



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CIVIL APPEAL NO. 80 OF 2017**

**THE KENYA POWER & LIGHTING CO. LTD.....APPELLANT**

**VERSUS**

**ANDY INTERNATIONAL.....RESPONDENT**

*(Being an Appeal from the Judgment and decree of the Hon. F. Kyambia (SPM) delivered on the 20.2.17 in Mombasa CMCC No. 387 of 2015.)*

**JUDGMENT**

1. The Respondent filed a case being **CMCC No. 387 of 2015** against the Appellant seeking an award of Kshs. 4,473,530 as well as the costs of the suit and interest at courts rate from the date of filing the suit until payment in full. The demanded amount arose from a tender to supply concrete blocks, which were duly supplied and the Appellant paid for the concrete blocks but left the balance of Kshs. 4,473,530.775 unpaid and outstanding.

2. On being served, the Appellant vide a statement of defence dated 14.4.2015, stated that the Respondent colluded with the Appellant's former Procurement Officer, Coast Region by submitting a request for quotation form dated 17.11.2011. It was pleaded that the quotation form fraudulently filled in by the said Appellant's former Procurement Officer, Coast Region thereby altering on the unit price for concrete Stay Blocks from Kshs.475/= to Kshs.530/= per stay block. Further, the Defendant/Appellant further added that the Plaintiff/Respondent was paid based on the fraudulently altered price which resulted into an overpayment of Kshs. 603,229/=. This amount, according to the Appellant ought to be set off in the event that the court found that there was any amount due to the Plaintiff.

3. After the case was heard, the learned Magistrate found that the Respondent was entitled to a total sum of Kshs. 3,488,875/= based on the price of Kshs.475/= per unit. The trial court further proceeded to set off the sum of Kshs. 603,229/= as money overpaid to the Plaintiff based on an exaggerated price of the stay blocks. The upshot of the finding of the trial court therefore was that the Plaintiff/Respondent was entitled to Kshs. 2,885,646/= as owing against the Defendant/Appellant. The Plaintiff/Respondent was also awarded the costs of the suit.

4. On being dissatisfied with the above decision the Appellant lodged the instant appeal and set out two (2) grounds namely: -

***1) The learned magistrate erred in failing to find that there was fraud and collusion between the Respondent and the Appellant former Procurement officer, Coast Region despite finding that the said Procurement Officer altered the Request for Quotation form dated 17.11.2011 to inflate the unit price of the Concrete Blocks the subject matter of the suit.***

***2) The Learned magistrate erred in exercising his discretion in favour of the Respondent by awarding the Respondent interest and costs. The learned magistrate failed to appreciate that since the Respondent was the ultimate beneficiary of the inflated unit price brought about by the fraudulent alteration of the request for quotation form dated 17.11.2011, the Respondent colluded with the Appellant's former Procurement Officer, Coast region, and was therefore not deserving of the courts discretion being exercised in its favour.***

5. When the appeal came up for directions, the court gave directions that the appeal be disposed by way of written submission. Both parties filed their submissions and opted not to highlight the same. Consequently, a judgment date was fixed and I proceed to consider the submissions as follows:

**Submissions**

6. **Mr. Mugambi**, Learned Counsel for the Appellant submitted that the trial Court in computing the balance payable adopted the Appellant's figure of Kshs.475/= and in so doing declined the Respondent's figure of Kshs. 530. Further, the trial Court agreed with the Appellant that the unit price figures had been changed by the Appellant's employee Mr. **Abel Maranga Mogire**. It is Mr.Mugambi's submission that the Respondent was to benefit from the alteration of the unit price by virtue of the payments made to him and further that the Appellant's employee could not have altered the unit price without the Respondent's involvement and consent.

7. **Mr. Mugambi**, also submitted that the Respondent has not appealed the finding by the trial Court on the alteration of the unit price. Therefore, the finding points to the fact that there was collusion between the Respondent and the Appellant's former Procurement Officer, Coastal Region. As such, the counsel's view is that ground one of the Appeal is merited.

8. On the issue of costs, Counsel for the Appellant submitted that the trial Court's discretion was not exercised judiciously for among other reasons that the trial Court agreed with the Appellant on the applicable rate on the price of the stay blocks and on the set-off, which points to the fact that the Appellant was successful in its defence. To that extend, Mr. Mugambi submitted that it was the Appellant who was entitled to costs.

9. On the other hand, **Mr. Ananda** Learned Counsel for the Respondent submitted that the trial Court never made any specific finding of any fraud or collusion on the part of the Respondent and therefore the first ground of Appeal should fail.

10. Further, counsel submitted that there was no finding by the trial Court that the Respondent was the ultimate beneficiary of the alleged inflated unit price brought about by the alleged fraudulent alteration of the request for quotation form dated 17.11.2011.

### **Determination**

11. In considering this appeal, I will be guided by the case of **Selle v Associated Motor Boat Co.** [1968] E.A. 123 at page 126, where the Court of Appeal stated: -

*“.....(the) principles upon which this court acts in such an appeal are well settled. Briefly put they are but this court must reconsider the evidence, evaluate itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”*

12. It is trite law that an appellate court can only interfere with findings of fact made by the lower court if such findings were based on no evidence or on a misrepresentation of the evidence or if the trial court in reaching its decision applied the wrong legal principles. **See the cases of Sumaria & Another v Allied Industrial Limited, [2007] 2 KLR 1; Jabane v Olenja, [1986] KLR 661; Simon Muchemi & Another v Gordon Osore, [2013] eKLR.**

13. Bearing in mind the principles in that case, and having read the record in satisfaction of the court's mandate, I do find the following two issues isolate themselves for determination by the court:-

**1. Whether there was fraud and collusion between the Respondent and the Appellant's former Procurement Officer, Coast Region.**

**2. Whether the Respondent is entitled to the costs of the suit as awarded.**

### **Whether there was Fraud and Collusion as alleged**

14. I have considered the appeal fully. On the outset, I wish to state that the quantity and supply of Stay concrete blocks was not disputed. It is only the unit price that is in dispute. The Appellant's contention is that the trial Court having adopted its unit price of Kshs. 475/= instead of the Respondent's price of Kshs. 530/=, and agreeing by the Appellant, then the trial Court ought to have arrived at a finding that there was collusion between the Respondent and the Appellant's.

15. In the case of **Kiruga v Kiruga & another [1988] KLR 348**, the Court of Appeal observed that

*“An appeal court cannot properly substitute its own factual findings for that of a trial court unless there is evidence to support the findings or unless the judge can be said to be plainly wrong---”*

16. Bearing in mind the above principles, I now move to reconsider and re-evaluate the evidence on fraud and collusion. In disregarding the Appellant's evidence on expert opinion, the trial court found that the alterations on the Request for Quotation were made by **Abel Maranga Mogire** and not **Andrew Thurania**. However, PW1 in his evidence in chief, had insisted that he was the one who made the said alteration on the Request for Quotation. Therefore, in the trial court's opinion there was conflicting evidence which called on the court to exercise its discretion and consider other relevant facts to arrive at an independent decision on the issue of collusion and fraud. The court then disregarded the expert opinion of the forensic document examiner and proceeded to consider the oral and documentary evidence adduced by the parties.

17. After considering the evidence before it, the trial court found that the Appellant had failed to discharge its burden of proof on the allegations of fraud made. The court also found that though it might agree to some extent it might agree that the defendant's employee might have altered the document in question, the defendant failed to link the plaintiff with such collusion and/or fraud. Therefore, the trial court held the view that the plaintiff ought not to suffer as a result of omissions and commissions of the defendant's employee, having supplied the goods as ordered.

18. From the foregoing, and having read the Record of Appeal, this court is satisfied with the trial court's finding of fact and that the trial court exercised its discretion correctly when it arrived at a finding that the allegations of fraud and collusion were not proved by the

defendants to the required standard which is a little bit higher than the normal balance of probabilities in civil cases but not as high as beyond reasonable doubt required of criminal matters.

19. On the issue of payment, the trial court anchored its finding on the fact that the supply of the Stay bricks was not in dispute and further, that the Plaintiff/respondent ought not to have suffered prejudice on account of the commission and omission of the defendant's employee. The trial court took note of the averments in the Defendant's statement of defence wherein it was averred that if the court finds that the plaintiff is entitled to any further payment whatsoever from the defendant, the payment should then be based on the unit price of Kshs.475/= per stay concrete block as opposed to the fraudulently entered value of Kshs.530/= per stay block. The Defendant further implored the court to find that the amount of Kshs. 603,229/= should be set off from any payment made that the court may order to be paid to the Plaintiff because it was an overpayment based on an exaggerated quotation price.

20. This court agrees with the finding of the trial court that the Appellant having failed to prove on the allegations of fraud and collusion on the part of the Respondent and Appellant's former Procurement Officer, then there would be no basis of denying the Respondent payment for the unpaid 7,345 Stay blocks that were supplied to the Appellant. If the court was to find as such, then it would amount to an unjust enrichment on the part of the Appellant. Nonetheless, the Appellant was agreeable to paying for the unpaid stay blocks based on a figure of Kshs.475/= per stay block. This court therefore finds that the trial court did not erroneously exercise its discretion by adopting the figure of Kshs.475/= as the unit price for the unpaid 7,345/= stay blocks. Consequently, I find no reason to substitute my discretion with that of the trial court, hence ground one (1) of the appeal is unmerited and hereby dismissed.

21. On the issue of costs, as a general rule, costs of a suit follow the event, and a successful litigant will be awarded costs so as to recoup the costs he/she/it has incurred in the course of the litigation. In the case of **Supermarine Handling Services Limited v Kenya Revenue Authority [2010] eKLR (Civil Appeal 85 of 2006)** the Court stated *inter alia*, that:

***“Costs of any action, cause or other matter or issue shall follow the event unless the Court of Judge shall for good reason otherwise order ... Thus, where a trial Court has exercised its discretion on costs, an appellate Court should not interfere unless the discretion has been exercised injudiciously or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also not interfere where reasons are given if it considers that those reasons do not constitute “good reason” within the meaning of the rule”.***

22. I embrace the sediments in the above case that an award of costs is an exercise of the Court's discretion and a court exercising appellate jurisdiction should only interfere with the trial court's award on costs on seldom occasions when it is satisfied that the trial court while awarding costs, exercised its discretion injudiciously or based on the wrong principles. Courts can also interfere on the award of costs upon the Applicant satisfying the court that there are good reasons to do so.

23. I have considered that the general rule in the award of costs to be that the successful party should always be awarded costs unless there are good grounds for not doing so. The question which follows is who the successful party in this suit was and if there were good grounds in not awarding the costs to that party. In this case, both the Plaintiff and the Defendant succeeded in their claims. The Plaintiff succeeded in the claim for the unpaid stay blocks whilst the Defendant successfully claimed Kshs. 603,229/= to be set off as an overpayment based on an exaggerated quotation figure. My view then is, this case has ended in a win-win situation and it would only be reasonable for each party to bear its own costs.

24. I therefore substitute the order by the trial court condemning the Appellant to costs with an order directing each party bears its own cost for the primary suit and the appeal herein.

25. it is so ordered.

**Dated, Signed, and Delivered at Mombasa this 28<sup>th</sup> day of January, 2021.**

**D.O. CHEPKWONY**

**JUDGE**

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15<sup>th</sup> March 2020**, this Judgment has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court.

**JUSTICE D.O. CHEPKWONY**