Rockview Investments Limited v Mungei (Civil Appeal E078 of 2021) [2023] KEHC 21042 (KLR) (27 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21042 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CIVIL APPEAL E078 OF 2021

WA OKWANY, J

JULY 27, 2023

BETWEEN

ROCKVIEW INVESTMENTS LIMITED ..... APPELLANT

AND

TOM NYACHAE MUNGEI ..... RESPONDENT

(Being an appeal from the Judgment and Order in Nyamira Civil Suit No. E009 of 2021 at the Chief Magistrate's Court in Nyamira by Hon. C.W. Waswa, Resident Magistrate on 4th October 2021)

JUDGMENT

1. The Respondent herein, who was the Plaintiff before the trial court, sued the Appellant seeking judgment for the payment of the principal sum of Kshs. 2,060,476.90/=, liquidated damages of Kshs. 1,030,738.45/= together with costs and interests.

2. The Respondent's case was that sometime in the month of April 2014, the Nyamira County Government Tender Committee awarded a tender worth Kshs. 3,77,632.80/= to the Appellant for the completion of an existing service block at Nyankongo Health. Through a letter dated 29th December 2015, the said Tender Committee changed the scope of works from renovation to construction and completion of the staff house at Nyankongo Health Centre. The Appellant accepted the offer of change of scope of works through a letter dated 8th January 2016.

3. The Respondent adds that by a Memorandum of Understanding (MOU) dated 29th June 2015 made him and Thomas Obuya Omao Getabu, Fred Nyabuti Omayio and Henry Mbotela, (hereinafter "the Partners") the Appellant, through its Managing Director Jackson Orina Otiso, the Appellant agreed not to get any benefits upon the completion of the said project.

4. The Respondent averred that pursuant to the terms of the MOU, the parties agreed that the County Government of Nyamira would release payment cheques in favour of the Appellant who would in turn draw post-dated cheques in favour of the Respondent and the Partners.

5. The Respondent contended that prior to the release of payment of Kshs. 1,799,097 by the County in respect to the first Certificate of Completion, he executed an agreement with the Partners on 17th February 2016. He adds that in the said agreement, the Partners Tom Omao, Fred Nyabuti and Henry Mbotela agreed to surrender/renounce their rights/interests in the tender in exchange of the sum of Kshs. 80,000, 70,000 and 20,000 respectively which the Respondent paid in full.

6. The Respondent further stated that based on the agreement of 17th February 2016 made pursuant to the MOU, the Appellant paid the sum of Kshs. 1,150,000 to the Respondent in respect to the first Certificate of Completion.

7. The Respondent further claimed that in breach of their MOU, the Appellant did not pay the balance on the 1st and 2nd Certificates of Completion after receiving payment in the sum of Kshs. 1,978,535.09 from the County Government of Nyamira thereby precipitating the filing of the suit.

8. The Appellant denied the Respondent's claim before the trial court through its Statement of Defence dated 3rd May 2021 wherein it states that it paid the sum of Kshs. 1,150, 000 to the Respondent, albeit, not pursuant to the MOU but on the strength of oral instructions/agreement at the instance of the Respondent's partner Thomas Ombuya Omae Getebu.

9. The Appellant averred that it paid the entire remaining amount received from the County, less Value Added Tax (VAT), to the said Thomas Ombuya.

Summary of the Oral Evidence

The Plaintiff/Respondent's Case

10. At the hearing of the case, the Respondent testified as PW1 and stated that the Appellant's Director Mr. Jackson Orina Otiso was aware of the agreement of 17th July 2016 in which the three partners Prof. Thomas Getabu Ombuya, Fred Nyabuti and Samuel Henry Mbotela relinquished their interests and responsibilities in the project in exchange for money which he paid to each of them. He testified that he was only paid Kshs. 1,150,000/= on 29th May 2017 in respect to the first Certificate of Completion and that he did not receive any payment for the 2nd Certificate.

11. The Respondent added that the Appellant remitted payment of the sum of Kshs. 1,683,000/= to one of the partners, Prof. Thomas Getabu Ombuya, yet he was not entitled to the same. He testified that the payment to Prof. Thomas was done contrary to the terms of the MOU that they all signed which at 8 provided for a penalty of 50% of the proceeds of the project upon breach.

12. PW2, Samuel Henry, Mbotela testified that he applied for the tender in question using the Defendant/Appellant's company profile and that the four partners and the director of Rockview Investments Jackson Orina Otiso signed an MOU dated 9th March 2015. He stated that Jackson Orina did not sign the second agreement of 17th February 2016 but was given a copy of the same at Zonic Hotel. He also testified that the Plaintiff did not receive the full payment in respect to the first Certificate of Completion.

