County Government of Kwale v Ryanja Enterprises Limited (Civil Appeal 169 of 2021) [2023] KEHC 21851 (KLR) (25 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21851 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 169 OF 2021

OA SEWE, J

AUGUST 25, 2023

BETWEEN

COUNTY GOVERNMENT OF KWALE ..... APPELLANT

AND

RYANJA ENTERPRISES LIMITED ..... RESPONDENT

(Being an appeal against the judgment and decree of Hon. E.K. Makori, Chief Magistrate, delivered on 22nd September 2021 in Mombasa CMCC No. 697 of 2020)

JUDGMENT

1. The appellant, County Government of Kwale, was the defendant before the lower court in Mombasa Chief Magistrate's Civil Case No. 697 of 2020: Ryanja Enterprises Limited v County Government of Kwale. It had been sued by the respondent pursuant to a works contract for the construction of storm water drainage at Ukunda in the sum of Kshs. 22,690,064. The respondent contended that it had completed the works satisfactorily and that the completed works were valued by Nyange & Associates, Quantity Surveyors, at Kshs. 38,121,057/=, thereby presenting a variance of Kshs. 15,430,993/=.

2. The respondent further averred that the appellant conducted a separate valuation and arrived at a variance of Kshs. 5,668,862/=; whereupon the parties ultimately agreed at a sum of Kshs. 28,358,926/=, inclusive of the value of the extra works accomplished. The respondent's cause of action therefore was that the appellant only paid Kshs. 20,421,058/= of that sum, leaving an outstanding amount of Kshs. 7,937,868/=. At paragraphs 7 and 8 of its Plaint, the respondent averred that, as a result of the said debt, it has been greatly incapacitated, resulting into various losses, including a sum of Kshs. 1,519,358/= for unexecuted projects, interest on bank loans in addition as well as being listed with the Credit Reference Bureau (CRB) for failure to meet its financial obligations.

3 Accordingly, the respondent prayed for the following reliefs:

   (a) The outstanding sum of Kshs. 7,937,868/=.

(b) Quantified losses of Kshs. 1,519,538/=.

(c) General damages for breach of contract.

(d) Accrued interest at court rates from the completion date.

(e) Costs and interest.

4 The appellant resisted the claim vide its Defence dated 7th May 2018. It conceded that it entered into a contract on the 10th August 2015 for valuable consideration of Kshs. 22,690,064/=, but denied that the value of the executed works by the respondent amounted to Kshs. 38,121,057/=, and therefore in excess of the contractual sum of Kshs. 22,690,064/=. The appellant further pleaded that, even if the valuation by Nyange & Associates, QS, was accurate, no such variation of contract was approved or communicated in writing in terms of Paragraph 5 of the Contract. Accordingly, the appellant denied that it owed the respondent Kshs. 7,937,868/= as alleged or at all and added that, if the respondent took any loan, it was not privy thereto; and the loan must have been taken with the full knowledge of the consequences of default. To this end, the appellant pleaded the maxim volenti non fit injuria. Thus, the appellant prayed for the dismissal of the respondent's suit with costs.

5 The appellant thereafter amended its Defence and introduced a Counterclaim & Set-Off at paragraphs 15 to 21 thereof, contending that, in gross breach of the terms of their contract dated 10th August 2015, the respondent failed to complete the construction of the Storm Water Disposal Drainage at Ukunda in the time and manner agreed in the contract; and that as a result of the breach, the appellant is likely to suffer loss and damage when it rains because of flooding. Accordingly, the appellant prayed for an order of specific performance or set-off against the sum of Kshs. 22,690,064/= that the respondent seeks against it, together with costs.

6 Upon hearing the parties, the learned magistrate found in favour of the respondent in the sum of Kshs. 7,937,868.43, being the composite sum of the retention fee of Kshs. 2,269,007.24 withheld by the appellant on account of the defects liability clause as well as Kshs. 5,668,862/= being the value of the extra works executed by the respondent by way of variation. The learned magistrate declined to grant general damages for breach of contract, taking the view that the contract was "largely amorphous". He nevertheless granted the respondent interest at court rates from date of filing suit as well as costs of the suit.

7 Being aggrieved by the decision of the lower court, the appellant filed the instant appeal on 5th October 2021 on the following grounds:

(a) That the learned magistrate erred in law by ignoring and failing to determine the appellant's Counterclaim;

(b) That the learned magistrate erred in fact and in law and misdirected himself in law and in fact in failing to consider the evidence and submissions adduced by the appellant;

(c) That the learned magistrate erred in fact and in law in holding that the respondent's work stood determined and that it was therefore entitled to the retention sum of Kshs. 2,269,007.24;

(d) That the learned magistrate erred in fact and in law in failing to appreciate that the variation of 24.98% was only in respect of the works carried out by the respondent, being 50% of the contractual works;

(e) That the learned magistrate erred in fact and in law in awarding interest on the sum of Kshs. 7,937,868.43;

(f) That the learned magistrate erred in fact and in law in holding that the respondent is entitled to the claim of Kshs. 5,668,862/=; and,

(g) That the learned magistrate erred in fact and in law in awarding costs to the respondent.

8 Accordingly, the appellant prayed that the judgment dated 22nd September 2021 delivered in Mombasa CMCC No. 697 of 2020 by Hon. E.K. Makori, CM, and any decree issued pursuant thereto be set aside in entirety and be substituted with an order dismissing the suit; and that the appellant's Counterclaim be determined by the Court. The appellant also prayed that the costs of this appeal and the suit in the subordinate court be borne by the respondent.

9 The appeal was urged by way of written submissions, pursuant to the directions given herein on 4th May 2022. Thus, counsel for the appellant, Ms. Abwao, relied on her written submissions dated 16th June 2022. In support of the first ground of appeal, Ms. Abwao urged the Court to peruse the judgment of the lower court, at pages 626 to 634 of the Record of Appeal, and find that, other than acknowledging that there was a Counterclaim in place, the learned magistrate completely failed to make a determination on the same; and thereby committed a grave error.

10 She further faulted the lower court for failing to consider the evidence and submissions tendered by the appellant; and thereby failed to appreciate that the variation was only in respect of the completed works; which then stood at about 50% of the total contractual works. Thus, in respect of Grounds 2, 3 and 4 as set out in the Memorandum of Appeal, Ms. Abwao submitted that the learned magistrate made a grave error and therefore arrived at the wrong conclusion in connection with the retention sum; which was only payable after completion of the total agreed works and hand-over of the completed project.

11 It was further the submission of Ms. Abwao, pursuant to Grounds 5, 6 and 7 of the Memorandum of Appeal, that the trial court erred in law and in fact in holding that the respondent was entitled to the sum of Kshs. 5,668,862/= in respect of variations undertaken. She pointed out that PW1 admitted that the variations claimed were never approved by the appellant, as the same would have been illegal and a contravention of Section 139 of the *Public Procurement and Asset Disposal Act*, No. 33 of 2015 (PPADA). She relied on Centurion Engineers & Builders Limited v Kenya Bureau of Standards 2017 eKLR for the proposition that all parties in procurement contracts are under obligation to comply with the law. Accordingly, counsel urged that the appeal be allowed and the orders sought by the appellant be granted.

12 On his part, Mr. Otieno for the respondent relied on his written submissions dated 3rd October 2022. He furnished a detailed background to the appeal and set out the salient terms of the subject contract. He accordingly proposed the following as the issues arising from the Grounds of Appeal for determination:

(a) Variations (Ground 4 in the Memorandum of Appeal;

(b) Completion of the works (Ground 3 in the Memorandum of Appeal);

(c) Retention Sum (Ground 6 in the Memorandum of Appeal);

(d) Remedies sought (Ground 7 in the Memorandum of Appeal);

13 Mr. Otieno submitted that the contract dated 10th August 2015 made provision for variations at Clause 5 thereof; and that the project manager had the authority to make all decisions in the course of the implementation of the contract. He therefore submitted that all the variations were duly authorized in writing by the project manager, Eng. K.N. Muema, and set out the detailed particulars of such

variations. Counsel further pointed out that the variations undertaken are lawful under Section 139 of the PPADA in so far as they fall below the 25% mark provided for.

14 On whether the works were completed by the respondent, Mr. Otieno submitted that no audit report was presented before the lower court and therefore the contention that the works were only 50% complete is untenable. He urged the Court to note that the respondent was paid the entire contract sum, save for the retention sum and variations; and therefore the appellant cannot be heard to complain about non-completion of works. He added that certificates of payment are only made upon verification of works; and therefore the respondent could not have been fully paid if the works were half-done.

15 On the retention sum, Mr. Otieno submitted that this was only retained on account of the defects liability clause, Clause No. 32.1 as read with Clause 26.1 of the Conditions of Contract. He added that the respondent was entitled to the sum because no defect notification was ever served on it. Counsel pointed out that, since no attempt was made by the appellant to utilize the 5% performance bond to cover for the alleged non-completion of the works, the allegations of non-completion was just an afterthought triggered by the institution of this suit. He therefore prayed that the appeal be dismissed with costs.

16 This being a first appeal, it is the duty of this Court to re-evaluate the evidence presented before the lower court and make its own conclusions thereon; while bearing in mind that it did not have the benefit of seeing or hearing the witnesses. (see Selle & Another v Associated Motor Boat Co. Ltd & Others 1968 EA 123). Accordingly, I have perused and considered the proceedings of the lower court at pages 595 to 625 of the Record of Appeal. George Gichohi Karanja (PW1) testified on behalf of the respondent on 8th September 2020. He adopted his witness statement dated 5th April 2018 to the effect that the respondent is a civil engineering contractor; and that it participated in and was awarded a tender floated by the appellant for the construction of storm water drainage at Ukunda in the contract sum of Kshs. 22,690,064/=. According to PW1, in the course of execution of the works, the appellant introduced several variations which the respondent acted upon; and that although the works were executed to completion and payment made for the initial contractual sum, the appellant declined to pay for the variations; which variations were all approved and made in writing. He added that the appellant similarly declined to release the retention sum of Kshs. 2,269,006.40 and gave no reason for its refusal.

17 PW1 further stated that the he took a loan from the bank to facilitate the project and that as a result of the appellant's failure to pay the balance, he was listed with the CRB which listing had the effect of reducing his credit rating. He added that was forced to sell his matrimonial home to offset the bank loan and had to incur other various losses in the sum of Kshs. 1,519,538/= in a bid to keep up with commitments made by the respondent in respect of other government projects. He produced the respondent's List and Bundle of Documents as exhibits before the lower court and prayed for judgment in the respondent's favour.

18 On behalf of the appellant, evidence was called from Nuru Mohammed Mboga, the County Chief Officer, Environment & Natural Resources. She likewise relied on her written statement dated 10th May 2021. She confirmed that the respondent was awarded a tender by the appellant for the construction of an open storm water drainage and a contract to that effect executed on 10th August 2015 in the sum of Kshs. 22,690,064/=. She further testified that although the works were to be completed within 8 weeks, the respondent did not conclude the construction of the drainage yet a substantial amount of Kshs. 20,421,056.76 had already been paid. She explained that the only amount outstanding was the retention sum, which was payable 6 months after completion of works.

19 According to DW1, the respondent did not seek for approval for any variation; and that such variations could only be valid if authorized in writing. She posited that, had the variations been approved, the

sum would have been no more that Kshs. 4,538,012.80, being 20% of the contractual sum. Hence, she testified that the sum of Kshs. 5,668,862/= adjudged as due for variations by the lower court is illegal from the standpoint of Section 139(4)(c) of the PPADA. She added that, on the ground, the respondent had only performed 50% of the contractual works and that what the appellant paid for, namely, Kshs. 20,421,056/=, accounted for about 90% of the contract sum, leaving only the retention sum of Kshs. 2,269,007.24, which is 10% of the contract price. DW1 further stated that the retention sum could only be paid upon completion and handing over of the project to the appellant, which was yet to happen.

20 It is plain from the foregoing summary of evidence that there is no dispute that the appellant floated an open tender for the construction of storm water disposal and drainage at Ukunda in Kwale County, being Tender No. CGK/193/2014-2015; or that the respondent emerged as the successful bidder. Consequently, a contract dated 10th August 2015 was executed by the parties in respect of the project in the contractual sum of Kshs. 22,690,064/=. That principal document was exhibited before the lower court along with other documents comprising the respondent's List and Bundle of Documents. The contract was subject to the Conditions of Contract forming part of the tender documents and are to be found at pages 132 to 207 of the Record of Appeal.

21 There is equally no dispute that the respondent embarked on the works and was paid from time to time on the basis of certificates issued by the Project Manager in terms of Clause 23.1 of the Conditions of Contract, which states:

> " The Contractor shall submit to the Project Manager monthly applications for payment giving sufficient details of the Work done and materials on Site and the amounts which the Contractor considers himself to be entitled to. The Project Manager shall check the monthly application and certify the amount to be paid to the Contractor within 14 days. The value of Work executed and payable shall be determined by the Project Manager."

22 Thus, it is common ground that 90% of the contract price, in the sum of Kshs. 20,421,056/=, was indeed certified due and payable to the respondent on diverse dates and was duly paid by the appellant, save for the 10% component, being the retention sum of Kshs. 2,269,007.24. Accordingly, the issues emerging for determination from the appellant's Grounds of Appeal are:

(a) Whether the alleged variations were authorized; whether the works in respect thereof were executed; and whether the sum awarded in respect thereof was justified.

(b) Whether the works were performed to completion by the respondent and whether the retention money was due as ordered by the learned magistrate;

(c) Whether the learned magistrate erred in connection with the appellant's Counterclaim; and whether the same was proved to the requisite standard.

A. On The Variations:

23 Needless to mention that the subject contract provided for variation of works at Clause 5 thereof under the heading: MODIFICATIONS TO THE WORK. The said Clause reads:

> " All changes and deviations in the work ordered by the Client must be in writing. Any claims for increases in cost of the work must be presented by the contractor to the Client in writing, and written approval of the Client shall be obtained by the contractor before proceeding with the ordered change or revision."

24 Variations were also provided for in the Conditions of Contract issued by the appellant as part of the tender documents. Hence at Clause 22.2 thereof, it was stipulated that:

> " The Contractor shall provide the Project Manager with a quotation for carrying out the variations when requested to do so. The Project Manager shall assess the quotation, which shall be given within seven days of the request or within any longer period as may be stated by the Project Manager and before the Variation is ordered."

25 That the Project Manager had the mandate to approve variations is further evident at Clause 1.1 of the Conditions of Contract, in which a variation is defined to mean:

> " ...an instruction given by the Project Manager which varies the works."

26 In the same vein, Clause 4.1 of the Conditions of Contract states:

> " Except where otherwise specifically stated, the project Manager will decide contractual matters between the employer and the Contractor in the role of representing the employer."

27 From the aforementioned Clauses, it is plain that variations could only be undertaken on the instructions of the appellant through its Project Manager; and that the instructions had to be in writing. Thus, in addition to his witness statement dated 5th April 2018, PW1 testified that, at the time of execution of the contract, no survey report or layout plan was given to the respondent showing the position of the drainage from the highway road shoulders as approved by Kenya National Highway Authority; and therefore that it became necessary for several variations to be made; the first of which followed a site meeting attended by the County Engineer, Project Manager and the County Secretary and the contractor.

28 Thus, PW1 testified that all the variations were done in writing and with the approval of the Employer through the Project Manager. Thus, there is on record a letter dated 19th October 2015 by the Project Manager to the respondent proposing a variation on the basis of forecasts by the Meteorological Department. Thus, the respondent was instructed to:

> " ...indulge manual laborers at a standard rate of Kshs 500 each per day to open up blocked access culverts, culvert crossings and side drains to enable the water to flow to prevent it from going to jogoo village as residents from that area are usually tormented by floods in rainy season..."

