



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
MILIMANI LAW COURTS
CIVIL SUIT NO. 476 OF 2014

TECHNO CONSTRUCT KENYA LIMITED PLAINTIFF
VERSUS
AFRICAN DREAMS COLLECTION LIMITEDDEFENDANT

R U L I N G

Introduction

1. This Matter comes before the Court on the Plaintiff of Techno Construct Kenya Limited ("the Plaintiff"). The Plaintiff was filed on 27th October 2014. The Defendant filed a Defence on 31 December 2014 after entering an Appearance on 21 November 2014. The Defence consists mainly of bare denials of the Plaintiff's case does not comply with **Order 7 Rule 5** of the **Civil Procedure Rules**. The Defendant has not filed a List and Bundle of Documents either with the Defence or separately. The suit was before the Court for Case Management first on 11th December 2015 pursuant to the Plaintiff's request filed on 27 July 2015. Prior to that, on 3rd June 2015 the Defendant had changed its Advocates from Messrs Nchogu Omwanza & Nyasimi Advocates to Messrs Balala & Abed Advocates by Notice file on the same day.

2. On 3rd August 200015, the Plaintiff's Advocates (Messrs Coulson Harney Advocates) invited the Defendant's Advocates to fix a mutually convenient date for the Case Management Conference. On 12th August 2015 a date was given for 20th November 2015. On that date this Court was not sitting and the Hon Deputy Registrar gave a further date. The Mention Notice dated 17th August 2015 was served on the Defendant's Advocates on 19th August 2015. The Defendant's Advocates did not attend on 20th November 2015. The Case Management Conference was re-listed on 1th December 2015. The Hearing Notice was served on the Defendant's Advocates on 27th November 2015. Prior to that, in August 2015, they had been served with the Request for Case Management and accompanying documents.

3. On 11th December 2015 the Defendants did not appear whether through their Advocates or otherwise. The Plaintiff's Advocate made an oral application for the Defence to be struck out under the Civil Procedure Rules **Order 11 Rule 3**. The Court did not accede to that Application at that time. The Defendant was given a final opportunity to comply and attend. The Case Management was listed for a third time on 5th February 2016. Paragraphs 2 and 3 of the Order were unequivocal in its stance on repeated non-attendance and the consequent delay. It stated:

"2. The Defendant's Advocates shall attend that hearing failing which they should show cause why they should not personally pay the costs of the case management thus far, and

3. *In the event neither the Defendant nor their Advocates attend the case management on 5/2/2016 the Defence shall be struck out and a date for formal proof taken."*

4. That Order appears to have made no impression upon the Defendant or its legal advisers and on 5th February 2016 there was again no Appearance. That meant that the previous "unless order" became operational and the Defence was struck out and the matter listed for formal proof on 22nd February 2016. On that date the Defendants were represented by a Mr Macharia who was holding brief for Mr Abed and had limited Instructions to request an adjournment. The reason given was that an adjournment was said to be necessary as the Defendant's Advocates were not aware of the date until the Order was served. The Order was served on 17th February 2016 and the Return of Service was filed on 19th February 2016. It was endorsed with the words "received under protest". The Grounds for that protest were never shared with the Court. The previous Mention Notice for the Case Management Conference on 5th February was similarly served in sufficient time before the Hearing. Therefore, the excuses about not seeing the Matter on the Cause List are implausible and unreliable without further explanation. None was provided.

The Claim

5. It is a demand for works done pursuant to a contract said to be entered into between the Plaintiff and Defendant. The Plaintiff is in the business of inter alia construction and erection of semi-permanent and permanent buildings and facilities.

6. The Plaintiff alleges that there was a contract whereby the Defendant, who had approached the Plaintiff to construct certain structures at a new site at Enkereri in the Maasai Mara Game Reserve ("ADC Mara Camp"). From the evidence before the Court, it is clear that the agreement between the Parties was partly oral and partly in writing. It is also clear - and uncontested by the Defendant whether in the Defence or otherwise that the Defendant chose and appointed the Plaintiff to do the works contracted. As a consequence the Contract does not have a specific date but the Plaintiff relies on the date of 4th July 2013, that being the date of the Letter of Appointment received from the Defendant.

