



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 640 of 2005

M/S IKUYU ENTERPRISES LTD.PLAINTIFF

VERSUS

M/S FEBA RADIODEFENDANT

JUDGMENT

This suit was commenced by originating summons which was amended. It is brought under **Order XXXVI Rule 5, Civil Procedure Code** and **Section 3 A of Civil Procedure Act**. The claim is that parties are bound by 1999 Agreement and Conditions of Contract for Building Works published by Arbitral Association of Kenya and Joint Building Council and by various correspondence exchanged by the parties on diverse dates commencing on 23/5/2000 and especially the letter of 5th June 2000 from the defendant to the plaintiff.

The issues to be determined are set out in the Originating Summons. Both parties called witnesses and produced exhibits. In addition to *viva voce* evidence. The application was supported by affidavit of Maingi Kubai sworn on 29/1/2001.

The defendant filed a replying affidavit and a further affidavit both sworn by Lombo Simba Lombo. The statement of issues was filed dated 6/5/2003 but was only signed by the plaintiff. The evidence adduced shows that the parties entered into a contract. The offer was made in the letter dated 23/5/2000 and the amended quotations dated 31/5/2000. The defendant accepted the offer in its letter dated 25/6/2000 written in following terms:-

“We are glad to inform you that your quotation for the above work dated 23/5/2000 in the sum of Kshs.4,082,315/= ... is hereby accepted to the amendments contained in your letter of 31/5/2000. The contract documents are under preparation for formal execution.

The form of contract shall be the 1999 Agreement and Conditions of Contract for Building Works published by Architectural Association of Kenya and Joint Building Council ...

You may take possession of site immediately but formal commencement shall be 12/5/2000”

The plaintiff submits that it is the interpretation of this letter of acceptance that is disputed. The letter of acceptance is written on letterheads of FEBA East Africa with “Feba RADIO” highlighted addressed to M/S Ikiyu Enterprises Ltd. and its signed by National Director and it is marked plaintiff’s Exhbt.4.

The agreement was that a formal contract shall be in the form of the 1999 Agreements and Conditions of Contract for Building Works published by the Architectural Association of Kenya and the Joint Building Council. This document is exhibited as "PEX 5". That form of contract contains an arbitration clause.

Without further correspondence and without execution of any formal "contract documents" the plaintiff took possession of the site and began works on the proposed project. Thereafter the defendant wrote a letter dated 15/9/2000 complaining of workmanship and delays by plaintiff in payment for materials and services to their workers and suppliers and the slow progress of work.

The defendant stated clearly that if the plaintiff's performance did not improve, they would seriously reconsider terminating the contract. The letter dated 21/9/2000 the defendant complained that work on the site had stalled for a week and delays in payments by the plaintiff continued and there was no insurance in place in respect of the project and there was non payment for water consumed on the site.

Consequently, the defendant cancelled the cheque it had issued to the plaintiff and terminated the contract as from 21/9/2000. It was on 26/9/2000 that the plaintiff protested the termination of the contract. The plaintiff addressed the defendant in the following terms:-

"...We feel you have erred in that:

- 1. You have purported to terminate our contract with complete disregard to the terms of agreement.***
- 2.***
- 3.***
- 4. You have stopped payment of cheque validly issued by yourselves in complete disregard to the fact that payments are made on our application after your representative has checked, verified and approved such application ...***

And we discussed the matter of possible arbitration of the dispute in light of the fact that we are all Christians and are biblical admonition to settle dispute without recourse to secular courts ..."

It is to be noted here that the plaintiffs were paid by the defendant in a method agreed "payments are made on our application after your representative has checked, verified and approved such application. This method is not as stated in the 1999 form of contract clause 34. The formal contract has set out the mode of the payments due on contract by Architect certificates. Again the plaintiff was not suggesting arbitration under the 1999 contract form but on Christian basis "under biblical admonition".

The evidence adduced by the plaintiff was led by PW1, Maingi Mbutia Kobia who is the director and majority shareholder of the plaintiff. His evidence is that he discussed the matter with defendants' representatives, the director and technical man. He submitted a formal quotation on 23/5/2000. Then there were further discussions and some alterations were made which were accepted by letter dated 25/6/2000. He explained that after acceptance the contractor will proceed with the works while the client prepares formal documents which are usually signed late in the contract or at the end. He recognized 1999 agreement and conditions for building works.

On 15/9/2000 he received a letter of complaints, forwarding a cheque in the sum of Kshs.226,865/=. On 15/9/2000 the site was closed. Thereafter, plaintiff wrote a second letter

dated 26/9/2000 stating that they had legal agreement on prescribed standard format which gives each party certain rights. Termination by employer falls under clause 38. He testified that he was seeking to go to arbitration in cross-examination he admitted that the “1999 agreement” was not signed by the parties. The only reference to that agreement in the defendant’s letter dated 5/6/2000.

He said they did not have architect or quantity surveyor and no bills of quantities. He is the one who made the quotation. Furthermore, he did not respond to the defendant’s letter dated 5/6/2000. He just took possession.

Defendant called 2 witnesses in support of its case. DW1 was Joseph Wamai Muigai, an accountant in the employment of the defendant as Finance & Administration. He testified that there were letters dated 23/5/00 and 31/5/2000 from the plaintiffs, the first was an offer and the second was an amendment. The offer was accepted by the defendant’s dated 5/6/00, possession of site was given immediately. No copy of the contract prepared by the Architectural Association was ever signed. The document was blank. He testified in the dealings with each other the parties did not comply with the formal agreement “1999 agreement”.

The second witness was Japheth Rasigu Nyamboki, a practicing quantity surveyor. He was called to sort out the disagreement between the parties. He found no signed formal contract. He examined correspondence exchanged. The commencement date was back-dated. He said that the “1999 agreement” was purchased by the user and the contract requires to be signed and details inserted and thereafter adopted by reference.

The parties filed written submissions and cited authorities. What is clear from the evidence is that the parties through correspondence made agreement as to works to be performed, the price and the mode of payments to the plaintiff. The plaintiff was given possession and was permitted to commence work. Apart from the correspondence no formal agreement was prepared or executed. The works was:

“Alterations and extensions at Kanyahwe road at Nairobi.”

The defendant (employer) was preparing contract documents for “formal execution”. The defendant stated “the form of contract shall be the:

“1999 Agreement and Conditions of Contract for Building Works published by Architectural Association of Kenya and the Joint Building Council.”

This is a document as exhibited by plaintiff’s (exhibit No. 5). The document contains several terms and conditions applicable in building contracts. It is obtained by purchase from the Building Council offices.

In this case, no formal contract was prepared or executed. And he said “1999 Agreement” form was never executed or completed by insertion of details as required therein. When the dispute arose after the termination of contract works, the plaintiff called for arbitration under clause 45 of the said “1999 agreement” form.

The defendant refused to engage in arbitration process saying that the “1999 agreement” was not binding upon them. They had not signed it. From the evidence adduced by the witnesses, it appears the parties were not well versed with the terms and conditions of the “1999 agreement”. They did not comply with conditions written thereon. They did not make use of experts – architects or quantity surveyors. Payment was not under Architects Certificates. The parties had formulated a method of determining the amount of payment as the works progressed.

It is the plaintiff's view that its relation with the defendant is under the terms of "1999 agreement" and it is the agreement that binds the parties and under that agreement the dispute existing between the parties ought to be referred to arbitration in terms of clause No.45.

The plaintiff's counsel supports this view and has cited authorities.

1. **Halsbury's Laws of England, 4th Edition.** – which deals with tenders "where the contractor agrees to carry out work without more but in expectation the employer must pay a reasonable sum in respect of the work done and to obtain a fixed price for the work an employer will often seek estimates or tenders from contractors. There is no custom that a document headed "quotation" or estimate of even "budget price" should not be treated as an offer. At paragraph 315 page 385 it is stated:-

"The unconditional acceptance of a tender gives rise to a contract".

The use of the term "subject to contract" is a strong indication that no enforceable obligation was intended to arise before the execution of a formal document but a statement in the acceptance that a formal contract is being prepared may prevent a binding contract arising.

In the circumstances of this suit the work was started after acceptance:-

"Contract documents are under preparation for formal execution you may take possession of site immediately but the formal commencement date is 12/5/2000.

The form of contract shall be"

The contract was to be of a standard form of agreement publishing for the guidance of Building Contractors. Therefore the contract here was contained in the letter of acceptance and the incorporated 1999 Agreement and Conditions of contract for building works.

