



Kenya Ports Authority v Cemtec Engineering Limited (Civil Appeal E068 of 2022) [2023] KEHC 22213 (KLR) (25 May 2023) (Judgment)

Neutral citation: [2023] KEHC 22213 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E068 OF 2022**

F WANGARI, J

MAY 25, 2023

BETWEEN

KENYA PORTS AUTHORITY APPELLANT

AND

CEMTEC ENGINEERING LIMITED RESPONDENT

(Being an appeal from the Judgment of the Chief Magistrate Honourable M.W. Mutuku delivered on the 14th April, 2022 in CMCC No. 88 of 2017 in Mombasa)

JUDGMENT

1. This is an appeal from the Judgment of the learned chief magistrate hon. M.W. Mutuku in Mombasa CMCC 88 of 2017 given on April 14, 2022.
2. The appellant appealed on the whole judgement and proceeded to set out eleven (11) grounds among them that the learned trial magistrate erred in law and fact by misconstruing the evidence on record and thereby arrived at a wrong conclusion particularly in holding that there was a valid contract for specialized painting works between the plaintiff and the defendant.
3. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep in mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
4. This was aptly stated in the cases of *Selle v Associated Motor Boat Company Ltd* [1968] EA 123 and *Peters v Sunday Post Limited* [1985] EA 424 where in the latter case, the court therein rendered itself as follows: -

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction



to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

5. In *Livestock Research Organization v Okoko & another* (Civil Appeal 36 A of 2021) [2022] KEHC 3302 (KLR) (29 June 2022) (Ruling), Justice R. E. Aburili, J. held as follows;

In other words, a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyse and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated that

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this 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 allowances in this respect”

Pleadings

6. The plaintiff (respondent herein) instituted a suit against the defendant (appellant herein) seeking judgement for a sum of Kshs. 19,954,991.29/= plus interests at commercial rates of 14% per annum from September 4, 2016 till payment in full plus costs of the suit and interests from the date of judgement till payment in full. The basis of the claim was that the respondent had successfully bid for a biennial tender number KPA/016/2013-14/CE floated by the appellant for specialized painting works commencing in the year 2014. The parties subsequently signed a contract specifying the terms and conditions of the engagement. Pursuant to the said tender and contract, in June, 2016, the defendant requested the respondent to carry out specialized paintwork and yard marking at an empty container yard at the appellant’s new container terminal. The respondent averred that the appellant approved and authorized the aforestated works to be carried out for a total sum of Kshs. 21,578,358.16/=.
7. It was the respondent’s position that it commenced and diligently carried out the work to the satisfaction of the appellant’s Head of Civil Engineering Department who was the authorized officer required to approve the works carried out by the respondent. The respondent stated that it issued the appellant with an invoice dated July 30, 2016 for Kshs. 19,954,991.29/= being the price for the works completed as at that date and which invoice was checked and approved by among others the Head of Civil Engineering Department and the I & A Committee of the appellant on August 4, 2016. The respondent continued and completed the works and thereafter raised another invoice dated August 25, 2016 for the balance of Kshs. 1,639,955.22/= which was similarly approved by among others the Head of Civil Engineering Department and the I & A Committee of the appellant on September 14, 2016.
8. The respondent averred that the invoice dated August 25, 2016 for Kshs. 1,639,955.22/= was settled but the one dated 30th July, 2016 for Kshs. 19,954,991.29/= was never settled and the reason given was that the respondent owed some money to Kenya Ports Authority Retirement Benefits Scheme 2012 which is itself a body corporate with its own identity quite separate from the appellant. The respondent stated that the appellant summoned it to its office and made it clear that no payment of Kshs. 19,954,991.29/= nor any part thereof would be made until and unless the respondent authorizes the appellant in writing to deduct an amount from the funds towards settling the debt allegedly owed to Kenya Ports Authority Retirement Benefits Scheme, 2012. Out of desperation and economic duress, the respondent authorized the appellant to deduct a sum of Kshs. 5,000,000/= and have the balance of Kshs. 14,954,991.29/= remitted to it. The appellant neither deducted the Kshs. 5,000,000/= nor



remitted the sum of Kshs. 14,954,991.29/= nor remitted the entire sum of Kshs. 19,954,991.29/=. The respondent's cause of action thus was breach of contract by the appellant for failing to settle the sum of Kshs. 19,954,991.29/=.

9. The claim was strenuously defended. A statement of defence dated February 20, 2017 was filed on February 20, 2017. In the said defence, the appellant denied entering into any contract in June, 2016. It was further averred in the defence that though the respondent had no valid contract with the appellant, the respondent continued with the alleged works to completion and thereafter raised invoices which were of values exceeding the actual value of the works done. The appellant denied making any payment in regard to the invoices raised by the respondent.
10. *Vide* a notice of motion application dated April 20, 2017 and filed on May 9, 2017, the respondent moved the court to have the appellant's statement of defence be struck out for being frivolous, vexatious and otherwise an abuse of process. Grounds of objection to the said application dated 4th July, 2017 was filed on even date. In the grounds, the appellant submitted that the application did not meet the criteria for striking out the statement of defence and counter claim. Parties submitted on the application and the trial court *vide* a ruling delivered on September 15, 2017 struck out the appellant's statement of defence.
11. Upon the defence being struck out, the respondent extracted the decree and a certificate of stated costs. Another application dated November 6, 2017 was filed on even date. The respondent sought for orders to garnish the appellant's account said to be held at Citibank N.A Kenya. From the proceedings, it appears that parties went to the High Court on appeal but what transpired in the High Court was never included in the record of appeal.
12. What can be discerned is that the High Court allowed the appeal and remitted the file back to the lower court for hearing and final disposal. The matter went through the usual motions and the same was finally heard and a judgement was delivered on April 14, 2022. It is this decision that precipitated the present appeal.

Evidence

13. The respondent's director, one Kennedy Njuguna Mwangi (PW1) testified on 19/10/2021. He stated that the respondent does construction and maintenance engineering works in Mombasa County and other parts of the country. He added that it has been doing business with the appellant since it was pre-qualified in 2010. He referred to a biennial contract for painting which was produced as an exhibit. He stated that the painting works were done and completed in good time. Upon completion, it was expecting to be paid. He stated that on June 30, 2016, an invoice of Kshs. 13,954,991.21/= was raised. He described what was in the said invoice among them three signatures among them one for the Head of Civil Engineering Department. He averred that the Head of Civil Engineering Department was the authorized person and overall boss. His stamp signifies completion of works and approval of payment. He also referred to an ETR receipt which he produced. Another invoice dated August 25, 2016 for a sum of Kshs. 1,629,925.20 was produced. The witness confirmed that the amount was paid to the respondent's account at Family Bank. An ETR receipt accompanying the invoice was produced.
14. On payment period, the witness stated that the appellant's practice is to pay between 30 – 45 days upon completion of works. When it failed to receive payment, he went to see the General Manager, Finance one Mr. Nyoike. It is here that he was told that payment had been held because of another job it had been awarded by the Pensions Department. Since it had received a down payment for that work, they amicably agreed on how to reimburse the down payment. The GM, finance asked him to write a letter which is dated August 16, 2016. The letter was produced. He stated that one cannot commence work



at the appellant's without a valid contract. He added that though it had issued a notice to produce the appellant, the appellant had not produced any.

15. On cross examination, he confirmed that he was the respondent's principal shareholder and that it had entered into more than sixty (60) contracts with the appellant. The appellant normally advertises for works. The respondent fills a bill of quantity then a tender document which are then submitted to the appellant who carries the technical and financial evaluation. Thereafter, an acceptance letter is given. A contract is then signed. He confirmed having his original contract which he referred to exhibit 1 at page 7. He agreed that a document cannot be looked at in isolation but as a whole. He confirmed that he did not produce the acceptance and performance bond issued to the appellant. He equally confirmed that he did not produce the actual contract signed with the appellant. In the acceptance letter, the signature page was not before court. He stated that the appellant could not have paid if there were no valid contracts. That marked the close of both parties' cases as the appellant neither called a witness nor produced any documents.
16. Both parties filed their submissions before the trial court and judgement subject of this appeal was delivered on April 14, 2022 wherein judgement was entered in favour of the respondent.

