Samuel Onango Ogolla t/a Zamken Building Construction & General Supplies v Board of Management St. Francis of Assis Myanga Secondary School (Civil Appeal E017 of 2022) [2023] KEHC 3631 (KLR) (28 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3631 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL E017 OF 2022

JRA WANANDA, J

APRIL 28, 2023

BETWEEN

SAMUEL ONANGO OGOLLA T/A ZAMKEN BUILDING CONSTRUCTION & GENERAL SUPPLIES ..... APPELLANT

AND

BOARD OF MANAGEMENT ST. FRANCIS OF ASSIS MYANGA SECONDARY SCHOOL ..... RESPONDENT

JUDGMENT

1. This Appeal arises from the decision of the trial Court made in Bungoma Chief Magistrate's Court Civil Case No. E049 of 2020. The Appellant is engaged in building construction as a contractor and the Respondent is a school.

2. By the Plaint filed on 23/12/2020 through Messrs Anwar & Co. Advocates, the Appellant sued the Respondent seeking a sum of Kshs 2,469,190/-, interest from 30/3/2019 till payment in full, costs and interest. It was alleged in the Plaint that sometime in January 2016 the Respondent contracted the services of the Appellant for the construction of 3 classrooms in three clusters - A, B and C, that classroom A was to be constructed at a cost of Kshs 1,150,350/- and classrooms B at C, at Kshs 1,256,670/- each, as per the Bill of Quantities approved by the Principal of the Respondent.

3. It was further alleged that cumulatively, the 3 classes were to be constructed at the sum of Kshs 3,663,690/- which monies were to be paid within 3 years, the Appellant commenced the constructions finishing the same on 30/05/2016 and thereafter handed the same to the Respondent's which started using the same as classrooms, the Appellant was again contracted to supply 3 mathematical boards at a price of Kshs 25,000/- which boards were supplied by February 2016, despite being entitled to be paid cumulatively the sum of Kshs 3,689,190/- by March 2019 he has to date been paid the sum of Kshs 1,220,000 leaving the balance of Kshs 2,469,190/- prayed for in the Plaint.

4. The Respondent filed its Defence on 19/02/2021 through Messrs Situma & Co. Advocates. It was averred in the Defence that the agreement entered into was for Kshs 1,759,622/-, the works were sub-standard and that is when the parties agreed that the Respondent be paid Kshs 1,759,622/- and the balance due was therefore Kshs 524,622/-.

5. On the basis of the admission of the amount of Kshs 524,622/- made in the Defence, on 19/02/2021 the Respondent filed an Application seeking Judgment on admission for the said amount. The Application was not opposed and was therefore allowed as prayed on 22/03/2021. The case then proceeded to full hearing on the remainder of the amount claimed in the Plaint. At the trial, the Appellant testified for himself and the defence presented two witnesses.

6. The Appellant, testifying as PW1, adopted his witness statement and bundles of documents filed. He basically reiterated the matters set out in the Plaint.

7. In cross-examination, he denied that he used any materials belonging to the Respondent and stated that he transported materials from other places to the site. He admitted that document PMF1 1 indicates a sum of Kshs 1,759,622/- but insisted that the contract was for Kshs 3.6 Million and that this amount is proved by his Bills of Quantities. He then stated that he finished the project in March 2016 and to prove it, he referred to the photographs on record. Regarding document DMFI 1, he stated that he was asked to sign a blank Form. In conclusion, he stated that he did not have a formal bidding from public works but that he followed all the procedures.

8. In Re-examination, he stated that the amount of Kshs 1,759,622/- was not written in the document DMF 1 when he signed it, the Respondent signed and stamped the Bill of Quantities and that he wrote a demand letter seeking for the balance of Kshs 2.5 Million but the same was never responded to.

9. Dr. Hellen Abuto, the school Principal testified as DW1. She too adopted her Witness Statement and testified that the Appellant did not complete the works, he used material belonging to the school in the construction without permission and that the contract was for Kshs. 1,759,622/- considering that most of the materials were sourced from the school.

10. In cross-examination, she admitted that she was not yet at the school when the works were ongoing, she joined the school in 2020 when the classrooms were already in use, she could not tell when the classrooms started being used, the agreed amount stated in the minutes that she found was Kshs 1,759,622/-, no letter was written to the Appellant regarding the alleged non-completion of the works and no counterclaim had been filed by the Respondent.

11. Fredrick Wanyama Wamalwa, the school bursar testified as DW2. He too adopted his witness statement and the bundle of document earlier filed. He stated that he was at the school when the contract was entered into, he is the one who did the agreement, the contractual sum was Kshs 1.7 million, he referred to the Schedule of Payments admitted as Exhibit DE1 and admitted that the amount therein was filled in after the Appellant had already signed, when the agreement was done on 29/01/2016 Bills of Quantities were not yet available, that is why they did not record the amount and that the Appellant was to avail the Bill of Quantities and which he availed later.

12. In cross-examination, he stated that he had been at the school for 26 years, there were minutes stating the contractual amount but the same were not in Court, amounts are set out before the contract begins, the top part of the payment schedules contained the contract, it was first signed on 29/01/2016, the amount was not indicated at first, the Respondent did not issue any letter to the Appellant asking him to complete the works, the Appellant used some of the Respondent's materials such as bricks, sand, wood and wooden doors although he did not sign anywhere that he took the materials and the

Principal signed the Bills of Quantities simply to acknowledge receipt. In conclusion, he admitted that they received the Appellant's demand letter.

13. After the trial and upon considering the testimonies of the witnesses and the evidence adduced in Court, the trial Court delivered Judgement on 07/02/2022. In the Judgment, the Court found that the only amount proved by the Appellant as being due was the sum of Kshs 524,622/-. Accordingly, Judgment was entered for that sum with interest from 30/03/2019 plus costs.

14. Being dissatisfied with the Judgement, the Appellant instituted this Appeal *vide* the Memorandum of Appeal dated 22/02/2022 premised on the following grounds;

    i. That the learned magistrate erred in fact and in law holding that there was no consensus of mind between the parties herein as regards to the contract sum yet she in the same judgment set the contract sum at Kshs. 1,759,622/-.

    ii. That the learned Magistrate erred in fact and in law in holding that there was no consensus on the contract amount yet there exists Bills of quantities stipulating the costs on construction and which Bills were received by the Respondent's principal and produced as exhibits in the matter by the Appellant.

    iii. That the learned Magistrate erred in fact and in law for disregarding the evidence of DW1 & D W-2 on the existence of minutes-in their possession stipulating the contract sum and which minutes were not adduced as evidence in the matter and for failing to make adverse inference on the evidence tendered by the Defendant pursuant, to section 112 of the *Evidence Act* for failing to adduce minutes and resolutions thereof of the meeting that awarded the contract to the Plaintiff and minutes authorizing the works and or the construction of classrooms and the contract sum thereof.

    iv. That the learned Magistrate erred in fact and in law in failing to appreciate the fact that all the demand letters by the Appellant never elicited any response disputing the contract sum and that prior to the filing of the suit herein there was no dispute as to the contract sum being Kshs. 3,663,690 and the implication thereof in this case.

    v. That the learned Magistrate erred in fact and in law by holding that the contract sum was for Kshs. 1,759,622 yet in the same judgment she appreciates that the payment schedule as signed by the Appellant did not have the contract sum indicated when payments were made by the Respondent.

    vi. That the learned magistrate erred in fact and in law in failing to appreciate the import of DW-2 evidence that the contract sum in the payment schedule was filled later after payments were made to the Appellant.

    vii. That the learned Magistrate erred in fact and in law in failing to appreciate the import and purport of her holding disregarding the Respondents exhibits for having come into existence way after the construction began.

Hearing of the Appeal

15. The Appeal was canvassed by way of written submissions. The Respondent filed his Submissions on 11/01/2023 through his new Advocates on record, Messrs J.W. Sichangi & Co. whereas the Appellant filed his on 17/01/2023 through Messrs Anwar & Co.

