



REPUBLIC OF KENYA



**Seyani Brothers and Co. Ltd v Window Plus (E. A) Limited (Civil Appeal
559 of 2019) [2023] KEHC 2712 (KLR) (Civ) (31 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2712 (KLR)

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

CIVIL

CIVIL APPEAL 559 OF 2019

PM MULWA, J

MARCH 31, 2023

BETWEEN

SEYANI BROTHERS AND CO. LTD APPELLANT

AND

WINDOW PLUS (E. A) LIMITED RESPONDENT

*(Being an appeal from the judgment and decree of Nairobi Chief Magistrate's court of
Nairobi in Case no. 8115 of 2013 delivered on 27th August 2019 by Hon. P. N. Gesora)*

JUDGMENT

Background

1. The appeal emanates from the judgement and decree of the Honourable Chief Magistrate's court of Nairobi in Case No 8115 of 2013 delivered on August 27, 2019.
2. On December 20, 2019, the Respondent filed suit against the Appellant. It claimed that at the request of the appellant it supplied and installed films to glass partitions at the premises of the World Bank Group at Delta Centre, upper hill. The sum due for supply, delivery and installation of good is Kshs 683,298/=. The Appellant on September 15, 2013, wrote a cheque of Kshs 431,360/= before the signing of the delivery note and an invoice. The appellant failed to pay the amount due and owing to the Respondent thereby breaching the contract.
3. Based on those claims the Respondent sought judgment against the appellant for the sum of Kshs 683,298/= together with costs and interests.
4. In a brief statement of defence filed on February 14, 2014, the Appellant states the amount as per the invoice was to be paid in two instalments, the cheque of Kshs 431,360 /= remained uncollected by the Respondent until October 11, 2013 when the same was cancelled, the quotation by the Respondent



was exaggerated and upon inspection the Appellant found the work done had some defects which the Respondent failed to rectify thus prompting the Appellant to hire another film installer to rectify the defects. The appellant denies owing the Respondent a sum of Kshs 683,290/=.

5. After hearing the parties and their witnesses the trial court entered judgment in favour of the Respondent for the sum of Kshs 683,290/= plus interest and costs.
6. Aggrieved by the decision of the trial court the appellant filed the memorandum of appeal dated September 27, 2019 citing 6 grounds as follows:
 - i. That the learned magistrate erred in law and in fact by failing to take into account and to consider the evidence adduced on behalf of the appellant
 - ii. That the learned trial magistrate erred in awarding the Respondent the sum of Kshs 683, 298/= which had not been proved as required by law.
 - iii. The learned magistrate misdirected himself and based his findings on wrong considerations of facts and law.
 - iv. The learned magistrate failed to appreciate the submissions of the learned counsel for the appellant by finding in favour of the Respondent herein.
 - v. The findings of the trial magistrate are unsupported by law or on the basis of the evidence adduced.

It was proposed to ask the court to allow the appeal and set aside the judgment and the decree in Nairobi Cmcc No 8115 of 2013, the appellant be awarded costs of this appeal and in the trial court.

7. The appeal was heard through written submissions at the time of writing the judgement the appellant's submissions were not in the court file, what was in the court file was their list of authorities.

Respondent's submissions

8. Mr. Mungai counsel for the Respondent filed submissions on December 19, 2022, he submitted the letter by the Appellant dated October 4, 2013 confirmed the existence of a contract between the appellant and the Respondent. In the letter the appellant communicated the results of the joint valuation exercise quoted a measurement of 561 square meters and total valuation costs of Kshs 684,701.60/=. The letter also indicated some defects needed to be done. the appellant proceeded to give the Respondent new instructions to be carried out on the 10th Floor and ground floor.
9. Counsel contends the allegation of poor workmanship was an afterthought and the appellant never filed a counterclaim in the trial court detailing the complaints of the poor workmanship. The appellant failed to demonstrate as per Section 109 of the *Evidence Act*, the shoddy work by the Respondent. The allegation is a ploy to deny the Respondents payments.
10. Counsel submits the sum of kshs 683,298/= is a liquidated claim that arose from a joint valuation exercise. Counsel urged the court to rely on of the contents of the letter dated October 4, 2013.
11. The second issue as submitted by counsel was on the terms of the contract. He states by the action of the appellant issuing a cheque before signing the delivery note and receiving an invoice was a ploy to avoid paying the entire contractual sums owed.
12. It is submitted there are no details of the person who conducted the inspection on February 6, 2104, that the person was not called as a witness to testify on the defects. The Respondent was not involved in the inspection exercise.



13. It is further submitted that the Respondent duly performed its parts of the contract but the Appellant breached the contract by failing to pay the sum of Kshs 683,298.
14. In the circumstances counsel urged the court to dismiss the appeal with costs.

Analysis and determination

15. This being the first appellate court I am required to re-evaluate and analyse the evidence adduced before the trial court. This position was held in *Selle & Another vs Associated Motor Boat Co Ltd & Others* (1968) EA 123 where the court stated as follows: -

“...An appeal to this court from the trial court is by way of retrial and the principles upon which the court acts in such an appeal are well settled. Briefly put they are that this court must 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 this respect...”

