



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 89 of 2010

CHUMA FABRICATORS LIMITEDPLAINTIFF

- VERSUS -

ACCROW SUPPLIES LIMITED.....DEFENDANT

J U D G E M E N T

1. The Plaintiff, **CHUMA FABRICATORS LIMITED**, filed this suit against the Defendant, **ACCROW SUPPLIES LIMITED** on **17th February 2010** claiming:-

- i.** Special damages of **Kshs.4,017,879/30**.
- ii.** Costs of the suit.
- iii.** Interests on (i) and (ii) above.
- iv.** Any other or further relief.

2. The claim is based on the allegation that sometimes between **September 2004** and **February 2005** the Plaintiff agreed with the Defendant to construct a steel fencing at two sites – in Muthaiga estate, Nairobi and in Machakos on the instructions of the Defendant. The Defendant was alleged to be an agent of a third party and entered into the alleged contract on behalf of the said third party and made representations which the Plaintiff acted upon to perform the oral contract and used expenditure of **Kshs.1,482,628.30**. The Plaintiff claims this sum and interest thereon at **3% per month** from **February 2005** till the date of filing of this suit hence a sum of **Kshs.2,535,251/=** on interests.

3. The Defendant filed a **Defence** on **12th March 2010** in which it admitted the existence of the oral agreement but contended that part thereof was reduced to writing wherein the Plaintiff was to carry out the contractual work for a total cost of **Kshs.2,912,826** and did receive a Local Purchase Order from the Defendant for that amount, but that there was no provision for interest penalty as alleged. The Defendant alleges that it made payments to the Plaintiff of upto **Kshs.2,000,000/=** which the Plaintiff has not disclosed. According to the Defendant the Plaintiff breached the said contract by failure to conclude the work by **December 2004** as agreed but did only complete the Machakos Works in **May 2005** while the Muthaiga works were never done due to this alleged breach of contract and seeks damages for breach of contract, costs of the counter-claim and interests.

4. The Plaintiff filed a **Reply to Defence** and **Defence to Counter-Claim** on **23rd April 2010**. The Plaintiff then requested for **Further and Better Particulars** on **14th May 2010**. These were supplied by

the Defendant on **8th July 2010**.

5. On **21st June 2011** the Plaintiff filed its list of documents and list of issues.

6. The hearing commenced on **22nd November 2001** with the evidence of **P.W. 1 – ANOOP SING KOLLAH** who testified that he is the Managing Director of the Plaintiff Company. He testified that in **August 2004** the Defendant agreed to fabricate and erect a steel fence in Machakos and Muthaiga. The Defendant's Managing Director **MR. JASPAL SIGN BIRDI** provided the specifications in terms of design and perimeter area of the two projects. Based on these the Plaintiff did a quotation. Mr. Jaspal then took the Plaintiffs to a different residence in town where they were shown a sample of the works required. Based on this sample the Plaintiff did a quotation produced as **exhibit number 1**. There was a considerable delay after this quotation. This led the Defendant to request for a second quotation produced as **exhibit number 2**. After this quotation parties negotiated verbally and on **17th September 2004** the Defendant placed an order for the fabrication. The witness produced this order as **exhibit number 3**.

The Plaintiff then proceeded and carried out the assignments as required. The Defendants paid a deposit of **Kshs.500,000/=** on **20th September 2004**. Upon completion of work a final invoice of **Kshs.1,482,628/30/=** was raised – **exhibit number 4** – which included extra works done on the two projects. The Plaintiff provided the breakdown of works done – as per **exhibit number 5**. When the final invoice was issued to the Defendant, the Defendant returned it claiming that their client – a Mr. Andrew Mullei had not seen or approved it (**see exhibit number 6**). To this the Plaintiff replied vide **exhibit number 7** that Mr. Andrew Mullei is a stranger to the contract. Up to this time, the witness testified, the Defendant had not challenged the invoice. When the Defendant refused to pay the Plaintiff then engaged the services of a debt Collector First Monetary Security but they did not succeed in recovering the debt.

On cross-examination the witness recognized that the principal sum claimed is **Kshs.3,482,031/=** but what is outstanding is **Kshs.1,482,628/30**. He acknowledged that to date they had been paid **Kshs.2,000,000/=**. The additional works were carried out at the sites and were agreed upon mutually and verbally as the negotiating parties are relatives. Jaspal is an uncle to the witness. The witness dismissed the Defendant's defence and counter-claim stating that the only reason the Defendant had failed to pay the Plaintiff was because the Defendant alleges that its client has not paid.

