



Straight Media Limited v Trustees JKUAT Retirement Benefit Scheme (Commercial Appeal E120 of 2022) [2023] KEHC 21753 (KLR) (Commercial and Tax) (29 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21753 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E120 OF 2022**

**DAS MAJANJA, J
AUGUST 29, 2023**

BETWEEN

STRAIGHT MEDIA LIMITED APPELLANT

AND

THE TRUSTEES JKUAT RETIREMENT BENEFIT SCHEME RESPONDENT

(Being an appeal from the Judgement and Decree of Hon. L.B. Koech, PM dated 4th August 2022 at the Nairobi Magistrates Court, Milimani in Civil Case No. 7693 of 2019)

JUDGMENT

Introduction and Background

1. This appeal grounded on the Memorandum of Appeal dated 05.05.2022 arises from the judgment of the Subordinate Court dated 04.08.2018 dismissing the Appellant's suit against the Respondent.
2. Before the Subordinate Court, the Appellant filed suit against the Respondent by way of the plaint dated 02.10.2019 seeking judgment for ksh 2,552,754.68 for unpaid work arising from expanded works it did on a contract dated 22.05.2018 to carry out signage works on Respondent's Premises at One Padmore Place, Kindarama Road, LR no 1/109, Kilimani, Nairobi. The contractual sum for the works was stated to be ksh 8,103,528.00. The Respondent paid the Appellant ksh 6,077,646.00 being the 75% deposit leaving a balance of ksh 2,025,882.00.
3. The Appellant claimed that upon commencement of works, the Respondent failed to make provision for necessary equipment and materials that the Appellant needed in order to effectively and efficiently carry out the assignment. That with the approval of the project Architect and Respondent's Administrator, the Appellant was constrained to procure the necessary equipment and materials causing it to incur additional costs and expenses amounting to ksh 302,200.00 above the designated



- provision for contingencies. Further, that the Respondent expanded the scope of works valued at ksh 1,090,754.68 which the Appellant satisfactorily carried out.
4. The Appellant stated that it duly notified the Respondent on 27.07.2018 that it had successfully and satisfactorily completed the assignment. It demanded to be paid ksh 3,418,036.68 within 30 days from the date of notification. On 11.06.2019, the Respondent paid ksh 865,882.00 leaving a balance of ksh 2,552,754.68 which the Appellant claimed in the suit.
 5. In its defence to the suit, the Respondent averred that in as much as there was a ksh 1,160,000.00 provision for contingency, the Appellant never sought approval from the Respondent to incur the additional costs and expenses and to carry out the expanded works. The Respondent maintained that it paid ksh 865,882.00 which was the final payment for the works.
 6. Following the hearing where each party called witnesses, produced documentary evidence and filed submissions in support of their respective positions, the court rendered its judgment on 04.08.2022. In the judgment, the Subordinate Court stated that the main questions for consideration before it was who between the parties was in breach of contract and whether the Appellant was entitled to the reliefs sought. The trial magistrate agreed with the Respondent that it did not approve the extra works done by the Appellant or permit it to incur costs for preliminary costs and expenses. The trial magistrate held that the evidence on record supported this position and held that the Appellant was in breach of contract and was not entitled to the prayers sought in the plaint. It is this judgment that has led to this appeal.
 7. The appeal has been canvassed by way of written submissions. Since the parties advance the positions I have already summarized above, I will not highlight the submissions but only make relevant references in my analysis and determination below.

Analysis and Determination

8. Since this is the first appeal, this court is enjoined by the provisions of section 78 of the *Civil Procedure Act* to evaluate and examine the subordinate court record and the evidence presented before it in order to arrive at its own conclusion. This principle of law was well settled in the case of *Selle v Associated Motor Boat Co. Ltd* (1968) EA 123 where the Court of Appeal outlined the duties of a first appellate court as follows:

[An appellate court] is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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 allowance in this respect...
9. I now turn to consider the appeal. From the summary of the case I have outlined elsewhere, it was common ground that the parties entered into a contract for signage works on the Respondent's premises for a contract sum of ksh 8,103,528.00 with a provision for contingencies amounting to ksh 1,160,000.00 inclusive of VAT. Not in dispute is the fact that the Appellant incurred preliminary expenses and carried out additional works on the premises. The question before the Subordinate Court and now before this court is whether the Appellant required approvals to carry out these additional works, if so, who was to authorize the approvals and whether these approvals were sought and duly authorized by the Respondent.



10. Even though the parties refer to a contract dated 22.05.2018, a perusal of the same indicates that it is a letter referenced, “Contract Award For Signage Works For One Pardmore Place, Kilimani” and marked, “Subject To Contract”. The parties did not produce any other contract but from the subsequent correspondence and conduct of the parties, it would appear that they intended to be bound by the terms of this letter which I hold constituted the contract.
11. In the absence of any other written contract stating that the Appellant would have to seek consent of the Respondent to incur additional expenses and carry out additional works, the court would have to consider the entirety of evidence and determine whether there was a meeting of minds on this issue. The Appellant relied on the fact that since the Respondent acquiesced to the additional expenditure and works, it was estopped from denying that it authorised the works. On the other hand, the Respondent insisted that its consent was a necessary prerequisite for payment.
12. From the evidence, the issue of approval by the Respondent arose at a meeting held on 25.01.2019. This was confirmed by the Appellant in its letter dated 29.01.2019 addressed to the Respondent where it stated as follows, “In previous projects, we have had to seek further approval if the cost estimate was greater than 40% of the total cost but in this case, it was less than 10%. We overlooked the fact that this was a material cost that should have been presented to the Board of Trustees for approval and we request that this be considered for payment.” This admission answers the question whether the additional works carried out by the Appellant ought to have been approved by the Respondent’s Board of Trustees.
13. The Appellant contends that the works were approved by the Project Architect and administrator, who were the Respondent’s agents, hence the Respondent could not disown the extra works. Although an agent has ostensible authority to bind a principal, the principal will not be bound if the third party dealing with the agent is aware of the agent’s limitation of authority (see *Total Kenya Limited v D. Pasacon General Construction and Electrical Services* [2022] KECA 593 (KLR)). In this case and as the admission in the letter dated 29.01.2019 shows, the fact of seeking approval from the Respondent’s Board of Trustees for such additional works was within the knowledge of the Appellant.
14. Having reviewed the evidence on record, I hold that the Appellant was aware and indeed admitted that the Respondent’s approval through its Board of Directors was required in order to incur additional costs and continue extra works. Without such approval, it could not be paid.

Disposition

15. For the reasons I have set out, the appeal is dismissed. I decline to award costs in view of nature of the matter.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF AUGUST 2023.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.

Ms Njoroge instructed by Agnes Njoroge and Company Advocates for the Appellant.

Ms Misere instructed by Oluoch Olunya and Associates Advocates for the Respondent.

