



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO 580 OF 2004

MZAHIM CONSTRUCTION COMPANY LIMITED.....PLAINTIFF

VERSUS

ACHELIS KENYA LIMITED.....DEFENDANT

JUDGMENT

INTRODUCTION

1. The Plaintiff's Complaint was dated 25th October 2004 and filed on 26th October 2004. It sought judgment against the Defendant for:-
 - a. **Kshs 5,113,137/=.**
 - b. **Costs of the suit.**
 - c. **Interest on (a) and (b) above at court rates from 27th April 2002 to the date of payment in full.**
2. The Defendant filed its Defence dated 12th November 2004 on 16th November 2004. On 7th December 2004, the Plaintiff filed a Reply to Defence of even date. The Plaintiff also filed a Notice of Motion dated 19th April 2005 on 22nd April 2005 wherein it sought entry of judgment on admission against the Defendant for the sum of Kshs 507,584.44. A Preliminary Decree for the said sum together with interest at court rates was given on 30th September 2005.
3. The Plaintiff's List of Documents was dated and filed on 21st December 2005 while that of the Defendant was dated 6th November 2007 and filed on 7th November 2007. An Agreed List of Documents, Statement of Issues and Statement of Agreed Facts all dated 30th May 2008 were filed on 4th June 2008.
4. On 23rd November 2009, the matter proceeded before Khaminwa J (as she then was) when the evidence of PW 1 was taken. The hearing was adjourned to 17th January 2010 for the Defence case but the same never proceeded on the said date.
5. When the matter came before this court on 26th February 2013, parties opted not to start the hearing *denovo*. This court therefore directed the Defendant to file its witness statements. It filed the Witness Statements for Emmanuel K. Kenga (hereinafter referred to as "DW 1") and Noreen Shivachi (hereinafter referred to as "DW 2") and a Supplementary List of Documents on 31st May 2013.
6. The matter was fixed for Defence hearing on 3rd February 2014. However, the Defendant failed to

attend court. As the Plaintiff had closed its case, the court gave its directions on how parties were to file their respective written submissions. The court also directed the Plaintiff to serve the order upon the Defendant for its further action. A date for highlighting the said submissions was to be taken at the registry.

7. On 20th February 2014, the Defendant filed a Notice of Motion of even date seeking orders to be given an opportunity to present its case. Its advocates informed the court that they had failed to attend court on 3rd February 2014 due to an inadvertent error on their part. By consent of the parties, on 24th February 2014, the court's orders of 3rd February 2014 were set aside and/or vacated and the Defendant was allowed to prosecute its case. The Defence case was heard on 21st May 2014 and 8th July 2014 whereafter the court directed the parties to file their respective written submissions.
8. Additional time was granted to the parties to file the said submissions as the Plaintiff had not done so within the time lines that had been given by the court. The Plaintiff subsequently filed its written submissions dated 23rd September 2014 on the same date while the Defendant filed its written submissions dated 9th October 2014 on 13th October 2013. Parties informed the court that they did not wish to highlight their respective written submissions whereupon the court reserved its judgment based on the said written submissions.

THE PLAINTIFF'S CASE

9. On or about 26th July 1999, the Defendant engaged the Plaintiff as a sub-contractor in the construction of the "Bailey Bridge" on the Kitui- Kibwezi Road under Contract Number 0369 for a consideration in the sum of Kshs 46,390,640/=. On completion of the work, the Defendant paid the Plaintiff a sum of Kshs 41,277,503/= leaving a balance of Kshs 5,113,137/=, which the Defendant had refused, ignored and/or neglected to pay. The Plaintiff therefore sought entry of judgment as had been sought in the Plaintiff.

