Aduda v Geoscope Drilling Company Limited (Civil Appeal E016 of 2020)
[2022] KEHC 11189 (KLR) (Civ) (31 May 2022) (Judgment)

Neutral citation: [2022] KEHC 11189 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E016 OF 2020

SJ CHITEMBWE, J

MAY 31, 2022

BETWEEN

JANE ADUDA ..... APPELLANT

AND

GEOSCOPE DRILLING COMPANY LIMITED ..... RESPONDENT

(Being an appeal arising from the judgment/decree by Honourable D.A.Ocharo (Mr.) Principal Magistrate, delivered in Nairobi CMCC No. 2697 of 2019 on the 4th February, 2020)

JUDGMENT

1. The appellant's claim against the respondent in the subordinate court was anchored on a contractual agreement of May, 2018 between the appellant and the respondent for borehole drilling. The applicant had contracted the respondent to drill a borehole, 120 meters depth, at her premises at Kipsitet at a cost of Kshs. 750,000, which amount was fully paid. That upon completion, the borehole did not yield any water. Subsequently, the applicant discovered that the respondent had only sunk the borehole to a depth of 100 meters. Consequently, in a further agreement of 14th June, 2018, the respondent undertook to drill the remaining 20 meters and the appellant agreed to shoulder any additional costs for water extraction.

2. Upon hearing the case, Hon. D.A. Ocharo, PM delivered judgment on 4th February, 2020 in Milimani Chief Magistrates' Court Case No. 2697 of 2019; Jane Aduda Vs Geoscope Drilling Company Limited. The trial court awarded the appellant Kshs. 125,000 being the cost of drilling the remaining 20 meters together with interest and dismissed the appellant's claim for Kshs. 750,000 being the total the contractual sum. The claim for general and special damages pleaded was equally dismissed.

3. Being dissatisfied with the judgement and decree of the lower court the appellant has preferred this appeal by way of a Memorandum of Appeal dated 16th June, 2020. The grounds of appeal are: -

i. That the learned trial magistrate erred in law and in fact by holding that the respondent herein performed almost three quarter of the agreed amount/work yet the borehole that was drilled did not yield any water.

ii. That the learned trial magistrate erred in law and in fact by considering extraneous facts and in particular by holding that the respondent performed three quarter of the work yet the respondent did not enter appearance and defend the claim against it and justify any work done.

iii. That the learned trial magistrate erred in law and in fact by finding that the appellant herein is only entitled to Kshs. 125,000 for 20 metres of the borehole as opposed to the entire contractual sum yet the borehole drilled by the respondent did not yield any water which was the essence of drilling the borehole in the first place.

iv. That the learned trial magistrate erred in law and fact by not appreciating that the respondent drilled a borehole that did not yield any water and thus it is of no use to the appellant since it is not functional. The appellant is therefore entitled to the entire contractual sum paid to the respondent for the borehole and the other reliefs sought in the plaint.

v. That the learned trial magistrate erred in law and in fact by failing to appreciate that despite the respondent severally making promises to the appellant that they will finalize the drilling of the borehole, they neglected and refused to do so.

vi. That the learned trial magistrate erred in law and in fact by failing to appreciate that there was an interlocutory judgment against the respondent herein for the sum of Kshs. 750,000 plus accrued interest and travel expenses as prayed for in the plaint.

vii. That the learned trial magistrate erred in law and in fact in failing to award general damages for breach of contract against the respondent herein, yet it was very clear that the respondent was in breach of the contract.

viii. That the learned trial magistrate erred in law and in fact by dismissing most of the appellant's clam without considering its merits.

ix. That the learned trial magistrate erred in law and in fact in failing to appreciate the appellant's submissions and/or failing to give reasons for disregarding the submissions and the authorities in support thereof.

4. On 14th October, 2021 the court directed that the appeal be canvased by way of written submissions. The appellant has on record submissions dated 28th October, 2021 while the respondents' submissions are dated 22nd November, 2021.

Appellant's Submissions;

5. It is the appellant's submission that the respondent breached the contract and that partial fulfilment of the contract in this circumstance equate to non-performance of the contract. The appellant has made reference to Anson's Law of Contract, 28th Edition at page 589 and 590 which states that;

> 'every breach of contract entitles the injured party to damages for the loss he or she has suffered. Damages for breach of contract are designed to compensate for the damage, loss or injury the claimant has suffered through that breach. A claimant who has not, in fact, suffered any loss by reason of that breach, is nevertheless entitled to a verdict but damages recoverable will be purely nominal'

6. The appellant submits that the respondent undertook to drill the borehole to 120 meters. However it only drilled 100 meters and refused and or neglected to fully perform its obligations under the contract despite making undertakings. It is the appellant's submissions that although the trial court acknowledged that the respondent performed three quarters of the work agreed under the contract and awarded her Kshs. 125,000 for the remaining work, it failed to take into account the loss and prejudice resulting from the breach. It is her submission that the amount awarded is not sufficient for the loss she has incurred as she cannot enjoy the benefits of the borehole as expected. The appellant made reference to the case of Consolata Anyango Ouma vs South Nyanza Sugar Co. Ltd(2015) eKLR and the case of *Victoria Laundry (windsor) Ltd vs Neman Industries Ltd; Coulson & Co. Ltd (third Parties)* [1949] 2KB 52 where the court held that;

> 'it is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position so far as money can go as if his rights had been observed.'

