



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 225 OF 2004

LANDMARK HOLDINGS LIMITED ::::::::::::::::::::::::::::::::::: PLAINTIFF

-VERSUS-

THE DEVCON GROUP LIMITED::::::::::::::::::::::::::::::::: DEFENDANT

J U D G M E N T

1. The suit herein was instituted by way of a Plaint date **29th April 2004** and filed in Court on even date.
2. The facts of the case are as follows. By a written agreement made between the Plaintiff and the Defendant on **22nd March 2004**, it was agreed that the Defendant would pay the Plaintiff a sum of **Kshs. 7,000,000/=** by 6 (six) cheques particularized in the agreement in full and final settlement of the Plaintiff's claim against the Defendant. The Plaintiff's claim was on account of a subcontract work they executed on behalf of the Defendant at the Defendant's site at Kikuyu Campus, University of Nairobi.
3. The Defendant proceeded to issue the said Cheques to the value of **Kshs. 7,000,000/=** in favor of the Plaintiff in due compliance with the terms of the agreement. However, the Defendant subsequently stopped the payments of the said cheques thereby violating the terms of the agreement and necessitating the commencement of the current proceedings. Therefore, the Plaintiff's claim against the Defendant is for **Kshs. 7,000,000/=** for the settlement of the agreement dated **22nd March 2004** and cheques for the same amount whose payment was stopped by the Defendant.
4. The Plaintiff's claim is controverted by the Defendant who filed a Defence on **19th May 2004**. The Defendant admits that it entered into a subcontract agreement with the Plaintiff to carry out some works at the students' hostel in Kikuyu campus, University of Nairobi. On or about **March 2004**, it became apparent that the Plaintiff was unable to execute the said works due to several delays in completion of the said works. As a result, the Plaintiff and the Defendant decided to mutually terminate the said contract and determine the amount payable to the Plaintiff for the work then carried out.
5. The Defendant also admits entering into the agreement dated **22nd March 2004**, with the Plaintiff for the payment of **Kshs. 7,000,000/=**. However, it is averred by the Defendant that they were induced to enter into the said agreement as a result of fraudulent misrepresentations by the Plaintiff. The Particulars of fraud are as stated at paragraph 6 sub paragraph a) to f). Among

the Particulars of fraud are that the Plaintiff fraudulently made a representation about the quantity of workmanship and they fraudulently obtained the approval of the Architect and the Quantity Surveyors.

6. It is averred for the Defendant that upon carrying out proper valuation of the works actually carried out by the Plaintiff, the Defendant discovered that the Plaintiff was only entitled to a sum of **Kshs. 1,016,619.12/=**. It is the Defendant's case that they countermanded the cheques amounting to **Kshs. 7,000,000/=** upon realizing that the Plaintiff was guilty of fraud and misrepresentation. In the circumstances, the Defendant denied being indebted to the Plaintiff in the sum claimed or at all.

7. In reply to the Defendant's allegations, the Plaintiff filed a Reply to Defence dated **28th May 2004** on even date. The Plaintiff reiterated the contents of the Plaintiff and averred that the agreement of **22nd March 2004** was drawn by the Defendant after satisfying itself as to the extent of work executed by the Plaintiff and the material on site.

8. The parties herein complied with **Order 11** of the **Civil Procedure Rules** and the matter was set down for hearing. The matter came up for hearing on **12th July 2012**.

ANALYSIS

9. The Plaintiff called one witness, its Director, Mr. **Manjit Singh Sethi** who outlined the Plaintiff's claim against the Defendant as stated in the Plaintiff. PW 1 relied on the Plaintiff's documents filed on **25th March 2012**.

10. The Defence did not call any witness. The Defendant filed its submissions on **22nd August 2014** while the Plaintiff filed its submissions on **26th August 2014**.

11. It is not disputed that the parties entered into the Settlement and General Release agreement dated **22nd March 2004** and agreed that the Defendant would pay the Plaintiff the sum of **Kshs. 7,000,000/=** in full and final settlement of the Plaintiff's claim against the Defendant. In fact the Defendant went ahead and issued the Plaintiff with cheques for the total value of **Kshs. 7,000,000/=** in settlement of the claim. However, the Defendant subsequently stopped the payments of the said cheques on grounds that the Plaintiff was guilty of misrepresentation and fraud.

12. The Court of Appeal in the case of **Ratilal Gordhanbhai Patel –vs- Lalji Makanji (1957) EA 314** established the threshold on the burden of proof required in Civil cases founded on fraud when the court observed thus:-

“There is one preliminary observation which we must make on the learned Judge's treatment of this evidence: he does not anywhere in the judgment expressly direct himself on the burden of proof or on the standard required. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required....”

In the case of **Koinange & 13 others –vs- Koinange (1986) KLR 23** the Judge relied on the decision in the **Ratilal G. Patel case (Supra)** and held as follows:-

a) *It is a well established rule of evidence, that whoever asserts a fact is under an obligation to prove it in order to succeed. The party alleging fraud in this case the plaintiffs had the burden of proving and they had to discharge that burden.*

b) *Allegations of fraud must be strictly proved and although the standard of*

proof may not be as to require proof beyond any reasonable doubt it ought to be more than on a balance of probabilities.

c) Much of the plaintiff's evidence of the alleged fraudulent intent and forgery on the part of the defendant was hearsay or at best circumstantial and not conclusive. The evidence therefore fell short of the required standard of proof".

13. In the current case, the Defendant, having not called a witness, failed to substantiate the allegations of fraud as particularized in its Defence. The burden of proving the allegations of fraud lay squarely with the Defendant. Any allegations of fraud require strict proof. In its submissions, the Defendant has extensively submitted on issues of procedure, which in my view borders on technicality. However, the Defendant did not address substantive issues like the allegations of fraud or even attempt to rebut the Plaintiff's claim. In the circumstances, this Court is of the view that the Defendant has not offered any sufficient reasons for countermanding the cheques it had earlier offered to the Plaintiff in full and final settlement of the agreement made on **22nd March 2004**.

14. It is therefore, the Court's conclusion that the Plaintiff has proved its claim on a balance of probabilities. The Plaintiff was already granted Judgment for the admitted sum of **Kshs. 1,016,619.12** in the Ruling dated **3rd August 2004**. I will therefore enter Judgment for the Plaintiff for the Sum of **Kshs. 7,000,000/=** less the said sum granted on admission plus interest at Court rates from the date of filing this suit till payment in full. The costs of the suit shall be for the Plaintiff.

That is the judgement of the court

READ, DELIVERED AND DATED AT NAIROBI THIS 4TH DAY OF NOVEMBER 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Omuga for the Plaintiff

No appearance for Defendants

Irene – Court Clerk