Submissions on Appeal

17. The appellant filed its submissions dated January 17, 2023 on January 18, 2023. The appellant isolated three (3) issues for determination. These are: -
 - i. Whether upon re-evaluation of the evidence adduced before the subordinate court, the decision contained in its judgement of April 14, 2022 is well founded;
 - ii. Whether the Trial Magistrate applied the law correctly;
 - iii. Whether the appellant is liable to the respondent on the claim
18. On the first issue, the appellant submits that though the biennial contract relied upon by the respondent at trial was 46 pages, the respondent only produced selective pages for the alleged contract. The appellant made reference to pages 348 and 349 of the record of appeal and isolated some 7 issues among them that the contract produced is not what the respondent signed. Referring to the case of *Michael Wanjohi Mathenge v Lydia Nyaguthi Agatha & another* [2007] eKLR and *Mary Wanjiru v Lucy Njeri Munyua & another* [2020] eKLR, the appellant submitted that in civil matters, the burden of proof lies with the plaintiff (respondent herein) and such burden does not shift to the defendant (appellant herein) until the plaintiff has discharged its burden. Further reliance was placed on the provisions of section 112 of the *Evidence Act*.
19. The appellant cited the case of *Kenya Akiba Micro Financing Limited v Ezekiel Chebii & 14 others* [2012] eKLR for the proposition that where a party has custody or is in control of evidence which that party fails to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such party. It added that the respondent having accepted that all documents were available for its production in evidence and having not so produced, an adverse inference ought to be drawn.
20. The appellant castigated the learned chief magistrate's reasoning describing it as wholly flawed when she found that the appellant had admitted the existence of a contract. The appellant submitted that notice to produce did not make any difference to the burden of proof principle but simply entitled the respondent to produce secondary evidence of the documents specified in the notice. In the appellant's view, in the absence of a signed contract setting out the terms and conditions of engagement between the parties, no proper or valid contract in law could be said to have existed between the parties and



no cause of action for breach of contract could accrue. Sections 86, 87, 134 and 135 of the [Public Procurement and Assets Disposal Act](#) of 2015 was referred to.

21. The appellant submitted that the respondent's claim and cause of action was premised on contract specifying the terms and conditions of engagement and for breach of contract as per paragraphs 3 and 14 of the plaint. For the proposition that parties are bound by their pleadings, the authorities in [Dakianga Distributors \(K\) Limited v Kenya Seed Company Limited](#) [2015] eKLR and [Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others](#) [2013] eKLR were cited.
22. On the second issue, the appellant submitted that notwithstanding part payment, there was no valid contract and therefore the trial court erred given the illegality that was admitted. The case laws relied on for this proposition [Purple Rose Trading Company Limited v Bhanoo Shashbikant](#) [2014] eKLR and [Festus Ogada v Hans Mollin](#) [2009] eKLR.
23. On the third issue, the appellant submitted that it was not liable for the respondent's claim for among others failure to establish the existence of a valid contract and failure to discharge its burden of proof as to the existence of a valid lawful contract. On the principle public policy that no court will lend its aid to a man who founds his cause of action on an immoral or an illegal act, the case of [Abmednasir Abdikadir & Co. Advocates v National Bank of Kenya Limited](#) [2006] eKLR. In totality, the appellant prayed that the appeal be allowed and the Lower Court judgement be substituted with an order dismissing the suit with costs.

Respondent's Submissions

24. The respondent's submissions dated January 13, 2023 were filed on February 3, 2023. The respondent identified four (4) issues for determination which are: -
 - i. What were the terms of the written agreement entered into between the appellant and the respondent;
 - ii. Whether the terms of the agreement of 26/8/2012 were varied by a subsequent agreement entered into by parties in June, 2016. If so, how?
 - iii. Whether the contract arising from KPA/016/2013-14/CE was signed by the parties;
 - iv. Whether the claim for Kshs. 19,954,991 was proved to be due and owing from the appellant to the respondent.
25. On the first issue, the respondent submitted that the agreements entered into by the appellant and the respondent were both written, oral and documentary through correspondences. The terms of the contract were express and implied. To the extent that the agreement was written and express, the agreement is contained in the tender documents dated 26/08/2013. The respondent thus submits that there was a valid contract since all the elements of a valid contract were met.
26. On the second issue, the respondent submitted that whether the terms of an initial agreement are varied by a subsequent agreement is a question of fact to be inferred from the available evidence whether by way of documents or conduct of parties. [Halbury's Laws of England](#), 4th Edition Vol. 9(1), paragraph 1019, G.H. Treitel in his book, [The Law of Contract](#), 3rd Edition at page 86 and [Chitty on Contracts](#), 32nd Edition, Vol. 1 at paragraph 22 – 33 were all cited in support of the second issue.
27. The respondent submitted that the agreement dated 28/08/2013 was varied by another agreement entered into on 02/06/2016. This was evidenced by extending the validity of the contract dated



28/11/2013 to 30/09/2016, increasing the contractual value from Kshs. 171,854/= to Kshs. 21,578,358.16 and inserting a completion date of 30/09/2016. The other evidence was said to be a purchase order dated 02/06/2016.

