REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 676 OF 2017

INTERNATIONAL SCHOOL OF KENYA LIMITED.....APPELLANT

VERSUS

PARAMJIT SINGH THETHY T/A SHELTPLAN CONSULTING

ENGINEERS & PLANNERS.....RESPONDENT

(Being an appeal from the judgment and decree of Hon. P.N. Gesora (C.M.) in Nairobi CMCC No. 5408 of 2014 delivered on 9th November 2017)

JUDGEMENT

1. The appellant and the respondent herein entered into Engineering Consultancy Agreements for the development of projects referred to as Common Project and Infrastructure Project on 24th June 2011 and 4th February 2013 respectively. In its case before the trial court, the respondent claimed that despite dutifully performing its obligations in accordance with the contracts, the appellant only made part payment and neglected to settle outstanding balances totaling to Kshs. 3,050,973.90/= for both projects.

2. In its amended defence and counter claim the appellant claimed that in December 2013, a 12 meter section of the boundary wall of the Infrastructure Project collapsed after the storm water drainage failed due to the respondent's faulty design. The appellant averred that it notified the respondent of this and engaged the services of an onsite contractor to temporarily rebuild the damaged section and also rebuild the walling structures which had structural faults. It estimated the cost of repairs to be Kshs. 1,058,000/=. The appellant further averred that on 2nd May 2015, a section of the wall designed by the respondent collapsed and had to be repaired at a cost of Kshs. 705,280/=. It therefore claimed a sum of Kshs. 1,932,560/= being the cost of repairs inclusive of VAT against the respondent.

3. As for the Commons Project, the appellant accused the respondent of failing to attend site meetings and failing to supervise 50% of the project in breach of the contract. The appellant alleged that this had led to the failure of the project as compaction tests for the driveways were never conducted, forcing it to have the driveways redone at extra costs.

4. Having heard the matter, the trial court was convinced that the respondent had made out its case against the appellant and entered judgment in its favour. The court was however not persuaded that the appellant had proved its counterclaim against the respondent and dismissed it. It is for this reason that the appellant lodged the instant appeal.

5. The appellant condensed the grounds of appeal into the following two issues in its written submissions;

> a. The subordinate court erred in law and in fact in failing to find that the respondent breached clear terms of the contracts entered between the parties and as a result the appellant suffered losses hence the respondent is not entitled to claim any payments under the contracts and the appellant's counter claim was merited; and
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> b. The subordinate court was not justified to dismiss the appellant's counter claim considering the overwhelming evidence.

6. The appellant contended that if the respondent utilized skill, diligence and thoroughness in designing the drainage system as stipulated in the agreement, it would have noted how the landscaping, the surrounding environment, existing infrastructure and geographical features would affect the drainage system and advised accordingly. The respondent submitted that the professionals hired to look into the collapse of the wall, had attributed the flooding and subsequent collapse of the wall on the faulty designs of the storm water drainage system by the respondent.

7. The appellant also argued that PW 1 had admitted that he had not done site visits but had not proved his allegation that he had been

excused by the project manager from doing so. The appellant contended that having failed to discharge its obligations the respondent was not entitled to assert any claim against the appellant. For its part, it had proved the loss suffered as a result of the respondent's breach and was entitled to the sums claimed as a counterclaim.

8. The respondent on the other hand argued that it was clear from the evidence that it had not constructed the boundary wall which collapsed. That it also came out clearly that the wall had a history of collapsing even before the appellant and the respondent entered into the contracts and therefore the appellant had no justifiable cause to breach the contract. Regarding the alleged failure to attend site meetings, the respondent submitted that its witness testified that he was excused from attending the meetings by the Project Manager and the appellant had in any event not shown how non attendance of the meetings had occasioned any damages.

9. As this is a first appeal, I will proceed to analyse and re-assess the evidence afresh and reach my own conclusion, bearing in mind that I did not have the benefit of seeing the witnesses testify. (See ***Selle v Associated Motor Boat Company Ltd. [1968] EA 123***)

10. Paramkit Singh Thethy (PW 1), the sole proprietor of Sheltplan Consulting Engineers & Planners, adopted his statement as his evidence before the trial court. He also produced his bundle of witness exhibits as his evidence and insisted that he had carried out his work diligently.

11. In cross examination, he stated that he had designed the gully system which got blocked and pulled down the wall. He blamed the collapse of the wall on the landscaper and contractor's negligence and testified that his designs had been checked by independent professionals who exonerated him of any liability. He also testified that he had attended all design meetings and was required to attend the site meetings but had been excused from doing so by the project manager.

