



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 210 OF 2005

KITOLOLO CONSULTANTS LIMITED.....PLAINTIFF

-VERSUS-

EAST AFRICA PORTLAND

CEMENT COMPANY LIMITED.....DEFENDANT

J U D G M E N T

1. The Plaintiff and the defendant are both Limited Liability Companies registered under the Companies Act. The plaintiff is **KITOLOLO CONSTRUCTION LIMITED** (hereinafter Kitololo). The defendant is **EAST AFRICAN PORTLAND CEMENT COMPANY LIMITED** (hereinafter Portland).

2. Kitololo's claim against Portland is for Kshs. 4,238,620. This amount is claimed in respect of, what Kitololo pleaded was, professional fees.

PRELIMINARY

3. Although Portland filed a defence in this case it did not adduce evidence in support of that defence. In other words it did not avail a witness in this case. It follows that the defence filed on its behalf, in as far as it relates to rebuttal or denial of Kitololo's claim, it remains mere allegations and it cannot be relied upon by Portland. This was the holding by Justice Lesiit in the case **AUTAR SINGH BAHRA & ANOTHER V RAJU GOVINDJI HCCC NO. 548 OF 1998**, thus:

“Although the defendant has denied liability in an amended defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the defendant in his defence and counterclaim are unsubstantiated, in the circumstances the counterclaim must fail...” where a party fails to call evidence in support of its case, the party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged...”

4. Kitololo, in this case, is under obligation to prove its case on required standard of proof in civil cases, that is on a balance of probability. That burden remains even if the case is one by way of formal proof. This was clearly stated, by Justice H. A. Omondi, in the case **EASTERN PRODUCE (K) LTD – CHEMOMI TEA ESTATE V BONFAS SHOYA (2018) eKLR** viz:

*“In civil cases a plaintiff is required to prove his claim against the defendant on the balance of probabilities. This position was clearly stated in the case of **KIRUGI & ANO. VS KABIYA & 3 OTHERS (1987) KLR 347** where the Court of Appeal stated that on the plaintiff to prove his case on the balance of probabilities, and that such burden was not lessened even if the case was heard by way of formal proof.”*

PLAINTIFF'S CASE

5. The evidence of Kitololo was led by Austin Salmon Kitololo. He did not state in his evidence what position he holds within Kitololo. He stated that he is an engineer having graduated in 1966 with a Bachelor of Science in Engineering from the University of East Africa, the Nairobi Campus. He is also a member of the relevant professional bodies.

6. The witness stated that in 1986 Kitololo had conducted an audit of the Portland factory for purpose of insurance. Kitololo was paid for those services.

7. On 28th September 2002 the witness received a telephone call from the Managing Director of Portland, namely Mr. Titus Barmazai, who requested to meet him on 30th September 2002, to discuss the proposed project of Portland, of building a Mill House. The witness explained that a Mill House is a factory that houses all the machinery required to produce finished cement from its various raw materials.

8. The witness did go and did meet the Managing Director of Portland at his office on Portland's premises. The witness stated that it was agreed at that meeting that Kitololo would design the proposed Mill House and prepare a Bill of Quantities for the entire project for approval by the company. Further to those instructions the witness stated that he obtained the services of a Surveyor, Geodetic Systems and two drill experts, Surtech and DPI to assist Kitololo to obtain data which would inform the design Kitololo would draw for Portland. The Surveyor and the drill experts presented their quotation for their work which the witness forwarded to Portland. It should be noted that it is the evidence of Kitololo that the drill experts presented their quotation after meeting the witness and the Managing Director of Portland.

9. The witness stated that on 16th October 2002 he received instructions, from Portland, for the Surveyor and the drill expert to proceed with preliminary tests. In that regard Geodetic Systems forwarded its report by letter dated 22nd October 2002 which Kitololo forwarded, together with Geodetic Systems fee note, to Portland on 23rd October 2002. Surtech and DPI, the drill expert, sent their report directly to Portland and copied it to Kitololo.

10. The witness stated that once those reports were availed Kitololo proceeded to work on the technical proposals for the provision of the Civil and Structural Engineering Consultancy Services for the project. The technical proposal was forwarded by letter dated 25th October 2002 to Portland and its agent Thyssen Krupp Engineering (Pty) Limited. The witness further stated that on that same day Kitololo also submitted the financial proposal, to Portland, which indicated the costs of staff input necessary for the design and construction stages of the project.