28. To show the variation, the respondent relied on the service order (page 75 of the Record), Bill of Quantities said to have been prepared by the appellant and filled by the respondent. Further reliance was placed on the invoices and the ETR receipts. It is submitted that the respondent believed and acted on the representation made the appellant's conduct that showed that the agreement dated 26/08/2013 had been varied by the terms of the agreement of 02/06/2016. The respondent's acts were as follows: - issuing bill of quantities based on the new value of Kshs. 21,578,358.16/=-, commencing works in June as revised, raising invoices based on the new contractual value, raising the ETR based on the new value, completing the works before 30/09/2016 and accepting the partial payments based on the revised Kshs. 21,578,358.16 and not Kshs. 171,854/=-.
29. The respondent submitted that save for declining to pay the balance of the contractual fees, the appellant complied with all the other terms varied in 2016. Having made the respondent to believe and act on the said representations, the appellant is estopped from denying that the written agreement of 26/08/2013 was varied in 2016. The case of *Multiple ICD (K) Limited & another v Kamau James Gitutho Njendu & 3 others*, Civil Appeal No. 77 of 2017 and section 120 of the Evidence Act were cited on the issue of estoppel.
30. On the third issue, the respondent submitted that no contract was produced by either party. However, it submits that there is evidence that the contract under tender No. KPA/016/2013 – 14/CE was reduced into writing and signed. Evidence to that effect is contained in a letter dated 27/06/2014. The respondent submits that the appellant who was the principal custodian of the original contract did not file any document in court including the said contract.
31. On whether there was any tendering in 2016, the respondent submitted that it is common ground that there were no new tenders floated in 2016. On section 135 of the Public Procurement and Assets Disposal Act, 2015, the respondent submits that the appellant cannot challenge the validity of the subject tender either before the Trial Court or this court citing section 93 of the Act. The case of John Kakindu v County Government of Makeni & 6 others [2018] eKLR was cited as well.
32. Lastly, it was submitted that the claim for Kshs. 19,954,991 had been proved to be due and owing from the appellant to the respondent. The other litigation between the respondent and Kenya Ports Authority Retirement Benefits Scheme was said to be separate with no correlation with the present case. In totality, the respondent urged that the appeal be dismissed with costs.

Analysis and Determination

33. I have carefully considered the pleadings, evidence, submissions, judgement, the grounds of appeal and the law and accordingly, the following are the issues for determination: -
 - a. Whether there was a valid contract between the appellant and the respondent;
 - b. If the answer to (a) above is in the affirmative, whether the respondent is entitled to the amount sought.
 - c. Who bears the cost?
34. At the onset, it is not in dispute that there was no contract that was produced in court. It has been held that the approach by a court in considering whether a contract exists is an objective one as opposed



to a subjective one. In *Abdulkadir Shariff Abdirahim & another v Awo Shariff Mohammed t/a A. S. Mohammed Investments* (2014) eKLR the Court of Appeal held that: -

“...There is no general rule of law that all agreements must be in writing. The numerous advantages of a written agreement notwithstanding, all that the law requires is that certain specific agreements must be in writing or witnessed by some written note or memorandum. Section 3(1) of the *Law of Contract Act* is one such provision...”

35. Further, in *Ali Abdi Mohamed v Kenya Shell & Company Limited* (2017) eKLR the Court of Appeal referred to the following persuasive decisions: -

“...In *Lamb v Evans* [1893]1 Ch 218, Bowen LJ stated: The common law, it is true, treats the matter from the point of view of an implied contract, and assumes that there is a promise to do that which is part of the bargain, or which can be fairly implied as part of the good faith which is necessary to make the bargain effectual. What is an implied contract or an implied promise in law? It is that promise which the law implies and authorizes u to infer in order to give the transaction that effect which the parties must have intended it to have, and without which it would be futile.”

Bingham LJ in *The Aramis* [1989] 1 Lloyd’s Rep 213 made some general observations about the circumstances in which a contract might be implied. At p.224 col. 1, he said:

“As the question whether or not any such contract is to be implied is one of fact, its answer must depend upon the circumstances of each particular case - and the different sets of facts which arise for consideration in these cases are legion. However, I also agree that no such contract should be implied on the facts of any given cases unless it is necessary to do so; necessary that is to say, in order to give business reality to a transaction and to create enforceable obligations between parties who are dealing with the one another in circumstances in which one would expect that business reality and those enforceable obligations to exist...”

36. What was the nature of the relationship between the appellant and the respondent? I have no doubt in my mind that the appellant entered into a biennial contract for specialized painting through Tender No. KPA/016/2013 – 14/CE on August 26, 2013. The Oxford dictionary defines the word biennial as happening once every two years. At page 53 of the Record of Appeal, the existence of a contract is confirmed by the appellant and from the particulars, it is not different from the one found at pages 15 to 26 of the Record of Appeal.