2. **Hudson Building & Engineering Contracts, Eleventh Edition, Vo.1 by I.N. Duncan Wallace Q.C.** – it is stated:-

"acceptance may, however be made either expressly by words or writing or impliedly by conduct, always provided that the acceptance correspondence to the mode of acceptance contemplated by the offer."

3. **Lewis vs. Brass QBD 1878** at page 667 it was held:-

"a tender which provides unless and until a formal agreement is prepared and executed this tender together with your written acceptance shall constitute a binding acceptance between us"

It was held that an instruction that a contract will afterwards be prepared the parties will be bound.

Construction Contracts by John Murdoch & Will Hughes, Second Edition, paragraph 9.2 – it was stated:-

"Many if not most building contracts, and certainly those which concern projects of any great size, are drawn up and executed by the parties in a formal manner. The terms of those contracts are therefore easily identifiable and, if the parties intend to incorporate other documents by reference, this will be made clear in the main contract document. This is commonly done, for example, in relation to such documents as the contract drawings, bills of quantity or specification."

The principle of incorporation by reference applies equally to contracts which are themselves made orally or by conduct. If it is clear that that is what the parties intend, then their contract will be subject to the appropriate standard form. However, the contract remains oral which may have certain important legal implications. For instance, although an arbitration clause in the standard form contract would be duly incorporated there would no "written agreement" to submit to arbitration and therefore the provisions of Arbitration would not apply; (at page 152).

In the decision of **Killby & Gayford Ltd. vs. Selincourt Ltd.** it was held:-

"Assuming that we can agree a satisfactory contract price between us, the general conditions and terms will be subject to the normal standard form of RIBA contract."

There was acceptance in these terms:-

"I am instructed ... to accept on behalf of client your estimate dated 6/3/1972 and I shall be obliged if you will accept this letter as your formal instruction to proceed with work."

The court said that the standard form was incorporated in the contract and further stated that:-

"Those letters show that the conditions of RIBA form were incorporated in the contract."

The defendant's case is that it accepted the initial tender contained in plaintiff's letter of 23/5/2000. The bid was in the sum of Kshs.4,082,315/=. The plaintiff wrote again on 31/5/2000 setting out certain amendments. The defendants replied:-

"The contract documents are under preparation for formal execution. The form of contract shall be the 1999 agreement and conditions of contract for building works published by the Architectural Association of Kenya and the Joint Building Council."

As stated earlier there was no other correspondence, the plaintiff was allowed to commence the construction works immediately and he was given the possession of the site. Later disputes arose and eventually the contract was terminated. It was suggested that the matter should be referred to arbitration instead of secular courts. Then later the plaintiff pointed out that the termination of contract was not in accordance with 1999 form of agreement and particularly Clause 38 thereof.

At this stage the main issue arising is whether the parties had entered into a contract at all. The defendant relies on Halsburys Laws of England, vol.9 at page 203 where it can be seen that two or more parties must be in agreement that, there must be a consensus *ad idem*, a meeting of minds and they must intend to create legal relationships that can be enforceable and supported by consideration.

In this case it is clear that these conditions were applicable. There was an offer by tender which was accepted as to the price in absolute and unqualified terms. Then there was absolute acceptance of amendments to the contract and by the conduct of giving the site to the plaintiff by the defendant "immediately". The issue of the incorporating the 1999 Agreement has been discussed above and the court has come to the conclusion that the terms of standard form published by the Architectural Society of Kenya and the Joint Building Council were incorporated and binding upon the parties.

Accordingly, the court does direct and order this dispute be referred to the Chairman or Vice Chairman of Architectural Association or the Chairman or Vice Chairman of Chartered Institute of Arbitrators Kenya Branch to appoint an arbitrator.

Having made that order the court refers to **Section 10 Arbitration Act 1995** which prohibits

a court from proceedings in any matter subject to **Arbitration Act**. However, the costs of this shall be paid to defendants since that they refused to comply with Notice issued by the plaintiff.

The costs to be agreed upon or taxed by the Taxing Officer of this court.

It is so ordered.

DATED, SIGNED and DELIVERED at Nairobi this 2nd day of July, 2009.

JOYCE N. KHAMINWA

JUDGE