



Lake Victoria South Water Services Board v Ticho Enterprises Limited (Civil Appeal 129 of 2019) [2023] KEHC 19355 (KLR) (30 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19355 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL 129 OF 2019
MS SHARIFF, J
JUNE 30, 2023**

BETWEEN

LAKE VICTORIA SOUTH WATER SERVICES BOARD APPELLANT

AND

TICHO ENTERPRISES LIMITED RESPONDENT

*(Being an appeal from the judgement and decree of Hon W. Onkunya S.R.M
in Kisumu CMCC No. 103 of 2017 delivered on 6th November, 2019)*

JUDGMENT

1. The respondent sued the appellant in the subordinate court seeking payment of the sum of Kshs 753,782/-, a declaration that the appellant was liable to pay all the penalties due to KCB, exemplary damages and costs of the suit. The respondent pleaded that vide contract executed on 22/8/2014, the appellant awarded the respondent a contract in the sum of Kshs 5, 399,867. That pursuant to the contract, it executed its part of the contract and actually paid by the appellant to the tune of Kshs 4, 646, 085/- leaving out the balance.
2. The appellant filed its statement of defence stating that it had indeed overpaid the respondent and in any event, the respondent had not requested for final inspection upon the lapse of the contract period.
3. The matter proceeded to hearing with Fredrick Wilfred Okello Obiny, a co-director of the respondent testified that pursuant to the contract, the Respondent executed the works until completion in November, 2014. The appellants did not however make complete payment for the work done.
4. PW-2 testified that he was a resident of the village where the dam was constructed. He testified that the dam was built in 2014 and is still in use.
5. The defence case was closed without adducing any evidence.



6. The court ultimately entered judgement in favor of the respondent in the sum of Kshs 753,782/- together with interest at court rates until payment in full. This aggrieved the appellant who moved this court vide memorandum of appeal raising the following grounds;
 - i. The learned trial magistrate misunderstood the evidence before her, wrongly analyzed the evidence thus ordering the appellant to pay the respondent Kshs 753,782 within 30 days.
 - ii. The learned magistrate erred in law and fact by failing to appreciate the totality of the evidence before her and the submissions made on behalf of the appellant thus reaching a conclusion that was contrary to the evidence before her.
 - iii. The learned magistrate erred in law in failing to follow the law as established through judicial precedent.
 - iv. The learned trial magistrate erred in considering frivolous, vexatious and unsupported facts.
 - v. The learned magistrate misunderstood and wrongly evaluated the evidence before her and therefore arrived at a wrong conclusion.
7. The court directed that the appeal to be disposed of by way of written submissions. The respondent complied and it's submissions have been considered.

Analysis and determination.

8. This being the first appellate court I am duty bound to reconsider the evidence, re-evaluate it and reach my own conclusion while bearing in mind that unlike the trial court, I neither heard or saw the witnesses wherefore I should take that into account in arriving at my decision. (see *Selle and Another v Associated Motor Boat Company Ltd & Others* [1968] EA 123).
9. Upon my perusal of the trial court's record, the memorandum of appeal and the submissions filed herein, the issue that emerge for determination is whether the respondent proved her case in the subordinate court to the required standards.
10. The respondent's case in the trial court was anchored in a contract executed on 22/8/2014 on behalf of the appellant by the CEO and the legal officer. The appellant's defence was that it had over paid the respondent and faulted the respondent for not making requests for final inspection.
11. A look at the matter leads me to the finding that the issue for determination is whether the respondent is entitled to the sums claimed as money due and owing to the respondent pursuant to the agreement exhibited.
12. As stated by case law, the court has no business re-writing contracts for parties but to interpret the same and give effect to the parties' intention. My assertion is supported by the authorities in *National Bank of Kenya Ltd vs. Pipe Plastic Samkolit (K) Ltd* (2002) 2 E.A. 503, the Court of Appeal at page 507 stated: -

A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.



13. In *Pius Kimaiyo Langat vs. Co-operative Bank of Kenya Ltd* (2017) eKLR the Court of Appeal held that: -

We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties, they are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.

14. The contract in this case was exhibited showing the contract sum was Kshs 5,399,867/- out of which the respondent stated it had received Kshs 4, 646, 085/-leaving out the outstanding balance now claimed. The appellant's defence having been raised that the respondent was indeed overpaid is unsupported by evidence.

15. On the contrary, I find the respondents evidence factually uncontroverted since the appellants failed to adduce any evidence to the contrary or in rebuttal of the respondent's assertions. The contract was produced into evidence and the witnesses testified that the project was already in use having been handed over to the recipients.

16. The totality of the above is that the respondent proved its case to the required standards and further find that the appellant's defence is an afterthought as no evidence to the effect was adduced. The appellant advanced no valid reason why it should not be compelled to pay up the sum due to the respondent. The appellant led no evidence why the respondent is not entitled to the sum sought.

17. I find the trial court's finding in tandem with the evidence tabled before that court.

18. The upshot of the above is that the appeal herein is devoid of merit and is dismissed with costs to the respondent.

DELIVERED, SIGNED AND DATED AT KISUMU THIS 30TH DAY OF JUNE 2023.

MWANAISHA. S. SHARIFF

JUDGE

In the presence of :

Mr Ariho for the Respondent

No attendance by Sala & Mudany for the appellant