THE DEFENDANT'S CASE

10. The Defendant admitted having received the Plaintiff's invoice for the sum of Kshs 46,134,455.85 whereupon it remitted a sum of Kshs 43,302,631.43, a sum that the Plaintiff acknowledged receipt thereof. Subsequently, it paid the Plaintiff further sums of Kshs 1,450,906.95 and Kshs 873,333/= giving a total sum of Kshs 45,626,871.40 thus leaving a balance of Kshs 507,584.44. The Defendant therefore denied owing the Plaintiff the sum of Kshs 5,362,000/= (sic) as had been alleged or at all. It therefore prayed that the Plaintiff's suit be dismissed with costs to it.

LEGAL ANALYSIS

11. The following were the issues both parties agreed were to be for determination by the court:-

1. **Whether the Defendant paid the Plaintiff all amounts due to the Plaintiff under the certificates of completion of works.**
2. **Whether the Defendant paid the Plaintiff Kshs 3,151,033.20 on 29th June 2000 as alleged.**
3. **Whether the Defendant had the Plaintiff's authority to deduct Kshs 70,000.00 as equipment hire from the amounts due to the Plaintiff.**
4. **Whether the Defendant had the Plaintiff's authority to deduct Kshs 255,000 (sic) as miscellaneous payments to one Kagiri from the amounts due to the Plaintiff.**
5. **Whether the Defendant paid withholding tax of Kshs 499,292.00 on behalf of the Plaintiff and if so, whether the Plaintiff was entitled to the receipts thereof.**
6. **Whether the Plaintiff was entitled to the reliefs sought.**

12. In its written submissions, the Plaintiff narrowed down the issues to two (2). They were as follows:-

1. **Whether the Defendant in fact paid to the Plaintiff the sum of Kshs 3,153,033.20 that it**

alleged it paid.

2. **Whether the Defendant paid, on behalf of the Plaintiff, the sum of Kshs 2,069,239.15 that it alleged it paid on the Plaintiff's behalf.**

13. The following facts were not in dispute **THAT:-**

1. **The Plaintiff and the Defendant entered into a contract via a letter of appointment dated July 26, 1999.**
2. **The Plaintiff Company was a sub-contractor under the main contract, being the construction of Bailey Bridge on the Kitui-Kibwezi under contract number 0369.**
3. **The Plaintiff completed the work under the contract.**
4. **The amount due to the Plaintiff under the certificates of completion of work was Kshs 46,390,640.00.**

14. The court encountered difficulties in completely comprehending the evidence that had been recorded by the aforesaid learned judge. This was a challenge as the Plaintiff did not file a written statement. The evidence of Ibrahim Mohamed Mzahim (hereinafter referred to as "PW 1") was taken prior to the enactment of the Civil Procedure Rules, 2010 that now mandate parties to file written statements.

15. Be that as it may, the court was able to deduce from the evidence, facts that had been recorded and documents that had been adduced as evidence that the Plaintiff had not been paid all the amounts for the works that it had completed. As can be seen hereinabove, the Plaintiff was categorical that out of the total costs in the sum of Kshs 46,390,640/=, the Defendant paid it a sum of Kshs 41,277,503/= leaving a balance of Kshs 5,113,137/= which it was entitled to. He said that the Plaintiff never issued it with a withholding tax certificate and that in any event, the Plaintiff was a sub-contractor.

16. PW 1 said that the Plaintiff was not paid the following amounts:-

a. Cheque No 000025	Kshs 3,151,033.20
b. Equipment Hire	Kshs 70,000.00
c. Various Misc (M.A/Kagiri)	Kshs 255,000.00
d. Cost of Bond	Kshs 128,250.00
e. Cost of Bond	Kshs 215,434.00
f. Cost of Bond	Kshs 24,956.80
g. Withholding Tax	<u>Kshs 499,292.20</u> <u>Kshs 4,343,966.20</u>