Appellant's Submissions

16. Counsel for the Appellant faulted the trial Magistrate for finding that there was no "meeting of minds" between the parties as regards the contract sum but nevertheless still proceeding to enter Judgment for Kshs 524,622/- which was by implication the deficit from the amount of Kshs 1,759,622/- alleged by the Respondent as being the contractual sum. He stated that if all there was no consensus on the contract sum as held by the trial magistrate, then she ought not to have entered Judgment for the said sum of Kshs 524,622/- as well.

17. Counsel also submitted that the Appellant prepared and submitted Bills of Quantities to the Respondent's Principal who received the same, the Bid was for Kshs. 3,663,690/- for construction of the 3 classrooms and since there is nothing adduced by the Respondent to show that the Bill of Quantities was declined or the sums contained therein altered, the award of the contract must be deemed to have been based on the Bill of Quantities. He faulted the Magistrate for holding that there was no consensus on the contract amount yet there existed Bills of Quantities stipulating the costs of construction and which Bills were received by the Respondent's Principal and produced.

18. Counsel also contended that the Respondent's witnesses confirmed that school decisions were contained in minutes of meetings and Resolutions thereof, whereas the witnesses admitted that as regards construction of the classrooms and the contract sum such minutes were in existence, the same were not produced, for this reason the Court ought to have made an adverse inference that if the minutes were to be produced - since they are in the custody of the Respondent - it would have been adverse to the Respondent's case more so owing to the fact that the suit was based on documents and the dispute was on contractual price. In regard to this point, Counsel relied on the holding of Mabeya J in Kenya *Akiba Micro Financing Limited v Ezekiel Chebii & 14 Others* [2012] eKLR in which the Judge invoked the provisions of Section 112 of the *Evidence Act*.

19. Counsel submitted further that the suit was preceded by several demand letters from the Appellant, the letters stated the contract sum as Kshs 3,663,690/-, the letters did not elicit any response from the Respondent, the contract sum stated in the letters was therefore not disputed, this shows that prior to the institution of the suit there was no dispute on the contract sum being Kshs. 3,663,690/-, the dispute only arose after filing of the suit and the introduction of the argument that the contract sum was Kshs 1,759.622/- was an afterthought.

20. Counsel further argued that in cross-examination, the Respondent's Bursar (DW2) stated that the contract sums were filled after the Appellant was paid and that the contract sum was not indicated therein at the time of making of the payments to the Appellant. Counsel submitted that this fact corroborated the evidence of the Appellant that he signed the document when it was blank as the contract sum was not stipulated therein. He added that this admission by the Respondent's bursar is instructive of the fact that the contract sum was fixed in the document to suit the Respondent's defence, the failure to include the contract sum in the document pointed to a ploy to defraud the Appellant and the Appellant cannot be blamed for signing for payments received by him on a document that has no contract sum indicated. He cited the holding of Majanja J in *Pasacon General Construction & Electrical Services Limited v Total Kenya Limited* [2018] eKLR.

21. Counsel added that all the documents presented by the Respondent in the suit were made after the contract had begun, this is captured in the Judgment, the Respondent's witnesses testified that the minutes were done after the contract had finished and so were the Bill of Quantities produced as Defendant's Exhibit 3 which was done after the Appellant had commenced the work and which were never shared with the Appellant, the Respondent's Principal who gave evidence as DW1 had not yet

joined the school in 2016 when the contract was made, the Bursar (DW2) stated that he did not discuss the contract sum with the Appellant since the same was the work of the management committee, the Appellant's evidence was therefore uncontroverted and an adverse inference ought to be made on the Respondent's evidence. He cited the case of *Charles Ochieng Ogola v Bhole Kondele Limited* [2017] eKLR and urged this Court to allow the appeal with costs.