7. The appellant's further submission is that the case was undefended and her evidence uncontroverted since the respondent neither entered appearance nor filed defence. That this failure signaled the respondent disinterest in the outcome of the case and should have served as an admission of liability hence judgment in her favour as provided for under Order 10 Rule 4(1) of the *Civil Procedure Rules*, 2010.

8. The appellant urged this court to set aside the trial court judgment and allow the reliefs sought. Reference was made to the case of *Francis Ngirongu vs Flamingo Hill Camp Limited* [2021] eKLR where the court held;-

> 'I have examined the submissions and averments of the parties herein. The main gist of the appeal is that the learned trial magistrate misdirected herself by failing to appreciate the crucial evidence submitted by the parties. This being a 1st appeal from the lower court, this court has a duty to re-evaluate the evidence of the parties herein.'

Respondent's Submissions;

9. The respondent identified the following issues for determination;

   i. Whether there was partial or complete non-performance of the contract.

   ii. What was the effect of the suit being undefended?

   iii. Whether the appellant is entitled to the payers sought.

   iv. Whether the case by the appellant at trial was dismissed or there was failure to give consideration?

10. On the first issue, the respondent admit that it was contracted by the appellant to drill a borehole to a depth of 120 meters. However, it only drilled up to a depth of 100 meters. The respondent submits that the contract was limited to drilling a borehole to a depth of 120 meters and not provision of water and therefore the appellant assertion that the borehole is useless is misleading. In its further submission, the respondent argue that the appellant has not produced a geological survey report by a qualified surveyor to confirm that there indeed was water at the depth of 120 meters.

11. The respondent submission is that the failure to file its defence before the trial court was because it did not challenge the evidence tabled by the appellant. Further, It is the respondent's contention that the trial court made an award based on the facts of the case and the evidence before it. That the appellant ought to have sought for an order of specific performance of the contract, which she did not. It is the

respondent's further submission that there was no obligation under the contract for payment and or reimbursement of travelling costs to the appellant by the respondent. Additionally, the respondent submits that the travelling costs of Kshs. 33,000, which figure is exaggerated, was neither pleaded nor proved at the trial court. The respondent maintains that general damages cannot be awarded for breach of contract and makes reference to the case of *Provincial Insurance Co. E.a. Ltd vs Mordekai Mwanga Nandwa* KSM CACA 179 of 1995 where the court held inter alia;

> '...it is now settled that special damages need to be specifically pleaded. Accordingly, none can be awarded for failure to plead. It is equally clear that no general damages may be awarded for breach of contract...'

Analysis and Determination;

12. This being a first appeal, the court is required to evaluate the evidence on record before drawing its own conclusion. It should also bear in mind that it did not see nor hear the witnesses and give an allowance for that. See *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* (1968)e.a 123; *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR; *Abok James Odera T/a A. J. Odera & Associates v John Patrick Machira T/a Machira & Co. Advocates* [2013] eKLR.

13. The appellant was the only witness before the trial court. She testified that she engaged the respondent to drill a borehole for her at a cost of Kshs.750,000. She paid all the money. The borehole did not yield any water. She did a resurvey and found out that only 100 metres had been drilled. The respondent agreed to drill the remaining 20 metres but she failed to do so. She sought a refund of the full sum of Kshs.750,000 plus Kshs.105,000 accrued interest.

14. Having taken into consideration the evidence adduced and written rival submissions of both parties the following are the issues that this court has framed for determination;

    i. What are the legal consequences of partial performance of a contract;

    ii. The effects of undefended suit; and

    iii. Whether the appellant is entitled to the prayers sought.

15. On whether there exists a contract as between the appellant and the 1st respondent, this court as a starting point is guided by the holding of Atkin, LJ in *Rose and Frank Co. vs. J R Crompton & Bros. Ltd* (1923) 2 KB 293, where it was held:

> 'To create a contract there must be a common intention of the parties to enter into legal obligations, mutually communicated expressly or impliedly.'

16. I have perused the pleadings and the evidence on record and although both parties have not disputed the existence of an agreement, there was no written contract as between the appellant and the respondent. The parties by their conduct confirmed that indeed there was a valid agreement as between them for the drilling of a borehole measuring 120 meters. The appellant's claim that she made a payment of Kshs. 750,000 on account of the drilling services is not disputed by the respondent. The respondent further does not dispute drilling a borehole for the appellant upto 100 meters deep in part performance of its contractual obligation. Consequently, this court finds that although there was no written agreement, the parties had all the intention of entering into a contract and did so by their conduct. There was a binding agreement between the parties and this can be inferred from the conduct

of the parties. In the case of *Ali Abdi Mohamed vs Kenya Shell & Company Limited* [2017] eKLR the Court of Appeal opined that: -

> "11. It therefore follows that a contract can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded...."

17. The dispute arose when the respondent sunk the borehole to 100 meters and not the agreed 120 meters despite full payment. A perusal of the evidence reveals that after a resurvey of the borehole drilled, since there was no water. The appellant discovered that the respondent had not drilled the agreed 120 meters but had sunk to a depth of 100 meters. It is the appellant's evidence that she raised the issue on 14th June, 2018 with the respondent who undertook to further drill the remaining 20 meters. That despite making the undertaking and numerous follow ups by the appellant, the respondent did not complete the drilling as agreed hence denying the appellant the chance to enjoy water from the borehole. The appellant has equated the partial fulfillment of the contract as a complete failure by the respondent to perform its obligation under the contract thus placing it in breach thereof.

18. The respondent on the other hand while admitting its breach, submits that the contract was for drilling depth but was not pegged on extracting water for the appellant. The respondent maintains without a geological survey report to show that water was available at the depth of 120 meters, it is impossible to demonstrate that the breach of the contract denied the appellant access to water. The respondent states that the trial court's finding that the contract was partially performed was right based on the evidence tendered.

19. From the foregoing, the respondent partly performed its contractual obligation towards the appellant. The elements of a part performance of contractual was laid down by Isaacs and Rich JJ in the Australian case of *Mcbride v Sandland* (1918) 25 CLR 69 as follows;

    i. The acts must be done by a party to the agreement

    ii. The agreement must have been complete

    iii. The acts must have been done in compliance with the terms of the oral agreement

    iv. The act relied on must be unequivocally and in its own nature referable to "some such agreement as that alleged". That is, it must be such as could be done with no other view than to perform such an agreement.

    v. The performing party must have been acting in reliance on the agreement, and the other party must have permitted those acts to be done because of the existence of the agreement

20. The question that now begs is whether the part performance should be considered as non-performance of the contract by this court. While discussing a similar issue, the court of appeal in the case of *Lucy Njeri Njoroge v Kaiyahe Njoroge* [2015] eKLR held that;

> "In the instant case, when the appellant defaulted in the payment of the balance of the purchase price, there is no doubt that the respondent was at liberty at any time to rescind the agreement, by notifying or communicating such rescission to the appellant. In so doing, the respondent would in turn have had to return any amounts paid to him in part performance of the contract, so as to return the parties to the position they would have been prior to entering into the agreement."

21. It has been submitted by the appellant that when she discovered a breach by the respondent on 14 June, 2018 instead of rescinding the contract, she raised the issue with the appellant who made a

further undertaking to perform its obligation. According to Jill Poole, in "Contract Law", 13th Edition at page 117 states that the basic rule of recovery of compensation in the case of breach of contract is that the non-breaching party is to be put into the position in which it would have been had the contract been performed as agreed. The customary measure of damages is the reasonable expense of completion. Which refers to a fulfillment of the same work, if possible, which does not involve unreasonable economic waste. This court is of the view that the appellant is only entitled to recover the difference between the contract price and the amount it would cost to have the work completed so as to put her in the same place she would have been had the respondent performed the contract.

22. This was the approach correctly taken by the trial court in its judgment when it held that;

> "Since the defendant performed almost three quarters of the agreed amount, it will be unfair to ask them to pay the entire contracted amount.
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> 120 meters of the borehole costed Kshs. 750,000/=. This therefore means that a meter was drilled at Kshs. 6,250/=, so the remaining 20 meters would cost Kshs. 125,000/=."

23. On the second issue, the appellant has argued that the trial court erred by failing to appreciate that there was an interlocutory judgment against the respondent herein for the sum of Kshs. 750,000 plus accrued interest and travel expenses as prayed for in the plaint. The appellant contends that the respondent's failure to file a defence meant that her evidence was uncontroverted. The respondent admits not filing the defence for the reason that it did not challenge the evidence tabled and further states that a judgment in default is not a final judgment since the trial court ought to address its mind to the evidence produced and make an independent decision.

24. I have read the appellant's submissions before the lower court and the authorities cited which are distinguishable from the present case. In the cited cases, the defendants had filed their defence but had failed to adduce evidence in support of its case. In the present case, the respondent did not file its defence as it did not dispute the evidence on record and the suit proceeded for formal proof. The definition of Formal Proof was discussed in the case of *Samson S. Maitai & another v African Safari Club Ltd & another* [2010] eKLR, where Emukule, J. observed thus;

> "..... I have not seen judicial definition of the phrase "Formal Proof". "Formal" in its ordinary Dictionary meanings - refers to being "methodical" according to rules (of evidence). On the other hand according to Halsbury's Laws of England, Vol. 15, para, 260, "proof" is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption."

25. In *Rosaline Mary Kahumbu v National Bank of Kenya Ltd* [2014] eKLR, the Court held: -

> " In contrast, at a formal proof hearing, if the party with the onus of adducing evidence fails to satisfy the truth threshold, the matter would stand to be dismissed on the basis that it was unmeritorious and did not raise sufficient proof of any issues of fact or law. It would be heard and determined on its merits."

26. From the above, formal proof proceedings is not a rubber stamping proceedings of the claimant's prayers. The party that alleges needs to adduce 'sufficient' proof to raise a presumption of truth. I therefore agree with the respondent's proposition that a court sitting on a formal proof hearing must

address its mind to the evidence adduced vis-a-vis the prayers being sought. Although interlocutory judgment had been entered for the sum of Kshs.750,000 in favour of the appellant. The evidence showed that the appellant benefited from the sum of Kshs.750,000 by having a 100metre borehole drilled for her.

27. As a general rule general damages are not recoverable in cases of alleged breach of contract-see Court of Appeal decision in *Kenya Tourism Development Corporation vs Sundowner Lodge Ltd* [2018] eKLR. The reason for such was explained by the court in the case of Consolata Anyango Ouma vs. South Nyanza Sugar Co. Ltd [2015] eKLR as follows:

> " The next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This principle is encapsulated in the Latin phrase restitution in integrum (see K*enya Industrial Estates Ltd v Lee Enterprises Ltd* NRB CA Civil Appeal No. 54 of 2004 [2009] eKLR, *Kenya Breweries Ltd v Natex Distributors Ltd* Milimani HCCC No. 704 of 2000 [2004]eKLR). The measure of damages is in accordance with the rule established in the case of Hadley v Baxendale (1854) 9. Exch. 341 that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see *Standard Chartered Bank Limited v Intercom Services Ltd & Others* NRB CA Civil Appeal No. 37 of 2003 [2004] eKLR). Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved (see *Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others*, NRB CA Civil Appeal No. 192 of 92 (UR) and *Charles C. Sande v Kenya Co-operative Creameries Ltd*, NRB CA Civil Appeal No. 154 of 1992 (UR))".

28. In the Anson's Law of Contract, 28th Edition at pg 589 and 590 the law is stated to be that:-

> "Every breach of a contract entitles the injured party to damages for the loss he or she has suffered. Damages for breach of contract are designed to compensate for the damage, loss or injury the claimant has suffered through that breach. A claimant who has not, in fact, suffered any loss by reason of that breach, is nevertheless entitled to a verdict but the damages recoverable will be purely nominal".

29. The Halsbury's Laws of England, Third Edition vol. II, defines nominal damages as follows:

> " 388. Where a plaintiff whose rights have been infringed has not in fact sustained any actual damage therefrom , or fails to prove that he has; or although the plaintiff has sustained actual damage, the damage arises not from the defendant's wrongful act, but from the conduct of the plaintiff himself; or the plaintiff is not concerned to raise the question of actual loss , but brings his action simply with the view of establishing his right, the damages which he is entitled to receive are called nominal... Thus in actions for breach of contract nominal damages are recoverable although no actual damage can be proved".

30. In *Kinakie Co-operative Society vs Green Hotel* (1988) KLR 242, the court of Appeal held that where damages are at large and cannot be quantified, the court may have to assess damages upon some conventional yardstick. But if a specific loss is to be compensated and the party was given a chance to prove the loss and did not, he cannot have more than nominal damages. In the present case, the appellant has failed to convince this court that her suffering due to lack of water was occasioned by the

respondent failure to complete the contract. Consequently, I will only award her nominal damages in the sum of Kshs. 100,000/=. The sum of Kshs.125,000 awarded by the trial court is simply a refund for the undone 20 metres of the borehole as per the contract. The appellant incurred extra expenses like resurveying the borehole and I do find that she is entitled to nominal damages.

31. In the end, this appeal partially succeeds I award the appellant a nominal award of Kshs. 100,000/= together with costs of the appeal. The rest of the claim shall be as per the award by the trial court.

DATED AND SIGNED AT NAIROBI THIS 18TH DAY OF MAY 2022

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S. CHITEMBWE

JUDGE

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MAY 2022

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J.K. SERGON

JUDGE