



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, GATEMBU & MURGOR, J.J.A)

CIVIL APPEAL NO. 283 OF 2011

BETWEEN

KISII COUNTY GOVERNMENT..... APPELLANT

AND

MASOSA CONSTRUCTION COMPANY LTD RESPONDENT

***(Appeal from the Judgment and Decree of the High Court of Kenya at Kisii (Hon. O. Muchelule, J.)
dated 23rd March, 2010***

in

HCCC NO. 67 OF 2007)

JUDGMENT OF THE COURT

1. Kisii County Government having been substituted as the appellant in place of The Municipal Council of Kisii by an order of this Court given on 25th February 2015 is aggrieved by the Judgment of the High Court at Kisii (A. O. Muchelule J.) dated and delivered on 23rd March 2010 allowing a claim by Masosa Construction Company Limited, (hereafter referred to alternatively as the respondent or the contractor) for Kshs.15,556,986.70 arising from two contracts for widening, grading, gravelling and culverting of various selected roads within the then Kisii Municipality. The main complaints against the Judgment are that the contractor did not prove its case on a balance of probabilities; that the claim was not supported by any evidence; and that the learned Judge should have upheld the appellant's plea that the respondent's claim was time barred and should have dismissed it with costs on that ground.

Background

2. On 6th June 2007, the respondent filed suit in the High Court at Kisii against the Kisii Municipal Council, (the Council), a local authority under the Local Government Act, Chapter 265 of the Laws of Kenya now repealed by virtue of Section 134 of the County Governments Act, 2012, asserting that it was awarded two contracts by the Council in the year 2000 for purposes of grading, widening and graveling selected high priority roads within the then Kisii Municipality; that the contracts were duly performed save for the second contract that was 'abandoned' after the contractor had mobilized. The contractor claimed that the Council remained indebted to it under the first contract for a balance of Kshs. 483,891.20;

that in respect of the second contract, a commitment fee that ought to have been paid amounting to Kshs. 663,298.50 was not paid; and that following “*the termination and or abatement of the second contract*” its contractual claim for Kshs.14,409,797.00 was certified on or about 26th November 2002. The contractor therefore claimed Kshs. 15,556,986.70 being the total of the three figures above mentioned contending that the Council had admitted that claim.

3. In its defence, the Council denied the claim in its entirety. It asserted that having entered into an agreement with the contractor for widening, gravelling and culverting six selected roads within Kisii Municipality on 31st August 2000, and having paid 10% of the contract sum to the contractor as mobilization fees, the contractor started work “*but failed to complete any section or part thereof*” that would have entitled the contractor to receive any payment under the contract; that the contractor did not comply with the contractual terms and conditions and should have paid the Council liquidated damages; that the provisions in the contract were not complied with in that, no payment certificates were issued in accordance with the contract. The Council also pleaded that the suit did not disclose any reasonable cause of action and that the same was “*statutory time barred*” intimating further then it would raise a preliminary objection to the suit.

4. In July 2007, the contractor moved the court to strike out the Council’s defence on the grounds that the same was a sham as the Council had continuously acknowledged or admitted the debt. The Council opposed that application and in a ruling delivered by Musinga J, (as he then was) on 30th May, 2008, the court declined to strike out the defence as it was satisfied that the same raised matters that required to be canvassed in a full trial.

5. The task of hearing the case fell upon A. O. Muchelule J. Maxwell Okemwa Mogere, a civil engineer and the managing director of the respondent testified on its behalf. The Council’s acting Municipal Engineer Mr. Prescott Mokaya Nyakango and Mr. Jim Maina Chira, the Town Clerk to the Council at the time, testified on behalf of the Council. After reviewing the evidence, the learned Judge concluded that officers of the Council had admitted the contractor’s debt and that “*they admitted the claim and that bound the defendant.*”

6. As regards the contention by the Council that the claim was statute barred, the Judge was not impressed. It is necessary to reproduce at some length what the learned Judge stated on this question:

“There was the issue by the Defendant that the suit was statute-barred by limitation as under **section 3(2) of the Public Authorities Limitation Act, Cap. 39**, the claim should have been filed within three years from the date on which the cause of action arose. Mr. Bosire for the Defendant submitted that if the [sic] was acknowledged on 26th November, 2002 as alleged and the suit was filed on 6th June, 2007, the allowed three years had elapsed. The evidence of MOGERE and that of DW1 and DW2 was that the Town Engineer and Town Clerk would certify and approve a certificate and then the later would send it to the Permanent Secretary Ministry of Local Government to pay. MOGERE told court that when the certificate of 26th November, 2002 (Exhibit 5) was sent he expected payment and that he variously he [sic] travelled to Nairobi with the Town Clerk to chase the payment and that it was not until 18th August, 2004 (Exhibit 7) when the Permanent Secretary wrote to the Town Clerk, with copy to the Plaintiff, saying he was not going to pay and called the contract a “serious financial mismanagement on the part of the council”. It is following that letter that the Plaintiff wrote a demand letter to the Defendant. On basis of that undisputed evidence from the Plaintiff, I agree with Mr. Oguttu that the right to sue accrued on 18th August 2004 when the Permanent Secretary said he was not going to pay. Up to that time the Plaintiff was under the impression payment was forthcoming as the debt had been acknowledged by the Defendant. (See **SIRE-VS-THABITI FINANCE CO. LTD [2002] IEA 279**). [Emphasis added]

7. The Judge did not stop there. He went on to say that:

“ Even if it were to be accepted that the last time the Defendant acknowledged the debt

was on 26th November, 2002, the Plaintiff tendered evidence contained in letter (Exhibit 13) dated 29th September, 2008 of their Town Clerk KENNEDY OTWORI written to the Ministry acknowledging they owed the Plaintiff Kshs.15,556,988/70 and were asking for funds to settle it. Any acknowledgement not only extends the limitation period but also revives an otherwise statute-barred action falling **within section 23 (3) of the Limitation of Actions Act (Cap.22)**. If the limitation period ended three years after 26th November, 2002 it was extended by this acknowledgement.

8. As already indicated, the appellant is dissatisfied with those decisions hence the present appeal.

The appeal and submissions by counsel

9. During the hearing of the appeal before us, Mr. Bosire Gichana learned counsel for the appellant relied on the grounds set out in the memorandum of appeal and submitted that the contractor's claim was statute barred; that the cause of action arose in September 2002 when the contractor knew of the alleged default of payment by the Council; that the suit was filed in June 2007 outside the time limited under section 3(2) of the Public Authorities Limitations Act Cap 39; that the Judge's finding that the Council acknowledged the debt, within the meaning of section 23 of the Limitation of Actions Act Cap 22, based on a letter dated 18th August 2004 was in error as that letter was not the Council's letter but was written by the Permanent Secretary, Ministry of Local Government; that in any event section 23 of the Limitation of Actions Act cap 22 does not apply to public authorities as it is not one of the provisions imported under section 6 of the Public Authorities Limitations Act.

10. Referring to a letter dated 26th November 2002 addressed to the Permanent Secretary, Ministry of Local Government by the Town Clerk stating that "*monies due to the contractor*" was Kshs.15,556,986.70, Mr. Gichana argued that that letter could not be relied upon as an acknowledgment of the debt as it was neither on the Council's letterhead and was authored by one Eric Simiyu after he had already been transferred to another station.

11. Regarding the substance of the claim, Mr. Gichana submitted that the terms and conditions of the contract were set out in the contract documents consisting of the tender documents, the FIDIC Conditions of Contract, 4th edition 1987; that under clause 48.3 of those Conditions the contractor should have demonstrated that it completed works under the contract by producing a "*Taking-Over Certificate*" issued by the Engineer to show substantial and satisfactory completion of the works under the contract; that no evidence was presented before the trial court demonstrating compliance with clause 60 of those Conditions which required the contractor to submit to the Engineer on a monthly basis valuations of work done for certification to facilitate issuance of payment certificates on the basis of which payments would then be made; that the "*Final certificate of payment for settling all outstanding balances and claims*" purportedly signed by the Town Engineer and Town Clerk on 26th November 2002 and purportedly certifying an amount of Kshs. 15,556,986.70 did not accord with the terms of the contract; and was not on the Council's letterhead and should in any event have been issued by the Engineer alone.

12. Opposing the appeal, Mr. J. M. Oguttu learned counsel for the respondent submitted that the suit filed by the respondent on 6th June 2007 was not time barred; that the debt giving rise to the suit accrued on 26th November 2002 when the final certificate of payment signed by the Town Engineer, the project manager and the Town Clerk of the Council was issued; that payments under the contracts entered into between the parties was to be effected by the Ministry of Local Government which was therefore the client; that based on the testimony of the Council's witness Prescott Mokaya Nyakango the acting municipality engineer, who testified before the lower court, the contracts were to be paid for by the Ministry; that it only became clear to the respondent on 18th August 2004 when the Permanent Secretary wrote a letter to the Town Clerk of the appellant that payment was not forthcoming in settlement of its claim; that the cause of action could only commence on that date and the respondent's cause of action therefore arose on 18th August 2004. Prior to that date, counsel argued, the respondent could not claim and it therefore had until 17th August 2007 to file suit.

13. Mr. Oguttu further submitted that in light of acknowledgement of the debt by the appellant on several occasions, the plea of limitation was not maintainable. Counsel referred us to minutes of a meeting of the Finance Staff and General Purpose Committee of the Council held on 18th July 2007; its list of creditors as at 30th June 2007 in which the respondent's debt of Kshs. 15,556,986.70 was referred to; a letter dated 29th September 2008 addressed to the Director, Urban Development Department by a Mr. Kennedy Otworu the Town Clerk of the Council also acknowledging the debt and argued that the actions of the Town Clerk were binding on the Council. Mr Oguttu went on to say that in view of the certification of the debt by the Council and the acknowledgement of debt, it is immaterial whether work under the contracts was actually carried out; that the contracts had already been terminated due to non- payment by the time the respondent quantified its claim of Kshs.39, 520,324.00 that was then adjusted by the appellant in accordance with the appellant's internal memo dated 25th October 2002 on the basis of which the final certificate for Kshs. 15,556,986.70 was issued.

Determination

14. We have considered the appeal and the submissions by learned counsel. The critical question in this appeal is whether the learned Judge erred in rejecting the plea by the Council that the contractor's claim was statute barred. In that regard, and as this is a first appeal, we have the mandate to review the evidence and to draw our own conclusions. [See **Selle vs. Associated Motor Boat Co Ltd [1968] EA 123.**]

15. The evidence led by Maxwell Okemwa Mogere, a civil engineer and the managing director on behalf of the contractor was that the respondent was on 5th April 2000 and on 15th August 2002 awarded contracts to undertake road works in Kisii Municipality. Under the first contract, works were completed and payments substantially made. A balance of Kshs. 483,891.20 however remained unpaid. Under the second contract, funding for the project encountered problems and the contract was "abandoned". An amount of Kshs. 663,298.50 that had been certified as at 2nd October 2002 was not paid. The respondent thereafter quantified its losses and submitted a total claim for Kshs. 39,520,324.00 to the appellant made as follows;

"CLAIM SUMMARY

- 1. Preliminaries Shs. 5,275,209.50
- 2. Loss of Anticipated Profit Shs. 10,525,984.00
- 3. Idle Machinery & Equipment Shs. 19,976,000.00
- 4. Interest on Delayed Payments Shs. 1,507,491.50
- 5. Retention Monies withheld Shs. 1,860,482.80
- 6. Interest on Retention Monies Shs. 375,156.50

Claim Total

39,520,324.00"

16. That claim was scrutinized by the Engineer G. K. Mungania of the Council who recommended a reduced amount of Kshs. 14,409,797.00 as due to the contractor made up as follows;-

"SUMMARY OF RECOMMENDED REDUCED CLAIMS DUE TO THE CONTRACTOR

- 1. Preliminaries Kshs. 98,947.45

2. Loss of anticipated profit Kshs. 7,468,431.90

3. Idle Machinery & Equipment Kshs. 3,168,000.00

4. Interest on delayed payments Kshs. 1,507,491.50

5. Retention monies to be released Shs. 1,860,482.80

6. Interest on Retention money

(first contract only) Kshs. 306,442.95

TOTAL

Kshs.14,409,797.00”

17. A final certificate dated 26th November 2002 was then issued for a total sum of Kshs. 15,556,986.70 made up of the recommended and reduced amount of Kshs. 14,409,797.00; and the figures of Kshs. 483,891.20 and Kshs. 663,298.50 already referred to. The witness stated that the appellant kept “*acknowledging the debt*” with the latest such acknowledgment being by a letter dated 29th September 2008.

