



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 541 OF 2017**

**LYCAN (EPZ) ENTERPRISES LTD.....APPELLANT**

**VERSUS**

**IMA COOLING SYSTEMS LTD.....RESPONDENT**

*(Being an appeal from the judgement and decree of Hon. D. O. Mbeja*

*Senior Resident Magistrate delivered on 8/9/2017 in CMCC No. 1845 of 2016)*

**JUDGEMENT**

1. A brief background of the matter is that the respondent on 22/3/2016 filed a plaint claiming Kshs. 804,400 as balance owed from a contract entered into by the parties. It was alleged that on 2/6/2011 the parties entered into a contract where the respondent was to install a cold facility at the appellant's facility. The cost of the contract as agreed was Kshs. 2,000,000 to be paid as follows;

- a) 30% on placing of the order
- b) 20% on demolition and use of materials from the old warehouse
- c) 30% during the period of work in progress
- d) 20% on commissioning of the facility

It was later amended on or about 18<sup>th</sup> July 2011 to be as follows;

- a) 30% on placing of the order
- b) 20% on demolition
- c) 15% during the period of work in progress
- d) 35% on commissioning

2. The appellant failed to secure the premises quickly and as a result work was delayed. The appellant has paid Ksh. 1,300,000 of the contract leaving a balance of Ksh. 804,400. Despite demand and notice of intention to sue, the appellant failed refused to pay the balance.

3. The suit was opposed by the appellant in its statement of defense dated 6/5/2016 and admitted to entering into a contract with the respondent for the installation of two cold rooms. However when the appellant realized that the respondent did not have the capacity to install the cold rooms it varied the payment terms of the contract and retained 35% until the project was completed. The appellant stated that the respondent breached the terms of their contract by failing to complete the installation and installing substandard materials. Additionally, the respondent failed to rectify the problem when called upon which forced the appellants to hire another contractor to rectify the anomalies and complete the installation at a cost of Kshs. 426,000 which amount was charged on the respondent.

4. The matter proceeded to full trial where 3 witnesses testified. PW1 Nicholas Keter Mburu told the court that he is the managing director of the respondent company. They entered into a contract with the appellant company where they were tasked with removing the cold storage from the airport and install in at Athi river. They agreed on a price of 2 million for the work. They were paid Ksh. 900,000 on 9/6/2011 and

thereafter the carried out demolition. The 2<sup>nd</sup> payment was made on 18<sup>th</sup> July and the 3<sup>rd</sup> payment on 25<sup>th</sup> July.

5. PW1 further told the court that they carried on with their work very quickly and when they finished installation they waited on power. They gave it to the appellant's managers personal assistant for commissioning but they declined. They tried to call but it was not until 13<sup>th</sup> October that they sent them an email saying that other people were contracted to finish the job.

6. DW1 Catherine Wanjiru Njenga in her testimony stated that she deals in the export of fresh produce with Lycan EPZ. She indicated that she entered into talks with the respondent where they agreed to install a cold room. They started works and paid the respondent company as agreed. However, issues began cropping up and she told Nicholas Mburu that she would pay them once the work was completed. His workers downed their tools claiming that they had not been paid and when she called PW1 he gave her one lie after the other. They agreed that 35% would be paid at commissioning. They had issues with the door as it was too tight and could not be pulled. When the power was installed there was a lot of leakage and when they called PW1 he did not answer. They thereafter engaged a Mr. Ochieng who charged them Ksh.40,000/= to install everything and they additionally bought a door for Ksh.200,000/=. They surcharged PW1 Ksh.426,000/= for the work that he failed to do and later refused to commission until he was paid.

7. **DW2 Fredrick Ochieng Kuja** in his testimony told the court that on 2/10/11 he was contracted by the director of Lycan Enterprises to inspect a cold room that had been installed for her. He found that the cold room was partially operational as it did not have lights and was dirty. He gave instructions for cleaning and suggested a new door to be bought at Ksh.285,000/=. He installed all the items and charged the respondent Ksh.40,000/= as labor.

8. The trial magistrate considered the said testimonies and it was his determination that the respondent did not in any way acquiesced and agreed to be bound by the change of the terms of engagement as imposed by the appellant when the appellant brought in the independent contractor. He also found that the respondent failed to complete the project as agreed and the appellant was entitled to make the deductions. In the end the court entered judgement in favour of the respondent for the sum of Ksh. 274,000 plus costs and interest.

9. The appellant was aggrieved by the aforementioned determination hence lodged this appeal proffering the following grounds of appeal;

**a) That the honorable learned magistrate erred and misdirected himself in law and in fact by awarding costs to the respondent on an amount not in dispute.**

**b) That despite finding that the appellant had the right to complete the installation of the cold rooms and surcharge the respondent, the honorable learned magistrate erred and misdirected himself in law and fact by failing to award costs to the appellant even after dismissing the respondent's claim in dispute of Ksh. 141,000.**

**c) That the honorable learned magistrate erred and misdirected himself in law and in fact by failing to find that the respondent had failed and/or neglected to collect the admitted amount of Ksh. 274,000 despite several written requests.**

**d) That the honorable learned magistrate erred in law and in fact by failing to properly analyze the evidence and submissions presented by the appellant thereby arriving at a manifestly wrong conclusion that the respondent had proved its case on a balance of probability and was entitled to costs**

**e) That the honorable magistrate erred in fact and law in failing to find that the admission by the respondent that the appellant rightly used Kshs. 285,000 to purchase a new door was in fact an admission of breach of contract by the respondent hence not entitled to costs.**

**f) That the honorable magistrate erred in fact and law in disregarding and/or failing to take into account the fact that the appellant was successful in its defence hence it was entitled to costs.**

10. On 24/6/2020 this court ordered that the appeal be disposed by way of written submissions.

11. The appellants in their submissions stated that the parties had entered into a contract where 2 cold rooms were to be installed at the appellant's premises. The appellant admitted to having paid the respondent a total sum of Ksh.1,300,000/= leaving a balance of Ksh.700,000/= equivalent to 35% of the total sum. The respondent did not complete the work which forced the appellant to seek a third party who would do the same. The appellants indicated that they bought a new door that cost Ksh.285,000/= and further used Ksh.141,000/= in materials and labour.

12. The appellants agreed with the magistrates award of Ksh 274,000 that was to be paid to the respondent but was aggrieved by the fact that costs were awarded to the respondent yet it found that appellant was entitled to engage DW2 to complete the cold rooms and charge the costs to the respondents. That the court ought to have awarded costs to the appellant who proved that the respondent had breach their contract by failing to complete the cold rooms.

13. The respondents in their submission argued that at the conclusion of the trial the lower court entered judgement in favour of the respondent in the amount of Ksh 274,000 which was an amount admitted by the appellant and up to the conclusion of the trial the said amount had not been paid. Therefore the appellant cannot complain about being ordered to pay costs and interest of the suit.

14. I have re-evaluated the case that was before the trial court and further considered the rival submissions. The issue for determination is **whether the lower court was correct in awarding the respondent costs and interest of the suit?**

15. In Halsbury's Laws of England 4th Edition ( Re-issue), {2010},

Vol.10. para 16 it is stated inter alia as follows;

**“The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice”**

16. Also in **The Party of Independent Candidate of Kenya vs Mutula Kilonzo & 2 others HC EP No. 6 of 2013** the court citing two leading decisions on the subject held inter alia that:-

**“It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is a matter in which the trial Judge is given discretion. ....But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”**

17. Having considered argument by both parties, this court finds that judgement in the lower court was entered in favour of the respondent in the sum of Ksh.274,000/= and was therefore entitled costs of the suit plus interest.

18. In light of this I find that this appeal has no merit and is consequently dismissed with costs to the respondents.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2021.**

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**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent