



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CIVIL SUIT NO. 2 OF 2019

MASTAQBAL CONSTRUCTION & SUPPLIES LTD.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF GARISSA.....DEFENDANT

JUDGEMENT

1. By a plaint filed and dated 27/2/2019 the plaintiff sought reliefs that:

- (1) The principal sum Ksh. 33.5 million plus interest at commercial rates from date of contract to payment in full be granted.**
- (2) Alternatively default period be treated as hire period made at prevailing market rate and contract be terminated and remaining motor vehicles be released to the plaintiff.**
- (3) Costs, interest, and general punitive damages.**

2. The plaintiff averred that the defendant advertised tender for supply of (7) 51 seater buses via tender No. C99/T/2016 – 2015. The plaintiff emerged as successful bidder at supply costs of Ksh.96,500,000/=.

3. The plaintiff was notified of the award via a letter dated 25/2/2015 and it accepted the award via a letter dated 27/2/2015. The contract was executed between parties on 13/3/2015.

4. Due to the amount involved the plaintiff had to borrow money from First Community Bank to finance the project. After getting the financial facility the plaintiff acquired the 7 buses and was jointly registered to the plaintiff and the financial institution. These motor vehicles are KCD 703T, KCD 701T, KCD 702T, KCC 992T, KCC 994T, KCC 993T and KCC 026U.

5. The above were bought and paid for at CMC Motors Group Ltd and delivered to and accepted by the defendant. It was a term of the agreement that 40% of the purchase price was to be deposited with plaintiff upon execution of the agreement/contract and the balance 60% to be paid upon delivery of the buses to the defendant. The delivery was done between 2015 and 16th June 2016. The Ksh. 63 million was paid by instalments by defendant leaving a balance of 33.5 million pending payment to-date.

6. The defendant was duly served with summons and upon default in making an appearance and/or filing defence, on 19/3/2019 interlocutory judgement was entered and a date for formal prove was fixed for hearing.

7. The matter came for hearing on 25/4/2019 and the defendant via its advocate sought 14 days to settle the matter or file application to set aside interlocutory judgement. Meanwhile a date for formal prove was fixed on 22/5/2019. The defendant sought 14 more days to file application to set aside interlocutory judgement. 2 more weeks were granted for defendant to file application to set aside interlocutory judgement or initial settlement and a date for formal prove was agreed to be 17/6/2019. Come 17/6/2019 neither the defendant nor its advocate attended court and thus the plaintiff's advocate stated that he was ready to proceed with the formal proof. The matter proceeded by plaintiff calling only one witness.

8. PW1 relied on her statement and the content of the plaint filed in court plus bundle of the documents filed in court along with plaint. The content of the plaintiff's statement and documents in court have not been contested or rebutted as the defendant has never appeared in court to testify in rebuttal.

ISSUES ANALYSIS AND DETERMINATION:

9. After going through the record and material before court I find the issues are; ***whether the plaintiff has proved its case on balance of probabilities? What is the order as to costs?***

10. The plaintiff via Samira Mohamed Abdi director confirmed that the defendant advertised a tender for supply of seven (7) 51 seater buses vide tender No. CCG/T/016/2014-2015. The plaintiff did the bidding for supply and emerged as the successful bidder to supply same at a cost of Ksh. 96.5 million. On 25/2/2015 the plaintiff was notified of the award vide a letter dated same date. The plaintiff accepted the award vide letter dated 27/2/2015 and a contract thereof was executed on 13/3/2015.

11. The plaintiff thereafter borrowed money from First Community Bank as the costs involved in performing the contract was huge in figure. The plaintiff required the requisite 7 (51 seater) buses registration numbers KCD 703T, KCD 701T, KCD 702T, KCC 992T, KCC 994T, KCC 993T and KCC 026U; from CMC Motors Group Ltd and delivered same to and accepted by the defendant.

12. The terms of the agreement vide Clause 3, 4 and 5 of the Agreement dated 13/3/2015;

“Clause (4) The Employer hereby covenants to pay the contractor an amount not exceeding 40% of the total amount of the contract sum to facilitate payment of motor vehicles duty and other taxes upon presentation of the pre-delivery inspection report.

Clause (5) The Employer hereby covenants to pay the contractor the remaining balance upon the delivery of the motor vehicles.....”

13. Between 2015 and 16th June 2016 Ksh.63 million was paid to the plaintiff by instalments and a balance of Ksh.33.5 million was outstanding as the balance unpaid.

14. On 15/3/2018 the plaintiff was served with demand for above stated balance but to date same remains unpaid. Thus the plaintiff was constrained to institute the instant suit seeking payment vide prayers in the plaint. However the court notes that there is an alternative claim to the effect that, **“default period be treated as a hire period thus defendant pays Kshs.70,000 per day from 16/6/2016 to date and return of the buses in conditions they were in at the time of the contract.”**

15. However the court notes that the above was not set out in the Agreement executed by the parties and further no evidence on how Ksh.70,000/= is arrived at as income which the buses would raise per day. Further to deliver the buses in the conditions they were in as by 13/3/2015 dated of contract would amount to procuring new buses to the plaintiff.

16. The above evidence having not been contested during the hearing of the court, the court is left with no option but to make a finding in favour of the plaintiff and allow the claim.

17. The court thus treats the claim to be uncontested and thus makes the following orders:-

(1) Judgement is entered for the plaintiff against defendant for Ksh. 33.5 million.

(2) Interest at court rates from the (date of default) 16/6/2016 to date of payment.

(3) Costs to the plaintiff.

DATED, DELIVERED, AND SIGNED AT GARISSA THIS 3RD DAY OF JULY, 2019.

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CHARLES KARIUKI

JUDGE