REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 31 OF 2017

ALFATECH CONTRACTORS LIMITED……APPELLANT

VERSUS

KENYA METHODIST UNIVERSITY……..…….RESPONDENT

(Being an appeal from the whole Judgment of the Honourable Senior Resident Magistrate L.W. Kabaria (Ms) delivered on 13th December 2016 in CMCC No 4302 of 2016)

BETWEEN

ALFATECH CONTRACTORS LIMITED……APPELLANT

VERSUS

KENYA METHODIST UNIVERSITY……..…….RESPONDENT

JUDGMENT

INTRODUCTION

1. In her Judgment that was delivered on 13th December 2016, the Learned Trial Magistrate, L.W. Kabaria (Ms),Senior Resident Magistrate (SRM) dismissed the Appellant's suit with costs to the Respondent on the ground that the contract between it and the Respondent had been varied.

2. Being dissatisfied with the said decision, the Appellant filed his Memorandum of Appeal dated 3rd February 2017 **on even date ?????.**It relied on six (6) Grounds of Appeal.

3. Its Written Submissions were dated and filed on 2nd July 2019 while those of the Respondent were dated 9th July 2019 and filed on 10th July 2019.

4. The parties asked this court to render its decision based on their respective Written Submissions which they were relying upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

THE APPELLANT'S CASE

5. The Appellant submitted that the Learned Trial Magistrate fell into grave error when she found that it had waived its right to interest and also failed to consider its submissions that had dealt with this issue at length. It contended that by the time it met the Respondent in the meeting of 20th May 2013, the Respondent had not fully paid it for the works it had carried out. It pointed out that Clause 34.6 of the Contract between them entitled it to get interest for delayed payments.

6. It argued that there was no meeting of minds as the nature and terms of the waiver were not agreed upon during the aforesaid meeting. It was emphatic that the waiver was conditional and that it was its expectation that the monies would be paid by a certain date.

7. It added that the waiver of interest was predicated upon the Respondent agreeing to pay it for the additional works and that there was no consideration because by the time the meeting was held on 20th May 2013, the works had already been completed. It pointed out that this

was a case of past consideration.

8. It relied on the cases of **The Government of the United States of America vs Joseph Muiruri Githongo [2000] eKLR** and **John M. Gaiko t/a Garkon Consult Quantity Surveyors vs Tripple Eight Construction (Kenya) Limited [2012] eKLR** in support of its case.

9. It therefore urged this court to allow its Appeal.

THE RESPONDENT'S CASE

10. On its part, the Respondent submitted that on the meeting of 20th May 2013, it was agreed that a variation of fifty (50%) per cent was unacceptable whilst a variation of fifteen (15%) per cent was acceptable. It further stated that the minutes showed that the Appellant agreed to waive interest under Clause 34.6 when it realised that it was not prepared to accept the phenomenal overrun.

11. It placed reliance on Paragraphs 566 and 568 of 4th Edition of Halsbury's Laws of England Volume 9 where it was stated that parties to a contract may vary the terms of the same but that the same cannot be unilateral, it has to be by expressed agreement or may be implied by conduct of the parties. It also relied on the cases of **John Mburu vs Consolidated Bank of Kenya [2018] eKLR**, **Gimalu Estates Limited & 4 Others vs International Finance Corporation & Another [2006] eKLR** amongst several other cases to buttress its argument that terms of a contract could be varied and/or re-negotiated.

12. It therefore urged this court to dismiss the Appeal herein with costs to it.

LEGAL ANALYSIS

13. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand.

14. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd[1968] EA 123**and **Peters vs Sunday Post Limited [1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

> **"It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses…But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion…"**

15. Right at the outset, this court wishes to point out that there was no dispute that the terms of a contract can be re-negotiated and/or varied. This court therefore associated itself with the Respondent's submissions in this regard. What was in contention was whether or not the terms of the contract between it and the Appellant herein had been varied.

16. The Respondent attached copies of Minutes which showed that as at 25th April 2013, the Appellant had not been paid. In the meeting of 8th April 2013, issues of verification of the works arose whereupon a team comprising technical persons from the Respondent to guide on the final decision on the submitted final invoice was appointed. In Recommendation (6) of Minute 7/8/4/2013, it was stated that the mandate for the said team was not dispute resolution but rather to clarify the extent of the variations and extra works undertaken during the project period.

17. In Minute 4/20/5/203 of the meeting that was held on 20th May 2013 in which the Appellant attended, it was indicated as follows:-

> **"(c)M/s Alfatech agreed with the joint verification figures except for corrections to be made on the tallies.**
>
> **(d) M/s Alfatech agreed to waive all interest charged on the funds."**

18. Notably, the Appellant did not deny that this is what was resolved during the said meeting. His only argument was that there was no meeting of minds because in his email of 23rd May 2013, he stated as follows:-

> **"Prof. Michieni**
>
> **In the last meeting we held with you on Monday, you requested that we waive the interest on the amounts due to us amounting to over Kshs 800,000/=. We accepted to do this on the understanding that our long standing payments will be paid soon. We still undertake to waive the interest subject to us receiving full payments by 23rd May 2013 else we reserve our rights to claim for the interest."**

19. It was evident from the minutes of 20th May 2013 that the Secretary who was recording the proceedings was the Respondent's Deputy Chief Supplies Officer. The Appellant therefore had no control over what was recorded therein. In addition, there was no indication that a further meeting was held in which it would have confirmed or had the minute rectified for having represented the wrong position, if at all. Indeed, the aforesaid email was written by Kenneth Mwaura on 23rd May 2013, which was three (3) days after the said meeting when he may not have seen the minutes.

20. For the foregoing reasons, this court found and held that there may not have been a meeting of minds as far as the issue of waiving

interest was concerned and the position remained as was in Clause 34.6 of the Agreement and Conditions of Contract for Building Works (hereinafter referred to as "the Contract").

21. The same stipulated as follows:-

> **"If a certificate remains unpaid beyond the period for honouring certificates stated herein, the Employer shall pay or allow to the Contractor simple interest on the unpaid amount for the period it remains unpaid at commercial bank lending rate in force during the period of default. The Quantity Surveyor shall assess the amounts to be included in an interim certificate as the interest due for the delay and if an interim certificate is issued after the date of any such assessment, the amount shall be added to the amount which would otherwise be stated as due in such a certificate."**

22. This court perused the documentation that was adduced by the Appellant in support of its case and did not see the assessment of the amount to be included in the interim certificate as the interest due for the delay under Clause 34.6 of the Contract. If there was any, the Appellant did not direct the court to it to support its claim that it was entitled to a sum of Kshs 615,088.53. If the court were to allow this figure, it would not have been based on any fact.

23. While this court determined that the Learned Trial Magistrate arrived at a wrong conclusion to the effect that there was a variation of the Contract, this court nonetheless found and held that as the Respondent correctly submitted, the burden of proof was on the Appellant to prove its case and it failed to demonstrate that it was entitled to the aforesaid sum of Kshs 615,088.53 as it had sought in its Plaint.

DISPOSITION

24. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was dated 3rd February 2017 was not merited and the same is hereby dismissed with costs to the Respondent herein.

25. It is so ordered.

DATED and DELIVERED at NAIROBI this 30th day of January 2020

J. KAMAU

JUDGE