



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL SUIT NO. 21 OF 2015

TIMAX BUILDING & GEN CONTRACTORS LTD.....PLAINTIFF

VERSUS

MACHAKOS COUNTY GOVERNMENT.....DEFENDANT

JUDGEMENT

1. The Plaintiff commenced this suit by filing a Plaint dated 24th April, 2015, and amended on 17th May, 2017 seeking judgement against the defendant for:-

(i) A liquidated sum of Kshs. 13,384,829.22 together with interest at the rate of 30% as per the contract from the date of issuance of payment certificates until full payment.

(ii) The Costs of the suit plus interest.

(iii) Any other or further relief that this Honorable court deems fit and just to grant.

2. The background facts of the Plaintiff's case are that, on or about 2013, the defendant invited tenders for construction of County Public Service Board office block and dog cages and the plaintiff applied and was awarded the tender whereupon the parties entered into an agreement and the plaintiff commenced work. After performing a substantial part of the work, the secretary to the defendant issued the plaintiff with a termination notice. The plaintiff then requested for payment for the work already done as stipulated by the contract, which amount had accrued to Kshs 11,607,145/= and if interest is included came to Kshs 13,384,829.22/=. The plaintiff avers that the defendant has refused to pay the amount due.

3. The Defendant filed a statement of Defense dated 23rd October, 2017 and denied all the claims by the Plaintiff.

4. The defendant averred that the work done by the plaintiff was defective and sub-standard and did not match the specifics set out by the defendant and that the plaintiff breached the contract therefore could not demand payment for incomplete work. As such, the claim by the Plaintiff should be dismissed.

5. During trial, Pw1 was Musee Mati. He testified that he was a contractor running the plaintiff's business and produced the certificate of incorporation. It was his testimony that in September, 2014 the contract that was executed on 4th December, 2013 was frustrated for want of payment despite having issued certificates. He testified that the first certificate of Kshs 9,447,237.20 was issued on 21.5.14 and another certificate of Kshs 883,108 was issued on 27.11.2014. Further that he received a letter of termination of contract in September, 2014 and responded by raising the issue of non-payment that was not resolved promptly issued a demand letter for payment through advocates **R M Matata and Co. Advocates** for the sum of Kshs.13,384,829.27. When the demand was not responded to, the matter was taken to court and the Plaintiff reminded court that the non-payment of the certificates attracted an interest of 27% plus 3% that makes it interest of 30%. Pw1 testified that after the suit was filed, and specifically on 12.5.2017 he received payment of Kshs 9,447,237.20 from the defendant in respect of the first certificate.

6. The Defendant opted not to tender evidence.

7. I have considered the pleadings herein and the evidence adduced in support thereof. I have also considered the submissions filed by the respective parties. I find the following issues have arisen for consideration:-

(i) What were the terms of the notification of award of tender issued to the Plaintiff on 4.12.13 and the contract dated 4.12.13?

(ii) Did the Plaintiff accept the terms of notification of award and contract as stipulated;

(iii) Did the Plaintiff breach any of the terms therein;

(iv) Was the Defendant entitled to terminate the Agreement as it did" and;

(v) Is the Plaintiff entitled to the orders sought for herein

8. I have carefully considered the Letter of Notification of Award herein dated 4th December, 2013 and the contract agreement dated the same day that was deemed to be construed together with the tender form and the price schedule submitted by the tenderer, the schedule of requirements, the technical specifications, the general conditions of contract, the special conditions of contract and the procuring entity's notification of award, and I find that it is not in dispute that the tender sum was Kshs. 21,846,796.20.00 for the purpose of construction of County Public Service Board Office Block. The terms of performance of the tender provided that upon deciding that the Works are complete, the contractor shall issue a written request to the Project Manager to issue a certificate of Completion of works whereupon the employer shall take over the site and the works within 7 days of the Project Manager's issuing a certificate. Payment was to be effected within 30 days of issue of the payment certificate and interest for late payment at 3 % points above the central bank of Kenya's average rate for base lending prevailing as of the first day the payment becomes overdue was payable.