The Defendant/Appellant's Case

13. DW1, Jackson Orina Otiso, conceded that his company entered into an MOU with the Respondent and his 3 partners upon getting the tender award from the County Government. He testified that his role was to pay the 4 partners through cheques when the County Government released payment into his company's account. He testified that one of the partners, Prof. Thomas Getabu, called him when the first payment was made and told him to give the Plaintiff/Respondent Kshs. 1,150,000/= on behalf of the others. He conceded that he made the payments but left some balance in his account.

14. He also testified that upon receiving the second payment from the County Government on 6th March 2020, Prof. Thomas Getabu again called him with instruction to transfer the money to his account but that two months after pay Prof. Thomas, the Respondent called him to enquire about the said payment. He also testified that he was not aware of the new agreement of 17th February 2016 and only came across it at the office of the Director of Criminal Investigations (DCI). He averred that he did not owe the Plaintiff any money and further, that he did not breach their contract.

15. On cross examination, DW1 stated that the retention money had not been paid by the County Government and that he only paid the monies as he did because the parties had changed their minds on the mode of payment and on the verbal instructions of Prof. Thomas Getabu. He also stated that he paid Prof. Thomas Getabu through cheque and cash but did not have any evidence to prove this and neither did he prepare a payment voucher to that effect. He denied the allegation that he shared the money with Thomas and stated that he intended to enjoin the Estate of the late Prof. Thomas Getabu into the case.

16. The trial court heard the case and at the end entered judgment in favour of the Plaintiff/Respondent for the payment of the claimed amount to the Plaintiff/Respondent herein.

17. Aggrieved by the decision of the trial court, the Appellant filed a Memorandum of Appeal dated 7th October 2021 wherein it listed the following grounds of appeal: -

    1. The learned trial magistrate erred in law and in fact by completely misinterpreting the provision of the Memorandum of Understanding vis-à-vis the oral agreement.

    2. The learned trial magistrate erred in law and in fact and misdirected himself fundamentally in holding that the defendant breached the Memorandum of Understanding.

    3. The learned trial magistrate erred in law and in fact in not holding that the Memorandum of Understanding had been varied and or altered contractually by the parties.

    4. The learned trial magistrate erred in law and misdirected himself by entering judgment in favour of the Respondent despite not being predicated on material evidence.

    5. The learned trial magistrate erred in law and in fact by failing to appreciate the role of the Appellant in the contract on one part and the Respondent and 3 partners on the other hand.

6. The learned trial magistrate erred in law and in fact by failing to hold that the Appellant had substantively performed his obligation to the Respondent and 3 other partners on the other side by releasing the money to them.

7. The learned trial magistrate erred in law and in fact in failing to correctly evaluate both oral and documentary evidence tendered by the Appellant thereby arriving at a wrong conclusion hence wrong judgment.

8. The learned trial magistrate erred in law by failing to adequately consider the Appellant's evidence, submissions and authorities relied on hence arriving at a wrong conclusion and judgment.

9. The learned trial magistrate misapprehended and misapplied the provisions of Order 1 Rule 15 of the Civil Procedure Rules, 2010.

10. The learned trial magistrate erred in law and in fact in failing to apply the express provisions of the Partnership Act.

11. The learned trial magistrate erred in law and in fact in selectively applying the obligations of the parties set out in the Memorandum of Understanding.

18. The appeal was canvassed by way of written submissions which I have considered.

Analysis and Determination

19. The first appellate court is expected to re-examine and re-analyse the evidence tendered before the trial court in order to arrive at its own independent findings while bearing in mind the fact that it neither heard nor saw the witnesses testify. This is the position that was taken by the Court of Appeal in Mwana Sokoni vs. Kenya Bus Service Limited (1982 -1988) 1 KAR 278 where it was held that: -

> "On a first appeal it is now well settled that, the role of the court is to revisit the evidence on record, evaluate it and reach its own conclusion, however the court will not interfere with findings of facts by the Trial court unless they were based on no evidence at all or on a misapprehension of it, or the court is shown demonstrably to have acted on wrong principles in reaching its findings."

20. I have considered the Record of Appeal and the parties' respective written submission. The following issues fall for my determination: -

i. Whether an oral agreement existed between the Respondent and the other 3 partners, altering the terms of the original Memorandum of Understanding dated 9th March 2015.

ii. Whether the Appellant was aware of the agreement dated 17th February 2016 between the partners and if, by remitting the payment of the 2nd Certificate to Thomas Getabu, it acted in breach of the original Memorandum of Understanding.

Existence of an oral agreement.

21. It was not disputed that the Appellant was awarded a tender No. NYCG/253/2013-2104 for the contract sum of Kshs. 3,777,632.80/= to complete the construction of an existing service Block at Nyakongo Health Centre. The said tender was later amended vide letter dated 29th December 2015 wherein the scope of work was modified to include the construction and completion of the Staff House at Nyakongo Health Centre.

