



Gesa Building & Engineering Limited v Wamwacha & 2 others (Civil Case 29 of 2017) [2022] KEHC 13072 (KLR) (22 September 2022) (Judgment)

Neutral citation: [2022] KEHC 13072 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL CASE 29 OF 2017
MM KASANGO, J
SEPTEMBER 22, 2022**

BETWEEN

GESA BUILDING & ENGINEERING LIMITED APPLICANT

AND

MOHAMED A M WAMWACHA 1ST DEFENDANT

FRANCIS W NGARIUKI (SECRETARY GENERAL & NATIONAL EXECUTIVE COMMITTEE MEMBERS OF KENYA CIVIL SERVANTS WELFARE ASSOCIATION) 2ND DEFENDANT

HYDRO DEVELOPERS LIMITED 3RD DEFENDANT

JUDGMENT

1. Interlocutory judgment was entered on February 28, 2019 against the National Executive Committee Members of Kenya Civil Servants Welfare Association, the 1st defendant. The case against the 2nd defendant Hydro Developers Ltd was withdrawn by consent on March 16, 2022.
2. The plaintiff, Gesa Building & Civil Engineering Ltd seeks judgment for Kshs 88,722,50/= with interest at court rate until payment in full.
3. The plaintiff through its pleading alleges that the 1st defendant with the authority of the 2nd defendant agreed to award the plaintiff a contract to construct a boundary/perimeter wall round about property LR No 4927 situated in Kamiti road, Kiambu which property is registered in the name of the 2nd defendant. The plaintiff alleged that the contract was evidence by correspondence between it and the 1st defendant. That pursuant to that agreement the plaintiff proceeded to mobilized for the anticipated works by appointing project consultants to prepare inter alia bills of quantities and architectural drawing. That, however on a site visit in September, 2016 the plaintiff established that 2nd defendant had reneged the contract by causing pieces of land to be subdivided into plots which were being offered for sale to the general public.



4. The plaintiff further pleaded that as result of the representation made to it, it had incurred expenses, loss and damage in the sum of Kshs 88,722,500. The particulars of that claim were broken as follows:-
 - i. Contractor’s mobilization fees - Kshs 50,000,000
 - ii. Consultant’s fee and disbursements - Kshs 27,215,000
 - iii. City County Government approval fees - Kshs 2,500,000
 - iv. NEMA approvals and reports - Kshs 1,705,000
 - v. NCA Levies - Kshs 1,502,500
 - vi. Cash advance/facilitation fee: -
To 1st defendant’s clerk of works - Kshs 800,000
 - vii. Miscellaneous expenses in preparation - Kshs 5,000,000

Total = Kshs 88,722,500
5. The plaintiff finally, in its plaint, “prays for judgment against the defendant” for the total loss it alleges it incurred. Note that the defendant does not identify whether judgment is sought against 1st or 2nd defendant.
6. The plaintiff formally proved its case against 1st defendant through the evidence of George Ngure Chira the managing director of the plaintiff.

Discussion and Analysis

7. As stated before the plaintiff withdrew the case against the 2nd defendant. This withdrawal in my view raises challenges to the plaintiff’s case as pleaded. This is because the plaintiff pleaded it was the 2nd defendant who reneged the alleged contract, not the 1st defendant. Since there is no allegation of the 1st defendant reneging the contract how can it be held liable for the loss the plaintiff alleges it incurred? That is the difficulty one of the many I find that plague this case.
8. The plaintiff’s case is that the 1st defendant on authority of the 2nd defendant awarded it contract to construct perimeter wall. By that pleading the plaintiff admitted that the relationship between the 1st defendant and the 2nd defendant was one of principal and agent. That is the 2nd defendant was the principal while the 1st defendant was the agent. In this regard, I shall site what was considered in the case *Victor Mabachi & Another v Nurturn Bates Ltd* (2013) eKLR thus:-

“It remains now to consider the second issue whether the enjoinder of the appellants in the suit in the High Court breached the principle of law that an agent cannot be sued where there is disclosed principal.

38. In *Anthony Francis Wareheim t/a Wareheim & 2 Others v Kenya Post Office Savings Bank*, Civil Appln Nos Nai 5 & 48 of 2002, at page 10, this court unanimously held as follows:-

‘It was also prima facie imperative that the court should have dismissed the respondent’s claim against the second and third appellants for they were impleaded as agents of a disclosed principal contrary to the clear principal of common law that where the principal is disclosed, the agent is not to be sued. Furthermore,



the court having found on the evidence that the second and third appellants were principals in their own right and not agents of the first appellant in the transaction giving rise to the suit, it should have dismissed the suit against the first appellant who had been sued as the principal.”

9. It is to be noted that the principle of common law is that an agent should not be sued where there is a disclosed principal. There is therefore no cause of action against the 1st defendant since it would be contrary to that common law principle that the principal, the second defendant, is a disclosed principal. It will be recalled that the case against the 2nd defendant was withdrawn. There is no factors in the pleadings vitiating the liability of the disclosed principal and the suit against 1st defendant cannot stand, it is unwarranted.

10. Although the plaintiff pleaded that it was awarded the subject contract by the 1st defendant at the authority of the 2nd defendant, the registered owner of the subject property, the plaintiff did not prove that relationship. Consider what was stated in the case *Lucy Nungari Ngigi & 4 others v National Bank Kenya Limited & Another* (2015) eKLR thus:-

“The above case took into consideration the case of *Garnac Grain Co Inc Versus H M Faure & Fair Dough Ltd And Bunge Corporation* (1967] 2 ALL ER 353 where Lord Pearson with the concurrence of the House used the words:-

“The relationship of the principal agent can only be established by the consent of the principal and agent. They will be held to have consented if they have agreed to what amounts in law to such a relationship, even if they do not recognize it themselves and even if they have professed to disclaim it... the consent must, however, have been given by each of them, either expressly or by implication from their words and conduct”. (Emphasis by applicants)”

11. Over and above that discussion I had difficulty appreciating what the plaintiff’s case entailed.

12. The plaintiff relied on correspondences as proof the contract awarded to it. The correspondence started with the plaintiff writing to the 1st defendant, by letter dated November 24, 2015, where the reference is the subject property and it stated in that letter as follows:-

“We understand that you are in a joint venture for construction of 11,000 houses in Kiambu on approximately 120 acres. We are applying to be considered sub-contractors for the construction of the boundary wall which we understand is separate from the main contract.”

13. The 1st defendant wrote to the plaintiff letter dated December 9, 2015 confirming it was authorized by 2nd defendant to appoint and ward the tenders for perimeter wall. By yet another letter dated December 17, 2015 1st defendant wrote to the plaintiff informing it that the national executive of the council of 1st defendant had resolved to offer the plaintiff the contract subject to performance bond from an insurance or bank and further stated construction would commence after the drawings, concept, NEMA certificate and BOG is approved by the authorities. It is not clear whether those conditions were met.



14. The plaintiff wrote to the 1st defendant an undated letter stating:-
- “Upon determination of the construction cost and approvals thereof, we shall proceed and sign a joint builders contract and commence construction.”
15. By letter of February 15, 2016 it would seem the all clear had been given to plaintiff to start any work because this is what it stated to the 1st defendant:-
- “... the consultant have given a projected construction costs of Kshs 343,379,700 and also a breakdown of advanced payment which need to be paid before they start working on the drawings and bill of quantities.”
16. 1st defendant responded to that letter by its letter dated February 17, 2016, where the 1st defendants stated:-
- “We are therefore requesting you to draft the contractor’s agreement and forward to us for approval.”
17. In all those correspondence and many others, which I did not reproduce here, it is clear both plaintiff and 1st defendant were contemplating they would enter into a written contract setting out the terms they agreed. There is no such agreement before the court. In my view, the plaintiff failed to prove a definite offer made. Indeed, I am left wondering whether there existed a contract at all. A case in point is *City Council of Nairobi v Wilfred Kamau Gitbua t/a Gitbua Associates & Another* (2016) eKLR thus:-
- “30. The main contention between the parties herein revolves around the existence of a contract. In this regard, the learned authors of *Cheshire, Fifoot and Formstons, the Law of Contract 14th Edn* at pages 34 and 35 state:-
- “The first task of the plaintiff is to prove the presence of a definite offer made ... proof of an offer to enter into legal relations upon definite terms must be followed by the production of evidence from which the courts may infer an intention by the offence to accept that offer.”
18. Additionally I failed to appreciate what the plaintiff had done to seek compensation as it does in this case. The plaintiff at the hearing stated:-
- “We fenced the entire property for them.”
19. Later the plaintiff stated that there was a certain claim it was foregoing because the project had not taken off.
20. On the whole and for the reasons set out above, the plaintiff’s case fails it is devoid of merit.

Disposition

21. In the end and bearing the above discussion, the judgment of the court is that the plaintiff’s case is dismissed with no orders as to costs since the case was undefended.

JUDGMENT DATED AND DELIVERED AT KIAMBU THIS 22ND DAY OF SEPTEMBER, 2022.
MARY KASANGO



JUDGE

In the presence of:-

Coram:

Court Assistant:- Mourice

For Plaintiff:- No appearance

For 1st Defendant: - No appearance

Court

Judgment delivered virtually,

MARY KASANGO

JUDGE