29 The letter further shows that the works were to commence immediately before the onset of the impending El Nino rains. It was produced before the lower court as Exhibit 11(a) and is to be found at page 381 of the Record of Appeal.

30 Another variation was authorized by the appellant's Project Manager vide his letter dated 1st February 2016 to the following effect:

> " ...According to instructions from KENHA (following a meeting held on 29.01.2016 at the site to put open drain 6.5 meters away from the edge of the road and not the 2.5 meters according to the original design, indulge a surveyor to do a survey report of the entire road stretch on contours, topography and levels which will be used in doing the drainage works..."

31 The letter was likewise exhibited before the lower court and marked Exhibit 11(b) and is to be found at page 382 of the Record of Appeal. The letter further shows that the instructions needed to be carried

out as a matter of urgency. The respondent adduced evidence to demonstrate that the cost estimates were furnished as per the Bill of Quantities dated 16th May 2016, produced before the lower court as Exhibit 11(c) and is at page 383 of the Record of Appeal.

32 On the 9th February 2016 further variation instructions were issued by the Project Manager, Eng. Muema, to the respondent authorizing certain changes and instructing the respondent to proceed with implementation in accordance with the proposed changes at a cost of Kshs. 350,000/=. The letter was marked as Exhibit 9(i)(d) before the lower court and is to be found at page 378 of the Record of Appeal. The respondent produced additional documents as Exhibits 9(i)(a) and 9(ii)(b) and 9(d) to confirm that the instructions were implemented. The documents form part of the Record of Appeal at pages 351 to 496.

33 Similarly, the appellant's Project Manager wrote a variation letter dated 15th February 2016 to the respondent. The respondent was accordingly given instructions as follows:

> " The owner of Naivas supermarket building at Ukunda had requested we increase the number of culverts at the entrance to the supermarket, he said he will provide the materials and we pay for the labour. Kindly find the attached breakdown for materials, labour and mixer and do labour-based work at cost of Kshs 336,470.000..."

34 The letter was produced before the lower court and marked Exhibit 11(f) and is at page 401 of the Record of Appeal. The respondent exhibited additional documents as Exhibits 11(c), 11(d) and 11(g) to demonstrate that he complied with the instructions of the Project Manager.

35 Lastly, the respondent adduced evidence before the lower court to show that, vide a letter dated 8th March 2016, he received variation instructions in writing from the Project Manager, Eng. Muema as follows:

> " The water pressure at the point where water is converging at Diani Beach corner kindly construct a pressure reducing tank to make the large volume of water manageable at that point. Kindly find the attached estimates for the works valued at Kshs. 667,850.00..."

36 The letter is to be found at page 403 of the Record of Appeal and at page 404 is the respondent's confirmation that the works would be executed as instructed. In addition, the respondent produced the documents at pages 405, 408, 409, 410, 421, 427 and 431 of the Record of Appeal to confirm that all the variations were validated at site meetings and by measurements taken by Nyange & Associates, QS, as well as by the appellant.

37 Thus, upon a review of the evidence presented before the lower court, I am satisfied that the variations were duly authorized in writing and were therefore properly undertaken in accord with the provisions of Section 139(1)(a) of the PPADA. In terms of scope, Section 139(4)(d) of the PPADA is explicit that:

> " For the purposes of this section, any variation of a contract shall only be considered if the following are satisfied—
>
> ...
>
> (e) The cumulative value of professional services does not result in an increment of the total contract price by more than twenty-five per cent of the original contract price."

38 The rationale for the above provision was aptly captured in Centurion Engineers & Builders Limited v Kenya Bureau of Standards (supra) thus:

> "Variations of contracts can be abused to give advantage to a contractor who is already engaged and to discriminate against other potential tenderers. Variations can be used as an opaque procedure to award a tender of what is essentially a new contract without subjecting it to competition...To allow a substantial variation of public contracts without subjecting it to fresh procurement undermines the spirit of transparency, competition and equal treatment of tenderers that underpins the legislation on Procurement. And the violation of the law should not be permitted even where the variation could result in a good deal and value for money for the Procuring Entity. The good deal and value for money should result from a competitive process and not a closed arrangement."

