



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 196 OF 2012

**LAWRENCE MUKORA MINIU T/A DYNAMITE CIVIL ELECTRICAL
CONTRACTORS.....PLAINTIFF**

- VERSUS -

**KAMANDURA TARAMBANA WATER DEVELOPMENT
SOCIETY.....DEFENDANT**

JUDGEMENT

1. The plaintiff's claim against the defendant arises from a contract between the 2 parties.
2. It was the plaintiff's case that he performed his part of the contract until the day when the defendant breached the said contract.
3. By the date when the defendant allegedly breached the contract, it had paid to the plaintiff the total sum of Kshs. 1,528,066.80/-.
4. According to the plaintiff the defendant still owed him Kshs. 538,813.20, which was the balance due after the defendant had paid Kshs. 1,528,066.80/-. Therefore, the plaintiff's first claim was in respect to that unpaid balance.
5. The second aspect of the plaintiff's claim arises from the contention that it was the defendant who breached the terms of the contract. In the circumstances, the plaintiff claimed Liquidated Damages in the sum of Kshs.10,000/- per day, from 1st July 2009, until the defendant rectified the breach of contract.
6. The plaintiff's other claim was for interest on both the outstanding balance and the Liquidated Damages. The plaintiff asserted that he was entitled to claim interest at Bank Rates.
7. His justification for that claim of interest was that the contract arose from a public procurement process. Therefore, in his view, pursuant to the provisions of Section 48 (b) of the Public Procurement and Disposal Act, he was entitled to interest at Commercial Rates.
8. As the prevailing Commercial Rates was 24% at the time when the plaintiff filed suit, the plaintiff said that the court should award him interest at 24% per annum.
9. Finally, the plaintiff asked the court to award him the costs of the suit.
10. In answer to the Plaintiff, the defendant asserted that it had paid the plaintiff all the money he was entitled to.
11. However, on a without prejudice basis, the defendant insisted that if there was any outstanding balance payable to the plaintiff, the quantum could not be for Kshs. 538,813.20/-.
12. The defendant's explanation was that the plaintiff failed to complete his contractual obligations,

- and that that therefore disentitled him from seeking payment of any money which may not yet have been paid to him.
13. The defence had also indicated that the suit had been filed prematurely because the parties had agreed, in the contract, that if there arose any disputes between them, the same would be resolved through arbitration.
 14. However, that line of Defence was later abandoned when a Further Amended Defence was filed. In its place, the defendant stated that there was no formally signed contract between the parties.
 15. Finally, the defendant said that the plaintiff had never raised any request for payment of the alleged unpaid balance, and also that the plaintiff had never been issued with a Certificate of Completion of Works by the Project Consultant.
 16. According to the defendant, the absence of the Certificate of Completion was proof that the plaintiff had never completed the work to the satisfaction of the client.
 17. When the case up for trial, each of the parties called one witness.
 18. **PW1, LAWRENCE MUKORA MUNIU**, is the plaintiff. His testimony was that the contract value was originally Kshs. 1,442,980/-. However, the said value was mutually revised upwards to Kshs. 1,882,480/-. The primary reason for that change was that the parties agreed that the make of the Meters which were to be installed, to those of “*Kent England?*”.
 19. In a letter dated 9th April 2009, the defendant did confirm to the plaintiff about the preferred make of the meters to be installed.
 20. Upon receipt of that letter, the plaintiff responded on 14th April 2009, accepting the terms spelt out by the defendant.
 21. On 21st April 2009 the defendant prepared a written Local Service Order in favour of the plaintiff. The said **LSO** was duly signed by the Chairman and the Secretary of the Defendant.
 22. The description of the services which the plaintiff was expected to provide were spelt out in the **LSO**, as follows;

Description of service	
<i>Supply and Install</i>	
2 ½” Zonal meter 1 (one)	
2? Zonal meter 3 (three)	
1 ¼” zonal meter 4 (four)	
½? Kent Meters 300 (three hundred)	
<i>All necessary fittings to complete connection and valves, washouts as pipes to complete distribution net-work per your tender – Eligible cost</i>	
10% Contingencies	
Total costs	
	1,656,800.00
	165,680.00
	1,822,480.00