17. DW 2 testified that the Defendant paid the Plaintiff the following payments as was evidenced on pp 128-137 of the Agreed Bundle of Documents:-

a. As per Banking slip 24/1/00	Kshs 3,456,848.00
b. As per Banking slip 24/5/00	Kshs 2,000,000.00
c. As per Banking slip 14/6/00	Kshs 1,400,000.00
d. As per Banking slip 20/6/00	Kshs 1,400,000.00
e. As per Banking slip 21/7/00	Kshs 4,000,000.00
f. As per Banking slip 10/8/00	Kshs 1,600,000.00
g. As per Banking slip 6/9/00	Kshs 1,000,000.00
h. As per Banking slip 30/10/00	Kshs 307,637.00
i. As per Banking slip 16/2/01	Kshs 7,302,647.70
j. As per Banking slip 26/11/01	Kshs 1,041,051.25
k. As per Banking slip 18/12/01	Kshs 5,525,624.00
l. As per Banking slip 18/4/02	Kshs 1,167,790.00
m. As per Banking slip 13/9/02	Kshs 500,000.00
n. As per Banking slip 4/10/02	Kshs 2,000,000.00
o. As per Banking slip 15/10/02	<u>Kshs 2,500,000.00</u>

Kshs 35,201,597.95

p. Cash payment	Kshs	3,151,033.20
q. Equipment Hire	Kshs	70,000.00
r. Various Misc (M.A/Kagiri)	Kshs	255,000.00
s. Cost of Bond	Kshs	128,250.00
t. Cost of Bond	Kshs	215,434.00
u. Cost of Bond	Kshs	24,956.80
v. Withholding Tax	Kshs	499,292.20
w. Cost of retrieving cheques	<u>Kshs</u>	<u>5,400.00</u>

Kshs 39,550,964.15

18. Since it was an agreed fact that the amount due to the Plaintiff on completion of works was Kshs 46,390,640.00, then it appeared from DW 2's evidence above that the Defendant owed the Plaintiff a sum of Kshs 6,839,675.85. This was inclusive of the sum of Kshs 4,343,966.20 in paragraph (16) hereinabove that the Plaintiff had disputed having received.
19. DW 2's evidence that the Plaintiff had confided to the Defendant that it had been having liquidity problems and had asked the Defendant to meet some of the Plaintiff's expenses was not supported at all. Indeed, in her testimony, DW 2 did state that she had worked as an administrator with the Defendant's company for two (2) years and would not have been in a position to knowledge such intricate and confidential details. She said that the person who gave her the information would not be called as a witness in the case herein.
20. The Defendant did not adduce any evidence to show that it had effected payments of Kshs 4,343,966.20 as it had contended or that if at all it had effected the same, it had received authority from the Plaintiff to make the deductions on the Plaintiff's behalf or that the Plaintiff was to refund it the said monies. Save for DW 2 having alluded to the fact that the said payments were made, she did not adduce any sort of documentation to support the Defendant's case in this regard.
21. The court was therefore in agreement with the Plaintiff's submission that DW 2's evidence in this regard was heresay and the cases it relied upon amongst them, being the case of **Kenya Commercial Bank Limited vs Thomas Wandera Oyalo [2005] eKLR** represented the correct position of the law. It was therefore the finding of this court that DW 2's evidence on the purported payments in the sum of Kshs 4,343,966.20 was not be admissible in evidence unless it was corroborated either by way of documentary evidence or by the person who gave her the information. Notably that person was not called to testify and no explanation was adduced to justify his or her non-attendance.
22. From the calculations in paragraph 18 hereinabove, the Defendant owed the Plaintiff Kshs 6,839,675.85. The court observed that there did appear to have been other payments that were made, proof of which was not presented to the court as the Plaintiff was claiming a sum of Kshs 5,113,137/=. The court can only accept that the Plaintiff was entitled to the lower figure that it had claimed.
23. Having said so, it was apparent that the bone of contention was whether the Defendant paid the Plaintiff a sum of Kshs 3,151,033.00 or Kshs 351,033.00. According to the Plaintiff, the work done was valued at Kshs 5,073,462.00. The total amount that was paid was Kshs 4,900,000.00 leaving a balance of Kshs 351,033.00. This computation was shown on page 14 of the Agreed Bundle of Documents. The court therefore agreed with the Plaintiff that the Defendant could not have paid a sum of Kshs 3,151,033.00 which would have been more than the balance that was to be paid. The court also came to the conclusion that the Defendant did not pay the Plaintiff the sum of Kshs 3,151,033.00 as it had alleged. If indeed, the Defendant paid the same, it did not give any justification why it paid the said figure. The Plaintiff's evidence therefore remained unrebutted in this regard.
24. It was not clear to the court why the said document on page 137 in the Agreed Bundle of Documents alluded to cheque 000025 and at the same time indicated that cash in the sum of Kshs 3,151,033.20 was received by the Plaintiff. This was a contradiction in terms. In view of the fact that this issue was hotly contested, nothing would have been easier than for the Defendant to have furnished the court with its Bank Statements, bank withdrawal slips or any other relevant document to demonstrate that, the Plaintiff had indeed been paid the sum of Kshs 3,151,033.20. The court attached little weight to the Document on pg 138 of the Agreed Bundle of Documents to