Respondent's Submissions

22. On his part, the Respondent's Counsel submitted that the Appellant never produced any agreement in support of his allegations on the contract sum alleged in the Plaint, no agreement with clear terms was ever produced, the Court had no duty to imply an agreement, it could neither re-write or assist to re-write an agreement, special claims must not only be pleaded but must be specifically proved and that failure by the Plaintiff to produce any agreement of such crucial allegations was fatal to his case. Counsel supported the trial Magistrate's findings that the Bill of Quantities were not agreements neither did they amount to works done.

23. He argued that there was evidence that materials used were from the school, the Court could not quantify materials under the Bill of Quantities and come up with figures in favour of the parties, the works done were sub-standard and the parties had to make a fresh understanding on the payments, the fact that the classrooms were put in use did not discharge the burden of proving the work done, the Appellant having agreed to a renegotiated arrangement where it was concessionally agreed that the works done were incomplete, substandard and even school materials had been used up in the construction so the Appellant was to be paid Kshs 1,759,622/-, a total of Kshs.1,235,000/- was accordingly paid, the Appellant could only demand a balance of Kshs 524,622/-, he is estopped from making fresh claims with exaggerated amounts that cannot even be tested, upon entry of Judgment the Appellant filed a bill of costs, the same was assessed, interest computed and the same fully paid and the Appeal is therefore an afterthought

24. Counsel submitted that the Appellant admitted to have used materials not specified in the Bill of quantities and materials that were supplied by the school, since the specifications in the Bills of quantities were not strictly followed and having obtained materials from the school that ought to have been bought elsewhere, it compromised the estimates in the Bill of quantities, the works were incomplete and substandard, the Bill of quantities could not be taken as proof of the payments or amounts of the contract, the mere fact that the then Principal received the Bills of quantities was not automatic seal of the contract, they were to be subjected to what transpired during the constructions and the findings of the trial magistrate were reasonable and justifiable. In conclusion, Counsel urged that the Appeal be dismissed with costs.

Analysis & Determination

25. As this is a first appeal, this Court's duty is as was set out in *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, as follows-

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

26. Upon considering the Memorandum of Appeal, Record of Appeal and Submissions of the parties, the issue that arises for determination in this appeal is, in my view, the following;

i. Whether the trial Court erred in finding that the Appellant proved entitlement to a sum of only Kshs. 524,622/-

27. I now proceed to analyse and determine the said issue.

28. It is evident that although there was a contract entered into between the parties for construction of classrooms, the same was never reduced into writing. To ascertain the terms of the contract, one is therefore compelled to consider the different separate documents on record and the parties' conduct and then conjure an interpretation.

29. Although the parties agree that a contract was entered into and that the Appellant had been paid instalments amounting to Kshs 1,235,040/- before he instituted the suit, the parties cannot agree on what was the contract sum in the first place. The major reason for this dispute is because it appears the works were commenced before the contract sum had been conclusively agreed upon. If it was agreed upon, then the same was not expressly stated.

30. According to the Appellant the contract sum was Kshs 3,663,690/-. In alleging this sum, he relies on the Bills of Quantities that were prepared by himself and submitted to the Respondent on 18/01/2016. However, it is evident that the same were prepared after the works had already commenced and further, there is no evidence that the figures entered therein by the Appellant were accepted by the Respondent. The mere fact that the Respondent's Principal received the Bills of Quantities and acknowledged receipt thereof by signing and stamping them cannot be equated to accepting the figures therein or incorporating the figures as being a term of the contract. The same applies to the Respondent's failure to reply to the Appellant's demand letters. Silence alone cannot be deemed to necessarily mean acceptance.

31. On the other hand, according to the Respondent the contract sum was Kshs 1,759,622/-. In urging this amount, the Respondent relies on the Payment Schedule Form in which on the top part, this figure of Kshs 1,759,622/- is entered. This figure is also not reliable since it was apparent from the witnesses' testimonies that the Form was signed when it was still blank and that the figure was entered subsequently by the Respondent.

32. Although it may be argued that by voluntarily signing a blank Form, the Appellant exposed himself to the risk of a figure not agreed upon being "sneaked into" the Form and that he was therefore the author of his own misfortune, I will not go as far as making such declaration against the Appellant. It is however evident that because of the foregoing, this figure of Kshs 1,759,622/- cannot also be relied upon.