- | | |
|--|--|
| | |
|--|--|
23. In my considered opinion, the Local Service Order dated 21st April 2009, as read together with the tender document and the correspondence exchanged between the 2 parties, constitutes a valid written contract.
 24. The fact that the defendant may not have signed the document called “*Contract for Supply and Installation of Domestic Water Meters?*”, does not mean that the defendant had not executed a binding contract.
 25. In this case, there is correspondence exchanged between the parties, making it clear that the parties had clearly identified the nature and scope of work to be undertaken; the cost of the work to be undertaken and the period during which the contract was to be performed.
 26. Thereafter, the plaintiff performed some work in accordance with the terms of the contract.
 27. In the event, I find that there was indeed a contract between the parties, and also that there had already been part-performance of the said contract.
 28. I further find, on the basis of concurrence between the parties, that the defendant has paid a substantial portion of the contractual sum.
 29. From the evidence provided by the plaintiff, he concedes having not completed the work. However, he attributes his said failure to the fact that the defendant frustrated the contract.
 30. The plaintiff testified that the defendant had ordered him to leave the site.
 31. In his understanding, the members of the community were supposed to have been paying Kshs. 10,000/- each to the defendant, as a pre-condition to the plaintiff fitting the pipes and the meters which would then enable such members to access water supply.
 32. The plaintiff was not a party to the conditions which the defendant laid down for its members.
 33. However, when the said members failed to remit payments of the sums of Kshs. 10,000/- each to the defendant, the said defendant asked the plaintiff to vacate the site, as the plaintiff could not be expected to fit the connecting pipes and meters for persons who had not met the pre-conditions set by the defendant.
 34. **DW1, DAVID KENNETH NGUGI**, testified in his capacity as the Chairman of the defendant. He confirmed that the plaintiff had fixed a total of 287 Individual Meters and One Zonal Meter. In his understanding, the remaining work entailed the fixing of 13 more individual Meters and 7 Zonal Meters.
 35. Ngugi also confirmed that if any member of the community did not pay a deposit to the defendant, he or she could not be connected to the water supply.
 36. Furthermore, Ngugi confirmed that it was the defendant’s responsibility to collect the deposit from the members of the community. In other words, the plaintiff had no responsibility in relation to the money which the members of the community were paying as a deposit to the defendant.
 37. The defendant’s explanation was that the deposits were being remitted to the defendant’s bankers, where it acted as collateral, to enable the bankers provide funding to the defendant.
 38. What happened to the meters which were not fixed?
 39. The plaintiff testified that he had already purchased the said meters and that he had handed them over to the defendant.
 40. Ngugi confirmed that the meters were delivered by the plaintiff to the chairman of the defendant. The chairman later handed over the meters to the secretary, who was responsible for releasing meters when it was time to fix them.
 41. In my understanding, the evidence tendered by the defendant corroborates the plaintiff’s case, concerning the fact that it is the defendant who literally held the “*key?*” to either open or close the door that could enable the plaintiff complete the job.
 42. Ngugi testified that it is the Government which instructed the defendant not to pay money to the plaintiff until the whole work was complete.
 43. When he was asked what or who exactly he meant by reference to “*the Government?*”, Ngugi said that that was the Ministry of Water.
 44. According to Ngugi, the Ministry of Water; the World Bank and the K-Rep Bank were the 3 bodies who had engaged the Project Implementation Consultant.
 45. The defendant’s position is that the Consultant ascertained that the work was incomplete.

- Therefore, the defendant believed that it was under no obligation to pay the plaintiff.
46. Of course, if the work was incomplete because the plaintiff was either unable or unwilling to complete it, then it would be wrong for the plaintiff to expect payment.
 47. However, the meters which the plaintiff needed to complete this job were already purchased by the plaintiff. The meters were, according to the defendant, being held by the defendant's secretary.
 48. It was the secretary who was supposed to release the meters to the plaintiff, to enable the plaintiff fix them to homes of those persons who had paid deposits to the defendant.
 49. Therefore, even if the plaintiff was ready and willing to fix the meters, as he has said he was, he could not have done so without the co-operation of the defendant, as it is the defendant who should have released the meters to the plaintiff.
 50. There has been no assertion by the defendant that it released some meters to the plaintiff, and that the plaintiff still failed to fix the said meters.
 51. In all probability the scenario appears to the court to be one in which some members of the community failed to make payments to the defendant. Therefore, the defendant did not release to the plaintiff, any meters which could have been used on the premises of such persons.
 52. In my considered opinion, the plaintiff did not refuse or fail to complete the work. It is the defendant which failed to facilitate the completion of the contract.
 53. The defendant has provided evidence to show that K-Rep Bank engaged **RURAL FOCUS LIMITED** to complete the job.
 54. Rural Focus Limited was supposed to, inter alia, install zonal meters. The cost for the installation of each zonal meter was said to be Kshs. 20,476/-.
 55. During re-examination, Ngugi said that the K-Rep Bank wrote to the plaintiff, saying that the plaintiff would be paid after the Project Implementation Committee had verified the work done.
 56. After the committee had verified the work, the defendant would have approved the invoice raised by the plaintiff. However, Ngugi testified that the plaintiff did not raise any invoice in respect to the sums now being claimed in this case.
 57. Ngugi also said that the defendant paid to Rural Focus Limited, the money which could have been paid to the plaintiff, if the plaintiff had finished the job. He said that Rural Focus Limited was paid Kshs. 534,000/-.
 58. To me, it cannot simply be coincidence that the sums being claimed by the plaintiff amounted to Kshs. 538,813.20; which sum was so close to the amount which was paid to Rural Focus Limited.
 59. I therefore find that the value of work which the plaintiff was stopped from doing was worth Kshs. 530,000/-. The plaintiff is entitled to judgement for that amount.
 60. The plaintiff did not lead evidence to prove either the prevailing "*Bank Rates of Interest?*" or the "*Commercial Rates of Interest?*". Therefore, he cannot be allowed to simply pluck a figure from the air and ask that he be awarded interest at 24%.
 61. I reject that claim, for lack of proof.
 62. I also find that the parties had agreed, in the contract document, to some liquidated damages. My view is that any of the parties who felt that the contract had been breached, would have only been entitled to either liquidated damages or interest on the sums claimed.
 63. A claim for both interest on the principle sum, together with interest on the Liquidated Damages would constitute a duplication of the claim for compensation.
 64. The contract does not specify the period in respect to which the liquidated damages would be payable. The claim cannot therefore be for an indefinite period of time.
 65. Considering that the contract was for a period of not more than six (6) weeks, I hold the view that a reasonable period of time would be two (2) weeks.
 66. In the result, the liquidated damages are calculated as amounting to Kshs. 140,000/-.
 67. In the result, the court grants judgement in favour of the plaintiff for Kshs. 670,000/-. The said sum will attract interest at court rates from the date of judgement until it is paid in full.
 68. The plaintiff is also awarded the costs of the suit.

DATED, SIGNED and DELIVERED at NAIROBI this 2nd day of February 2016.

FRED A. OCHIENG

JUDGE

Judgement read in open court in the presence of

Nyaribo for Njuguna for the Plaintiff

Shah for Miss Wambua for the Defendant

Collins Odhiambo – Court clerk.