



**Benson Mukoto t/a Benai Building & Contractors Co. Ltd v Kameri (Civil Appeal 62 of 2021) [2023] KEHC 21002 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21002 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CIVIL APPEAL 62 OF 2021  
SC CHIRCHIR, J  
JULY 28, 2023**

**BETWEEN**

**BENSON MUKOTO T/A BENAI BUILDING & CONTRACTORS CO.  
LTD ..... APPELLANT**

**AND**

**JOHN O. KAMERI ..... RESPONDENT**

*((Being an appeal from the decision of Hon. E. Makoyo, SPM  
in Butere SRM No. 32 of 2018 delivered on 19th October 2021))*

**JUDGMENT**

)

1. The appellant herein sued the respondent in the lower court seeking recovery of Kshs 429,192/= being the value of work allegedly done but not paid for pursuant to a construction contract entered into between the parties for the construction of the respondent's residential house in plot No 1292 Ematawa, Butere district.
2. The trial magistrate delivered judgment in which he found that the appellant had failed to prove its case, and dismissed the claim.
3. The appellant was aggrieved by the Judgment and proffered this appeal.

**Grounds of Appeal**

- a. That the learned trial magistrate grossly erred in evaluation of the evidence before him.
- b. That the trial magistrate grossly erred in arriving at a decision not backed by facts.



- c. That the trial magistrate grossly erred in not giving due weight to the agreement, contract and certificate of costs entered into between the appellant and the respondent.
- d. That the trial magistrate exhibited actual bias against the appellant in the matter.
- e. That the final orders of the trial magistrate are a complete miscarriage of justice
4. The Appeal was canvassed by way of written submissions

### **Appellant's Submission**

5. It is the appellant's submissions that the existence of the contract dated October 12, 2022 and the contract price of Kshs 6,448,325/=; is not in dispute. He further submits that the contract was terminated at the instance of the Respondent; and that at the time of termination the work that had been completed was placed at 83.51%. It is further submitted that at termination the Project engineer issued a certificate for a net payment of Ksh 1, 316, 440.
6. The Appellant further submits that there had been additional works and variations in the project that were agreed to by all the parties involved in the project but which the Respondent has ignored.
7. He further states that upon the issuance of the payment certificate, the respondent paid a sum of Kshs 887, 248/= purporting to be at 88.27 % of the contract price without considering the variations
8. He contends that the certificate was issued by the professionals who were in the employment of the Respondent and that the respondent went against the workings of the professionals and came up with his own calculations of what he thought was due.
9. It is finally submitted that it is trite law that an Expert evidence can only be challenged by another expert.

### **Respondent's submissions.**

10. The Respondent's submission is that he made payment based on the value of the work done as per the report prepared by the project engineer; that the said Engineer valued the work done at 88.27% which is equivalent to Ksh 6,114,525; and that having previously paid Ksh 5,227,278 he paid Ksh 880,000 on termination being the full and final balance.

### **Analysis and Determination**

11. The Court of Appeal in *Ephantus Mwangi and Another v Duncan Mwangi Wambugu* (1982) – 88) IKAR 278 stated that:

“A court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did”

12. The basic facts of the case were not in dispute and are as follows.

In the year 2017, the appellant entered into a contractual agreement with the Respondent for the construction of the Respondent's residential home on a parcel of land No. 1292 Ematawa, Butere district at a cost of Kshs 6,948,325/=

The appellant was paid a total sum of Kshs 5,227,278/= out of the sum that was agreed.



13. A dispute seems to have arisen due to delays on payment and allegation of substandard work done. The respondent complained about the substandard work done while the Appellant complained that there was a delay in payment. The contract was eventually terminated by the Respondent.
14. When the parties decided to end the agreement the project manager carried out the valuation of the works and came up with a report dated September 25, 2017. Some highlights in this report are:
  - Changes made on site by technical team 's instructions through the client, variation to be prepared on the same
  - payment overdue for roof works
  - on the comments section of the report, the Engineer listed some of the defects noted
  - In conclusion part of the report, he states: In conclusion from the observations and actual measurements of the works currently executed stand at 88.27% of the total work done inclusive of retention and VAT as per clause 4 in the form of agreement.”The report ends with a note to the effect that All additional works and variations herein were agreed by the parties involved in this project
15. An interim payment certificate was issued by the same project Engineer. It was issued the same day as the report
16. The report and the certificate were produced in Evidence without calling the maker- the project Engineer, who in my view would have provided some clarity on what was outstanding.
17. The key issues, which emerge from the report and which were not contested by the parties herein, are that there were variations requested by the client( The respondent) and there also defects noted on the completed works.
18. The respondent's case is that he had made payment based on the percentage of the work done, that is 88.27%, which as against the contract price of ksh 6,948,325 translates to ksh 6,114, 525. ( I hasten to point out that 88.27% of ksh 6,948,325 is actually is Ksh 6,133,286.50 not, the figure given by the respondent.)
19. The Appellant on the other hand argues that the payment that was due at the time of termination is as per the certificate that was issued by the engineer, which valued the work done but unpaid for, which was ksh 1,316,440
20. The respondent ignores the fact that there were variations of works, and also defects on the works that had already been done. That variation would have a direct effect on the contract price. That in my view would explain the need for the certificate dated September 25, 2017, which accompanied the main report, bearing the same date.
21. The report as well as the certificate was prepared by the project Engineer, who according to the Appellant was appointee of the respondent. This fact has not been refuted by the Appellant. The certificate was produced, without any objection from the respondent. The certificate in an interim certificate for the works covered at intervals. A scrutiny of the certificate showed that project Engineer places the value of the work done at ksh 1,456,160; then he discounted the omitted works at ksh 139,720, leaving a balance of ksh 1, 316,440. This was the amount due to the Appellant at the time of termination.



22. The respondent seemed to have decided to close his eyes and simply calculate 88.27% as against the original agreed price of KSh 6,948,325 and in the process ignored the fact of variations and defects had effectively varied the gross value that the parties had initially agreed upon.
23. In any event as per clauses 13.1 (during the subsistence of the contract) and 16.2 (on termination) payments were to be made on the basis of interim payment certificates.
24. The respondent as argued that payments had been made for previous works without the interim certificates. There is nothing that can stop parties from operating “gentlemanly”, but contracts are meant to hold parties to their part of the bargain when disagreements set in.
25. The project engineer was an expert hired by no less the respondent. He issued a certificate showing what the appellant was entitled to upon termination. I agree with the appellant that an expert witness’s testimony can only be challenged by a fellow expert. The trial court erred in ignoring what was clearly uncontested evidence of an expert.
26. The appellant however admitted that he received KSh 880,000, leaving a balance of KSh 429,192, which forms the subject matter of this claim.
27. The standard of proof in civil case is on a balance of probabilities. Am satisfied, in view of the aforesaid, that the appellant indeed proved his claim on the said balance. The dismissal of his claim was erroneous.
28. Consequently I hereby set aside the judgment of the trial court and substitute it with the following:
  - a. Judgment is hereby entered for the Appellant as against the respondent for KSh 429,192
  - b. Interest at court rates from the time of filing suit until payment in full
  - c. The Appellant shall have the costs of this Appeal as well as costs in the lower court.

**Dated, signed and delivered virtually at Kakamega this 28<sup>th</sup> day of July, 2023**

**S. Chirchir**

**In the presence of:**

Eric- Court Assistant.

No appearance by the parties.

