



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 309 OF 2014

BAYLEM LIMITEDPLAINTIFF

- VERSUS -

MOI TEACHING AND REFERRAL HOSPITAL.....DEFENDANT

RULING

1. The application before me is for judgement on admission. The plaintiff stated that in the Defence lodged by the defendant, there was an admission of the facts which basically constitute the plaintiff's entire claim.

2. Therefore, the plaintiff's position was that the defence did not give rise to any issues of fact or of law, which could necessitate a trial.

3. The application was supported by the affidavit of **J.F. GUMBO**, a director of the plaintiff. He reiterated that the plaintiff's claim of Kshs. 5,620,059.47 was;

“the amount of price variation resulting from a significant change in the foreign exchange rate between the time of tendering and the time of supplying goods?.

4. Mr. Gumbo further deponed thus:

“THAT the plaintiff also claims interest on the said amount at the rate of 32% p.a accruing from the time of the Defendant's failure to pay the variation amount?.

5. It is common ground that the parties to this suit executed a contract on 30th August 2011.

6. The defendant asserts that the plaintiff supplied the equipment which were the subject matter of the contract, in accordance with the terms of the contract.

7. And, as far as the defendant was concerned, the contract document did not contain any provision which allowed for the variations of the terms of the contract.

8. The plaintiff pointed out that the Tender **No. MTRH/56/2010-2011** was opened on 26th January 2011. It was a tender for the Supply, Delivery, Installation and Commissioning of mortuary equipment.

9. The plaintiff described the bidding process as having been open, transparent, fair and competitive. At

the conclusion of the process, the defendant awarded the contract to the plaintiff, on 15th June 2011.

10. It is common ground that the original contract was signed by both parties on 30th August 2011, although it was not until 1st September 2011 that the plaintiff received the contract document.

11. According to the plaintiff, as soon as it received the contract, it promptly sourced for the equipment, and also made payment for the same.

12. The plaintiff asserted that it made payment using foreign currency. At the time when the plaintiff made payment, it is said that the prevailing rate of exchange was substantially higher than it had been at the time of tendering.

13. The plaintiff further stated that the defendant was in a financial crisis, which made it difficult for the defendant to proceed with the implementation of the contract.

14. In those circumstances, it was not until 23rd January 2012, that the defendant issued a Local Purchase Order (**LPO**) to the plaintiff.

15. In answer to those aspects of the plaint, the defendant stated that it had never been in any financial crisis. Secondly, the defendant pointed out that the prices in the contract were quoted in Kenya Shillings. Therefore, the defendant considered itself to be a stranger to the assertions about variances in the rate of exchange for the foreign currency.

16. In the absence of a provision which would allow for a variation of the prices specified in the contract, I hold the considered view that the plaintiff would have to lead evidence to establish the factual or the contractual basis for the variation.

17. The plaintiff knew that it was purchasing the goods from a supplier based in Germany. By the time the plaintiff was acquiring the goods, it says that;

“the foreign exchange rates had significantly fluctuated, such that there was a big difference between the rates in January and the rates in September?.

18. In effect, even though the plaintiff only received the contract document on 1st September 2011, by which time the exchange rate had substantially changed, the plaintiff proceeded to acquire the goods. Yet he did so without first obtaining the concurrence of the defendant.

19. When it is borne in mind that clause 2.23.1 of the contract stipulated that;

“where other currencies are used, the Procuring Entity will convert those currencies to Kenya Shillings using the selling exchange rate on the date of tender closing provided by the Central Bank of Kenya?.

20. I find that the plaintiff will need to justify its claim for the exchange rates applicable at the time the plaintiff paid for the goods.

21. Paragraph 3.13 addresses the issue of prices. It provides as follows;

“3.13.1 Prices charged by the tenderer for equipment delivered and installation performed under the Contract shall not, with the exception of any price adjustments authorized in Special Conditions of Contract, vary from the prices by the tenderer in its tender?.

22. That paragraph suggests that variation of prices were not allowable unless the same were authorized in the Special Conditions of the Contract.

23. Therefore, it might be necessary for the plaintiff to establish how the variation of prices it is claiming were authorized.

24. The plaintiff has claimed the sum of 5,620,059.47 on account of;

“an amount that reflected the proportionate increase in the price of the equipment, that was necessitated by the fluctuation in the exchange rate of the Kenya Shilling that occurred between the period of January, 2011 and September 2011?.

25. By the plaintiff’s calculations the variation constituted a 24% adjustment to the contract price.

26. Pursuant to clause 3.13.3 of the contract;

“where contract price variation is allowed, the variation shall not exceed 10 % of the original contract price?.

27. Therefore, the plaintiff would need to prove not only that a variation of price was allowed, but that the variation of 24% was justifiable.

28. It is noted that although the defendant admitted that the plaintiff approached it, on the issue of the variation of the price, the defence expressly stated that the defendant was unable to accept the proposal. The reason given by the defendant, for not accepting the proposal was that the proposal was;

“unlawful and baseless, and further that the contract had already been performed in terms of the contract...?”

29. In effect, the defendant did not just reject the plaintiff’s proposal, without reason. The defendant said that the proposal was unlawful and baseless.

30. Therefore, the plaintiff would have to contend with the assertion that the variation was not only unlawful but also baseless.

31. It is worthy of note that the plaint (*at paragraph 9*) states that the plaintiff supplied the equipment to the defendant;

“in execution of its contractual obligations and mandate?.

32. That pleading appears to mirror the contention of the defence (*at paragraph 7*) wherein the defendant said that;

“the contract had already been performed in terms of the contract....?”

33. If that be the common ground of the parties, the question would still be, whether or not the contract provided for the variation of the prices, and if so, in what circumstances and to what extent?

34. The plaintiff’s further claim is for interest, amounting to Kshs. 3,794,664.00.

35. The plaintiff, who asserted that it performed its obligations under the contract, has not shown how the defendant became liable to pay the interest sum claimed.

36. The plaintiff also asked the court to award it interest on the sum of Kshs. 9,414,723.47, at the rate of 32%, from 1st July 2014.

37. I have carefully considered the Plaint and the Defence, but I found no clear or unequivocal admission of liability by the defendant.

38. In my considered opinion the Defence on record raises several triable issues, which require interrogation by the court, at a full trial.

39. Accordingly, the application for Judgement on admission fails.

40. The plaintiff is ordered to pay the defendant the costs of the application dated 19th January 2016.

DATED, SIGNED and DELIVERED at NAIROBI this 14th day of September 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Musili for Mrs. Fundi for the Plaintiff

Miss Wainaina for Muriuki for the Defendant

Collins Odhiambo – Court clerk