22. It was also not disputed that the Appellant entered into the contract with the County Government on behalf of the Respondent and his three partners, namely; Thomas Ombuya Getabu, Fred Nyabuti Omayio and Samuel Henry Mbotela. The parties herein and the Respondent's partners entered into a Memorandum of Understanding dated 9th March 2015 in which it was agreed that the Appellant shall, upon completion of the project, pay each partner through post-dated cheques and shall not receive any benefits from the contract apart from what was to be remitted to the government in taxes.

23. I have perused the said MOU (P.Exh5) and noted that it stipulates that any breach of the agreement would attract a penalty of the equivalent of 50% of the project proceeds.

24. It was the Appellant's case that the parties amended the terms of payment through an oral agreement when one of the partners Thomas Ombuya Getabu (now deceased) allegedly called him on phone and instructed him to make the first payment to the Respondent herein. The Appellant claimed that it was the said Thomas who again issued him with supporting documents to take to the bank for the second payment and that he had therefore duly discharged his duty under the MOU.

25. It is at this juncture necessary to address the issue of whether there was an oral contract between the parties as alleged by the Appellant and whether the oral agreement could vary the existing written agreements so as to justify the actions of the Appellant's director. In Patrick Njuguna Kimondo vs. Geoffrey Vamba Mbuti [2019] eKLR the court discussed the issue of oral contracts and held thus: -

> "I am of the opinion that oral agreements supported by credible evidence can be and are enforceable. All what the law requires is that certain contracts be in writing – Section (3) (3); Short of that, it would be a travesty of justice as most people either knowingly or otherwise transact their businesses upon oral agreements."

26. From the above decision, it is clear that oral contracts are recognized and enforceable in law. In the instant case, the Appellant claimed that it received oral instructions from Prof. Thomas Getabu to vary the terms of payments under the original MOU and make the 1st payment to the Respondent and the 2nd one to him (Thomas Getabu). The Appellant argued that the variation of the MOU emanated from an oral alteration of the terms of payment by the parties themselves and that it was not at fault in paying the parties as he did. The question which arises is whether oral instructions/contract can vary a written agreement. Sections 97(1) and 98 *Evidence Act* stipulates as follows: -

> 97. Written contracts and grants.
>
> (1) When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act.
>
> 98. Evidence of oral agreement.
>
> (1) When the terms of any contract or grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 97 of this Act, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument

or their representatives in interest for the purpose of contradicting, varying, adding to or subtracting from its terms:

Provided that—

(iv) the existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of such documents;

27. In the case of Housing Finance Co. of Kenya Limited vs. Gilbert Kibe Njuguna Nairobi HCCC No. 1601 of 1999, it was held: -

> " ...Courts are not for as where parties indulging in varying terms of their agreements with others will get sanction to enforce the varied contracts. Contracts belong to the parties and they are at liberty to negotiate and even vary the terms as and when they choose and this they must do together and with meeting of the minds. If it appears to the Court that one party varied terms of the contract with another, without the knowledge, consent or otherwise of the other, and that other demonstrates that the contract did not permit such variation, the Court will say no to the enforcement of such contract."

28. Similarly, in County Government of Migori vs. Hope Self Help Group [2020] eKLR Wendoh J. referred to the case of Gimalu Estates Ltd. & 4 Others vs International Finance Corporation & Another Civil Suit 606of2003, [2006] e KLR where Emukule J. quoted several English decisions and held thus:-

> " Parties to a contract effect a variation of the contract by modifying or altering its terms by mutual agreement.....
>
> On the other hand a mere unilateral notification by one party to the other in the absence of any agreement, cannot constitute a variation of contract. (see Cowey –vs- Liberation Operations Ltd, [1966} 2 Lloyds' Rep. 45)"

29. The principle that emerges from the above cited cases is that while parties to a contract are at liberty to vary the terms of their agreement, such variations must be based on the mutual agreement of the parties and must also be reduced into writing in accordance with the requirements of Section 98 where the original agreement was made in writing. Halsbury's Laws of England 4th Edn, Vol 9 (1) at para 622 provides guidance in this regard as follows: -

> " Where the intention of the parties has in fact been reduced to writing, under the so-called parol evidence rule, it is generally not permissible to adduce extrinsic evidence whether oral or written, either to show the intention, or to contradict, vary or add to the terms of the document, including implied terms."

30. In the instant case, I have established that both the MOU and the agreement of 17th February 2016 (P.Exh6) were made in writing. This means that any variation to these written agreements ought to have been done in the same manner. I therefore find that the existing written MOU could not have been varied through the oral instructions from one partner as claimed by the Appellant.

31. The Appellant alleged that that all the partners were in agreement with the oral instructions from Thomas Getabu. The Appellant did not show that he made any efforts to get a confirmation of the said oral instructions by the rest of the partners. It is apparent that, in making the payments as he did, the

Appellant acted on a unilateral modification of the terms of payment in the original MOU by Thomas Getabu.

