



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO.262 OF 2017

PARKENG AGENCIES LIMITED.....PLAINTIFF

VERSUS

NAIROBI CITY COUNTY.....DEFENDANT

J U D G M E N T

INTRODUCTION

The Plaintiff herein filed this suit against the Defendant seeking Kshs.. 6,704,482.96, damages for breach of two contracts and costs of this suit. The Defendant failed to enter appearance and file defence. Interlocutory judgment was entered on 31st August 2017.

The Plaintiff's contention is that it successfully bid for tenders as follows:-

1. Contract No. **NCC/HEALTH/RT/884/2104-20115**) executed on 14th August 2015 for **REHABILITATION OF PIT LATRINES AT MIGINGI MARKET –LUCKY SUMMER WARD** for Kshs.. 4,501,902.
2. **CONTRACT NO. NCC/RPW & T/RT/1128/2014-2015** executed on 18th September 2015 for **STREET LIGHTING INSTALLATION** along **DIGO ROAD**.

The Defendant contends that the Defendant terminated the two contracts on ground that there was no site for the Plaintiff to work on. The Plaintiff seeks compensation for goods purchased and managed engaged in preparation to commence the contract.

PLAINTIFFS EVIDENCE

The Plaintiff who is the director of the Plaintiff Company adopted his witness statement dated 23rd June 2017 as evidence. He testified that the Plaintiff entered into two separate contracts with the Defendant after mandatory pretender process. He said mandatory requirement was for the prospective contractors to see the works before tendering. After seeing the works, the Plaintiff tendered and entered into two contracts with the Defendant as shown in the forms of agreements listed as item 2, 3 and 4 in the list of documents. He said the Plaintiff expected to be paid Kshs. 8,215,062 for the 2 projects. He said that Plaintiff spent Kshs. 6,704,482.96 on goods purchased in readiness for the projects. In the bundle of documents is a list of receipts for the items purchased.

The Plaintiff testified that the contracts were later terminated on the ground that there was no site for him to work. He said the site was there before they tendered and that they did pre-tender visit. He added that he quoted on the basis of what left on the site. He said it was wrong for the Defendant to say that the site was no longer there.

The Plaintiff testified that once he was contracted, he engaged a Company known as Top Contract (K) Ltd to supply 7 ton lorry, skilled and semi-skilled manpower and that they also went to the site before the agreement between Plaintiff and Defendant was executed. He said the termination was a breach of contract between Plaintiff and the Defendant and resulted in breach of contract between the Plaintiff and subcontractor who is claiming from the Plaintiff.

PLAINTIFFS SUBMISSIONS

The Plaintiff restated that evidence adduced and relied on the Constitution of Kenya, Civil Procedure Rules and cited three authorities.

ANALYSIS

I have considered evidence adduced and find the following as issues for determination:-

1. Whether the Defendant is in breach of the two contracts ,
2. Whether Plaintiff is entitled to Kshs. 6,704,482.96,
3. Whether Plaintiff is entitled to general damages,
4. Who should pay costs of this suit?

The Plaintiff availed documents to prove that it tendered for works for rehabilitation and pit latrines at Migingo Market in Lucky Summer Ward. A certificate of site visit dated 1st September 2015 was issued to the Plaintiff.

By letter dated 4th June 2015 the Defendant accepted the Plaintiffs offer on street lighting installation and awarded the works at their bid of Kshs. 3,713,160 and rehabilitation of pit latrines and awarded works at the bid sum of Kshs. 4,501,902 and asked for bid bond of Kshs. 225,095.

The Plaintiff acknowledged that letters of acceptance and provided bond.

Certificate for site possession filed by Plaintiff indicate that possession of site was 1st September 2015 and completion date was to be 24th November 2015; contract period being 12 weeks.

In the letter dated 18th May 2017 the Plaintiff through its Advocates indicated that the Plaintiff had purchased certain items fit for the contract including man power which should be compensated.

By letter dated 14th January 2016 indicate that on visiting the site it emerged that streetlights had been installed under Light Up Nairobi Towards A 24 Hour Economy Program. He requested for change of site from Digo road to Lamu road, Butecho road and Kayole road.

A letter dated 2nd February 2016 showed there was delay in commencement the pit latrine project as there was indecisiveness on part of the Defendant on how the project was to progress. It showed that it was no consensus as to whether to dig pit latrine or rehabilitate the existing toilets and connect it to a nearby sewer line. In the same letter the Plaintiffs operation manger indicated that on visiting the site with an Officer from the Defendant and realized that there were challenges in connecting the toilet to the sewer line due to the gradient.

In the letter, the Operations Manager indicated that the works had not commenced due to lack of communication from the Defendant and that time had since lapsed.

By letter dated 9th May 2016 the Defendant's Head of Supply Chain management wrote to Officer Roads Public Works indicating that change of site for street lighting contract was approved. He attached minutes to that effect.

The Plaintiff has also annexed receipts for purchase of good dated 4th, 6th, 11th October 2015.

The above evidence was not controverted.

DETERMINATION

From evidence adduced, it is quite clear that the Plaintiff was awarded 2 contracts. For both there were delays due to change of site in the street lights and whether to rehabilitate or dig pit latrines in respect of the other contract. Communication between the parties show that new site was approved for installation of street lighting by the Defendant as installation had already be done at the original site.

The Plaintiff confirmed that it was a mandatory requirement to visit installation site before quoting for the advertised tender and that he visited as required. He has not denied that the lights had already been installed in the area/site mentioned in the advertisement.

This clearly shows that he knew the street light had been installed and he should not have quoted for the same. No evidence has been adduced to the effect that streetlights were installed in the site after award of contract to Plaintiff.

From the foregoing, it is evident that the initial site for installation of streetlights never existed. The Plaintiff should have disclosed that fact if he indeed visited as he alleged. I therefore dismiss prayer for breach of contract in respect of installation of street lights.

In so far as the pit latrine contract is concerned, it is evident that the delay was occasioned by indecisiveness on part of the Defendant. The Plaintiff carried out his duty in so far complying with that contract is concerned. There is however no prove that the items alleged to have been purchased by the Plaintiff were delivered to the Defendant, no delivery note was availed to Court nor were the items utilized for the benefit of the Defendant. There is also no prove that they were wasted because of delay. The fact that the contract never commenced was not disputed and was expressly admitted by the Plaintiff in his evidence. It therefore follows that the items alleged to have been purchased were not put to use and further the alleged subcontractor could not have commenced any works. I will not therefore award Plaintiff value of items purchased but find that the Plaintiff is entitled to damages for breach of contract.

I find an award of 1.5 million is sufficient to compensate Plaintiff for breach of Contract no. NCC/HEALTH/RT/884/2014-2015) for REHABILITATION OF PIT LATRINES AT MIGINGI MARKET – LUCKY SUMMER WARD. I therefore enter judgment for the Plaintiff against the Defendant for Kshs. 1,500,000 plus costs and interest from the date of Judgment.

Judgment dated, signed, and delivered at Nairobi this 11th day of May, 2018.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:

.....**COURT ASSISTANT**

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

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