Turn-O-Metal Engineers Limited v Ministry of Medical Services & another (Civil Appeal 552 of 2019) [2025] KECA 896 (KLR) (23 May 2025) (Judgment)

Neutral citation: [2025] KECA 896 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 552 OF 2019

SG KAIRU, FA OCHIENG & AO MUCHELULE, JJA

MAY 23, 2025

BETWEEN

TURN-O-METAL ENGINEERS LIMITED .... APPELLANT

AND

MINISTRY OF MEDICAL SERVICES .... 1ST RESPONDENT

THE ATTORNEY GENERAL .... 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (M. Odero, J.) dated 14th March 2019 in HCCC No. 234 of 2011)

JUDGMENT

1. In this appeal, the appellant, Turn-O-Metal Engineers Limited, is challenging the judgment of the High Court at Nairobi (M. Odero, J.) delivered on 28th June 2019. In that judgment, the High Court partially allowed the appellant's claim against the respondents, the Ministry of Medical Services and the Attorney General, and entered judgment in favour of the appellant in respect to retention monies for Kshs. 1,511,506 and interest thereon at court rates. The remainder of the appellant's claim for special damages of Kshs. 101,939,381.79 and general damages was declined and hence this appeal.

2. The background is that on or about 17th November 2005, the appellant contracted with the 1st respondent to provide services for drilling, construction and development of boreholes for water supply for hospitals in various parts of Kenya including North-Eastern Kenya and Central Kenya. The contract price was Kshs. 35,869,117. The project was donor funded by International Development Association (IDA) to the extent of 90% while the balance was to be financed by the Government of Kenya.

3. In its suit before the High Court, the appellant contended that the 1st respondent, in breach of the agreement, frustrated the appellant in execution of the works making it impossible for it to

complete the works in time. It was the appellant's case that the 1st respondent delayed in granting it possession of the sites; failed to supervise and give proper instructions; failed to provide necessary borehole statutory documents; cancelled award of Lot 5/Zone E; and was late in and improperly made payments. Consequently, the appellant claimed special damages of Kshs. 101,939,381.79 made up as follows:

1. Certified payments-Kshs. 1,950,725.10
2. Contractual retention amount-Kshs. 1,511,500.06. (being the only claim that was ultimately allowed by the High Court)
3. Un-contractual retention amount-Kshs. 1,338,776.32
4. Interest on above items-Kshs.47,776,039.02
5. Claim for performing role of project manager and site supervisor-Kshs. 2,367,152.98
6. Claim for reduced scope of work-Kshs. 3,651,348.60
7. Claim for wrongful withdrawal of Lot 5/Zone E-Kshs. 2,548,606.43
8. Claim for wrongful evaluation of bid tender-Kshs. 20,495,405.20
9. Extended time on site and loss of earnings- Kshs.19,599,828.08
10. Legal fees-Kshs. 700,000.00

4. The respondents in their statement of defence denied the claim. In addition to denying the contract and asserting that the same was invalid for violation of Public Procurement Regulations, the respondents put the appellant to strict proof of its claims.

5. After the appellant's bid to obtain summary judgment before the trial court failed, the matter ultimately proceeded to trial. At the trial, Surinder Singh Birdi, the appellant's Managing Director and Peter Karaya, an Accountant with the appellant, testified for the appellant. The respondents did not adduce any evidence.

6. Having reviewed the evidence and the submissions, the High Court rendered the impugned judgment delivered on 14th March 2019. The Judge identified four issues for determination namely, whether there was a valid contract between the parties; whether there was breach of the contract by either party; whether the appellant is entitled to general damages for breach of contract; and whether the appellant's claim for special damages was proved.

7. As to whether there was a valid contract between the parties, the judge found that the Government of Kenya did invite bids for drilling of boreholes; that the appellant submitted a bid in response which bid was accepted by a letter of acceptance dated 17th November 2005; and that the agreement was formalized through execution of a contract dated 24th November 2005. The Judge concluded that there existed a valid and enforceable contract between their parties.

8. As to whether there was breach of the contract, the Judge found that from the available evidence, the court was satisfied that the appellant proved that it fulfilled its contractual obligations by drilling the boreholes required. The Judge went on to say:

> " ... I am satisfied that there were breaches of contract on the part of the defendant in failing to make payments upon certificates within the specified. And due to the failure to ensure the availability of a site supervisor on the site."

9. Regarding the question whether the appellant is entitled to general damages for breach of contract, the trial Judge expressed that generally, courts do not award general damages for breach of contract, but an exception to the rule is in cases where "the conduct of the defendant is proved to be oppressive, high-handed, outrageous, insolent or vindictive." The Judge concluded that the appellant did not provide "evidence to prove malice vindictiveness or high- handedness in the conduct of the 1st [respondent]". In the result, the claim for general damages was disallowed.

