



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO 208 OF 2012

JOMAT CONSTRUCTION LIMITED.....PLAINTIFF

VERSUS

NYORO CONSTRUCTION COMPANY LIMITED.....DEFENDANT

JUDGMENT

INTRODUCTION

1. According to the Plaint that was dated 30th March 2012 and filed on 12th April 2012, the Plaintiff had sought judgment against the Defendant for the following reliefs:-

- a. **Kshs 27,271,003.18 being the unpaid outstanding amount.**
- b. **Costs of this suit.**
- c. **Interest on (a) above at bank's commercial rates or court's (sic) rates from September 2011.**
- d. **Interest on (a), (b) and (c) above from the date of judgment until payment in full.**
- e. **Any other relief that this Honourable Court shall deem fit to grant.**

2. The Plaintiff's List of Witnesses, Witness Statement, List and Bundle of Documents were all filed on 12th April 2014 while its Statement of Agreed Issues was filed on 6th February 2014. Its Written Submissions were dated and filed on 22nd October 2014.

3. The Defendant's Statement of Defence, initial List and Bundle of Documents and List of Witnesses were all dated and filed on 18th May 2012. The Defendant's undated Witness Statement was filed on 26th March 2014.

4. Despite being aware of the hearing date, the Defendant did not attend court on 23rd September 2014 when the matter was fixed for hearing. The Affidavit of Service of Francis N. Matu that was sworn on 22nd September, 2014 and filed on 23rd September, 2014 was evidence that the Defendant was duly served with the Hearing Notice dated 9th May, 2014. The court gave directions on the filing of the parties' Written Submissions and fixed the highlighting of the said submissions on 15th October 2014. The Plaintiff was also directed to serve the Defendant with the said order to ensure the latter's

compliance.

5. Neither the Plaintiff nor the Defendant complied with the said directions by the aforementioned date. Upon request by the Plaintiff's counsel, the court extended the time for compliance of the filing of the said Written Submissions and fixed the matter for mention on 5th November 2014 for further orders. The court also ordered that the Plaintiff extracts the order for service upon the Defendant for its further action.

6. Unfortunately, the court did not sit on 5th November 2014. However, parties appeared before the court for a mention on 18th March 2015 when they both confirmed that they had duly filed their respective Written Submissions and requested for a judgment date. The judgment herein is therefore based on the said Written Submissions, the parties having waived their right to highlight the said Written Submissions.

7. It was worthy of note that the Defendant filed another Bundle of Documents dated 16th March 2015 on 17th March 2015 which was the same date it filed its Written Submissions dated 16th March 2015 and a day before the aforesaid mention on 18th March 2015.

THE PLAINTIFFS' CASE

8. At all material times relevant to the suit herein, the Plaintiff and Defendant had entered into an Agreement for the Hire of Equipment/Vehicles between them (hereinafter referred to as 'the Agreement') whereby the Defendant was to hire from the Plaintiff various construction equipment and vehicles at agreed daily dry rates with a view to carrying out a construction project known as the Rwathia-Murang'a Project. The same was expected to run between June 2008 and June 2011 or thereabout.

9. Between 2008 and July 2011, at the request of the Defendant, the Plaintiff availed to it construction equipment and vehicles. However, when the Plaintiff demanded that the Defendant pay a sum of Kshs 27,291,003.18 which was the amount due and owing to it by the Defendant as at September 2011 on account of the hire of the said construction equipment and vehicles, the Defendant refused, ignored and/or neglected to meet its claim.

10. The Plaintiff therefore sought that judgment be entered in its favour against the Defendant as had been prayed for in the Plaint.

THE DEFENDANT'S CASE

11. The Defendant admitted that it had entered into an Agreement with the Plaintiff as had been pointed out by the Plaintiff. It, however, denied ever having refused, ignored and/or neglected to pay the Plaintiff the aforementioned sums of money and contended that it had paid all verified and genuine invoices in accordance with the terms between the parties. It therefore put the Plaintiff to strict proof of the assertions that it owed the Plaintiff the said sum and urged the court to dismiss the Plaintiff's suit with costs.

LEGAL ANALYSIS

12. The Plaintiff listed the following as the Agreed Issues for determination by the court:-

- a. **Did a contract exist between the Plaintiff and the Defendant for hire of construction equipment?**
- b. **Does the Defendant have an outstanding amount of Kshs 27,291,003.18 payable to the Plaintiff?**
- c. **What was the consequence of the Defendant's undertaking to pay the amount owed to the Plaintiff based on the June 2008- June 2011 Ministry of Roads (Mechanical Department) rates in a meeting between the two parties on the third week of August 2011?**

d. Had the Defendant as the matter stands (sic) paid the amount legally owed to the Plaintiff?

