



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. 552 OF 2015

SHENG SHUANG QUARRY LIMITED.....PLAINTIFF

VERSUS

LIMING HEAVY INDUSTRY SCIENCE & TECH COMPANY

LIMITED.....DEFENDANT

JUDGEMENT

1. This matter proceeded by way of formal proof as Liming Heavy Industry Science Tech Company Limited (the Defendant) failed to Enter Appearance and/ or Defence and therefore suffered an Interlocutory Judgment on 11th April 2016.

2. Desirous of acquiring a Mobile Crushing and Screening Plant, Sheng Shuang Quarry Limited (the Plaintiff) entered into discussion with the Defendant culminating in a quotation issued by the Defendant on 4th September 2014, (P. Exhibit pages 18-29). The highlights of the quotation for purposes of the Plaintiff's claim are as follows;

- a. The total price (FOB China port) USD 698,791
- b. Delivery time was to be within 40 working days after receipt of advance payment
- c. There was a guarantee period of one year but excluding tear and wear of parts.

3. On installation and commissioning the quotation provided-:

'After receiving advance payment, the seller will provide operation manual and foundation drawing to the buyer. If the buyer requires, the seller shall send three or four engineers to direct installation, commissioning, trial-run, and training local workers. The buyer is responsible for board and lodging, return tickets, safety of engineers. In addition, the buyer is responsible for engineers' salary, USD40 per day per person. If buyer installs the equipment by himself, the buyer will be responsible for any problem caused by improper installation.'

4. David Muigai Nganga (PW1) who is a director of the Plaintiff Company gave evidence that the Plaintiff made the following payment in answer to the quotation-:

- i. USD 230,000 on 16th October 2014, (P. Supplementary Exhibit 1) being advance payment;
- ii. USD 445,829 on 30th December 2014, (P. Supplementary Exhibit 2).

There was then further payment of USD 85,620 (P. Supplementary Exhibit 3) to meet shipping charges. Receipt of these payments has not been disputed by the Defendant.

5. As delivery was to be within 40 working days after receipt of the advance payment, the Plaintiff contends that it ought to have happened by 15th December 2014, but that was not to be until 24th January 2015.

6. The installation and commissioning clause allowed the buyer to request the seller to send 3 or 4 engineers to direct installation, commissioning, trial run and training of local workers. The Plaintiff, relying on this provision, requested the Defendant to send two

technicians to assist with the installation and commissioning of the crusher. However, the Defendant sent only one.

7. It was the evidence of PW1 and Eliud Njuguna Muigai (PW2), (the Technical Manager of the Plaintiff Company), that the stay of the Technician was problematic. One, he could not communicate in English, forcing the Plaintiff to request for another technician who also suffered language barrier. In the end, the Plaintiff had to employ an interpreter.

8. Secondly, the assembling of the crusher was not successful as some parts were missing making it necessary for the Plaintiff to procure the same locally. The Plaintiff put the cost at over Kshs 4,000,000/=. However, the Court was only able to find proof of Kshs. 1,569,704/= (P Exhibit Page 30-36). Even after assembly and testing, the crusher was found to have major electrical problems. The Plaintiff also claims that the Defendant's technicians were mechanical engineers and could not resolve the electrical problems but only after spending Kshs. 489,800/= on their accommodation (P Exhibit Pages 39, 40, 41, 43, 47, 48) and USD 2130 on salaries (P Exhibit pages 50 and 51).

9. In addition, the Plaintiff claims that it ordered and made payment to the Defendant for an additional Toggle Plate on 2nd July 2015, (P Exhibit Page 65) but the same is yet to be delivered. This delay in delivery forced the Plaintiff to buy a Toggle Plate locally at Kshs. 319,000 (P Exhibit page 67).

10. A major complaint by the Plaintiff is that it has incurred major losses due to non-production at the time the Crusher has not worked. And in the end, the Plaintiff claims a sum of Kshs. 134,219,055 made up as follows:-

Loss of production from 1 st February 2015- May 2015 (approx 100 days) 100x 8 hours x 150 tonnes x 800 per tonne	Kshs 96,000,000
Travel expenses for the Chinese technicians	Kshs 250,945/-
Salary for the technicians (USD 2130)	Kshs 206,610/-
Accommodation for the technicians	Kshs 4,889,800
Electrical cables and other spare parts	Kshs 4,000,00/-
Hiring interpreter	Kshs 55,000/-
Rescheduling flight for one technician	Kshs 26,840/-
Clearing of rheostat (USD 1035)	Kshs 99,360
Clearing of soft starters and thermal relays	Kshs 53,000/-
Loss of production 26 th June 2015 to 30 th July 2015 34 days x 8 hours x 15 tonnes x 800 per tonne	Kshs 32,640,000
Purchase of new toggle plate (USD 785)	Kshs 78,500/-
Purchasing a new toggle plate locally	Kshs 319,000/-
TOTAL AMOUNT	Kshs. 34,219,055

11. In submissions the Plaintiff Counsel had proposed three (3) issues for determination;

- i. Whether there was a valid contract between the Plaintiff and the Defendant;
- ii. Whether the Defendant breached the contract; and
- iii. Whether the Plaintiff is entitled to special damages and general damages for breach.

These in my view are proper and valid issues for resolution and can be quickly answered.

12. There is evidence that the Defendant raised a quotation for sale and delivery of a Mobile Crushing and Screening Plant. This was an offer made by the Defendant to the Plaintiff and which was accepted when the Plaintiff made full payment in answer to the quotation. By the acceptance of payment a contract has been consummated. Following this, there was delivery.

13. The problematic aspect of the contract was the installation and commissioning. The challenges come in three ways: Some parts were missing and had to be replaced by local purchases. A Toggle Plate that was paid for was not delivered. Lastly the technicians sent by the Defendant were inept and this cost the Plaintiff. Yes, I find that in these three ways the Defendant breached the Contract.

14. The Plaintiff provided proof for the following special damages;

- a. Accommodation for technicians Kshs 489,805/-
- b. Salaries for technicians USD 2,130
- c. Purchase of toggle plate locally Kshs 319,000/-
- d. Clearing for Rheostat USD 1,350
- e. Electrical cables & other parts Kshs 1,569,704/-

Although there was evidence of payment of USD 785 for a Toggle Plate from China, it would be to make a double award as the Court has made an award of Kshs. 319,600/- for the one bought locally in its place. The other claims have not been proved and this includes the big claim for loss of production.

15. This Court enters judgment for the Plaintiffs against the Defendant in:

- i. Kshs 2,378,504/-
- ii. USD 3,480
- iii. Interest in (i) and (ii) above at Court rates from the date of filing this suit
- iv. Costs.

That portion of my judgment expressed in US Dollars can be converted, if the Plaintiff so wishes, to local currency at the rate applicable at the date of payment or enforcement of the judgment.

16. Those are the orders of the Court.

Dated, Signed and Delivered in Court at Nairobi this 3RD Day of May, 2018

F. TUIYOTT

JUDGE

PRESENT:

Mr. Kawama for Plaintiff

Nixon - Court Assistant