32. It is my finding that the oral instructions allegedly issued by one partner, Thomas Getabu did not constitute an oral agreement and that the same unilateral instructions could not amount to a variation of the MOU or the subsequent contract of 17th February 2016. The oral instructions were therefore not enforceable in law unless written and mutually agreed to by all the parties.

Whether the Appellant was aware of the agreement dated 17th February 2016 between the partners and acted in breach of contract in remitting the payment of the 2nd Certificate to Thomas Getabu.

33. The Respondent claimed that through an agreement dated 17th February 2016 (P.Exh6), the Respondent and the 3 partners agreed that the Respondent shall receive the full benefit of the proceeds from the project in exchange for payment of certain sums to the other partners.

34. It was the Appellant's case that he was not aware of the subsequent agreement between the partners. The Respondent on the other hand stated, during cross-examination, that the Appellant's director was fully aware of the second agreement as it was the basis upon which it made the first payment to him. The Respondent (PW1), presented the evidence of one of the partners, Samuel Henry Mbotela (PW2), who testified that the Appellant's director was given a copy of the new agreement even though he did not acknowledge receipt of the same.

35. I note that it came out in evidence that the Appellant's director made the first payment to the Respondent on 26th May 2017 which was after the second agreement had been signed on 17th February 2016. I find that if indeed the Appellant's director was not aware of the second agreement amending the original terms of payment as he had alleged, then he ought to have maintained the payment mode contained in in the original agreement by drawing individual post-dated cheques in favour of each partner.

36. From my analysis of the facts on Record, I find that the Appellant's director was well aware of the existence of the second agreement between the partners and this explains why he agreed to pay the Respondent for the 1st Certificate. I note that when asked, during cross-examination, whether he had any proof that he appeared before the DCI where he allegedly learnt of the existence of the said agreement, the Appellant was not able to table any such proof. To my mind, this leaves his assertion that he did not know of the second agreement as a mere denial that is not backed by any evidence.

37. As I have already stated in this judgment, it was necessary for the Appellant to confirm any instructions from Thomas Getabu to make the payments as he did from the remaining two partners. Failure to do so meant either that he breached the terms of the original MOU which he was aware of or that he actually knew of the terms of the new agreement and proceeded to pay the Respondent according to the terms of the new agreement. It is also quite suspect that the Appellant only had records in respect to the 1st payment to the Respondent but does not have any records of the second payment he allegedly made to the late Thomas Getabu. He did not produce any vouchers for the said payments. The absence of evidence in this regard means that the Appellant's assertions were not proved. Section 109 of the *Evidence Act* provides:-

Proof of particular fact.

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.

38. My finding is that paying the proceeds of the 2nd Certificate of the project to Thomas Getabu to the exclusion of the Respondent amounted to a breach of the contractual terms that the Appellant initially entered into with the four partners which contract was modified by the agreement of 17th February 2016. In my considered view, whichever angle one may take in considering the Appellant's case, the only outcome would be that it breached the terms of the existing agreements.

39. The inconsistencies that I have noted in the Appellant's case are material and create an impression that his account of facts should be treated with utmost caution for want to honesty. I am guided by the decision in John Cancio De SA vs. V N Amin Civil Appeal No. 27 of 1933 [1934] 1 EACA 13 where it was held: -

> "Probably every judge has had occasion at some time or other to regard discrepancies as showing veracity, and to regard uniformity as showing fabrication, but it depends upon the nature of the discrepancies and the uniformity. If two people allege that they made a journey together from Kampala to Nairobi and they differ on such details as the time the train stopped at Eldoret, what they had for lunch and dinner, and whether it rained on the journey and where, it would be more reasonable to argue a difference in memory than that the journey was never undertaken. But if one says they made the whole of the journey by rail, and the other says they went to Entebbe by car and thence by air to Nairobi, it would be more reasonable to argue that the journey never took place than that one or both suffered from a defective memory."

40. In light of the above findings, I find that the Appellant acted in breach of the original MOU between it, the Respondent and the 3 partners by making payments through terms that were not agreed upon by all the parties. I have also found that even though the Appellant was not a party to the second agreement, he must have been aware of it thus explaining why he paid the Respondent for the 1st Certificate.

41. In conclusion, I find that the Respondent proved its case against the Appellant on a balance of probabilities and that the Appellant was indeed in breach of the MOU dated 9th March 2015. I therefore find that the trial court made the right finding in entering judgment in favour of the Respondent and I find no reason to interfere with the said decision.

42. Consequently, I find that the instant appeal is not merited and I therefore dismiss it with costs to the Respondent.

43. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS THIS 27TH DAY OF JULY 2023.

W. A. OKWANY

JUDGE