEWERAGE PROJECT”**

20. The Plaintiff further attached to its application three interim Certificates Nos 24, 25 and 26 which were checked, signed and approved by the Defendant’s Resident Engineer, Wanjohi Consulting Engineers, the Defendant’s Technical Services Manager and the Defendant’s Chief Executive Officer. Those Certificates so checked and approved were for Kshs. 64,819,267.27 in Certificate No. 24, Kshs. 31,689,419.55 for Certificate No. 25 and Kshs. 29,620,838.33 for Certificate No. 26. The Plaintiff deponed that there has been part payment of those Certificates.

21. Part of the Plaintiff’s other claim also Kshs. 3,498,578.69 which, although the Plaintiff deponed was recommended by Wanjohi Engineers Consultant that recommendation was not part of the application and in my view remains unproved.

22. The Defendant, through its Replying Affidavit of Abdikadir N. Osman denied the Plaintiff’s claim. In respect to all the Plaintiff’s claims, set out above, the Defendant through that Replying Affidavit stated that the services of Wanjohi Consulting Engineers were subservient to the Defendant’s Inspection and Acceptance Committee. That the said Committee had not approved the sums as required under The Public Procurement and Disposal Act 2005.

**ANALYSIS AND DETERMINATION**

23. The parties filed their submissions in respect to both applications.

24. Let me however begin by responding to the Plaintiff’s statement that the Defendant had failed to file a defence within the prescribed period.

25. It will be recalled that the Defendant by its application seeks to stay these proceedings because it wishes to invoke the Alternative Dispute Resolution clause of the contract. That being so the Defendant could not submit to the jurisdiction of this Court by filing a defence. Indeed had it filed its defence it would have out rightly defeated its application. This was what the Court of Appeal in the case of **ADREC LIMITED V NATION MEDIA GROUP LTD (2017) eKLR** stated:

*“The option to refer to the matter to arbitration was sealed when the Defendant herein entered appearance and followed it with a defence. In the case of CORPORATE INSURANCE COMPANY VS WACHIRA (1995-1998) IEA 20, it was held that if the appellant had wished to invoke the clause, it ought to have applied for a stay of proceedings after entering appearance and before delivering any pleading and that the appellant had lost its right to rely on the arbitration clause by filing a defence...*

*Any party who wishes to take advantage of the arbitration clause in a contract should either at the time of entering appearance or before the entry of appearance make the application for reference to arbitration.”*

26. The Defendant has disputed the Plaintiff’s claim on the ground that the amounts claimed were not approved by the inspection and

Acceptance Committee. Such a Committee as provided under The Public Procurement and Disposal Regulation 2005 was required, in respect to a procuring entity, to inspect and accept goods, works or services immediately they are delivered.

27. The Plaintiff, by its submission, in response to the Defendant's argument submitted that the responsibility of setting up an inspection and acceptance Committee was on the Defendant's Chief Executive Officer. Further that the contract, between the parties, provided that it is the Engineer and the Resident Engineer who were to provide inspection for the works. In the Plaintiff's view, such a Committee was nonexistent.

28. The Plaintiff relied on the case TELKOM KENYA LIMITED V KENYA RAILWAYS CORPORATION [2018] eKLR where the Court stated:

***“Lord Simmonds summarized the rule in Turquand case as follows in Morris V Kanssen [1946] AC, 474:***

***Persons contracting with a company and dealing in good faith may assume that acts within its constitution and powers have been properly and duly performed and are not bound to inquire whether acts of internal management have been regular.”***

29. The Plaintiff, in my view, correctly used the above case to submit that the Defendant's attempt to say that Wanjohi Consulting Engineers were not appointed by them fails because the Plaintiff was not under obligation to inquire of the proper appointment or otherwise of that Engineers.

30. I would go further to say that the Defendant failed to explain its own letter dated 12<sup>th</sup> May 2009 addressed to that said Engineer whereby that Engineer was appointed. That letter in part stated:

***“This is to confirm to you that you are hereby appointed to perform the supervision of Garissa Sewerage Project.”***

The Defendant in that same letter gave the Engineer power to settle disputes between the Plaintiff and Defendant.

31. The Defendant did not also adequately explain away the approval of the Plaintiff's claims made by its own CEO D. N. Shem Nderi which approved the same claims that had been approved by the Engineer.

32. The Defendant also failed to explain how it can deny the Plaintiff's Certificate Nos. 24, 25 and 26 which were checked, certified and approved by its Resident Engineer, its appointed Engineers and its Chief Executive Officer.

33. It is clear that in considering the above discussion that there is no valid dispute of the Plaintiff's claim in respect to the bills that were checked, verified and approved and also which were approved by the Defendant's CEO.

