



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 189 OF 2019**

**NAWILA NASSIR .....APPELLANT**

**VERSUS**

**SCALA ENTERPRISES LIMITED .....RESPONDENT**

**JUDGMENT**

1. This appeal challenges the judgment of the lower court dated 7<sup>th</sup> March 2019 in which *Hon. E. Wanjala (SRM)* awarded the respondent, then the plaintiff, KShs.329,800; interest at court rates from the date of filing suit until payment in full together with costs of the suit.
2. By way of background, the respondent in its plaint dated 24<sup>th</sup> August 2017 sued the appellant *Ms. Nawila Nassir* claiming that she had breached an oral contract in which she had contracted the respondent to supply and fix a kitchen in her house at Akila 2 Estate, Karen.
3. According to the respondent, the initial terms of the contract were that the total cost of installation of the kitchen was KShs.831,952 including 16% VAT but after negotiations, this was discounted to KShs.680,000 plus 16% VAT; that 50% of the contract sum was to be paid as deposit and the balance thereof before installation but this latter term was subsequently varied to allow the appellant to pay the balance after delivery of the kitchen.
4. The respondent further averred that on 4<sup>th</sup> May 2017, it delivered the materials needed to fix the kitchen and proceeded to install 85% of it; that what was remaining was ready in its workshop and would have been fixed to complete the work had the appellant not refused its workers further access to her house; that despite several reminders, the appellant failed or refused to pay the balance of the contract sum amounting to KShs.448,800 which is the amount that was claimed in the suit.
5. The particulars of the appellant's alleged breach of contract were set out in paragraph 9 as follows:
  - a. *Failing/refusing to pay the balance of the contract sum;*
  - b. *Failing/refusing to allow completion of agreed contractual works by the plaintiff.*
  - c. *Unilaterally rescinding the contract.*
6. In her brief statement of defence dated 23<sup>rd</sup> January, 2018, the appellant admitted the existence and terms of the contract as stated by the respondent but denied having breached its terms in the manner alleged in the plaint.
7. After a full trial, the learned trial magistrate rendered the impugned judgment in which she found that the respondent had proved to the required legal standard that the appellant had breached terms of the contract after the respondent performed 85% of its obligations and that consequently, the respondent was entitled to 85% of the contract sum less the amount paid as deposit.
8. The appellant was aggrieved by the trial court's decision hence this appeal. In her memorandum of appeal filed on 4<sup>th</sup> April 2019, she raised eight grounds of appeal which can be condensed into the following three main grounds:
  - i. That the learned trial magistrate erred in law and fact by varying terms of the contract between the parties in favour of the respondent.
  - ii. That the learned trial magistrate erred in law and fact by failing to appreciate that consideration for the contract was KShs.680,000 inclusive of VAT.
  - iii. That the learned trial magistrate erred in law and fact by shifting the burden of proof from the respondent to the appellant and in

finding the appellant liable for breach of contract.

9. At the hearing, the parties consented to having the appeal prosecuted by way of written submissions which both parties duly filed and which I have carefully considered together with the authorities cited.

10. This being a first appeal to the High Court, it is an appeal on both facts and the law. As the first appellate court, I am duty bound to revisit and exhaustively re-evaluate the evidence presented before the trial court to arrive at my own independent conclusions but bearing in mind that unlike the trial court, I did not have the advantage of seeing and hearing the witnesses and give due allowance for that disadvantage. See: *Selle & Another V Associated Motor Boat Company Ltd & Others*, [1968] EA 123; *Peters V Sunday Post Limited* [1958] EA 424.

11. Having given due consideration to the grounds of appeal, the pleadings in the suit, the evidence adduced before the trial court and the submissions filed by the parties alongside the authorities cited, I find that it is not disputed that the parties herein entered into an oral contract for the supply and installation of a kitchen in the appellant's house; that after negotiations, the contract sum was agreed at KShs.680,000 plus 16% VAT which amounted to KShs.788,800 contrary to the appellant's complaint on appeal that the amount was inclusive of VAT; that the appellant paid a deposit of KShs.340,000 and the balance was to be paid upon delivery of the kitchen. It is also not disputed that the contract was not fully executed and both parties blamed each other for breach of its terms.

12. During the trial, the respondent called one witness, its Chief Executive Officer *Mr. Vittoriria Veneziani* in support of its case. The witness testified that after variation of the initial terms of the contract resulting into an agreement that the balance of KShs.448,800 was to be paid after delivery of the kitchen, the respondent installed 85% of the kitchen and would have proceeded to finish the work since the cabinets that had not been fitted were ready in the workshop and would have been fixed had the appellant not denied the respondent access to her house.

13. In her evidence, the appellant who testified as DW1 denied that she was responsible for the respondent's failure to fit the entire kitchen as envisaged in the contract. She claimed that it is the respondent who first breached the contract by allegedly communicating its decision through its agent one *Edith* that it was rescinding the contract because of her failure to pay the balance of the contract sum; that in the circumstances, she saw no reason to give the respondent any further access to her premises and that's why she engaged another carpenter to complete the work.

14. The carpenter who was subsequently contracted was *Mr. Caleb Lusembe* who testified as DW2. In his written statement which he adopted as part of his evidence in chief and in his oral testimony, *Mr. Caleb* testified that when he visited the respondent's premises, he found that the kitchen had been partially installed. He assisted DW1 to buy what was required to complete fixing the kitchen which included a sink, marble, handles, shelf rack and drawer rail. He recalled that he did not alter anything on the works he found already done by his predecessor; that what he did in addition was to fix a sink and granite; doors on three cabinets and added one more shelf. He also fixed some handles and shelf rack.

He finished the work in four days and was paid KShs.14,000 as his labour charge.

15. In her judgment, the learned trial magistrate thoroughly analysed the pleadings and the evidence adduced by both parties before arriving at her decision. Although I agree with the appellant that the trial court erred in making a finding that the respondent ought to have paid the balance of the purchase price before delivery of the kitchen which was contrary to the terms agreed upon by the parties, it is noteworthy that this was not the only finding that formed the basis of the trial court's decision. The learned trial magistrate also found that performance of the contract collapsed because the appellant instead of allowing the respondent access to her premises to enable it complete the work contracted the services of another carpenter.

16. After my own independent appraisal of the evidence on record, I find that the respondent's claim that it was ready and willing to finish installation of the kitchen as agreed by the parties but was prevented from doing so by the appellant's action of denying it access to her premises is strongly supported by the evidence on record which confirms that the respondent had substantially performed the task of putting the kitchen together and had clearly expressed its intention to complete the work if the appellant availed it an opportunity to do so. This can be ascertained from a careful, wholesome and objective analysis of the emails addressed to the appellant which were tendered in evidence by the respondent when juxtaposed with the text messages availed in evidence by the appellant.

17. In the concluding paragraph of the email dated 17<sup>th</sup> May 2017, the respondent's representative wrote as follows:

***"We produced the kitchen, we delivered almost everything and only a few items are pending. We are planning to finish everything by this week and you kindly avail the balance of what is due to us so that we close this chapter to everybody's satisfaction. Kindly let me know when we can finalise ....."***

18. In the subsequent email of 24<sup>th</sup> May 2017 which the appellant has substantially relied on in her submissions, after reiterating the initial terms of the contract, the respondent stated as follows:

***"...according to our agreement, the balance of payment was supposed to be paid before installation you insisted that the kitchen be delivered. We delivered the kitchen and proceeded with installation even before receiving the balance. On 4/5 we have delivered and fixed approximately 85% of the kitchen. The remaining items are ready for your inspection in our workshop. We have called you and texted severally reminding you of your obligation. You are refusing to talk to us and pay the balance. In a text to our employee Mrs. Habiba you have stated that our services are no more required; this, however, without an explanation or a reason. Your actions are in bad faith and in contravention of our agreement. We are still willing to complete the installation of the remaining items once you confirm that we can collect the balance at the time of delivery."***

19. It is important to note that these two emails are dated 17<sup>th</sup> and 24<sup>th</sup> May 2017 well after the dates of the text messages in which the appellant claimed that the respondent had pulled out of the contract and that she was therefore justified in denying the respondent access to her premises. Though in her submissions the appellant made a lot of capital from selected parts of the emails in which the respondent demanded payment of the balance, a reading of the emails as a whole demonstrate without doubt that the respondent was ready and willing to complete assembling the kitchen even if the appellant had not paid the outstanding balance.

20. Given the environment in which the contract was being performed as shown by the evidence, it was not unreasonable in my view for the respondent to require an assurance from the appellant that she was going to pay the balance immediately after the kitchen was fully installed. In any event, this was in line with their agreement that the appellant would pay the outstanding balance after the kitchen was delivered.

21. Besides, apart from relying on the text messages contained at pages 44 and 50 of the record of appeal which originated from herself, the appellant did not adduce any evidence to prove how and in which manner the respondent pulled out of the contract when it was partially performed. The law is that he who alleges the existence of certain facts has the burden of proving that those facts actually exist. The appellant did not adduce any evidence to discharge that burden.

22. Having considered the evidence in its entirety, I am persuaded to find that the respondent's claim that the appellant frustrated completion of the contract by refusing its agents access to her home was supported by the evidence on record and was probably true. In the circumstances, I am unable to fault the learned trial magistrate's conclusion that the respondent had proved on a balance of probabilities that it is the appellant who breached terms of the contract and was thus liable to pay the respondent what was due under the contract.

23. The appellant has argued that the learned trial magistrate shifted the burden of proof from the respondent to the appellant when she stated that the appellant had failed to avail a valuation report to prove what percentage of work had been done by the respondent when she contracted a new carpenter. This is indeed true and I agree with the appellant that this amounted to an error of law but in my opinion, this is an error which did not affect the legality of the trial court's eventual decision and did not occasion the appellant any prejudice. I say this because there is evidence on record by the appellant's own witness, *Mr. Caleb* that he found the kitchen partially installed and he was able to finish the remaining work in four days for which he was paid only KShs.14,000. In the premises, I do not have any reason to fault the learned trial magistrate's finding that the respondent had finished 85% of the work it was contracted to do and it was entitled to payment for the work done less the amount paid as deposit.

24. Regarding the claim that the trial court erred by failing to find that the consideration for the contract was KShs.680,000 inclusive of VAT, the amended quotation found at page 15 of the record of appeal confirms the respondent's pleadings and evidence that the renegotiated contract sum was KShs.680,000 exclusive not inclusive of 16% VAT. When 16% VAT was added, the contract sum amounted to KShs.788,800 and 85% of the amount translates to KShs.670,480. The learned trial magistrate deducted from this amount KShs.340,000 paid as deposit which means that the total sum payable to the respondent was KShs.330,480 not KShs.329,800 as calculated by the trial court.

25. As the respondent did not file a cross appeal disputing the amount awarded to it by the trial court, I will not interfere with the trial court's award and the same will remain undisturbed.

26. For all the foregoing reasons, I am satisfied that this appeal lacks merit and it is hereby dismissed with costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF MAY 2021.**

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Ms Mwikali holding brief for Ms Jin for the respondent

No appearance for the appellant

Mr. Ichuloi: Court Assistant