18. Prescott Mokaya Nyakango acting Municipality Engineer who was dealing with construction projects in the Engineers Department of the Council testified that he joined the appellant in June 2001; he stated that under the first contract, “*work was done, certificates prepared and forwarded to Nairobi for payment*”; that under the second contract “*no works were done*” and “*no certificates of payment were issued*” and “*no completion certificates were given*” and that there was no record that the second contract was performed. He accordingly described the respondent’s claim as “*strange*” stating that, the final certificate issued should have been on the Council’s letterhead and such certificates ordinarily bear only the signature of the engineer unlike here, where it purports to bear the signature of the Engineer and that of the Town Clerk, who when he purported to sign “*had been transferred to another station.*”

19. Jim Maina Chira who joined the Council as Town Clerk in June 2009 stated that “*from the records no work was done*” under the contract; the final certificate issued purportedly certifying payment due to the respondent was signed by the Town Clerk when on transfer; that the inclusion of the respondent’s claim in its list of creditors was not an admission of the debt and that “*for budgeting process it is prudent to include any debt for provisional purposes*” and that the claim is not admitted.

20. That then was the state of the evidence that was before the trial court.

21. In his internal memo dated 25th October 2002, by which the Town Engineer Eng. G. K. Mungania communicated his recommendation to the Town Clerk for the adjustment of the respondents claim from Kshs. 39,520,324.00 to Kshs.14,409,797.00, Eng. Mungania referred to “*the claim...forwarded by Masosa Construction Company for breach of contract under letter...dated 4th October 2002.*”

22. It follows, therefore that by the 4th October 2002, the respondent considered that it had an accrued right to claim against the appellant under the contracts. A “*final certificate of payment for settling all outstanding balances and claims*” was then issued on 26th November 2002 certifying the total amount to the respondent as Kshs. 15,556,986.70. Assuming for a moment that that certificate accorded with the contractual terms between the parties, we take the view that the respondent’s cause of action would, on the basis of that certificate, have accrued and become exercisable as at 26th November 2002.

23. The respondent pleaded in its plaint, and it is common ground, that Kisii Municipal Council was a

local authority under the Local Government Act, chapter 265 of the Laws of Kenya. It was therefore a public authority, under Section 2 of the Public Authorities Limitation Act, chapter 39 of the Laws of Kenya. Section 3(2) of that Act provided that:

“No proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date on which the cause of action accrued.”

24. Taking the 26th November 2002 as the date when the cause of action accrued, the respondent’s claim should have, at the very latest, been filed by 25th November 2005. It was not filed until 6th June 2007.

25. The learned Judge was however of the view, and held that *“the right to sue accrued on 18th August 2004 when the Permanent Secretary said he was not going to pay.”* The letter from the Permanent Secretary dated 18th August, 2004 on which the Judge based his holding requires full reproduction. It was addressed to the Town Clerk of Kisii Municipal Council and was in the following terms:

“The Town Clerk

Kisii Municipal Council

P. O. Box 406

KISII.

RE: GRADING, WIDENING AND GRAVELLING OF SELECTED ROADS IN KISII TOWN

I wish to refer to the above Contract which was awarded to Masosa Construction by Kisii Municipal Council.

The position of the Ministry regarding this contract is still as per the letter Ref. No. UDD/5-14/(34) of 11th December 2002 which was addressed to you.

The Ministry of Local Government was not party to the Contract between Kisii Municipal Council and Masosa Construction Ltd.

The award of the Contract was a serious financial mismanagement on the part of the Council and the Council should handle this matter to its logical conclusion.

You are therefore advised to resolve the arising dispute of payment with the contractor without involving this Ministry.

Z. O. Ongongo, EBS

PERMANENT SECRETARY

cc: Masosa Contraction Ltd

P. O. Box 3067

KISII.”

26. As is immediately discernible from that letter, it reiterated the position of the Ministry regarding the contract as per an earlier letter that was not produced dated 11th December 2002. Assuming the letter of 11th December 2002 asserted, as the Judge found that the Ministry was not *going to pay* then that communication, albeit to the Council was made as early as 11th December 2002. If the right to sue was to accrue from the date when the ministry said it was not going to pay, then that would have been in

December 2002. The result would be that by the time the suit was filed on 6th June 2007, the three year time limit had already passed. We think, therefore that the learned Judge fell into error in holding as he did firstly that, the right to sue accrued on 18th August 2004, and secondly that, it accrued when the Permanent secretary said he was not going to pay. The right to sue could not be dependant upon or be hinged on the admission or denial of the claim by the Permanent Secretary or for that matter the Council.

27. On the question whether the purported acknowledgment of the debt by the Council extended the limitation period or revived an otherwise statute barred claim, the learned Judge based his holding on Section 23 of the Limitation of Actions Act which deals with fresh accrued of right of action on acknowledgment or part payment. Section 23(3) of that Act provides;

“Where a right of action has accrued to recover a debt or other liquidated pecuniary claim, or a claim to movable property of a deceased person, and the person liable or accountable therefore acknowledges the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgement or the last payment; Provided that a payment of a part of the rent or interest due at any time does not extend the period for claiming the remainder then due, but a payment of interest is treated as a payment in respect of the principal debt.”

The question therefore is whether that provision of the Limitation of Actions Act applies to local authorities.

28. The extent to which the provisions of the Limitation of Actions Act, Cap 22 apply to the Government and to Local Authorities is spelt out under Section 6 of the Public Authorities Limitation Act, Chapter 39. Section 6 provides:

“6. Notwithstanding the provisions of Section 31 of the Limitation of Actions Act, Section 22 of that Act shall not apply in respect of the provisions of this Act: and in Section 27 of the Limitation of Actions Act the reference to Section 4 (2) of that Act shall be read and construed as a reference to Section 3 (1) of this Act; but subject thereto and notwithstanding Section 42 of the Limitation of Action Act, Part III of that Act shall apply to this Act.”

29. Part III of the Limitation of Actions Act cap 22, as qualified by Section 6 of the Public Authorities Limitation Act, chapter 39 therefore applies to local authorities. Section 23 of the Limitation of Actions Act cap 22 which we have reproduced above is under Part III of that Act.

30. Under that provision, where the “*person liable or accountable*” acknowledges the claim, the right accrues on the date of acknowledgment. Although the respondent had relied on other letters as acknowledgments of debt by the Council, the letter on which the Judge based his finding that the debt was acknowledged is a letter dated 29th September 2008 addressed to the Director, Urban Development Department Nairobi by the Town Clerk, Municipal Council of Kisii stating as follows:

“Dear Sir,

RE: PENDING PAYMENTS FOR MASOSA CONSTRUCTION LTD

As per the letter of Town Clerk dated 26/11/2002 No. KMC/GGC/VS/ROADS/11/14/17 which shows that the council did receive funds for the year 2002. The contractor had raised a claim of Kshs.39,520,324 but the Town Engineer Albert G. Mungania valued the claim to Kshs.Kshs.14,409,797 with the other balances for works done due to contractor being Kshs.1,147,189.70. Therefore making a total due to M/S Masosa Construction Ltd Kshs.15,556,986.70 as per the approved certificate of 26th November, 2002.

Consequently the council cannot raise funds to pay the contractor since the payments were being done by the Ministry of Local government, who were the fuel

levy agents for councils, and currently the matter is now in court.

Now we request through your office you liaise with the pending bills committee and thereby assist us to settle this matter before the court can deliver its ruling.

[Emphasis added]

Yours faithfully

Kennedy Otworu

Town Clerk

31. That letter, written during the pendency of the proceedings in the lower court, undoubtedly emanated from the Council being the “*person liable or accountable*” for the debt within the meaning of Section 23 of the Limitation of Actions Act Cap 22. It acknowledges the respondent’s debt of Kshs. 15,556,986.70. The learned Judge was therefore right in taking the view that the respondent’s claim, which was otherwise statute barred, was revived by dint of section 23 of the Limitation of Actions Act cap 22.

32. Finally, there is the complaint by the council that the contractor did not prove that it undertook or it completed works under the contracts. In view of the acknowledgement of debt and in the absence of allegations of fraud or other grounds for vitiating the claim, it was unnecessary to prove or establish the claim beyond that admission of the debt.

33. The result is that the appeal fails. It is dismissed with costs to the Respondents.

Dated and delivered at Kisumu

This 25th day of November, 2015

D. K. MARAGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

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DEPUTY REGISTRAR