34. The Plaintiff attached a letter written by the Defendant's CEO dated 4<sup>th</sup> March 2016 by which letter the CEO cancelled the guarantee given by Gulf Africa Bank Garissa, on behalf of the Plaintiff, for the project on the basis the Plaintiff had “discharged the contract after completion of the project.” The CEO further said:

***“We have no claim against the guarantee.”***

35. Since the contract has successfully been completed by the Plaintiff, the Defendant needed to explain to this Court why it denies the Plaintiff's claim to amounts approved and its claim for the amounts retained during the contractual period. The CEO's confirmation that the Plaintiff had completed the contract and his confirmation that the Defendant had no claim against the guarantee tells it all.

36. There is in my view no dispute of the Plaintiff's claim, as envisaged in the contract, which would justify the suit being stayed or it being referred to alternative dispute resolution body. The case UAP PROVINCIAL INSURANCE COMPANY LTD V MICHAEL JOHN BECKETT (2013) eKLR is apt to be referred to. The Court of Appeal in that case stated:

***“The inquiry by the Court with regard to the question whether there is a dispute for reference to arbitration, extends, by reason of Section 6(1)(b), to the question whether there is in fact, a dispute. In our view, it is within the province of the Court, when dealing with an application for stay of proceedings under Section 6 of the Arbitration Act, to undertake an evaluation of the merits and demerits of the dispute.”***

37. The Courts in exercise of the civil jurisdiction is guided by the overriding objective set out in Section 1A of the Civil Procedure Act, Cap 21. That Section provides:

***“The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act.”***

38. As stated before the Defendant has failed to show that disputes exists in as far as the amounts it has admitted of the Plaintiff's claim. To not enter judgment for the non disputed amounts would be to fail to accord a just and expeditious resolution of the matter. It is for that reason the Civil Procedure Rules, particularly Order 36, provide for Courts to enter summary judgment where the Defendant fails, as in this case, to show that it should have leave to defend the suit. that is what was stated as the purpose of that Order by the Court in the case NAIROBI GOLF HOTELS (KENYA) LIMITED V LALJI BHIMJI SANGHANI BUILDERS & CONTRACTORS [1997] eKLR

viz:

**“... with a view to eliminate delays in the administration of justice which would keep litigants out of their just dues or enjoyment of their property the Court is empowered in an appropriate suit to enter judgment for the claim of the Plaintiff under the summary procedure provided by 0.35 (now Order 36) subject to there being no triable issue which would entitle a Defendant leave to defend.”**

39. The Defendant’s application is unmeritorious and is dismissed with costs for indeed there is no dispute to refer to Dispute Resolution Expert.

40. The Plaintiff has, in respect to the approved amount, proved its claim for summary judgment. The Plaintiff by its Plaintiff sought judgment on the amount claimed with interest at 20% per annum. That rate of interest is claimed, as pleaded in the Plaintiff because the Plaintiff had obtained Bank financing to carry out the project and because of the non-payment of the sums claimed the Plaintiff had failed to service its loan with the bank. The Plaintiff alleged that the bank charged it commercial rate of interest.

41. Having perused the Plaintiff’s documents have I seen a letter dated 9<sup>th</sup> October 2015 addressed to the Plaintiff by Gulf Africa Bank demanding payment of Kshs. 3,147,987. That letter stated that that amount, advanced to the Plaintiff to carry out the Defendant’s project, was accumulating interest at 20%.

42. The Court has discretion under Section 26 of the Civil Procedure Act to award interest, as the Court deems reasonable, where the decree is for payment of money.

43. Although the Plaintiff produced the letter referred to above, it did not provide evidence that the amounts advanced by the bank were utilized solely for the Defendant’s project.

44. That notwithstanding, I will exercise the discretion afforded by Section 26, of Cap 21, to award the Plaintiff 14% interest because the Defendant failed to sufficiently explain its failure to pay the sums approved by it which some of sums have been outstanding since the year 2012.

45. In the end, the Orders of the Court are:

a) **The Defendant’s Notice of Motion dated 22<sup>nd</sup> November 2017 is dismissed with costs to the Plaintiff.**

b) **Summary judgment is entered for the Plaintiff for the sum of Kshs. 4,381,784.00, Kshs. 12,480,320.00, Kshs. 56,256,451.57 and Kshs. 29,620,838.33, with interest at 14% from the date of filing suit until payment in full.**

c) **The Plaintiff is awarded costs of the Notice of Motion dated 16<sup>th</sup> March 2018.**

**DATED, SIGNED and DELIVERED at NAIROBI this 8<sup>TH</sup> day of MAY, 2019.**

**MARY KASANGO**

**JUDGE**

**Ruling Read and Delivered in Open Court in the presence of:**

Sophie..... COURT ASSISTANT

..... FOR THE PLAINTIFF

.....FOR THE DEFENDANT