16. I will analyse the trial court evidence hereunder.

Trial court evidence

17. PW1 David Odour Ojwang testified that he worked for the plaintiff as a technician. In 2013 he put windows in the World Bank Building. That the measurements were taken on October 4, 2013 the work entailed rectifying two spots. The work was to be paid kshs 684, 701.60/= which has not been paid to date. He told the court the defects as per the content letter dated February 6, 2014 are not correct.
18. During cross examination he said the work was to be done for one month and was carried out between August and October, they received complaints of the defect and the same were addressed in October 2013. The defects were that the first film was not properly put on the two windows, paint dropped on one glass panel and a scratch on the other window.
19. Pw2 Samuel Simuyu testified he worked for the plaintiff as an accountant. The Plaintiff worked for the Defendant in 2013, he adduced a quotation for work dated September 2, 2013. The work costs were Kshs 684,701.60/= and they were issued with a cheque for Kshs 431,880/= which was cancelled and the money is still unpaid.
20. During cross examination he stated he worked with the plaintiff since 2017, he could not however ascertain when the work was done and how the quotation was taken.
21. DW1 Lilian Githinji testified she is a quantity surveyor and working for the defendant. the Defendant issued a cheque of Kshs 431,880/= to the Plaintiff which amounted to 75% of the work done. According to the contract the Defendant was to pay in two (2) instalments. And retain 10% of the sum to be released later. The cheque was uncollected by the plaintiff and the same was cancelled by the Defendant. she stated the Plaintiff failed to make good the defects which prompted the Defendant hire another installer who rectified the glaring ones.
22. She stated the Defendant was under pressure from their client to deliver.
23. During cross examination she stated the plaintiff carried out the work but failed to carry out the repairs. The agreed final amount was Kshs 684,701.60/=. The claimant breached the contract as there was a lot of work that was re-done which were rectified by classic builders.



24. The trial court found the Defendant in breach of the contract for failure to pay the Plaintiff and they were held liable, and judgment was entered in favour of the plaintiff in the sum of Kshs 683,298/=

Determination

25. I have considered the appeal and the submissions by the Respondent. I frame the following issues for determination:
- i. Whether the trial court erred in establishing there was a valid contract between the parties?
 - ii. Whether there was a breach of the contract by either party?
 - iii. Whether the appellant is entitled to the reliefs sought?
26. In the case of *Mbogo & Another v Shah* [1968] EA 93, the Court stated: “A Court of Appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and as a result there has been injustice.”

Whether the trial court erred in establishing there was a valid contract between the parties?

27. The trial court established there was a valid contract between the Appellant and the Respondent. It is not in contention that the Appellant did involve the Respondent in partake in the supply and installation of films to glass partitions at the premises of the World Bank Group at Delta Centre, upper hill for the sum of Kshs 683,298/=
28. This position has been confirmed by both parties, the latter dated October 4, 2013 written by the Appellant confirms the existence of the contract. the Appellant has not disputed the existence of the contract, what is disputed is the quality of the work done. the issuance of a cheque to the Respondent for the sum of Kshs 431,360/= for the 75% work completion confirms the existence of a contract of service. DW1 also confirmed the Appellant had contracted the Respondent.
29. I therefore find the trial court did not err in establishing there existed a valid contract.

Whether there was a breach of the contract by either party

30. The Appellant contends the Respondent breached the contract since after the completion of the work there were glaring defects which the Appellant had to engage the services of another contractor to rectify the same which costs the appellant additional finances. According to the Appellant the amount spent on the other contractor ought to be subtracted from the amount due to the Respondent.
31. The Respondent on the other hand contends that it did correct and repair the defects as outlined by the Appellant save for the additional work being added to the Respondent vide the letter date October 4, 2013. And further that it did not breach the contract and the Appellant ought to pay the work done by Respondent as per the contract agreement.
32. The trial court held that as per the letter dated October 4, 2013 it would appear as though the Respondent did not perform any task and dismissed the assertion of defects and found the appellant was in breach of the contract for non- payment.
33. The appellant despite having alleged the work was poorly done by the Respondent and defects rectified by another contract it did not avail in court evidence to demonstrate the poor work done by the Respondent. The moment the Respondent filed a suit in the trial court for non- payment and breach of



contract the burden of proof shifted to the Appellant who ought to have proved the non-payment was due to the breach on the part of the Respondent as per Section 109 of the Evidence Act, which states:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

Whether the appellant is entitled to the reliefs sought?

34. I am not satisfied the Appellant discharged the burden of proof to the required standard. That standard of proof was considered in the Canadian Case R vs Layton, 2009 Scc 36 (Canlii), [2009] 2 Scr 540 as follows:

“4. What does “proof on a balance of probabilities” mean? It does not mean proof beyond a reasonable doubt — that standard of proof applies only in criminal trials. In civil trials, such as this one, the party who has the burden of proof on an issue must convince you that what he or she asserts is more probable than not — that the balance is tipped in his or her favour. You must examine the evidence and determine whether the party who has the burden of proof on an issue is relying on evidence that is more convincing than the evidence relied on by the other side. In short, you must decide whether the existence of the contested fact is more probable than not.”

35. In my view the appellant failed to bring credible evidence before the court in support of the assertion that the Respondent breached the contract.

36. Having found the Appellant breached the contract, the Respondent is entitled to payment for the work done. The remedy that arises from a breach of contract is in the form of special damages. It is settled law that special damages must be pleaded and specifically proved. The Respondent pleaded that the amount due and owing as a result of the contract was Kshs 684,701.60/-. This position was proved by the Appellant’s letter which confirmed the said amount.

37. I concur with the findings of the trial court that indeed the appellant breached the contract. In the upshot I do not find the trial magistrate misdirected himself or applied the wrong principles of the law in his determination, and therefore I find no reasons to interfere with the trial court’s judgment.

Final Orders

38. The appeal herein lacks merit and dismissed with costs to the Respondent.

JUDGMENT DELIVERED VIRTUALLY, SIGNED AND DATED AT MILIMANI THIS 31ST DAY OF MARCH, 2023

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P.M. MULWA

JUDGE

In the presence of:

Aden – Court Assistant

No appearance for Appellant

No appearance for Respondent

