



Sanitam Services (EA) Limited v Kenya Pipeline Company Limited (Civil Appeal E809 of 2021) [2024] KEHC 267 (KLR) (Civ) (25 January 2024) (Judgment)

Neutral citation: [2024] KEHC 267 (KLR)

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

**CIVIL
CIVIL APPEAL E809 OF 2021**

**JN MULWA, J
JANUARY 25, 2024**

BETWEEN

SANITAM SERVICES (EA) LIMITED APPELLANT

AND

KENYA PIPELINE COMPANY LIMITED RESPONDENT

JUDGMENT

1. This Appeal arose from the judgment of the trial court delivered on 28/02/2020 in CMCC No. 6289 of 2018 wherein the Appellant's case was dismissed for want of proof to the required standards in a Civil Suit, upon a balance of probabilities.
2. The Memorandum of Appeal raises numerous grounds which may be summarized into four thus: -
 - a. The learned trial Magistrate in law by a finding that the contract between the Appellant and the Respondent executed on 1/10/2010 was validly terminated on 31/10/2023.
 - b. The learned trial Magistrate erred in law and fact by not appreciating that the contract between the Appellant and the Respondent commenced pursuant to the successful tender of March 2013 and not the contract of 1/10/2010 and therefore arrived at an erroneous judgment.
 - c. The learned trial Magistrate erred in law and fact in finding that there existed no valid contract between the Appellant and the Respondent.
 - d. The learned trial Magistrate erred in law and fact in failing to award to the Appellant general damages for breach of contract.



3. The Appellant seeks that the appeal be allowed by setting aside the trial court's judgment, and thereafter judgment be entered in favour of the Appellant as prayed in the Amended plaint dated 28/09/2016.
4. The Appeal was disposed of by way of written submissions that the court has considered.

Appellant's Case And Submissions.

5. By the submissions dated 14/7/2022 the Appellant states that the contract for provision of services between the parties entered into on 1/10/2010 provided that the same could be terminated by either party giving the other a quarter's notice. However, in March, 2013 the Respondent floated a tender for supply of patented AP 773 sanitary bins with the periods of contract to run for uninterrupted two years. Further it is the Appellant's case that the earlier contract of 1/10/2010 was extended for three months to lapse on 31/10/2013.
6. The Appellant urges that in the intervening period pending the finalization of the tender modalities, it was issued with LPOs with reference to the tender number of the 31/10/2013 tender, and therefore in its understanding, the said tender floated as SU/QT/001N/2013 would be for two years; and that by dint of the respondents actions, the parties therein were deemed to have entered into a binding contract; upon which the appellant proceeded with performance under the contract, engaged personnel and technical training to ensure they performed as expected under the contract and cited several authorities, among them in support; *Stancon Sacco Society Ltd v Alliance One Tobacco Ltd* [2018] *Ali Abdi Mohamed v Kenya Shell & Co. Ltd* [2017] eKLR; *Lucy Mwihaki Mwietiri v Sylvanus Ngaira Mukotsi* [2018] eKLR.

Respondent's Case And Submissions.

7. While admitting existence of the 1/10/2010 contract and its terms, and in particular that it was a one-year contract, and that it could be terminated by a notice of quarter notice, they submit that this contract expired on 31/08/2022.
8. As to the March, 2013 tender it is submitted that while the tender process was ongoing it issued to the Appellant an LPO for provision of the sanitary services for a period of four (4) months from July to October, 2013.

It is a further submission that the Appellant was not awarded the 30/10/2013 tender, and therefore its first contract expired after the four months on the 31/10/2013.
9. The Respondent therefore agrees with the trial Magistrate that the contract dated 1/10/2010 was properly terminated on 31/10/2013 and therefore, there could be no breach of a contract that was not awarded to the Appellant.

Issues For Determination

10.
 - (a) Whether there existed a legally binding contract for provision of services under tender no. SU/QT/001N/20B dated March, 2013 between the Appellant and the Respondent.
 - (b) If the answer to (a) above, is in the affirmative, was there breach of the said contract by the Respondent so as to attract damages for breach of the said contract
 - (c) Who bears costs of the Appeal.



Analysis And Determination.