11. The witness referred to the minutes of a meeting held from 19th to 21st November 2002 at Portland's offices to discuss the Mill House Project. The witness referred to minute 1(1.1, 1.2 and 1.4) which he stated showed that Kitololo had been contracted to implement the proposals and draw up a Bill of quantities. The invitation to attend that meeting, according to the witness, was on the basis that Kitololo's proposals had been accepted by Portland and that the minutes confirmed that.

12. As a consequence of that confirmation Kitololo proceeded to design the Mill House and on 9th December 2002 Kitololo presented to Portland an invoice for work done for Kshs. 961,700.

13. Kitololo by its letter dated 20th January 2003 forwarded preliminary designs. By a further letter dated 23rd January 2003 Kitololo provided to Portland a revised master programme for the project. Within the set deadline of 28 January 2003 Kitololo presented the Bill of Quantities and preliminary estimate of costs. However because of changes made in Portland's top management in the early of the year 2003 there was lack of information from Portland which impeded the work.

14. Kitololo presented an updated invoice for work done to Portland for Kshs. 4,238,620 in April 2003.

15. From then on, the witness stated that Kitololo failed to obtain information on its continuous work on the project and on the payment of its fee note. The witness confirmed that Kitololo had acted, on the project, on verbal instructions of Portland. The witness however stated that Kitololo was entitled to payment for the professional services rendered to Portland. That Kitololo had met all the set stages and deadlines satisfactorily. On that basis Kitololo sought for judgment for Kshs. 4,238,620.

16. As stated before Portland failed to adduce evidence in proof of its defence.

ANALYSIS

17. In my view Kitololo has met the civil standard of proof. It proved that it was contracted by Portland to provide professional services to design the proposed Mill House and prepare a Bill of Quantities for the Mill House Project. There is no evidence before me which contradicts Kitololo's evidence in that regard.

18. Portland, through its Learned Advocate's written submissions, stated that Portland being a public body was, at the time Kitololo stated it was contracted, a public body. As such it was governed by the provisions of the Exchequer and Audit (Public Procurement) Regulations, 2001. That the said Regulation forbade the award of contract, by public bodies, other than through procurement process. That the only exception direct award of contract was permitted was when the purchase of goods or works or services was at times of national emergency or disaster. It is on that ground that Portland sought the dismissal of Kitololo's claim.

19. There was no evidence before me proving Portland to be a public body. Portland erred to rely on the case **EAST AFRICAN PORTLAND AND CEMENT COMP. LTD. V TAUSI ASSURANCE COMP. LTD & ANOTHER (2004) eKLR**. In that case the Court by its ruling of 26th April 2004 stated these words:

“The Plaintiff (Portland) is a large parastatal...”

20. Those words stated by a judge of the High Court do not suffice as proof that Portland is a public body. Portland had an obligation to prove in this case that it indeed is a public body. Although Portland submitted it was a public body in its defence it admitted its description in the plaint where it was described as a Limited Liability Company. Portland cannot be heard to now say it is a public body.

21. Even if Portland was a public body and therefore bound by the Public Procurement Regulation I find and hold that the obligation to comply with the dictates of that Regulations lay solely at the door of Portland. In other words it was Portland that was required to comply

with the provisions of that Regulation. Portland cannot however use its non compliance of that Regulation to defeat Kitololo's claim.

22. Further it ought to be noted that under Regulation 19 (2) direct procurement is permitted so long as the price does not exceed what is stated in schedule of the Regulation. The schedule was not provided to the Court and despite concerted effort the schedule was not available to me to confirm if Kitololo's contracted exceed such amount.

23. It is however my finding that the issues raised by Portland in regard to that Regulation does not afford it a defence at all.

CONCLUSION

24. In the end my finding is that Kitololo has proved it was orally contracted by the Managing Director of Portland to provide professional services and accordingly it is entitled to be paid for those services as prayed in the plaint. Having wholly succeeded in its claim, and as provided under Section 27 of the Civil Procedure Act, costs of the suit will be awarded to Kitololo.

25. The judgment of this Court is:

a. Judgment is hereby entered for Kitololo Consultants Limited for Kshs. 4,238,620 plus interest at Court rate from the date of filing suit until payment in full.

b. Kitololo Consultants Limited is awarded cost of the suit.

DATED, SIGNED and DELIVERED at NAIROBI this 18TH day of JULY, 2019.

MARY KASANGO

JUDGE

Judgment Read and Delivered in Open Court in the presence of:

Sophie.....**COURT ASSISTANT**

.....**FOR THE PLAINTIFF**

.....**FOR THE DEFENDANT**