



Muga Electrical Contractors Limited & another v Rimun Ventures Limited (Civil Case E142 of 2021) [2024] KEHC 11045 (KLR) (Commercial and Tax) (19 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11045 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E142 OF 2021
JWW MONG'ARE, J
SEPTEMBER 19, 2024**

BETWEEN

MUGA ELECTRICAL CONTRACTORS LIMITED 1ST PLAINTIFF

REALTECH PLUMBERS LIMITED 2ND PLAINTIFF

AND

RIMUN VENTURES LIMITED DEFENDANT

JUDGMENT

Introduction and Background

1. By a re-amended plaint dated 15th February 2022, the Plaintiffs filed suit stating that sometime in August 2020, Kenyatta National Hospital advertised a tender for the construction of a mortuary at Kenyatta National Hospital, Othaya for a contract sum of Kshs. 49,219,625.00/= (“the Project”).
2. The Plaintiffs stated that together with the Defendant, they made a joint bid for this tender which led to them entering into Pre-Subcontract Agreements on 25th August 2020 (“the Agreements”) and consequently the Defendant was awarded the tender.
3. The Defendant was to be the main contractor and the Plaintiffs were to be subcontractors and the Plaintiffs claimed that as per the Agreements, the Plaintiffs were to be involved from the inception of Project so that each of the Plaintiffs could undertake their distinct roles with the 1st Plaintiff carrying out electrical works while the 2nd Plaintiff carrying out plumbing works. However, the Plaintiffs claimed that the Defendant had commenced construction of the Project without involving them and they were apprehensive that the Defendant had engaged other sub-contractors in breach of the



Agreements. That as per the Agreements, the Plaintiffs were to be involved from inception and as the structure was taking shape and not when the Project was completed.

4. The Plaintiffs aver that the Defendant took advantage of the fact that it was the contact person between the parties and the procuring entity to take over the construction site, commence and commence the Project implementation without engaging the Plaintiffs. That the Defendant could not have won the tender for the Project without the competency and capacity of the Plaintiffs. The Plaintiffs thus accuse the Defendant of breach of the Agreements and claim loss of business of Kshs. 9,948,207.00/= in respect of the 1st Plaintiff and Kshs.7,560,410.00/= in respect of the 2nd Plaintiff which they now seek as special damages.
5. The Defendant filed its amended statements of defence on 22nd March 2022. Whereas it admitted the Agreements between the parties, it averred that the Plaintiffs breached the same by failing to avail themselves on site despite several attempts to reach out to them. That despite knowing that the Project had a deadline, the Plaintiffs ignored calls from the Defendant to visit the site and carry out their part and that as a result, the Defendant procured the services of other providers to undertake the said works.
6. The Defendant denied that it sought the assistance of the Plaintiffs in applying for the tender stating that the Plaintiffs were only joined into the tender as subcontractors and that they were not party to the tender. As such, the Defendant stated that it was at liberty to engage third parties to perform part of the contractual bargain that the Plaintiffs failed in as the said third parties are duly registered professionals who are competent enough to complete the electrical and plumbing works on the Project. For these reasons, the Defendant urged the court to find that the plaintiff did not disclose any reasonable cause of action against it and sought that the same be dismissed.
7. When the matter was set down for hearing, the Defendant did not participate in the same despite substituted service of the hearing notice. The matter thus proceeded for formal proof where the Plaintiffs availed two witnesses; the 1st Plaintiff's Managing Director, Andrew Gichuki(PW1) who adopted his witness statement dated 16th March 2021 and; the 2nd Plaintiff's director, David Njoroge Komu, who also adopted his witness statement dated 16th March 2021. The Plaintiffs relied on their List of Documents dated 16th March 2021 which were produced by PW 1 as the Plaintiffs Exhibits 1-10. The documents included; The tender advert by Kenyatta National Hospital, the Agreements, the tender award document, the letter dated 19th February 2021 from the 2nd Plaintiff to the CEO Kenyatta National Hospital, the Letter dated 22nd February 2021 from the 1st Plaintiff to the CEO Kenyatta National Hospital, photos taken at the Project site, authorities given to PW 1 and PW2 and Demand Letters dated 5th March 2021 to the CEO Kenyatta National Hospital.
8. After the hearing, the court directed the parties to file written submissions which only those of the Plaintiffs are on record. Since the parties' testimonies and the submissions are along the lines I have already summarized above, I will not rehash the same but make relevant references in my analysis and determination below.