10. As to whether the appellant's claim for special damages claimed in the amount of Kshs.101,939,381.79 was proved, the Judge expressed that special damages must not only be specifically pleaded but must also be strictly proved; that despite the appellant having listed "the alleged losses and damages he incurred due to the 1st [respondent's] default failed to tender any evidence in support thereof; that the appellant merely suggested figures without backing any of those figures "with documentary evidence by way of receipts, invoices etc" and that the appellant merely relied on figures generated by PW2, the inhouse accountant, and no audited accounts were made available to the court to prove the expenses claimed.

11. The Judge however found that the 1st respondent did not prove that any of the works undertaken by the appellant were in any way incomplete or defective, and the appellant was therefore entitled to the retention amount of Kshs. 1,511,500.06 which the court awarded.

12. In its memorandum of appeal, the appellant has faulted the finding by the learned trial judge that: there was no evidence to prove malice, vindictiveness or high handedness on the part of the 1st respondent; that the appellant did not prove its claim for obtaining relevant licenses; that the appellant did not tender adequate proof of financial loss; that the appellant failed to complete works in time; failing to award interest on retention money; finding that the appellant did not have a valid performance guarantee.

13. During the hearing of the appeal before us on 11th February 2025, learned counsel Mr. Wanjohi appeared with Ms. Mary Koko for the appellant while Ms. Carolyne Kanini, learned counsel appeared for the respondents. Counsel orally highlighted their respective written submissions. The appellant filed two sets of written submissions dated 29th October 2020 and 10th July 2024 while counsel for the respondents filed submissions dated 26th September 2024.

14. For the appellant, it was submitted that having fulfilled its contractual obligations under the contract, it is entitled to damages it claimed, and the Learned Judge erred in declining to award the same. In that regard, it was urged that the High Court erred in holding that the appellant failed to complete the work on time; that the Judge was wrong in failing to hold that the appellant was entitled to the amount of Kshs. 1,950,725.10 unlawfully deducted from its payments by the 1st respondent as liquidated damages; that the 1st respondent's actions, or inactions prevented the timely completion of the work; that specifically, delays were caused by the Project Manager who failed to fulfill his duties, including providing supervisory guidance, issuing completion certificates, and addressing community issues; that clear and uncontroverted evidence was presented showing that the Project Manager was never at the drilling sites; that the Appellant performed the functions of the Project Manager to ensure smooth progress throughout the entire contract period; and that the Learned Judge erred in dismissing the appellant's plea for compensation for carrying out those functions.

15. It was submitted further that the appellant is entitled to compensation for performing the duties of the Project Manager, as the appointed Project Manager failed to do so and the Learned Judge erred in failing to award this compensation, despite evidence presented by the Appellant on the costs incurred in undertaking these responsibilities.

16. It was submitted further that the 1st respondent failed to process and pay the payment certificates in a timely manner and the High Court erred therefore in not awarding Kshs. 69,152.71 which according to the appellant was found due after reconciliation; that when payment certificates were submitted, the 1st respondent paid in irregular trenches after deducting the retention money equal to 10% of the payment; and that the appellant is therefore entitled to interest on late payments of Shs. 34,780,183.79.

17. The Appellant contends that the Learned Judge erred in not awarding damages for Reduced Scope of Work; that the scope of work was reduced significantly (by 39.39%), resulting in a substantial loss of expected profit and the appellant is entitled to compensation for this lost profit, calculated at 30% of the value of the reduced scope. It was urged that due to the great reduction in the quantity of work done, the appellant is entitled to 30% profit margin on the contract amount against the tendered contract sum of Shs. 38,869,117.45, making the value of the reduced scope of work Shs. 12,171,162.00 hence 30% margin on the reduced scope of work is Shs. 3,651,348.60.

18. The High Court is also faulted for declining to award the appellant additional costs of Shs. 19,509,828.08 allegedly incurred by the appellant due to the extended and prolonged contract period. It was urged that the additional costs comprise of costs of repairs and maintenance of site vehicles and inspection and road licence costs; additional expenses for maintaining staff on site, additional costs on key personnel involved in the project; additional site expenses in the form of telephone, photocopies, postages; and insurance. It was urged that the High Court erred in disregarding evidence presented by the Appellant in support of its claims.

19. It was urged that it was incumbent upon the court, in keeping with established legal principles on award of damages, to restore the appellant as the injured party to the position it would have been in had the contract been properly performed. Counsel concluded by urging this Court to allow the appeal and grant the appellant the damages it sought as well as the costs of the suit and of this appeal.

