

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
COMM CASE NO. E430 OF 2019

BETWEEN

**SHANGDONG CONSTRUCTION CO.
LIMITED.....1ST PLAINTIFF**

**TITUS NGUGI.....2ND
PLAINTIFF**

-VERSUS-

**KENYA FORESTRY RESEARCH
INSTITUTE.....DEFENDANT**

JUDGMENT

Introduction and Background

1. By a Plaint dated 26th November 2019, the Plaintiffs initially sued the Defendant for Kshs. 11,495,516.92/= for outstanding contractual sums and 10% retention, plus Kshs.89,544,000.00/= for idle equipment arising out of a contract dated 14th November 2017 for the construction of two water pans at Lenkism and Kuku in Loitokitok, Kajjado South Sub-County. A judgment in default of appearance was entered for the Plaintiffs on 6th January 2020 but the same was set aside in part on 2nd June 2020, only regarding the

Kshs.89,544,000.00/= claim for idle equipment and the Defendant subsequently paid the Plaintiffs the amount of Kshs.11,495,516.92/=.

2. The Plaintiffs' claim for idle equipment is for 273 days, computed at Kshs.328,000.00/= per day for eight equipment. They state that the Defendant admitted default on payment in a letter dated 13th August 2019, stating the project was suspended by the National Environment Management Authority (NEMA) due to a budgetary dispute with the Defendant. The Plaintiffs assert that this determined the question of breach of contract in their favor and the Defendant, in the same letter, denied the claim but did not dispute that the enumerated equipment was on site and could not be moved without payment of the outstanding amount necessary for demobilization.
3. The Plaintiffs aver that the Contract's Preliminaries and General Items noted that mobilization and demobilization were costs to be met by the Defendant and that the Plaintiffs provided evidence of their inability to remove the equipment before the admitted outstanding amount was paid. As such, the Plaintiffs argue that the claim on account of idle equipment for 273 days has been proved on the facts and sustained by the law and they urge the Court to

allow their claim for Kshs.89,544,000.00/= together with interest and the costs of the suit.

4. In response, the Defendant relied on its Statement of Defence dated 12th June 2020. It states that works on the project were certified as complete on 8th October 2018 and it admits that the claim for interest is justified under General Condition (GC) 46.1 of the Contract, which provided for interest on late payments. The Defendant states that its obligation to pay amounts under the Final Certificate crystallized on 17th March 2019 and not the certification date, because the Final Certificates were not certified by the Project Manager, Dr. Gabriel Muturi, as required. Further, that the retention sums became due at the end of the Defects Liability Period on 8th April 2019 and it states that the delay period for the Final Certificates is from 17th March 2019, to 12th June 2020, and for retention sums from 8th April 2019, to 12th June 2020. The Defendant also admits that the interest rate should be 13% p.a. as pleaded by the Plaintiffs.
5. However, the Defendant opposes the claim for special damages for loss of use of plant and machinery stating that the Plaintiffs failed to provide conclusive proof that the specific plant and equipment were actually mobilized to the site for the works or that they were

present on the site after the completion date or the end of the Defects Liability Period. It further contends that evidence such as Daily Site Cards, security contracts, or insurance details were not presented and that the Plaintiffs failed to present conclusive evidence of ownership for the claimed plant and equipment, noting that only evidence from the Registrar of Motor Vehicles is conclusive.

6. The Defendant urges that the contractor is deemed discharged from the contract at the end of the Defects Liability Period and there is no contractual basis for retaining equipment after this date. The Defendant argues that the award of interest on the delayed payment, which included demobilization costs, is a sufficient remedy for any loss incurred due to late payment of demobilization costs and that the interest is meant to compensate for being kept out of funds, not to enrich the party or punish the opposing party. The Defendant further states that general damages should not be awarded for a breach of contract because damages arising from breach are usually quantifiable and that since the contract provided for interest for delayed payments and the Plaintiff has already claimed this interest, an award of general damages would amount to double compensation. In conclusion, the Defendant invites the

Court to order each party to bear its own costs because the claim for special damages for the Final Certificates was undisputed and already paid and that the rest of the Plaintiffs' claims are unfounded and should be dismissed.

7. At the hearing, the 2nd Plaintiff testified on behalf of the Plaintiffs (PW 1) where he relied on his witness statement sworn on 26th November 2019 and produced the Bundle of Documents dated 26th November 2019(PExhibit 1-35). The Defendant called its Corporate Secretary and Principal Legal Officer, Philip Kichana (DW 1) who relied on his witness statement dated 15th October 2024 and produced the Bundle of Documents dated 16th October 2024(DExhibit 1-10). Thereafter, the parties were directed to file written submissions which I have considered together with the evidence on record and I will make relevant references to the same in my analysis and determination below.