7. The Defendant engaged the Plaintiff to carry out building works for the "Back of House" facilities for the intended camp. That seems to be the term of art used to describe that part of the hospitality industry that is not focussed on the ultimate customer. The Plaintiff was to be the sub-contractor as the Defendant had already appointed a main contractor (Sichuan Yongzhi Construction Company). The Plaintiff alleges that the Defendant engaged it to carry out certain works. The building was to comprise permanent and semi-permanent structures using light gauge steel construction solutions. Those works were said to comprise the substructure and superstructure of:

- (1) Ranking Staff Houses;
- (2) 6 Single Rooms with shared bathrooms
- (3) 2 Shared Rooms with Bathrooms - 9 Rooms
- (4) Administration Building
- (5) Main Entrance and Laundry Block
- (6) Main Kitchen

6. The Parties had envisaged a timescale for the Contract. The Defendant had stated that the site would be handed over on 1st July 2013. The building works were to be completed over a fixed period of time, being 7 months from the date of handover. There was a written contract between the Defendant and the Main Contractor. A copy has not been produced in evidence although the Defence as was relied upon it. On 18th June 2013 the Plaintiff submitted a revised quote to the Defendant. The previous quote was revised to take into account changes in, for example, the size of the structures. The exact parameters of the Works were to be contained in the Drawings and Specifications as well as revised specifications

agreed with a Mr Martin Tairo of the Defendant. The Plaintiff asserts there was a contract. The Defence had denied it.

7. In any event the Plaintiff was given access to the site where it moved its staff and equipment. Work started and around 29th September 2013, work was suspended due to problems with the County Government. It seems the Governor had suspended the works pending further approvals and planning involving NEMA and other stakeholders. The position was communicated to the Plaintiff by the Defendant in a letter dated 23rd September 2013. Work on the site re-commenced around 10th December 2013. There was no direct evidence on this point by the Plaintiff's Bundle at page 21 contains the Minutes of the Project Manager's Meeting Held on 10th December 2013 at the Offices of the Defendant. The List of Attendances records that the project Manager from ADC was Martin Tairo Maseghe. That was the position then. Imran Jamal is described as BoH Sub Contractor - Technocon. That is at odds with the Defence. On page 23 it is recorded that, "*The Contractor noted that the following drawings have not yet been issued*" and that "*The sub contractor noted that their payment have been delayed previous and this has led to a lot of inconveniences on their end. The requested that this be looked into.*" That item was marked to be actioned by the Project Manager. In any event the works continued and the Plaintiff was still on site in February 2014 and was still asking for the documentation to be put into place. This is demonstrated by the email dated [14] February 2014 between the Plaintiff and the Main Contractor asking for the contract to be signed. It is fair to assume that is was not as neither Party has produced a copy. The Defendant had provided a quotation of a fixed price of KShs77,254,262/=.

8. It was a term of the main contract that the Defendant would pay the Sub-Contractor. The Sub-Contractor was to be paid within 14 days of valuation by the Quantity Surveyor appointed by the Defendant. The Plaintiff has produced at page 27 of its bundle a copy of such valuation (No 4) which states at the foot; "We advise that in accordance with clau 34.5 of the conditions of contract, **the client is obliged** to honour the payment certificate within 14 days of presentation. It seems that the Client, in the form of the Defendant, did honour the first five Certificates. From the documentary evidence it seems that there was partial payment of the 6th Certificate and non- payment of the Seventh Certificate. That state of affairs is apparent from consideration of the Certificates. Valuation Certificate No 6 was in the sum of KShs.9,765,0681/= and Valuation Certificate No 7 was in the sum of KShs.2,835,051/= . The cumulative outstanding payment claimed in the Plaint is KShs9,765, 0681/=.

9. Copies of the Valuation Certificates have not been included in the Plaintiff's Bundle

10. It was the Plaintiff's Managing Director's oral evidence that aside from the sub-contract and extraneous reasons for stoppages, there was also an ongoing dispute between the Defendant and the Main Contractor. The dispute between the Plaintiff and the Defendant seems to have come to a head around March 2014, the time of the non-payments. In addition, the Defendant changed both the Project Manager and the Quantity Surveyor. The Quantity Surveyor (Aegis) was replaced by Built Sync Consult, who carried out a valuation of works done and prepared at report that appears at pages 62 to 77 of the Plaintiff's Bundl

11. The Letter of Acceptance of 4th July 2013 was signed by the Project Manager and the CEO of the Defendant, a Afshan Poona-Alibhai. In his oral evidence the Plaintiff's witness gave evidence that she was the signatory of the cheques for the payments that had in fact been made on the earlier Certificates. The Plaintiff's Witness took the Court to page 51 of the Bundle. It is a Letter of Demand for payment of the outstanding sum of KShs15,197,949/= . The dialogue box at page 51 contains a breakdown as follows

balance outstanding on

Valuation Certificate No 6	6,930,017.00
Valuation Certificate No 7	2,835,051.00
Retention	4,632,881.00

Demobilisation

800,000.00

Total

15,197,949.00

12. It is unfortunate that the breakdown set out in the demand letter of 7th July 2014 is not set out in the Plaintiff. However, amounts claimed are clear and are demonstrated in the evidence. In addition the Report from Built Sync Consult also records that the Works claimed as completed by the Plaintiff in the Plaintiff were 100% complete.

13. Following the various disputes between the Defendant Client and the Main Contractor and the Sub-Contractor Plaintiff, the Defendant replaced its officers and quantity surveyor. The Defendant seems to have appointed a Mr Gralinsky who describes himself as an Architect and Project Manager as well as head of Property Development. He is a citizen of Poland and Norway, he says. In addition on 1 June 2014 all work on the site was suspended and a Notice of Cessation sent. Prior to that on 29th May the Plaintiff had drafted a Letter challenging the Notice.

14. On the Plaintiff's Claim, following the striking out of the Defence, no application was made for reinstating the Defence, either before the Hearing of the proof or since. Therefore the Court has to consider the Plaintiff's case as pleaded. The Court has undertaken the exercise of a formal proof. Notwithstanding, that the Defence has been struck out, the Court still needs to be satisfied that the Plaintiff's claim is justified.

15. The Claim is for payment for work done. It is clear there was an agreement or contract between the Parties. The Offer was contained in the Plaintiff's Quote of 18th June 2013. The Acceptance was contained in the Defendant's acceptance of 4th July 2013. There was part performance which is demonstrated by the Valuation Certificates 1-5 which were accepted and paid. The dispute in relation to certificate 6 and 7 raises all the issues that were not raised previously. However, it is clear from the Report that the Works claimed for have in fact been done. That is clearly documented in the Report by Built Sync Consult. The Plaintiff's witness was very candid that the Defendant had challenged the work done and had sought to discount all the work done to suggest that the valuation certificates were not true and fair.

16. However, the evidence of the Defendant both in the Plaintiff's Bundle and the Defendant's own evidence is provided by a person who calls himself an Architect but takes over the role of the Quantity Surveyor without further explanation. Further, he does not have a practicing certificate within the jurisdiction. Thirdly, he does not have a work permit to practice in Kenya, therefore all his actions must be evaluated in that light. In the circumstances, I find that the product of his actions whether as an agent of the Defendant within the contracted works or as a witness within these proceedings is tainted by those shortcoming and therefore is of no evidential weight. If indeed he was employed without a work permit, it raises issues of *ex turpi causa*. In his witness statement he admits as much. At the time he was still deciding whether to comply with the legal requirements of his employment.

16. Even if there was no contract, the Plaintiff did the works and the Defendant encouraged the Plaintiff to do so and accepted the work, those actions give rise to a claim for quantum meruit for the work done. The Plaintiff has demonstrated that work through the valuation certificates and the Report. I therefore find for the Plaintiff for the quantum of the Valuation Certificates still outstanding together with the retention. In relation to the claim for demobilisation costs, there is no evidence to justify the quantum claimed. There is no explanation in evidence of how it was calculated. However, it is clear there was an element of mobilisation costs in the original quotation. It follows therefore that the plant equipment staff and machinery brought onto site needs to be removed. It also follows that the claim includes an element for "idle time" when staff, equipment, materials etc were not being used and were deteriorating. The correspondence shows the Plaintiff acted in good faith seeking a mediated settlement during this period. therefore the principle of the payment is sound. As to the quantum, there is no challenge and therefore the Court has to accept the quantum claimed.

17. Therefore I allow the Plaintiffs claim as prayed in the Plaintiff. The sums due shall be liable to interest

at Court rates of 14% per annum from the date of the Letter Before Action until payment. Earlier interest is not justified as the Plaintiff has not produced any evidence of contractual terms allowing for interest, nor industry practice, therefore interest is only justified from the time the Defendant was put on notice that it would be chargeable.

18. The Defendant to pay the Plaintiff's costs of the Suit to be taxed if not agreed.

Order accordingly,

FARAH S. M. AMIN

JUDGE

DATED 26th May 2016

SIGNED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF SEPTEMBER 2016.

In the Presence of :

Isaiah Otieno - Court Clerk

Mr Kassam - Plaintiff

No Appearance - Defendant