20. In opposing the appeal, counsel for the respondents submitted that the appellant failed to meet the legal burden of proof required to substantiate its claims and did not provide sufficient evidence to support various aspects of its case. It was submitted that no evidence was presented to prove either malice, vindictiveness or high-handedness on the part of the respondents as the appellant claimed; that the appellant failed to prove its claims and did not tender adequate proof of the alleged financial loss; that the appellant failed to prove that it obtained the requisite licenses and its claim in that regard was not proved; that contrary to the appellant's contention, it did not complete the works within the stipulated time frame; that the Appellant is not entitled to interest on retention money because the contract winding-up procedure was not followed, and interest does not accrue under Clause 57.1; that there is no contractual basis for interest on late payments, and the Appellant did not provide the contract clause on the basis of which the claim was made; that the Appellant's performance guarantee from CBA Bank was only valid until 17th August 2007, despite the project extending beyond that date and the Appellant failed to ensure a valid guarantee for the entire duration, which they consider a fundamental breach. Counsel concluded by urging that the appeal lacks merit and should be dismissed with costs.

21. We have considered the appeal and the submissions and the authorities cited in keeping with our mandate under Rule 31 of the Court of Appeal Rules. We echo the words of the Court in Abok James Odera T/A A.J Odera & Associates vs. John Patrick Machira T/A Machira & Co. Advocates [2013] KECA 208 (KLR) that:

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re- evaluate, re-assess and reanalyse the extracts on the record and then determine

whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kuston (Kenya) alia that:-

> "On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.""

22. The essence of the appellant's case before the High Court was that the respondents breached the contract through actions that hindered completion, delayed payments, and reduced the scope of work leading to significant financial prejudice for the Appellant. It was on that basis that the appellant sought compensation for losses allegedly incurred as a result which claims included claims for liquidated damages, late payment interest, project management costs, reduced scope damages, and additional expenses. As already noted, the High Court found that the parties entered into a contract for drilling of boreholes which the respondents breached. That is not in issue. What is in issue is whether the Learned Judge erred in concluding that the appellant did not discharge its burden of establishing its claims to the required standard.

23. Beyond the claim for damages for alleged malice, high- handedness and vindictiveness, the reliefs that the appellant sought before the High Court are in the nature of special damages, as the learned trial judge correctly stated. The total claim was for Kshs. 101,939,381.79 as itemized above. The question then is what evidence did the appellant present with respect to each of those heads of claims?

24. The claim labelled a "certified payments "in the amount of Kshs. 1,950,725.10 is in respect of the amount which the appellant asserted was wrongfully withheld by the 1st respondent as liquidated damages following termination of the contract. In declining to award the appellant that claim, the Learned Judge found that the appellant "failed to complete the works on time" and that under the contract, the appellant, as contractor, was liable to pay liquidated damages to the 1st respondent as employer for delayed completion and to deduct the same from payments due to the appellant. It is not in doubt, as the Learned Judge found, that there was a contractual basis for the payment of liquidated damages by the appellant as contractor, in the event of delay in completing the works. Clause 49 of the Conditions of the Contract provided as follows:

> " 49. 1 The Contractor shall pay liquidated damages to the Employer at the rate per day stated in the Contract Data for each day that the Completion Date is later than the intended completion date. The total amount of liquidated damages shall not exceed the amount defined in the Contract Data. The Employer may deduct liquidated damages from payments due to the Contractor. Payment of liquidated damages shall not affect the Contractor's liabilities."

25. Although the appellant maintained that the deduction of the liquidated damages was not justified as there was no delay in completion, the evidence shows the appellant applied for extension of time on several occasions. Examples are appellant's letters dated 10th June 2006 and 2nd February 2007. In the latter letter of 2nd February 2007 to the 1st respondent, the appellant alluded to having "requested an official extension of contract period" which they required till 17th August 2007, but extension appears to have been granted, albeit by the Engineers, GTZ, as opposed to by the 1st respondent as employer up-to 30th April 2007" subject to extension of the performance bond.

26. In its letter to the appellant date 12th April 2007, following an earlier meeting held on 12th April 2007, the Engineers, GTZ informed the appellant that it had recommended to the 1st respondent extension

of the contract to 30th April 2007 adding that "you are instructed to conform to your newly revised programmes of 12th April 07 and complete all works included before 30th April 2007. Failure to do so might attract contractual penalties." In its letter to GTZ dated 20th April 2007, the appellant wrote:

> " As of now drilling work is in progress and come cutoff date (30th April 2007), we will be in a position to report and comment. We are directing all efforts for maximum achievement by 30th April 2007 by which date the contract is due for conclusion as per your written instructions."

