



**REPUBLIC OF KENYA**

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

**COMMERCIAL & ADMIRALTY DIVISION**

**HCCC NO. 611 OF 2010**

**C. J. SECURITIES LIMITED.....PLAINTIFF**

**VERSUS**

**S. S. SEHMI GENERAL BUILDING &**

**CIVIL CONTRACTORS LIMITED.....DEFENDANT**

**JUDGMENT**

1. At the heart of this dispute is the consideration for a contract entered between C. J. Securities Limited (C.J or the Plaintiff) and S. S. Sehmi Building & Civil Contractors Limited (S.S or the Defendant).
2. British Broadcasting Corporation (BBC) has a station in Karen, Nairobi. It was desirous of erecting a palisade fencing with razor wire around that station and contracted S.S to carry out the works at Kshs.9,180,000.00. The contract was comprised in a letter dated 30<sup>th</sup> March 2009 which I reproduce as follows:-

*British Broadcasting Corporation,*

*NAIROBI*

*30<sup>th</sup> March 2009*

*The Manager*

*S. S. SEHMI GENERAL BUILDING &*

*CIVIL CONTRACTORS LIMITED*

*NAIROBI*

*Dear Sir,*

**RE: PROPOSED SECURITY FENCE FOR BBC MINOTING**

*Thank you for your quotation which has been accepted as amended between yourselves and our systems support specialist in consultation with our UK based in-charge-of-facilities and detailed specifications are in separate documentation already in your possession.*

*The project sum being Kshs.9,180,000.00*

*Payment will be as below;*

*30% with go ahead as at 9<sup>th</sup> March 2009 which is the start date.*

*40% when the visible physical set up crosses the 50% mark.*

30% when the project is certified complete.

Completion date is expected to be 60 days from start date.

Yours faithfully,

Munene M. Gatere

Accountant

Sikandar Abdullah

System Support Specialist

3. S.S. and C.J had previously had a business relationship and S.S asked C.J to carry out the work on its behalf. On 17<sup>th</sup> March 2019 Mr. Saranjit Sehmi who is a director of S.S wrote the following note;

S. S. SEHMI GENERAL BUILDING &

CIVIL CONTRACTORS LIMITED

NAIROBI

17.3.2009

REF: PALISADE FENCING WITH RAZOR WIRE AT BBC KAREN

ATTENTION OF MR. C.J CRISTO

Dear Sir,

We enclose our first payment as follows for above referred job.

1. Cheque No. 297555 for (dated 24/3/2009) Kshs.1,500,000.00

2. Cheque No. 297556 for (dated 31.3.2009) Kshs.1,200,000.00

Received by: Signed – date 17/3/2009

Total cost of the project Nine Million only INC. of VAT.

On completion of 50% of works further deposit of 40% will be due. Balance on completion.

Saranjit Sehmi

17/3/2009

4. It is common cause that by two cheques dated 24<sup>th</sup> March 2009 and 31<sup>st</sup> March 2009 S.S paid C.J a sum of Kshs.2,700,000.00 and this was authorized by C.J on the note of 31<sup>st</sup> March 2009. It is also common ground that C.J put up the fence and completed the works on November 2019. A final inspection of work was done by C.J and BBC on 14<sup>th</sup> December 2009 and the following note was written by the parties:-

FINAL CONDITIONS

1. Works satisfactory completed

2. 12 months warrant on materials and workmanship – letters given.

3. Final inspection of works done jointly by:-

1. Christo Desa – CJ Securities

2. Sikandar Abdullah BBCM

3. *Munene Gatere – BBCM*

*Cheque above – Full and final payment collected by:-*

*Name: Christo Desa Date: 14/12/2009*

*Stamped & Signed: BBC Monitoring Unit*

*Nairobi*

*14/12/2009*

5. It is also not disputed that S.S authorized BBC to pay some sums directly to C.J. These were paid on three instalments and were for a sum of Kshs.2,754,000.00.

6. For the Defence, it is contended that it orally subcontracted C.J to carry out the works at Kshs.5,480,000.00 and not Kshs.9,000,000.00. That it would not make any business sense for it to subcontract a contract of Kshs.9,180,000.00 for Kshs.9,000,000.00. The claim is resisted.

7. At hearing Christo Desa testified on behalf of C.J while Saranjit Singh Sehmi testified on behalf of S.S. And while the parties proposed 9 issues for determination, I would think that the only issue for resolution is the contract price between C.J and S.S. This is because it is common ground that S.S contracted C.J to carry out the works.

8. The Court is urged by C.J to find that the contract is constituted in the note of 12<sup>th</sup> March 2009 and as to follow the decision of Ohungo J in Caroline Cheron Kirui v Liner Cherono Towett [2018] eKLR in which he cited the Court of Appeal decision in **Fidelity Commercial Bank Limited v Kenya Grange Vehicle Industries Limited [2017] eKLR**:

31. The law relating to construction of written contracts is that no oral evidence is admissible to contradict, vary or alter the terms of such an instrument. The Court of Appeal sated as follows in Fidelity Commercial Bank Limited v Kenya Grange Vehicle Industries Limited [2017] eKLR:

This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it...

The supporting rationale for this rule is that, since the contracting parties have reduced their agreement to a single and final writing, extrinsic evidence of past agreements or terms should not be considered when interpreting that written contract agreement, as the parties had consciously decided to ultimately leave them out of the contract. In other words, one may not use evidence made prior to the written contract to contradict the ultimate contract that has been reduced into writing.

9. S.S, on the other hand beseeched the Court to find that on the note of 14<sup>th</sup> December 2009 C.J acknowledged receipt of payment of Kshs.504,000.00 as full and final payment. For S.S nothing more can be due.

10. It seems to the Court that the document of 17<sup>th</sup> March 2009 speaks for itself. It sets out that cost of the payment at Kshs.9,000,000.00 and on payment it stated that upon completion of 50% of the works a further deposit of 40% will be paid and the balance on completion. The payment made reflected what BBC had itself agreed with S.S in its letter of 30<sup>th</sup> March 2009 (See paragraph 3 of the letter).

11. S.S should not, in my view, be permitted to resile from the position merely because it feel that it made a bad deal. This Court is also not persuaded that in acknowledging payment of Kshs.504,000.00 from BBC as full and final payment, the total contract sum had been paid. The Court understands the acknowledgment to be that it was full and final payment from BBC not from S.S.

12. On a balance of probabilities the Plaintiff has proved its claim and I enter judgment in its favour for Kshs.3,546,000.00 with interest thereon at Court rates from the date of filing of the suit. The Plaintiff shall also have costs.

Dated, Signed and Delivered in Court at Nairobi this 11<sup>th</sup> Day of December 2019

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Kyalo for Ruth for Defendant

Mugisha for Adoyo for Plaintiff

Court Assistant: Nixon

Kyalo: I seek stay for 45 days

Mugisha: They should make a formal application.

Court: Stay for 45 days.

**F. TUIYOTT**

**JUDGE**