Analysis and Determination

8. In making this determination, the court is guided by the fact that the standard of proof in civil cases is on a balance of probabilities and that the burden of proof is on the party alleging the existence of a fact which they want the Court to believe. This is anchored in

section 107 (1) and (2) of the Evidence Act(Chapter 80 of the Laws of Kenya) which provides that “*whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist*” and that “*When a person is bound to prove the existence of any fact it is said that he burden of proof lies on that person*”. In **Miller .V. Minister Of Pensions 1947 ALL E.R 372**, Lord Denning aptly summarised the application of the standard in the following terms:-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in criminal cases. If the evidence is such that the tribunal can say: We think it more probable than not; the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case is which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

9. The Court of Appeal in **James Muniu Mucheru v National Bank of Kenya Limited [2019] KECA 1058 (KLR)** simply put it that

'Courts will make a finding based on which party's version of the story is more believable.'

10. With the above in hindsight, I will now proceed to determine this matter and I find that the court is being called upon to determine whether the Plaintiffs' claim for Kshs.89,544,000.00/= in respect of idle equipment should be allowed and whether damages should be paid for breach of contract. I have gone through the said Preliminaries and General Items clause of the Contract cited by the Plaintiffs at pg. 62 of DExhibit 1. The same provides that *"Mobilization of plant and equipment to the project site. Rate shall be inclusive of Demobilization after completion of the works."* Whereas I agree with the Plaintiffs that demobilization costs were to be borne by the Defendant, my interpretation is that these costs were part of the contract price and were to be borne by the Defendant as part of the contract sum. The Contract does not explicitly state equipment must remain until final payment, only that demobilization is part of the contract.

11. Therefore, since the Defendant has already been paid the sum of Kshs.11,495,516.92/= which is the full and final payment under the Contract, it follows that even demobilization costs have been paid for. The Defendant has also correctly pointed out that there is no Daily Site Register, equipment checklist, or photographic

evidence or such evidence to confirm equipment remained on site post-completion and I note that PW 1 also admitted to the same in his testimony. There are no logbooks, registration documents, or insurance records for specific equipment and I note that the Contract's Confidential Business Questionnaire (pgs 70-71 of DExhibit 1) required equipment lists, but no such filled forms were produced by the Plaintiffs.

12. What is clear is that the Taking Over Certificate was issued on 8th October 2018 and Defects Liability Period ended on 8th April 2019. PW 1 admitted that a contractor is deemed to have been released from their obligation after the Defects Liability Period and once the Take Over Certificate has been issued. While demobilization was part of the Contract, there was no contractual obligation for equipment to remain on site until payment. It would appear that the Plaintiffs' failure to demobilize after the Defects Liability Period was their own commercial decision, not a breach by the Defendant.

13. As I understand it, a contractor's entitlement to payment for idle equipment typically arises during the active construction phase when an excusable and compensable delay, such as one caused by the client results in equipment being on site but unable to be used productively. This is often framed as part of prolongation costs or delay damages, where the contractor must demonstrate causation,

that is, the delay is the client's responsibility, that mitigation efforts were made for example, no feasible alternative use for the equipment elsewhere, and that actual losses were incurred. This entitlement does not generally accrue after the Defects Liability Period which is a post-completion phase and stated by PW 1, is focused solely on the contractor's obligation to remedy notified defects at their own cost or using sums retained by the client. During this period, the site is handed over to the client, and the contractor is expected to have demobilized equipment unless briefly needed for specific rectification work.

14. In this case, since demobilization was included in the paid contract sum and no evidence has been provided for equipment remaining on site, the Plaintiffs have no valid basis for their idle equipment claim, especially after the Defect Liability Period. It is therefore my finding that the Plaintiffs have failed to demonstrate that they are entitled to the claim for idle equipment for the sum of Kshs.89,544,000.00/=.

15. In respect of damages for breach, I am inclined to agree with the Defendant that general damages are not awarded for quantifiable loss and since the Plaintiffs are admittedly entitled to interest on the delayed payments which is quantifiable, an award of general damages would amount to double compensation (see **Paul**

**Muiyoro t/a Spotted Zebra v Bulent Gulbahar Remax
Realtors [2016] KECA 95 (KLR)]**

16. On costs, since the Plaintiffs' claim for the outstanding contractual sum was undisputed and has since been paid and the remaining claim for idle equipment has been dismissed, I will exercise discretion and order that parties bear their own costs for the suit.

Conclusion and Disposition

17. In the upshot, the Plaintiffs' suit is hereby dismissed with each party bearing their own costs.

**DATED SIGNED and DELIVERED virtually at NAIROBI this 4th
DAY of DECEMBER 2025**

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**J.W.W. MONGARE
JUDGE**

IN THE PRESENCE OF:-

1. N/A for the Plaintiff.
2. N/A for the Defendant.
3. Ivan - Court Assistant

ORIGINAL