33. For the above reasons and the stalemate, I agree with the trial Magistrate that there was no "meeting of minds" otherwise described as consensus ad item on the contract sum.

34. On this point, I cite the decision of Kasango J in *Vincent M. Kimwele v Diamond Shield International Limited* [2018] eKLR where she stated as follows:

> 18. It is for that reason that I find the contract failed to have the offer and acceptance. The American Jurist Oliver Wendell Holmes Jr. wrote on the meeting of minds as follows:
>
> > "We talk about a contract as a meeting of the minds of the parties, and hence it is inferred in various cases that there is no contract because their minds have not met; that is, because they have intended different things or because one party has not known of the assent of the other. Yet nothing is more certain than that parties may be bound by a contract to things which neither of them intended, and when one

> does not know of the other's assent. Suppose a contract is executed in due form and in writing to deliver a lecture, mentioning no time. One of the parties thinks that the promise will be construed to mean at once, within a week. The other thinks that it means when he is ready. The court says that it means within a reasonable time. The parties are bound by the contract as it is interpreted by the court, yet neither of them meant what the court declares that they have said. In my opinion no one will understand the true theory of contract or be able even to discuss some fundamental questions intelligently until he has understood that all contracts are formal, that the making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs – not on the parties having meant the same thing but on their having said the same thing."

19. In the decision Carlill v Carbolic Smoke Ball Company [1892] EWCA Civ it was held:

> " One cannot doubt that, as an ordinary rule of law, an acceptance of an offer made ought to be notified to the person who makes the offer, in order that the two minds may come together. Unless this is done the two minds may be apart, and there is not that consensus which is necessary according to the English Law – I say nothing about the laws of other countries – to make a contract."

20. In this case, at the Bar, there is no meeting of the minds of the plaintiff and the defendant. Therefore, no contract was formed."

35. In this case, yes indeed there was a contract which was even performed. However, the evidence presented cannot justify a finding that one important term, the contract sum, was conclusively agreed upon. There was clearly no meeting of minds" or "*consensus ad idem*" as to how much the contract sum was. I therefore agree with the trial Court that what she was being asked to do was to re-write the contract which it could not do.

36. Perhaps, before the trial, the Appellant should have considered moving the trial Court to direct that the works performed be valued and a Report thereof presented to the Court. This might have been one way out of the quagmire. In the absence of such valuation and in the absence of a meeting of minds on the contract sum, this Court cannot imply such term.

37. With the above state of affairs, it is the Appellant who has to suffer the consequences since as the Plaintiff, he bore the burden of proof. On this point, I refer to the decision of Ongudi J in *Alice Wanjiru Ruhiu v Messiac Assembly of Yahweh* [2021] eKLR wherein she stated as follows:

> 20. It is a principle of law that whoever lays a claim before the court against another has the burden to prove it. Sections 107 and 108 of the *Evidence Act* provide as follows:
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> > 107 "(1) 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.
>
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.
>
> > 108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

21. I rely on the case of Muriungi Kanoru Jeremiah vs Stephen Ungu M'mwarabua [2015] eKLR where the court held as follows with regard to the burden of proof:

> "…. As I have already stated, in law, the burden of proving the claim was the appellant's including the allegation that the respondent did not pay the sum claimed as agreed; i.e. into the account provided ….. The trial magistrate was absolutely correct in so holding and did not shift any legal burden to the appellant ….. The appellant was obliged in law to prove that allegation; after the legal adage that he who asserts or alleges must prove …. In the circumstances of this case, the respondent bore no burden of proof whatsoever in relation to the debt claimed. By way of speaking, the shifting of burden of proof would have arisen had the trial court magistrate held that the respondent bore burden to prove that he deposited the sum of Kshs. 98,200/= the debt being claimed herein."

38. In view of the foregoing, this Court finds that the evidence on record was not sufficient to enable the trial Court reconcile the two conflicting sets of alleged contract sum or determine which of the alleged rival contract sums was the correct one. In light of this situation, it is the Appellant who, being the Plaintiff, asserted that the contract sum was Kshs 3,663,690/- It is therefore he who would lose if that assertion was not proved. As aforesaid, that alleged contract sum was disputed and the situation remained unresolved. In the circumstances, the trial Court cannot be faulted for ruling as it did. A party's case is as strong as the evidence it adduces to prove its case. If it falls short of proving its case to the required standard, then that can only lend to its case being dismissed at the end of the trial.

39. In *Gimalu Estates Ltd & 4 others v International Finance Corporation & another* [2006] eKLR], Anyara Emukule J held as follows:

> "In the very useful case of Campling Bros & Vanderwal Ltd (supra) the Court of Appeal for Eastern Africa held that – a "term can only be implied if it is necessary in the business sense to give efficacy to the contract." Explaining this holding Sir Barclay Nihill (President of that Court) referred to the case of Rufate –Vs- Union Manufacturing Co. (Ramsbottom) (1918) L.R. I K.B. 592, where Scrutton L.J. said:-
>
> "The first thing is to see what the parties have expressed in the contract and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract. A term can only be implied if it is necessary in the business sense to give efficacy to the contract that is, if it is such a term that can comfortably be said that if at the time the contract was being negotiated someone had said to the parties, "what will happen in such a case" they would have replied "of course so and so will happen, we did not trouble to say that; it is too clear." Unless the court comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed."

40. In view of the above, I find that the trial court did not err as it could not imply the existence of terms of the contract upon which the parties have given conflicting terms and in the absence of sufficient evidence to enable the Court make a reasonable determination.

41. The Appellant has invoked Section 112 of the *Evidence Act* and asked this Court to make an adverse inference against the Respondent for its failure to produce minutes of the meetings in which the Appellant believes the contract sum was stated. The Section provides as follows:

> "In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

42. In Kenya A*kiba Micro Financing Limited V Ezekiel Chebii & 14 Others* [2012] eKLR, the Court of Appeal held that:

> "Section 112 of the *Evidence Act* Chapter 80 of the laws of Kenya provides: - In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.....where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party'.

43. It is therefore true that indeed the Court is entitled to draw an adverse inference against a party who chooses not to produce evidence that is in his custody and which is deemed to be material. I do not however understand this provision to be a substitute to the age-old principle that in civil proceedings, the burden of proof is always on the Plaintiff. In any event, the contents of the minutes whose non-production this Court is being asked to draw adverse inference are unknown to the Appellant and secondly, the minutes relate to internal meetings within the school management in which the Appellant was not even a participant.

44. At most then, the Appellant is engaging in a fishing expedition in the hope that such minutes may contain some information that is in his favour. In an adversarial legal system like ours, such practice cannot be allowed.

45. Further, the record does not show that at any time during the case before the trial Court the Appellant served any "Request for Further and Better Particulars" or Interrogatories upon the Respondent as allowed under Order 2 Rule 10 of the *Civil Procedure Rules*. The Section provides as follows:

> "The court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading, or a statement of the nature of the case on which he relies, and the order may be made on such terms as the court thinks just."

46. The issue of the minutes of the meetings could therefore have been brought up early in the case, even during Pre-trial and/or Case Management under Order 11 of the *Civil Procedure Rules*.

47. The Appellant also argues that the trial Court contradicted itself by holding that the contract sum was not proved and yet at the same time proceeding to enter Judgement for the sum of Kshs 524,622/-. According to the Appellant, the implication is that Judgment was entered at the said figure on the basis that the contract sum was Kshs 1,759,622/- as alleged by the Respondent. On my part, I do not share this view since my reading of the Judgment reveals that the trial Court entered Judgment for the sum of Kshs 524,622/- simply because that figure was admitted in the Respondent's Statement of Defence, not because the Respondent had proved that the contract sum was Kshs 1,759,622/-.

48. In the premises I find that this appeal is not merited. It is hereby dismissed with costs to the Respondent.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 28TH DAY OF APRIL 2023

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JOHN R. ANURO WANANDA

JUDGE