7. Defence witness was **D.W.1 – JASPAL SING BARDI** who described himself as a director of the Defendant Company. He confirmed the elements of the contract at a total sum of **Kshs.2,912,826**. They had paid upto **Kshs.2,000,000/=**. The balance was **Kshs.912,826/=**. There was never any variation to the contract, and time of completion was to be of essence i.e. **December 2004**, yet the Plaintiff concluded the work in **April 2006**. The witness testified that despite their counter-claim they were ready and willing to give the Plaintiff **Kshs.912,826/=**. He further said the Plaintiff one not entitled to any interests as they are the ones who delayed the entire project.

On cross-examination the witness admitted receiving a quotation dated **7th September 2004** for additional works. The **2nd** quotation did not cancel the **1st** quotation. It was only for additional works. The witness admitted owing the Plaintiff **Kshs.912,826/=**.

8. I have considered the entire evidence. I raise the following issues for determination:-

- (i) Whether there was a contact as alleged.
- (ii) Whether there were additional works.
- (iii) Whether the Plaintiff is entitled to interest.
- (iv) Counter-claim whether proved.

9. Evidence of both parties prove existence of the verbal contract. The Plaintiff has also shown that

when they were taken to actual site, the sites were different from the sample they were given. This led to extra works at the Muthaiga site. The quotation for these extra-works were given to the Defendant as per Plaintiff **exhibit number 4**. It is no wonder, therefore, that when the Plaintiff raised the final invoice which contained these extra-works, the Defendant never raised any objections. The Defendant's only issue was that the invoice had not been seen or approved by a Mr. Andrew Mullei. Obviously, Mr. Mullei was a stranger to the agreement between the Plaintiff and the Defendant. It would have been proper and a little convincing if the Defendant had outrightly rejected the invoice. This was not the case. Further, there is contradiction between the Defendant's witness testimony and the allegations contained in the defence. In the defence it is alleged that the Plaintiff did not carry out the Machakos works. In the D.W. 1 testimony, the contrary is alleged. In any event the witness admitted that the Defendant owed the Plaintiff **Kshs.912,826/=**.

I am satisfied that the Plaintiff carried out the additional works as alleged and they were entitled to invoice for the same.

10. On the issue of interests, no document was placed before the court to show that parties had agreed on interest, leave alone a rate of interest. The Plaintiff seeks interest at **3% per month**. There is no basis provided for the same. Neither was evidence led by the Plaintiff to prove element of interest at **3% per annum**. In my view, the Plaintiff is not entitled to interest at **3% per month** as claimed.

11. Finally there was a counter-claim by the Defendant for breach of contract. No evidence was adduced by the Defendant to show that the Plaintiff was in breach of the contract. Indeed it is the Defendant witness who admitted in court that the Defendant owed the Plaintiff **Kshs.912,826/=**. Why has the Defendant withheld the payment for this long? In my view, the allegations in the counter-claim are afterthoughts and are not well founded. It is clear to me that if the Defendant had any issue with the Plaintiff's invoice, the Defendant would have raised the same in at least one correspondence to the Plaintiff. The closest reaction to the invoice raised by the Plaintiff is when the Defendant returned the same to the Plaintiff in the pre-text that it needed a comment from Mr. Mulei who, in my view is a stranger. All these show that the Defendant's claim that the Plaintiff breached the contract is not genuine. They had never raised the issue before.

12. In the upshot I enter judgement for the Plaintiff against the Defendant as follows:-

(a) Kshs.1,482,628.30/=

(b) Interest at court rates as from **13th July 2006** being 30 days after the date of invoice (plaintiff exhibit number 4)

(c) Costs of the suit and interest therein at court rates.

13. I also dismiss the Defendant's counter-claim.

This is the Judgement of the court.

DATED, READ AND DELIVERED AT NAIROBI

THIS 6TH DAY OF NOVEMBER 2012

E. K. O. OGOLA

JUDGE

PRESENT:

Imende for Kariuki for the Plaintiff

Gachie H/B for Omenta for the Defendant

Teresia – Court Clerk