9. The main conditions however are stipulated under the following clauses:-

i) clause 20.1 provided that the Project Manager shall inspect the contractor's work and notify the contractor of the defects found and the contractor shall be required to correct the defect;

ii) clause 23 provided that the contractor shall submit monthly applications for payment that shall be certified within 14 days and the payment shall be within 30 days failing which it shall attract interest;

iii) clause 33.2 if the notice of termination is issued, the Project manager shall decide if the breach is fundamental or not; and

iv) clause 34 provides that if the contract is terminated for fundamental breach, then the Project manager shall issue a certificate for the value of the work done up to the date of the issue of the certificate.

10. The question that arises is whether the parties fulfilled all these conditions. I note from the letter dated 7th October, 2014, written by the Defendant to the plaintiff which stated as follows:-

"The contract period for the above project elapsed on 31st July, 2014 by which time you had not completed the contracts agreement between yourselves and the County Public Service Board. This constitutes a fundamental breach of the contract agreement and I hereby determine your employment as Contractor, without prejudice to any other rights or remedies to which the County Public Service Board, Machakos is entitled.

On serving this notice, the respective rights and duties of the County Public Service Board and the Contractor shall be defined in clause 34 of the Contract Agreement".

11. The understanding thereof would be that all the preliminary requirements for the performance and failure thereof had been dealt with, by the time the Defendant gave the notice and an undertaking to pay the amount due as per clause 34 of the Contract Agreement. It is noteworthy that these conditions were to be observed by the Project Manager, and not the Plaintiff so if none were complied with then the Plaintiff was not to blame.

12. The plaintiff vide letter dated 28.10.2014 indicated that the delay was due to the fact that two payment certificates remained unpaid for long and remain unpaid to date.

13. However, despite all these events, on 10.2.2015, when the Plaintiff's advocate wrote to the defendant demanding for payment of the amount due and the Defendant did not respond to this letter the question to be asked is "Was the Defendant therefore sincere to raise all these issues of non-compliance with the specifications herein as at 27.10.2017 when they filed the defence?.

14. The other issue raised by the Defendant is that the plaintiff was behind schedule and abandoned work for over 30 days. However, I note that the plaintiff complained about the delay in payment and notified the defendant who did not honor the payments. The Defendant cannot argue that the plaintiff delayed in the construction work as it could not expect the plaintiff to incur costs from their own pocket with no assurance of payment. In any event the Defendant opted not to tender evidence in defence and hence the Plaintiff's evidence remained as uncontroverted. Further the Defendant on its own violation made part payment in the course of the trial thereby putting paid to its claim that it did not owe the Plaintiff any monies. This was a clear admission that it was truly indebted to the Plaintiff.

15. The question that arises is: Did any of the Parties breach the contract" The Plaintiff maintains that, it's the Defendant who breached the contract by failing to release the funds to them. The Defendant on its part maintains that, it is the Plaintiff who failed to honour its obligations under the Contract.

16. Before I address that issue, I wish to address other issues that arose from the submissions on record. First and foremost, I note that in the letter of notification of award dated 4th December, 2013, it is stated;

"You are required to respond in writing within (7) days from the date of this letter confirming your acceptance". (emphasis

mine).

17. This notification letter was therefore valid for acceptance with effect from 4.12.2013 to 11.12.2013. The Plaintiff wrote the acceptance letter on 6.12.13 and signed the contract on 4.12.13, within the stipulated period of 7 days. Generally speaking, therefore upon acceptance of the letter of offer, a valid contract existed between the Parties.

18. Secondly, when the Defendant issued the contract agreement dated 4.12.2013, the Defendant clearly stated as follows:-

*“the procuring entity **covenants to pay** the tenderer. . . **the Contract Price** or **such other sum as may become payable** under the provisions of the contract at the times and manner prescribed by the contract. . . (emphasis mine).*

19. The key words are “**covenants to pay**” and “**such other sum as may become payable**”. In my view, the Defendant was expected to have paid the amounts payable under the contract when they became due. The contract refers to a project manager who will receive the request for payment, but the documentation is silent on who that person is, though the contract defines the said person.

20. Thirdly, I note that, it took the Defendant up to one month, to notice that the plaintiff had stopped work and to communicate the termination of the Contract. Unfortunately, the offer had already been accepted and the contract partly performed by the Plaintiff. The Defendant was already a party to a valid contract, upon which it had made a commitment to pay for the work done.