11. Three things are not in dispute in my view: -
 1. That the contract of 1/10/2013 which was for a one-year period expired without issues on the 1/10/2014.
 2. That the Respondent floated a Tender No. SU/QT/OOIN/2013 in November 2013, for a one-year period upto October, 2014 that as the tendering process was ongoing, the Respondent issue an LPO to the Appellant for supply of the same services under the contract that had expired for a (3) (three) month period, upto October, 2013.
 3. That by a letter dated 30/10/2013, the Respondent notified the Appellant of expiry of the extended contract, that it expires with effect 31/10/2013, and advised it to collect its bins from its premises, as well as a request to forward any unpaid invoices for settlement.
12. Upon the above material facts, this Court as a first Appellate Court is duty bound to re-analyze and re-evaluate the totality of evidence tendered before the trial court and come up with its own findings and conclusion as ably stated in several superior courts decisions among them *Abok James Odera t/a A.J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR; *Gitobu Imanyara & 2 Other v AG* [2016] eKLR.
13. I have perused the Appellants evidence adduced by one Kamau Ngang'a (PW1) before the trial court, as well as his witness written statement that he adopted as his evidence in chief. He is a director of the Appellant company. I fully agree with the trial Magistrate in her judgment that there was no evidence tendered that the Appellant was awarded the tender of March, 2013, and indeed that the Appellant's name did not appear among the seventeen companies that tendered, leave alone winning the tender.
14. I further agree that the tender the Appellant was awarded expired on 30/10/2013, so by the time the second tender was awarded, there existed no valid contract between the Appellant and the Defendant, the Appellant having not been prequalified. In my view therefore in the period before the tender process was finalized there was a short contract of four months that was extended to the Appellant, and that too expired seamlessly.
15. In the case *Stancom Sacco Society Ltd v Alliance one Tobacco ltd* [2018] eKLR, the court observed that:

“To create a contract, there must be a common intention of the parties to enter into legal obligations, mutually communicated expressly or impliedly-----“
16. The court of appeal in *Ali Abdi Mohamed v Kenya Shell* (*supra*) further stated

“It therefore follows that a contract can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded---“
17. The Appellant's submissions that the Respondents actions by issuing LPO's to the Appellant while the tender process was ongoing constituted an award of the tender cannot be sound submission at all, relying on the above two decisions. I find so because, there is clear documentary evidence by the Respondent that the extension to provide the sanitary services was only for three months while the tender process was ongoing. This was in writing and no terms were agreed upon save that the rates were to be pegged on the tender.
18. Additionally, though the appellant seems to have applied for the tender, it was not prequalified, and therefore to talk of the tender having been granted to it is but a wishful thinking. In different



circumstances, it is true that a contract can exist where it is inferred or implied by conduct of the parties as well stated in *Ali Abdi Mohamed s. Kenya Shell & Co. Ltd (supra)*

19. Considering the conduct of the Appellant and the Respondent, it is evident that every step in their business transactions was well documented.

In the disputed tender, the Appellant did not produce any document from which it could be implied that a contract had been concluded by and between the parties.

20. By the extension of period of provision of services by the Respondent to the Appellant, it was clear that it was time bound, for three months pending conclusion of tendering process. That in my opinion was the intention as they awaited to conclude the process and award binding contract.

As ably stated in the Stanco Sacco Society Ltd (*supra*) there must be a common intention of the parties to enter into legal obligations.

21. In the above scenario, there lacks any or probable intention by the Respondent to create any legal obligations during the period as evidently clear that the Appellant's short term contract for three months was terminated and indeed nothing turned out on this as the letter of notification of expiry of the three months dated 30/10/2013 was but, a reminder, in my view that the extended period had come to an end.

22. In *Jackson Kaio Kivuwa v Pennina Wanjiru Muchene* [2019] eKLR, the court reiterated the duty of an Appellate Court and having done so, I find no fault in the trial magistrate's judgment that may necessitate this court to have doubts on its findings and conclusion.

23. Upon my independent review and re-analysis of the evidence and documents produced during the trial, and to answer to the issues framed for determination, I come to the conclusion that there existed no legally and binding contract between the Appellant and the Respondent in respect to the Respondent's Tender No. SU/QT/OOIN/2013; and therefore no breach of a nonexistent contract could be inferred or implied.

24. Consequently, I find no merit in the Appeal. It is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JANUARY, 2024

J. N. MULWA

JUDGE

