REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 75 OF 2019

NESCO SERVICES LIMITED.....APPELLANT

VERSUS

CM CONSTRUCTION [E.A] LIMITED.....RESPONDENT

(Being an appeal from the Judgement of the Learned Chief Magistrate, Machakos in Civil Suit No. 162 of 2017)

BETWEEN

CM CONSTRUCTION [E.A] LIMITED.....PLAINTIFF

VERSUS

NESCO SERVICES LIMITED.....DEFENDANT

JUDGEMENT

1. The Respondent was the Plaintiff in Machakos Chief Magistrate's Court Civil Case No. 162 of 2017 in which it sued the Appellant herein seeking Kshs. 10,941,779.80, Interest thereon, damages for breach of contract as well as the costs.

2. According to the plaint, in 2014 the Appellant contracted the Respondent orally to carry out renovations at Moke Gardens Phase 1 and 2 owned and managed by the Appellant and to build show houses/sample houses thereat. The said construction works were basically modifications and renovation works which had already been attended to by another contractor, albeit not to the satisfaction of the Appellant. According to the Respondent, it performed his part of the bargain in respect of the said modifications and renovations to the satisfaction of the Appellant and his charges were partly settled leaving a balance of Kshs 2,776,865.00.

3. Alongside the said modifications, the Respondent was also contracted by the Appellant to construct show houses/sample houses comprising of three and two bedrooms plus a studio. The Respondent, it was pleaded, diligently carried out the said works and constructions to the satisfaction of the Appellant and as per the Bill of Quantities and the scheme provided to the Respondent and that a joint inspection on measurements, schedule of materials, labour and materials supplied to the site was agreed between the Appellant's deputed Quantity Surveyors M/S Nyara Consults and the Respondent's Quantity Surveyors.

4. However, when the Respondent requested for settlement of its outstanding fees, the Appellant totally refused and/or denied its claim which the Respondent particularised.

5. In its defence, the Appellant pleaded that it introduced the Respondent to purchasers of Moke Gardens Limited who required modifications of their purchased premises and that at no time did the Appellant engage the Respondent for the said work on its own instance. It was therefore denied that the Appellant contracted the Respondent as alleged by the Respondent. To the contrary, it was clarified that the constructions of the show houses/samples was mutually agreed between the Respondent, the Appellant and other consultants as pre-qualification for the anticipated Phase Two Construction work in Moke Gardens Limited where the Respondent was to be contracted for the said work. According to the Appellant, it was mutually agreed between the parties that Moke Gardens, the Owner was to provide land, construction materials, water, electricity, stores and insurance covers whereas the Respondent was to provide labour for constructions of show houses/samples and that at no time did the parties contemplate payments for work done as the said show houses/samples were meant to attract potential customers and were pulled down thereafter.

6. In support of its case, the Appellant called **Manji Lalji Vekarya,** its director as PW1. Apart from adopting his witness statement, he testified that the Appellant was their client for whom they constructed houses. It was his testimony that the Appellant was introduced by a **Mr. Masiswa Jathuar** and that after he met the Appellant's directors he visited the site at Lukenya where he was shown the construction they wanted and were given a bill of quantities after which they built sample houses and excavation based on the costings done by the Quantity Surveyors for both parties. However, there was no agreement. It was his testimony that the Respondent was paid for phase 1 which was renovation works but was not paid for phase 2 despite several meeting between the parties. As a result, the Respondent was claiming Kshs. 10,941,779.80 which was unpaid. According to PW1, the calculations were done by the parties' respective quantity surveyors and though they sent a demand to the Appellant, the Appellant declined to pay hence this suit in which they prayed for payment for the amount for the work done.

7. In cross-examination, PW1 stated that they were two directors and that he was authorised to attend court. the reiterated that the Respondent did not have an agreement with Appellant. He however stated that there was agreement for renovation and that the Appellant paid for the 1st phase. It was his evidence that the land belonged to the Appellant though he did not know the parcel number. In his evidence Moke Gardens Limited also belonged to Appellant. He maintained that the figures were arrived at by the quantity surveyors and stated that though he had delivery notes and invoices, they were not in court. The same position applied to records for labour services.

8. PW1 stated that the quantity surveyor made measurements and that they excavated the Place and removed the materials. They also purchased materials on site though he had no delivery notes or invoices. Referred to the bill of quantities by joint quantity surveyors, PW1 admitted that the same was not signed by the Respondent's quantity surveyor. Though he found other material on site, he brought other materials. According to him, they were building sample houses which were meant to enable him get the big contract. However, the Appellant had promised to pay costs since he added other materials. He also disclosed that he took people to see the sample houses which were complete and occupied. He however, did not have completion certificate.

9. During the time of the renovations, PW1 stated that he was dealing with the Appellant and was not told names of purchasers. He stated that he did not give renovation to a sub-contractor since he was not permitted to sub-contract. He stated that he had evidence of payment and did not know if tenants chased the sub-contractor since in his evidence the sub contractor finished well though he did not have a completion certificate. Though the Appellant showed him the site, there were no hand over notes. He stated that he had been a contractor for 15 years and was working on relation basis.

10. In re-examination, PW1 clarified that the sample houses are still on site as set out in his bundle of documents. He reiterated that though the Appellant had some materials on site, he also brought other materials. It was his evidence that there is no requirement that main contractor must get consent from client to sub-contract. In his evidence the agreement was a verbal one but no payment was made for the work done.

11. PW2, **Mansukh Javda Patel,** a supplier of building materials also relied on his witness statement and testified that he brought together the Appellant and the Respondent since he knew them well. In his evidence **Haroun Ndambuki** of defendant was his customer. It was his testimony that Moke Gardens alias Nesco Services wanted construction of houses and while the Respondent constructed sample houses and studio he supplied materials. He stated that he met the two once. He confirmed that there was a quantity surveyor, Architect and others. He confirmed that the Respondent did the work and was not paid his money amounting to Kshs. 9,022,700/- and though he demanded the same the Appellant did not respond but maintained that that was the contractor's issue. He therefore supported the Respondent's claim so that he could likewise be paid.

12. In cross-examination, PW2 reiterated that he supplied the Respondent with the goods and issued a demand to Respondent but informed the Appellant of the same. In his evidence, Moke services is same as Nesco services. Though he had delivery notes, the same were not in court and he did not avail them or invoices. He insisted that he did not write the letter to assist the Respondent. In his evidence, the 1st meeting was to start works of the sample houses and he did not fully supply the materials for renovation but was paid for what he supplied.

13. In re-examination, he stated that he introduced the Appellant to the Respondent as a friend.

14. PW3, **Joel Wafula Nyongesa,** the Respondent's Quantity Surveyor testified that in the year 2014, his boss went with the Appellant's director where the Appellant contracted the Respondent to renovate maisonette and build a 3 bedroom, 2 bedroom and 1 bedroom units sample house. At the time there was no agreement. He was asked to go to the site to value the works and they were paid for the works done as per quotation. Therefore there was no claim for the 1st phase and the claim was with regard to sample houses, renovations and partition for which they were claiming Kshs. 10 million. He testified that the assessment was jointly undertaken together with the Appellant's quantity surveyor on site, Nyara Consults. It was his evidence that the last time he was on site was when they did valuation with Nyara Consults. According to him, the sample houses are occupied.

15. In cross examination, PW3 stated that he qualified as a quantity surveyor in 2005 from Kenya Institute of Highways and Building but became a professional quantity surveyor by 2010. He confirmed that he had the certificate for practice and that he did higher national diploma at Kenya Polytechnic and had worked with a quantity surveyor for 2 years and was admitted by 2010. He however never attained University education and is not a degree holder.

16. PW3 however insisted that in 2014, he attended meetings for the project though referred to the list of documents, he confirmed that the record does not list attendance and his name was not there. The witness confirmed that he did not attend the particular meeting referred to and whereas he pointed out the joint report, he confirmed that he did not sign the same. In his evidence, the report was addressed to Project Manager to authorize payment though he could not tell if there was authorization of payment by project manager. He insisted that he saw materials on site as well as invoices and delivery notes in the office.

17. In re-examination, PW3 stated that the issue of his certificates was not in issue. According to him, they communicated with the Appellant's Manager vide email about the project indicating service was to be rendered at a cost and that the Appellant wrote email from Nyara Consultant to Appellant on the assessment of the project. While he insisted that he attended meetings he was unable to see the

minutes.

18. At the close of the Respondent's case, the Appellant called **Harun Osoro Nyamboke,** the Appellant's director who testified as DW1. It was his evidence that he was a real estate developer. He knew the plaintiff and the witnesses who had testified. He confirmed that the Appellant and Moke Gardens have common directors but are limited companies. He further confirmed that the works were done at Moke Gardens Ltd with the Appellant being an agent.

19. According to the witness, Moke Gardens engaged the Respondent to construct 2000 house units on its land at Lukenya for residential purposes with other services. He therefore requested PW2 to propose a contractor and PW2 proposed the Respondent. In his evidence, they had a consortium of consultants and agreed that contractor had to demonstrate capacity. To prove that they asked the Respondent to show them projects they had done and the Respondent took them to completed projects.

20. The Respondents were also to do sample houses at the Moke Gardens being a studio, 1, 2 and 3 bedrooms units. Moke Gardens provided site and materials and Respondent was to provide labour. However, it was averred, the job was unsatisfactorily done. Since the contractor was on site, the Respondent was approached by the purchasers of completed units in Phase 1 to do modifications for them and the payment was to be made by the said purchasers. However, the Respondent did not complete the work and standards were shoddy because plaintiff delegated the works.

21. DW1 however admitted that he received demand and responded to the same asking for supporting documents for the claim. In his evidence, the project was supervised by consultants who advised them that before making payment, they should seek valuations and certificates.

22. In cross-examination, DW1 stated that he had dealt with PW1 for long and admitted that he was communicating with plaintiff company. According to him, renovations was done as the works continued and that the purchasers paid for the renovations. He reiterated that the Respondents were recommended to them by PW2. He admitted that the Respondent constructed a studio, 1, 2 and 3 bedrooms units to see if plaintiff could qualify for the construction of Moke Gardens Phase II. He however admitted that the Respondents was to be reimbursed by the Appellant. Referred to the documents, he confirmed that the client was indicated as the Appellant. He confirmed that the sample houses were still intact but according to him, the same were being used while awaiting the case so that they could demolish them since according to him, the Plaintiff did shoddy workmanship and was requested to make good the defects.

23. However, referred to the documents, DW1 stated that his email states works was to be rendered at costs and that the Respondent was to be reimbursed. He however stated that there was no written agreement and that the Respondent moved to the site without first making a quotation and that the Contractor abandoned the site. He however had no report on the defects and according to him, evaluation was not done which would have been a basis for payment. Referred to the documents in the bundle, he stated that the purchasers paid through the Appellant.

24. In re-examination, DW1 stated that they were never supplied with particulars and that for existing houses purchasers agreed on the works and paid the Respondent through the Appellant. However, for show houses, the Respondent was to supply labour. In his evidence the claim is not supported and Appellants have always been ready.

25. The learned trial magistrate in his judgement found that there was no dispute that the Appellant and Respondent had entered into an oral agreement to enable the Respondent construct samples of show houses which comprised of studio, one, two and three bedrooms. The learned trial magistrate held that DW.1 did confirm that the works were done to completion and that the houses had been occupied awaiting determination of the suit. The learned trial magistrate noted that DW.1 stated that evaluation of the work was to be conducted to be the basis for payment. The learned trial magistrate held that the costing allegedly prepared jointly by quantity surveyors for the work done was not objected to by the Appellant nor did the Appellant produce contrary figures. The learned trial magistrate held that the Respondent in its list of documents which was produced as exhibits listed a listing of costing for the work done. The learned trial magistrate noted that the Respondent produced photographs of the constructed house units and that DW.1 confirmed that the houses had been rented out. The learned trial magistrate held that on a balance of probabilities that the Appellant did owe the Respondent the outstanding fees of Kshs. 10,941,779.80/-, plus costs and interest at 12% from the date of filing the suit.

26. Aggrieved by the said decision, the Appellant lodged this appeal based on the following grounds:

> **(1) That the learned Chief magistrate erred in law and in fact by relying on inadmissible evidence produced by the Respondent and in so doing arrived at a wrong decision.**
>
> **(2) That the learned Chief magistrate erred in law and fact by failing to dismiss the Respondent's suit as there was insufficient evidence tendered by the Respondent to support its suit.**
>
> **(3) That the learned Chief magistrate erred in law and in fact by failing to hold that the Respondent's failure to call the makers of documents relied on was fatal to its case.**
>
> **(4) That the learned Chief magistrate erred in law by holding that the Respondent had proved its case on a balance of probability when evidence on record does not support such a finding.**
>
> **(5) That the learned Chief magistrate erred in law by awarding the Respondent a sum of Kshs. 10,941,779.80/- which evidence tendered did not support such an award.**
>
> **(6) That the learned Chief magistrate erred in law by failure to apply the principles laid down in binding authorities cited by the Appellant and in so doing arrived at a wrong decision and further violated the cardinal principle in law and practice**

that lower courts are bound by precedents of higher courts.

(7) The learned trial magistrate erred in law and in fact failing to hold that failure by the Respondent to produce its documents during the hearing was fatal to its case and contrary to the directions given during pre-trial proceedings.

(8) The Learned trial magistrate erred in law and in fact by awarding interest and costs to the Respondent when the Respondent had failed to prove its case

(9) The Appellant pray that the Learned Chief Magistrate judgement and subsequent orders be set aside and the Respondent's suit be dismissed with costs and appeal be allowed with costs.

27. On behalf of the Appellant it was submitted that the learned trial magistrate relied on documents not formally produced and the failure to hold the non-production fatal to the Respondent's case was an error. The Appellant took issue with the findings of the learned trial magistrate that the Plaintiffs lists of documents were produced as exhibits in particular the list of costings for the work done which was allegedly prepared jointly by quantity surveyors of the Appellant and Respondent. According to the Appellant the report was not prepared jointly as confirmed by PW.3 who claimed to have not signed the report hence the report is not admissible. It was submitted that contrary to Section 35(b) of the ***Evidence Act***, the maker of the report, Nyara Consults, was not called as a witness to produce the report and reliance was placed on the case of **Kenneth Nyaga Mwige vs Austin Kiguta & 2 Ors. [2015] eKLR**.

28. It was further submitted that the Respondent failed to prove its case on a balance of probabilities by failing to produce the delivery notes, invoices and completion certificate or handover notes to sustain its claim. Reference was made to Section 107 of the ***Evidence Act*** as regarding the burden of proof and the Appellant relied on the case of **Robert Ouma Njoga vs Benjamin Osano Ondoro [2016] eKLR**.

29. According to the Appellant since a representative of Moke Gardens Limited introduced the purchasers to the Respondent the suit ought to have been filed against the purchasers not the Appellant. In a nutshell the Appellant was acting for as an agent of a disclosed principal Moke Gardens Limited.

30. It was further submitted that special damages of Kshs. 10,941,779.80/- were not proved since no invoices or receipts were produced in court. Reliance was placed on the case of **Capital Fish Kenya Limited vs Kenya Power & Lighting Co. Ltd [2016] eKLR.**

31. According to the Appellant, the learned trial magistrate disregarded the doctrine of *stare decisis* in respect of proof of special damages and reliance was placed on **Mohamed Abushiri Mukullu vs Minister of Lands & Settlement & 6 Others [2005] eKLR** and **Jabir Singh Rai & 3 Others vs Tarlochan Singh & 4 Others [2013] eKLR.**

32. The Respondent on the other hand submitted that the joint valuation report was among the documents adopted by PW.1 in court as the Respondent's documents and neither was the report objected to by the Appellant. The Respondent insisted that the report was prepared jointly by both parties' representative quantity surveyors in the discharge of their respective professional duties and their presence in court could be dispensed with pursuant to Section 33(B) of the ***Evidence Act*** and reliance was placed on the case of **High Chem East Africa Ltd vs David Njau Wambugu & 4 Ors. [2020] eKLR**.

33. According to the Respondent, the renovation work was paid by the Appellant as evidenced by the payment vouchers and this evidence was not controverted by the Appellant. The Respondent has submitted that it has proved its case on a balance of probabilities by demonstrating that it constructed the show houses by producing photographs of constructed houses that were not objected to by the Appellant. Counsel submitted that the allegations of poor workmanship were never substantiated by the Appellant since no evidence was tendered before court. The Respondent has asserted that the Appellant is collecting rent from the sample houses yet it has refused to pay the Respondent's costs. The Respondent has placed reliance on the email dated 22/4/2015 found at page 22 of the Record of Appeal from DW.1 to PW.1 to show that the work was to be carried out as a cost. Reliance was placed on the case of **Trishcon Construction Co. Ltd vs Avtar Singh Bahra(2017) eKLR**.

34. According to the Respondent, it was the duty of the Appellant to prove that it was Moke Gardens Ltd that had contracted the Appellant and not the Respondent since DW1 admitted that the client was the Appellant. The Respondent asserted that it was orally contracted by the Appellant and not Moke Gardens Limited.

35. According to the Respondent Kshs. 10,941,779.80/- is a liquidated claim that arose out of a joint valuation exercise and reliance was placed on the case of **Cimbria East Africa Ltd vs Kenya Power & Lighting Ltd** and contended that the case of **Capital Fish Kenya Ltd vs The Kenya Power & Lighting Co. Ltd** was not applicable since it addressed the aspect of special damages.

Determination

36. This being a first appeal, the role of this court is to re-evaluate and subject the evidence to afresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. The court also takes note of the fact that it did not have the benefit of seeing or hearing the witnesses testify and therefore has to make an allowance for the same. It was held in the case of **Selle vs. Associated Motor Boat Co [1986] EA 123** as follows:-

"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal from the trial court by the high court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions through 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 the 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."

37. It is not in dispute that the Respondent was orally contracted to renovate Moke Gardens Phase 1 and 2 and build Show Houses/sample houses at Moke Gardens. It is not in dispute that the Respondent was paid for renovations in Phase 1. What is in dispute is the claim arising from the building of the show houses/sample houses. Whereas in the pleadings, the Appellant contended that the agreement was that the Respondent was not entitled to be paid for the same since the Respondent constructed a studio, 1, 2 and 3 bedrooms units to see if the Respondent could qualify for the construction of Moke Gardens Phase II, in his evidence DW1 admitted that from his email, the works were to be rendered at costs and that the Respondent was to be reimbursed. The question that arises is who was to reimburse the said payment. According to the Appellant it was Moke Gardens, separate entity from the Appellant, which was meant to do so. However, in cross-examination, DW1 admitted that the Respondent was to be reimbursed by the Appellant and when referred to the documents, he confirmed that the client was indicated as the Appellant. It is therefore clear that there is no doubt that the Respondent was dealing with the Appellant as its client.

38. As regards the issue whether the work undertaken was shoddy, DW1 confirmed that the sample houses were still intact but according to him, the same were being used while awaiting the case so that they could demolish them. However, there was no evidence that the same were shoddily construct. It was upon the Appellant pursuant to section 109 of the ***Evidence Act*** to prove this fact which was within its knowledge.

39. It was contended that since Nyara Consults who authored the valuation report was not called to testify the report produced by it amounted to hearsay. It ought to be noted that the said Nyara Consults was the Appellant's agent. His report whether signed by PW2 or not was produced among other documents in fact at the instance of the Appellant and was adopted by the court. It is therefore clear that the said report was produced by consent of the parties. In **Jackson K Kiptoo vs. The Hon Attorney General [2009] KLR 657**, the Court of Appeal expressed itself as hereunder:

> **"The onus was on the appellant to prove the special damages strictly. The payments made by the appellant for the various purchases are certainly consistent with the damage noted by the police in the certificate of inspection issued to the appellant and produced as an exhibit without objection. The purchases were supported by proper documents and there was no reason why the appellant could not produce them in court as he sought to do. The documents were admissible and ought to have been admitted and considered by the trial court. The omission to do so invites the court's intervention and the appeal is allowed."**

40. In my view, the fact that the document in question was authored by the Appellant's agent and was produced by consent of the parties themselves entitled the learned trial magistrate to rely on it. The Court of Appeal in **Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278** had this to say on the issue:

> **"Where documents are put in by consent, as for example an agreed bundle of correspondence, the usual agreement is that they are admitted to be what they purport to be (so as to save the necessity for formal proof of each document)."**

41. Since the said author was for reasons unknown to the Court not called to testify and dispute its authenticity, adverse inference could be made thereon. In **Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR** the court stated as follows:

> **"Section 112 of the Evidence Act Chapter 80 of the laws of Kenya provides:**
>
> ***'In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.'***
>
> **Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of Kimotho –vs- KCB (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession."**

42. An issue was taken with regard to failure to produce invoices, delivery notes and completion certificate. In **Peter Njuguna Joseph and EARS vs. Anna Moraa Civil Appeal number 23 of 1991,** it was held that:

> **"Special damages must be pleaded with particularity and must be strictly proved. Loss of income is special damages, which must be pleaded and proved."**

43. However, it was held in **Nizar Virani T/A Kisumu Beach Resort vs. Phoenix of East Africa Assurance Company Limited [2004] 2 KLR 269**, that:

> **"Whereas a claim for special damages should not only be pleaded but strictly proved what amounts to strict proof must depend on the circumstances that is to say, the character of the acts producing damage, and the circumstances under which those acts were done."**

44. The same Court, while relying on **Coast Bus Service Ltd vs. Sisco E. Murunga Ndanyi & 2 Others Civil Appeal No. 192 of 1992** similarly held in **Gulhamid Mohamedali Jivanji vs. Sanyo Electrical Company Limited Civil Appeal No. 225 of 2001 [2003] KLR 425; [2003] 1 EA 98** that although special damages must be specifically pleaded and strictly proved the degree of certainty and particularity depends on the circumstances and the nature of the acts complained of. In light of the fact that the valuation report whether jointly prepared or not was authored by the Appellant's agent and in light of the failure to dispute its contents, the learned trial magistrate was properly

entitled to rely on the same and award the sum claimed as proof of the Respondent's case.

45. In the premises I find no merit in this appeal which I hereby dismiss with costs to the Respondents.

46. It so ordered.

Judgement read, signed and delivered virtually at Machakos this 19th April, 2021

G V ODUNGA

JUDGE

Delivered the presence of:

Miss Nyakundi for the Appellant

CA Geoffrey