- prove payment of the said sum as the same was an Excel document, a fact that was brought to the attention of the court by DW 2.
- 25.The burden was on the Defendant to prove that it had paid the sum of Kshs 3,151,033.00 the moment the Plaintiff contended that it had not been paid the same sum. In the absence of any evidence, the Plaintiff’s evidence remained unrebutted that the said sum was not paid.
- 26.While DW 1 testified that the signature appearing in the Verification Affidavit that was sworn by PW 1 and Document dated 13th June 2000 on pg 137 of the Agreed Bundle of Documents were made by one and the same person, he did not examine the handwriting in the body of the latter document.
- 27.However, in view of DW 1’s evidence regarding the similarity of PW 1’s signatures, the court was satisfied that the PW 1 was paid a sum of Ksh 351,033.00. He did not adduce any evidence to demonstrate that he never received the said sum and it was not clear from his evidence whether or not he had admitted the Plaintiff having been paid the said sum. In Examination in Chief he said **“...I do not remember cash written in the name of Plaintiff. When they paid cash they paid my name Abdula. I did not receive cheque or the cash written therein...”**
- 28.He did, however, state that he had never complained that his signature was forged leaving the court to conclude that he did acknowledge the said sum of Kshs 351,033.00. In the proceedings it was stated:- **“page 137 I do see that document. We have never seen this document. The signature is not my signature...I have not complained signature is forged.”**
- 29.If indeed the Plaintiff was not paid the said sum, it can only be blamed for not having set out its case in a cogent manner. As was correctly pointed out by the Defendant in its written submissions, it is not for the court to wade through the documents and try to make out what exactly was the Plaintiff’s claim. PW 1 was infact very evasive as to whether or not he received the sum of Kshs 351,033.00.
- 30.In the circumstances foregoing, having considered the parties’ pleadings, documents in support of their cases, written submissions and case law in support of their respective cases, the court finds the Plaintiff to have substantially succeeded in its claim. The court hereby enters judgment for the Plaintiff against the Defendant for the sum of Kshs 4,762,098.00 which was inclusive of the sum of Kshs 507,844.44 that was admitted by the Defendant and for which a Preliminary Decree was issued. The said sum of Kshs 4,762,098.00 was computed as follows:-

a. Amount claimed in the Plaintiff	Kshs 5,113,137.00
b. Less Amount paid on 13th June 2000	<u>Kshs 351,033.00</u>
	<u>Kshs 4,762,098.00</u>

- 31.This sum will accrue interest at court rates from the date of filing suit until payment in full. Again as was rightly pointed out by the Defendant, the Plaintiff did not justify to the court why it ought to be paid the interest from 24th April 2002. It did not even submit on this issue in its written submissions. As the Plaintiff failed to demonstrate why it was entitled to interest from the said date, the court is not inclined to grant it interest at any other rate than the court rate and from the date of filing suit herein until payment in full. The Defendant shall bear the Plaintiff’s cost of this suit.
- 32.It is so ordered.

DATED and DELIVERED at NAIROBI this 12th day of February 2015

J. KAMAU

JUDGE