21. The law of contracts is clear. A Contract is a result of an agreement between the Parties, although for a contract to be enforceable there must be an intention to create legal relations. In commercial or business agreements, it is generally presumed by the Courts that there is an intention to create legal relations, unless the Parties insert a clause that their agreement shall not be binding in law but shall be binding in honour only. (see the case of *Jones vs Verrions Pools Ltd 1938, and Rose Franck v Crompton, 1925*).

22. As regards acceptance of an offer, the offeror may attach any conditions to the offer. In commercial agreement, this rule is important where the terms of the offer are of a complex nature and usually in the form of an exemption clause. Thus, acceptance of the offer means acceptance of the conditions thereto. However, where the offer is accepted, and the offeror, by conduct does any act to imply the acceptance is complete, then the offeror, is bound to honour the contractual terms and will be estopped from denying that there was no valid contract between the Parties.

23. In the instant case, when the Defendant gave an undertaking to pay for work done, the Defendant committed itself to honour the payment. When the Defendant indicated in its pleading that the plaintiff did not meet the required standards, this is not material. In any case the defendant opted not to tender evidence in defence and thus the plaintiff's evidence remained uncontroverted.

24. Be that as it may, based on the materials placed before the Court and oral evidence adduced, I find that the amounts due are in two batches, the first of Kshs 9,447,237.20 and the 2nd of Kshs 883,108.00 as per the certificates issued by the defendant. The Defendant had not disputed the amounts and therefore their argument that the work did not meet the standards is inadequate. However, the payments were effected as admitted by the plaintiff, albeit late and this is the complaint that the plaintiff seemed to have and the defendant took cover in purporting to terminate the contract unilaterally. Why did the Defendant take so long to effect payment and why didn't the Defendants seek for extension of time to pay, knowing very well that there was interest accruing?

25. The Other ground raised by the Defendant is that the failure of the plaintiff to perform the contract within the stipulated time subjected the plaintiff to interest of 13.5%. The Plaintiff testified that the contract is silent on the completion period. I have carefully considered clause 31, of the conditions of contract, and note that the condition there under stipulates that upon deciding that the Works are complete, the contractor shall issue a written request to the Project Manager to issue a certificate of Completion of works whereupon the employer shall take over the site and the works within 7 days of the Project Manager's issuing a certificate. Taking into account that the payment was not effected within time by the defendant, and the fact that the contract was terminated before completion, this condition was overtaken by events. However, indeed the contract period is not defined.

26. I shall now deal with specific prayers in the Plaint. The first prayer is seeking for an order that *a liquidated sum of Kshs 13,384,829.22 together with interest at the rate of 30% as per the contract from the date of issuance of payment certificates until full payment*. Two questions arise, taking into account the date when payment was finally effected. Did it take this suit for the defendant to pay? Did the defendant expect the plaintiff to sit back and incur costs of performance of the contract without payment forthcoming? To order the Defendant to pay the liquidated sum would serve no purpose since part of the amounts were paid in the course of this trial. However, I am inclined to agree with the Plaintiff to award interest as part of the amounts claimed in the certificates were paid after the stipulated period.

27. I find that, the obligation to pay was towards the defendant. If the Defendant failed to pay the plaintiff, they were entitled to payment with interest. Nevertheless, non-performance of the Contract for non-payment of the sum undertaken, without the seeking to enforce the contract will not be just. In this instance, the defendant shot itself in the foot vide its actions and the terms of the contract, because it indicated that the amount payable shall be paid, therefore because this suit is properly before court to enforce payment, I find that the plaintiff is entitled to interest of 13.5% on the Kshs 10,330,345.20 from the date of issue of payment certificates which amounts to Kshs 1,394,596.602/=. The Plaintiff is also entitled to the unpaid balance of Kshs.883,108/= in respect of the second certificate.

28. The second prayer is for costs, and on the issue of costs, the law is clear. Costs follow the cause. I find that the plaintiff's case has succeeded and shall be entitled to the costs of the suit.

29. My final orders are as follows. Judgement is entered for the plaintiff in the following terms;

(a) Unpaid balance of Kshs.883, 108/=.

(b) Interest on the liquidated amount totaling to Kshs 1,394,596.602/=.

(c) Costs of the suit plus interest at court rates.

It is so ordered.

Dated and delivered at **Machakos** this **21st** day of **May, 2019**.

D. K. KEMEI

JUDGE