39 Thus, the respondent needed to and did demonstrate that the cumulative value of all the variation works undertaken did not exceed 25%. The documents marked Exhibit 13(b) and 13(c) at pages 427 and 431 of the Record of Appeal show that the variations were approved in the total sum of Kshs. 5,668,862/= forming 24.98% of the contractual sum. In the premises, the learned magistrate cannot be faulted for coming to the conclusion that the variations were not only authorized but also lawful; and that the works in respect thereof were duly executed and therefore the sum of Kshs. 5,668,862/= adjudged as due in respect thereof was warranted.

B. On Whether the works were performed to completion and whether the retention money was due:

40 Although the appellant posited that only 50% of the works was undertaken by the respondent, DW1 did not give convincing evidence in this regard. She conceded that for a certificate of payment to be issued, their engineer would have to be satisfied that the works the subject of the payment was satisfactorily done. She further confirmed that payments had been made by the appellant to the respondent in tranches on the basis of valid certificates of payment, and explained that when a certificate was raised, it would be forwarded to Accounts and Procurement for verification; and that thereafter, a project management committee as well as the supervising engineer would verify the works before payment could be made.

41 Hence, at paragraph 21 of her witness statement, DW1 conceded that the appellant paid the respondent Kshs. 20,421,056.76, representing 90% of the contractual sum; such that only the retention money and the disputed amount for the variations were withheld. She gave particulars of the payments at paragraphs 9, 10 and 11 of her statement and reiterated the same in her evidence in chief before the lower court. That is proof enough that the works were inspected and certified as due for payment; and for the appellant to pay 90% of the sums due, less retention money, the works must have been implemented to completion, granted that, by dint of Clause 26.1 of the Conditions of Contract, the retention money would only be due for payment upon the lapse of the defect liability period of 6 months from the date of completion.

42 It is also noteworthy that although this aspect of the appellant's case was premised on an audit report prepared by an external independent quantity surveyor, that report was never produced before the lower court. Again, it is my finding that, on the basis of the evidence presented before the lower court, the learned magistrate cannot be faulted for coming to the conclusion that the works were essentially complete. Moreover, there was no indication of any defects noted by the appellant that were brought to the attention of the respondent. The retention sum of Kshs. 2,269,007.24 was therefore properly adjudged by the lower court as due to the respondent.

C. On the appellant's Counterclaim:

43 As pointed out hereinabove, the appellant amended its Defence and introduced a Counterclaim & Set-Off at paragraphs 15 to 21 thereof. It pleaded gross breach of the terms of the contract dated 10th August 2015, and alleged that the respondent failed to complete the construction of the Storm Water Disposal Drainage at Ukunda in the time and manner agreed in the contract; and that as a result of the breach, the appellant is likely to suffer loss and damage when it rains because of flooding. Accordingly, the appellant prayed for an order of specific performance or set-off against the sum of Kshs. 22,690,064/= that the respondent seeks against it, together with costs.

44 A perusal of the judgment of the lower court confirms that, other than a fleeting mention at paragraph 2 thereof that "The claim is contested – there is a counter-claim in place." no further mention or attention was given to it. That was clearly an error on the part of the learned magistrate. I have therefore considered the Counterclaim in the light of the evidence presented herein; and, noted that this aspect of the appellant's case was hinged on the audit report allegedly prepared by an independent quantify surveyor as per paragraph 19 of DW1's witness statement (at page 507 of the Record of Appeal). That audit report was not presented before the lower court; and therefore, having found that the works were done to completion, it would follow that the Counterclaim, and in particular the order for specific performance, is not tenable.

45 I note too that although a set-off was pleaded, no particulars were supplied in the Counterclaim. The appellant also failed to provide the specifics of what was accomplished and what remained undone in terms of quantities. In the premises, I find absolutely no merit in the appellant's Counterclaim, which is hereby dismissed with costs.

46 In the result, the appellant's appeal lacks merit and is hereby dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 25TH DAY OF AUGUST 2023

OLGA SEWE

JUDGE