13. Having considered the facts of this case, the court was of the view that there were basically two (2) issues for its consideration and/or determination. The said issues which will be dealt with under different heads shown hereunder can generally be summarised as follows:-

a. Whether or not there a valid and binding contract between the Plaintiff and the Defendant?

b. Whether or not the Defendant was liable to pay the Plaintiff the sum of Kshs 27,291,003.18?

c. If the answer to (b) hereinabove was in the affirmative, what was the applicable rate of interest?

d. Who is pay the costs of this suit?

THE CONTRACT

14. On page 10 of the Plaintiff's Bundle of Documents, there was evidenced the aforementioned Agreement. It was dated 12th August 2008 and duly executed by Joshua Ndiangui and J.J. Njuguna on behalf of the Plaintiff and the Defendant respectively. The description of the Equipment and/or Vehicles was set out in the Schedule therein. In its Statement of Defence, Witness Statement and Written Submissions, the Defendant admitted the existence of the said Agreement.

15. As the existence of the said Agreement was not in dispute, it was the view of the court that this was not an issue for determination but rather it was an Agreed Fact. The court will therefore say no more about it.

CLAIM FOR THE SUM OF KSHS 27,291,003.18

16. Joseph Ndiangui (hereinafter referred to as "PW 1") adopted his Witness Statement as his evidence-in-chief. He relied on several documents evidencing the summary of the Plaintiff's claim for the aforesaid sum and several letters demanding that the Defendant pay to it the said sum.

17. The Defendant was categorical that it paid all the verified and genuine invoices in accordance with the said Agreement. However, it did not tender any oral evidence or produce any documentary evidence to rebut the Plaintiff's assertions that it had not paid the said sum of Kshs 27,291,003.18.

18. Instead, on 17th March 2015, the Defendant filed Written Submissions and a Bundle of Documents dated 16th March 2015 in which it attempted to controvert and/or rebut the Plaintiff's claim by contending that it paid the Plaintiff the said monies.

19. Notably, the Defendant never complained that it was denied an opportunity to adduce evidence in this case. It lost its right to adduce evidence when it failed to call any witnesses during the hearing on 23rd September 2014. The facts stated in the said Written Submissions and Bundle of Documents could not therefore assist its case as they were introduced after the Plaintiff had closed its case and the court given directions on filing of written submissions.

20. The undated Witness Statement of Josiah Njoroge Njuguna filed on 26th March 2014 thus remained just that, a Witness Statement. This is because the same was not tendered under oath and was therefore of no evidentiary or probative value to the court. Consequently, as the Plaintiff's case was not controverted and/or rebutted by the Defendant, the court came to firm conclusion that the Plaintiff was entitled to the claim in the sum of Kshs 27,291,003.18.

RATE OF INTEREST

21. The Plaintiff claimed interest on the sum of Kshs 27,291,003.18 at commercial rates from September 2011. Neither the Plaintiff nor the Defendant submitted on the applicable rate of interest or why interest should or should not accrue from September 2011. The court therefore perused the several letters from the Plaintiff and its advocates to the Defendant with a view of establishing whether or not the applicable rate of interest ought to be commercial rates and from which date.

22. The several letters from the Plaintiff to the Defendant were written between 16th June 2011 and 6th December 2011. The demand letter from the Plaintiff's Advocates to the Defendant was dated 30th January 2012. Evidently, there was no indication why the period of accrual of interest was set at September 2011. There was also no indication in the documentation that was produced by the Plaintiff that interest was to be paid at commercial rates.

23. Undoubtedly, under Section 26 of the Civil Procedure Act Cap 21 (Laws of Kenya), the court has discretion to award interest on the principal sum on such rates and rests that it would deem reasonable or fit to grant depending on the circumstances of each case. These periods of payment of interest until payment in full are :-

- a. **From any period before the institution of the suit;**
- b. **From the date of the filing of the suit; and**
- c. **From the date of decree**

24. It therefore follows that the interest herein could either have been chargeable from any of the dates stipulated hereinabove. However, there must be justification why interest should be granted from the period before the institution of the suit. One such justification would be that there was a contractual obligation on a party to have paid interest at the time they entered into a contract that provided for such payment of interest.

25. In all other instances, the general principle of awarding interest ought to be from the date of filing. This is a position that was held in the case of on the case of **Isaac Aduvagah vs Standard Chartered Bank Limited [2012] eKLR** which this court found ought to be the case herein.

26. Notably, the Plaintiff did not demonstrate that there was any contractual obligation between it and the Defendant or provide any justification that the latter was obligated to pay interest at commercial rates before the institution of the suit or that it was entitled to interest as it had claimed in prayer (d) of its plaint. Consequently, interest can only be at court rates and from the date of filing suit.

DISPOSITION

27. In the circumstances foregoing, the court found that the Plaintiff was entitled to the sum of Kshs 27,291,003.18 being the outstanding amount due and owing to it from the Defendant as it had sought in its Plaint dated 30th March 2012 and filed on 12th April 2012 together with interest thereon at court rates from the date of filing suit until payment in full and costs of the suit herein.

28. It is so ordered.

DATED and DELIVERED at NAIROBI this 16th day of July, 2015

J. KAMAU

JUDGE