37. At pages 27 to 36 of the record of appeal, the bill of quantities are exhibited and they bear the stamp of the appellant’s Head of Civil Engineering. Page 36 confirms that the contract sum was Kshs. 21,578,358.16/=. At page 18, the name and address of the employer’s representative is clearly indicated as the Head of Civil Engineering. In his testimony, the respondent’s witness stated that the Head of Civil Engineering was the overall boss and his stamp signified completion of works and payment approval. At page 75 of the record of appeal, there is a service purchase order issued by the appellant to the respondent. It is dated August 2, 2016. The short description states “Paint work and yard marking at new cont. yard.” The total amount involved is Kshs. 21,578,358.16/=. This marches the amount reflected in the bill of quantities.

38. So whether the contract was produced or not is immaterial. It shall only be material on the issue of the amounts claimed and how the same was arrived at. Therefore, my finding in relation to the first issue is in the affirmative. The position taken by the appellant is quite evasive. On the one hand, the appellant



denied that there was any contract between it and the respondent yet it goes ahead to state that despite there being none, the plaintiff continued with the alleged works and thereafter raised invoices which were of values exceeding the actual value of the works done (paragraph 9 of the statement of defence). This begs the question, if there was no contract, what were these works that the respondent continued with?

39. Another red erring on the part of the appellant's case was disclosed from the proceedings. If indeed there was no contract, what were they negotiating about? I agree with the respondent that the appellant is estopped from denying existence of a contract. In *Titus Muiruri Doge v Kenya Cannery Ltd* [1988] eKLR, the Court had the following to say: -

“...If a party is made so to believe in a certain state of facts and that party acts on those facts to his detriment, and the other party stands by and does not stop him from so acting, that other party is estopped from changing his stand. If one says to A “go ahead, this is land, but you may build on it, spend money, we will go into formalities of transfer later’ and A does all that the representor is estopped from denying the right accrued to and acquired by A...”

40. Having found that a contract existed, I now turn to the issue of whether the respondent proved that it was owed a sum of Kshs. 19,954,999.29/=. The total amount quoted was Kshs. 21,578,358.16/=. The respondent confirmed being paid a sum of Kshs. 1,639,955.22/= thus leaving a balance of Kshs. 19,954,999.29/=. An invoice dated 30th July, 2016 bearing the stamps of the Head of Civil Engineering Department and the appellant's I & A Committee was produced. An ETR receipt accompanying the invoice was also produced. This piece of evidence was not controverted at all since the appellant called no witness and neither did it file documents to controvert those of the respondent.

41. I am alive to the holding that the fact that the defendant fails to call any witness does not automatically mean that the plaintiff's case succeeds (see the case of *Charterhouse Bank Limited (Under Statutory Management) v Frank N. Kamau* [2016] eKLR). In the present case, the respondent's case was not controverted at all and as such, I hold that the respondent proved that it was owed a sum of Kshs. 19,954,999.29/=.

42. The appellant submitted heavily on the provisions of section 135 of the *Public Procurement and Asset Disposal Act*, 2015 for the proposition that since there was no contract, whatever resulted was an illegality. Section 135 to which reference has been made states as follows:

135. Creation of procurement contracts

- (1) The existence of a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be signed by the accounting officer or an officer authorized in writing by the accounting officer of the procuring entity and the successful tenderer.
- (2)
- (3)

43. The answer to this issue is contained at page 53 of the Record of Appeal. It is the appellant who confirmed that there was a duly signed contract and the fact that it was not produced cannot be a ground to disentitle the respondent herein. Doing so would be contrary to the persuasive authority of *In Lamb v Evans* (above) as cited by the Court of Appeal. Therefore, I am not persuaded that there was anything illegal as postulated by the appellant.



44. Lastly, on the issue of costs, the same follow the event as guided by section 27 of the Civil Procedure Act. The respondent being the successful party is entitled to costs and I so award.
45. Flowing from the foregoing, I proceed to make the following orders: -
- a. The appeal is found to be without merit and it is hereby dismissed with costs to the respondent;
 - b. The award of Kshs. 19,954,991.29 as ordered by the trial court shall attract interests at court rates from the date of filing until payment in full.

Orders accordingly

DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 25TH DAY OF MAY, 2023.

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F. WANGARI

JUDGE

In the presence of:

Ondego Advocate for the appellant

Karina Advocate for the respondent

Guyo, Court Assistant