27. In its letter to GTZ dated 30th April 2007, the appellant noted that it had been instructed "to halt works come 30th April 2007 whether complete or not". Based on the foregoing the conclusion by the Learned Judge that despite the extension period granted the appellant "still failed to complete the works on time" and was therefore "obligated to pay damages" to the 1st respondent for delayed completion is well supported by the evidence. Consequently, the Learned Judge did not err in declining the prayer for Kshs. 1,950,725.10.

28. Regarding the interest claims, Clause 43.1 of the Conditions of Contract, provided as follows:

> "... the Employer shall pay the contractor the amounts certified by the Project Manager within 28 days of each certificate. If the Employer makes a late payment, the Contractor shall be paid interest on the late payment in the next payment. Interest shall be calculated from the date by which the payment should have been made up to the date when the late payment is made at the prevailing rate of interest for commercial borrowing for each of the currencies in which the payments are made."

29. Clause 42 of the Conditions of Contract required the appellant to submit to the Project Manager, monthly statements of the estimated value of work executed less the cumulative amount certified previously. It was incumbent upon the Project Manager to check the statement and certify the amount payable to the appellant. As the Learned Judge noted, the payment certificates, on which the claims for interest were based, were neither certified by the project manager nor by a person appointed by the 1st respondent in accordance with the terms of the contract. We are therefore unable to fault the Learned Judge for concluding that the appellant failed to prove those claims on a balance of probabilities. As the Judge also noted, the contract is silent on interest on retention monies, and there was therefore no contractual basis to award the same. Nonetheless, the Judge awarded interest at court rates.

30. Regarding the claim by the appellant for performing role of project manager and site supervisor, no contractual basis was established for this claim. We agree with the Learned Judge that the Project Manager was identified with specificity in the contract and no variation was made to that contractual provision. There is no basis for this claim.

31. We turn to the claim for reduced scope of work in the amount of Kshs. 3,651,348.60 and for wrongful withdrawal of Lot 5/Zone E in the amount of Kshs. 2,548,606.43. We will address this alongside the claim for Kshs.19,599,828.08 for alleged loss of earnings on account of extended time on site as there is a co-relation in these claims.

32. In its letter dated 29th January 2007, the 1st respondent informed the appellant that Foundation Engineering Services Limited which had initially been awarded the contract to drill Zone E (North-West Kenya) had failed to carry out the works and that the Ministerial Tender Committee had therefore awarded the tender to the appellant. The appellant accepted to undertake the works for Zone E by its letter dated 2nd February 2007. Thereafter, and as already indicated, the appellant was granted an extension of time until 30th April 2007 to complete the works. It was at the same time cautioned

that failure to do so would attract penalties. Prior thereto, by letters dated 14th March 2007 and 19th March 2007 the appellant had been advised that their performance in respect of the works based on the work plan was unsatisfactory. It was at the same time required to extend the Performance Bond with reminders to that effect sent. It was on account of delays in completing works in Zones A and D, that the appellant was informed of the decision to withdraw the notification of award regarding Zone E. In its said letter to the appellant dated 19th March 2007, GTZ pointed out to the appellant that its performance had been below the expectation. GTZ went on to inform the appellant:

> "We do not foresee the intended completion of Zone E works as per your acceptance letter dated 2/2/2007, and therefore in light of the prevailing circumstances, we have to withdraw the Notification of award against Zone E."

33. In its response dated 21st March 2007, the appellant, while acknowledging "the slow pace of performance and anomalies engulfed in Zone A & D of the contract" protested and stated that it was dismayed by the intention "to link the performance of Zone A & D to that of intended Zone E." Moreover, Minutes of a meeting held between the appellant and GTZ on 8th February 2007 indicate that it was agreed at that meeting that "GTZ/MoH to prepare contract and advance payment formalities for Zone E which has to be completed latest by the end of June 2007." There is no evidence that such contract was indeed concluded regarding Zone E and neither is there evidence of any mobilization in that regard absent which the appellant's claim "for reduced scope of work" in relation to Zone E appears to lack foundation. The Learned Judge cannot therefore be faulted for declining to award the appellant the amount it claimed.

34. Apart from the acknowledgment by the appellant in its letter dated 21st March 2007 of its "slow pace of performance" and concerns expressed by the 1st respondent over the appellant's performance and the delays experienced leading to delays and the ultimate termination of the contract, the claim for Kshs.19,599,828.08 for alleged loss of earnings was not proved beyond presentation of what appears to have been a desk top computation and calculations by the appellant's accountant of projections.

35. All in all, having reviewed the record, we are unable to fault the Learned Judge for concluding, as she did, that other than the claim for retention monies that trial court awarded, the other claims for special damages were not established to the required standard.

36. The appeal fails and is hereby dismissed. Given the public nature of the works the appellant was executing, we order that each party shall bear its own costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MAY 2025.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR