Sifatronix Limited v Tumaz and Tumaz Limited & another (Civil Suit E216 of 2019) [2025] KEHC 1021 (KLR) (Commercial and Tax) (27 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1021 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL SUIT E216 OF 2019

FG MUGAMBI, J

FEBRUARY 27, 2025

BETWEEN

SIFATRONIX LIMITED ..... PLAINTIFF

AND

TUMAZ AND TUMAZ LIMITED ..... 1ST DEFENDANT

JULIUS MWALE ..... 2ND DEFENDANT

JUDGMENT

1. By a plaint dated 8th July 2019, the plaintiff ("Sifatronix") filed this suit against the defendants ("Tumaz" and "Julius") seeking KShs. 30,686,336/= and interest at a monthly rate of 4% calculated from February 2019. Sifatronix claims that this amount is for services rendered and goods supplied and delivered on various dates at the request of Tumaz and Julius for the development of of Mwale Medical and Technology City ("the development").

2. Sifatronix states that in an attempt to settle the outstanding debt, the defendants issued it with posted-dated cheques for various amounts, a number of which were, on presentation for payment, returned to due to insufficient funds.

3. In response to the suit, the defendants filed an amended statement of defence and counterclaim dated 16th August 2019. They assert that the alleged contract between Sifatronix and the defendants was actually between the defendants and their contracted supplier, Epic Agency Limited, which was engaged to provide murram, fulfilled its obligations, and was duly paid.

4. The defendants argue that no contract existed between them and Sifatronix for the supply of murram and that the only agreement between Sifatronix and Tumaz was for the construction of a six-kilometer road within the development. They further claim that Sifatronix approached Tumaz requesting

security for a Local Purchase Order (LPO) it had been awarded for tarmacking the road. It was under this arrangement that Tumaz issued post-dated cheques to Sifatronix, with the understanding that the cheques would only be presented for payment upon confirmation of work completed.

5. The defendants further assert that Sifatronix requested Tumaz to provide financing under the LPO agreement, pursuant to which Tumaz made various payments totaling KShs. 2,596,000/=. However, they claim that Sifatronix breached the agreement by failing to commence the road tarmacking works. As a result, the defendants argue that they were justified in not honoring the post-dated cheques and contend that the suit does not disclose any cause of action against them.

6. In their counterclaim, the defendants seek reimbursement of the KShs. 2,596,000/=, which they claim was paid as a deposit for the road tarmacking works, or alternatively, an order of specific performance compelling Sifatronix to complete the tarmacking of the six-kilometer road.

7. When the matter was set down for hearing, Sifatronix presented its director, Amon Robert Okumu as its witness (PW 1). He relied on his witness statement dated 8th July 2019 and produced Sifatronix's List and Bundle of Documents dated 8th July 2019 (PExhibit 1) and Supplementary List and Bundle of Documents dated 20th September 2019 (PExhibit 2).

8. The defendants' counsel informed the court that they were unable to procure their witness. As a result, they closed their case and defense without calling any witnesses or presenting any evidence. The parties were then directed to file written submissions, which are now on record. I will refer to these submissions, along with the evidence presented, in my analysis and determination below.

Analysis and Determination

9. It is trite law that the standard of proof in civil cases is on a balance of probability. Further, that the burden of proof is on the party alleging the existence of a fact which he wants 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".

10. In Miller v Minister of Pensions 1947 ALL E.R 372, Lord Denning aptly summarized 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."

11. 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.' As stated, the defendants filed a statement of defence and counterclaim but they did

not call any witness or produce any evidence. This means that Sifatronix's case remains unchallenged (See Avtar Singh Bahra & Amarjit Kaur Bahra v Raju Govindji Ganatra T/A Sweetbite Manufacturers [2001] KEHC 375 (KLR)] and Motex Knitwear Limited v Gopitex Knitwear Mills Limited [2009] KEHC 4017 (KLR)].

12. Even then, Sifatronix still has a duty to prove its case on a balance of probabilities as is required by law. This was held by the Court of Appeal in Karugi & another v Kabiya & 3 Others [1983] KECA 38 (KLR) where it was stated that,

> " The burden was always on the plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof".

13. Likewise, failure by a defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard hence in Gichinga Kibutha v Caroline Nduku [2018] KEELC 3981 (KLR) the Court held that,

> " It is not automatic that instances where the evidence is not controverted the claimants shall have his way in Court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest."

14. With the above in mind, I will now proceed to determine the dispute which from the parties' submissions is whether Sifatronix is entitled to the Kshs. 30,686,336/= plus interest that it claims from the defendants. From the evidence produced by Sifatronix, it is evident and uncontroverted that Tumaz issued it with various LPOs for the supply of murram. The murram is said to have been delivered and received by Tumaz as evidenced by the Delivery Notes and thereafter Sifatronix issued Tumaz with various invoices, the latest one being that of 19th February 2019 for an amount of Kshs. 30,686,336/=. I agree with Sifatronix's submission that these documents constitute sufficient evidence of a contractual relationship between Sifatronix and Tumaz.

15. As to whether this amount was paid, I have reviewed the email and WhatsApp correspondences provided. It is evident that Tumaz, through its agents and Julius, as the promoter and developer of the Development, has repeatedly made promises to Sifatronix regarding the payments. Despite numerous assurances, no payments have been made, and the issued cheques have bounced.

16. I note that Sifatronix seeks to recover the sum of Kshs. 30,686,336/=. According to the LPOs, the total contractual sum was Kshs. 17,128,300/=. This amount is acknowledged by Sifatronix in its letter dated 30th March 2017. The increase to Kshs. 30,686,336/= appears to be due to the 4% monthly interest that Sifatronix included in its invoices to Tumaz. However, after reviewing the LPOs and contractual documents, I do not find any clause where the parties agreed that Sifatronix could charge interest at a monthly rate of 4% on unpaid invoices. The general rule is that a party cannot impose interest unless it is expressly provided for in the contract or was agreed upon at the time the agreement was made. (see Ramji Ratma & Company Limited v Attorney General [2020] KEHC 10061 (KLR)]

17. The application of the 4% interest on the unpaid invoices was a unilateral term introduced by Sifatronix, effectively altering the parties' original agreement. It is important to note that for any enforceable contract to exist, there must be a meeting of the minds, where an offer is made, accepted, and consideration is provided. This principle also applies to contract variations—a party cannot unilaterally modify a contract without the other party's acceptance and corresponding consideration for the variation.

18. The legal position on contract variation was clearly articulated by Gicheru JA., in Kenya Breweries Limited v Kiambu General Transport Agency Limited [2000] KECA 417 (KLR) where the court stated:

> "A variation of an existing contract involves an alteration as a matter of contract of the contractual relations between the parties; hence the agreement for variation must itself possess the characteristics of a valid contract. To effect a variation therefore, the parties must be ad idem in the same sense as for the formation of a contract and the agreement for the variation must be supported by consideration. If the agreement for the variation is mere nudum pactum it would give no cause of action for breach particularly if its effect was to give a voluntary indulgence to the other party to the agreement..."

19. I therefore find that the amount owed to Sifatronix for the supply of murram, as per the agreed LPOs, is Kshs. 17,128,300/= not Kshs. 30,686,336/=, which includes an interest charge that was not agreed upon by the parties. Sifatronix's suit therefore succeeds to this extent, but its claim for interest at 4% per month lacks a legal basis and is denied. However, I find that Sifatronix is entitled to simple interest at court rates as compensation for the delayed payments.

Disposition

20. Accordingly,

    i. Judgment is hereby entered for the plaintiff against the defendants for the sum of Kshs. 17,128,300/=;

    ii. The plaintiff is awarded interest on the sum above at court rates from the date of filing suit until payment in full

    iii. The defendants' counterclaim dated 16th August 2019 is dismissed

    iv. The plaintiff is awarded costs of the suit and the counterclaim.

SIGNED IN NAIROBI

F. MUGAMBI

JUDGE

DATED AND DELIVERED IN NAIROBI THIS 27th DAY OF FEBRUARY 2025.

A. VISRAM

JUDGE