Analysis and Determination

9. In making this determination, I am guided by the fact that the standard of proof in civil cases is on a balance of probability and 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](#) 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 in 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.”

10. The Court of Appeal in *James Muniu Mucheru v National Bank of Kenya Ltd* CA Civil Appeal No 365 of 2017 [2019] eKLR simply put it that ‘Courts will make a finding based on which party’s version of the story is more believable.’ It is also not lost to me that even though the Defendant filed a defence, it did not call any witness or produce any evidence. The effect of a defendant filing a defence but not calling evidence to challenge a Plaintiff’s testimony renders not only the defence unsubstantiated but also leaves the plaintiff’s case unchallenged (See *Autar Singh Babra And Another v Raju Govindji*, HCCC No. 548 of 1998 (UR) and *Motex Knitwear Limited v Gopitex Knitwear Mills Limited* [2009] eKLR).
11. However, even though the Defendant failed to support its defence by evidence, the Plaintiffs still have a duty to prove their case on a balance of probabilities as is required by law. This was held by the Court of Appeal in *Kirugi and Another v Kabiya & 3 others* [1987] KLR 347 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”. 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] eKLR 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.”
12. With the above in hindsight, I will now proceed to determine this matter which from the Plaintiffs’ submissions, the court is being called to deal with two issues as follows:
 - a. Whether the Defendant breached the terms of the Pre-Subcontract Agreements?
 - b. Whether the Plaintiffs are entitled to special damages?

Whether the Defendant breached the terms of the Agreements

13. As stated, the Agreements and its terms were common to the parties. Its purpose was to establish “...the basis for a relationship under which the parties will work together for purpose of preparing and submitting a Bid for Procurement of Works for Constuction of Mortuary at Kenyatta National Hospital Othaya”. It indicated that the Defendant was the contractor whereas the Plaintiffs were to be the subcontractors and that once the Defendant was awarded the tender, the Defendant was to award the Plaintiffs subcontracts for electrical installation works and mechanical installation works.
14. The Plaintiffs stated and testified that the Defendant breached the Agreement by not awarding them the subcontracts after winning the tender as indicated in the Agreements and that instead, the Defendant awarded the same to third parties. This position was not controverted by the Defendant and as such constitutes an obvious breach of the Agreements. I thus answer this issue in the affirmative that the Defendant breached the Pre-Subcontract Agreements that it had entered into with the Plaintiffs.



Whether the Plaintiffs are entitled to special damages?

15. As stated, the Plaintiffs claim loss of business of Kshs. 9,948,207.00/= in respect of the 1st Plaintiff and Kshs. 7,560,410.00/= in respect of the 2nd Plaintiff which they now seek as special damages. They aver that had they proceeded with the said works under the Agreement, they would have earned these amounts. Indeed, the Court of Appeal in *Nyamogo & Nyamogo Advocates v Barclays Bank of Kenya* [2015] eKLR held that a claim such as that of loss of business has to be pleaded and proved as a special damage. The Plaintiffs have demonstrated that these were the sums quoted and payable for the said works as is evident from the tender award document (PExhibit 4). It is also obvious that the Plaintiffs lost this business opportunity as a result of this breach by the Defendant. PW 1 and PW 2 in their testimonies sought to be paid 25% of the quoted sums which translate to Kshs. 2,487,051.75/= and Kshs. 1,890,102.50/= respectively. This, in my view, is what was proven and I urge the court to award the same.

Conclusion and Disposition

16. In conclusion, it is my finding that the Plaintiffs' suit as set out in the re-amended Plaint dated 15th February 2022 is merited and the same is hereby allowed. The Court makes the following final orders:
- a. A declaration be and is hereby made that the Defendant breached the terms of the Pre-Sub Contract Agreements.
 - b. Judgment be and is hereby entered for the 1st Plaintiff against the Defendant for the sum of Kshs. 2,487,051.75/=.
 - c. Judgment be and is hereby entered for the 2nd Plaintiff against the Defendant for the sum of Kshs. 1,890,102.50/=.
 - d. Interest at court rates on the (b) and (c) from the date of judgment till payment in full.
 - e. The Plaintiffs are awarded costs of the suit

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF SEPTEMBER, 2024.

J.W.W. MONG'ARE

JUDGE

In the Presence of:-

1. Mr. Ndungu holding brief for Mr. Mathu for the Plaintiffs.
2. N/A for the 1st Defendant
3. N/A for the 2nd Defendant.
4. Amos - Court Assistant