12. The appellant's witness, Moez Jiwani (DW 1) similarly adopted his written statements and listed documents as his evidence in chief. He further testified that the appellant had hired the respondent to do civil design for two contracts one being the library and the other being the drainage and external works. He testified that they had declined to pay the respondent as they were seeking compensation for a collapsed wall which was knocked down by flooding at the site due to the respondent's faulty drainage system. He stated that it had cost them a total of Kshs. 1,932,000/= to repair the damage. DW 1 also testified that the respondent had failed to comply with the requirement to attend site meetings.

13. In cross examination, DW 1 testified that the respondent had not designed the wall that had collapsed. He however insisted that the respondent's designs should have taken into account the existing structures.

14. The issue for determination in this appeal is fairly straight forward. The existence of the contracts dated 24th June 2011 and 4th February 2013 and the terms thereto are not disputed by the parties. The stalemate between them is who acted in breach of the contracts and if so what remedies should apply.

15. It is trite that the remedy applicable for a breach of contract is special damages. (See ***Kenya Tourist Development Corporation v Sundowner Lodge Limited Civil Appeal No. 120 of 2017 [2018] eKLR***) It is also well settled that special damages must be pleaded with as much particularity as circumstances permit. It is only when the particulars of the special damage are pleaded in the plaint that a claimant will be allowed to proceed to the strict proof of those particulars.

16. The respondent claimed special damages of Kshs. 3,050,973.90/= being the outstanding debt for consulting services provided to the respondent. While the appellant claimed a sum of Kshs. 1,932,560/= for repairs it had to carry out as a result of the respondent's alleged poor performance of the projects.

17. There was an admission by the appellant that it had not fully paid the respondent for his services. In its Amended Statement of Defence and in the oral testimony of its witness, the appellant urged that the respondent was not entitled to the sums claimed due to the poor and negligent performance of his duties under the contracts. The respondent's assertion that an outstanding balance of Kshs. 3,050,973.90/= remained unpaid by the appellant for its services was therefore not challenged.

18. I concur with the persuasive authority of the court in the case of ***Gudka Westend Motors Limited v Industrial & Commercial Development Corporation CIVIL CASE NO. 37 'A' OF 2008 [2019] eKLR*** where the court held;

> The plaintiff still bore the duty to discharge its evidentiary burden of proof. As the Court of Appeal stated in Kirugi & Another v Kabiya & 3 Others **[1987] KLR 347**, "The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof." The same principle applies to the Counterclaim which has now been dismissed. Any statement therein unless they are admissions remain devoid of evidentiary value (see Shaneebal Limited v County Government of Machakos **MKS HCCC No. 25 of 2016 [2018] eKLR).[Emphasis added]**

19. The burden of proof in this case shifted to the appellant to prove its counterclaim against the respondent. Regarding the Infrastructure Project, the appellant pleaded that the respondent had provided faulty designs for the storm water drain and for construction of the boundary wall which collapsed. The appellant's witness, DW 1 reiterated that the respondent's faulty storm water drainage design had caused the flood which led to the collapse of the wall. In his further witness statement, DW 1 also claimed that the respondent had constructed the wall that collapsed but recanted the assertion upon being probed in cross examination.

20. The appellant's claim that the respondent's designs were faulty was based on what it termed an independent consultant's report. In a letter dated November 2014, attached to the appellant's supplementary list of documents, one Rupra advised that a number of players including the respondent were to blame for the floods which caused losses to the appellant. It is noteworthy that in the said letter, the consultant did not specify the extent of the respondent's alleged contributory negligence.

21. Moreover, the consultant was not called to testify in support of the appellant's claim that the respondent's faulty designs had led to the

collapse of the wall. It would have been especially important for the consultant's opinion to be tested in cross examination given that there were varying reasons given in the correspondences between the parties of why the wall collapsed.

22. For instance, the respondent in an email dated 5th July 2014 claimed that he had engaged the services of a structural consultant who visited the site to look into his designs and gave a report blaming the collapse of the wall on the landscaper and maintenance team. In that email, the respondent maintained that the wall did not have weep holes and could not withstand the pressure exerted by wet soil due to the deferential ground level. An earlier letter by the respondent dated 17th January 2012 also suggested that the wall had previously collapsed due to developments made by the appellant's neighbour. A letter dated 7th December 2011 from independent consulting engineers also affirmed the respondent's claim that developments in the adjacent land had had an adverse impact on the stability of the boundary wall. It also supported the respondent's claim that the wall had defects preceding its collapse in December 2013.

23. I therefore find that the appellant failed to prove that the losses it incurred in rebuilding the wall were as a result of the respondent's poor workmanship of the project.

24. As for the Commons Project, the appellant claimed that the respondent was not entitled to payment because he had not done compaction tests for the driveways and had not attended site meetings according to the contract.

25. Clause 2.3 of the Commons Project agreement stipulated;

Construction supervision services will include:

a. Attendance of site meetings once every month

b. Site visits and inspections of civil works on as required basis

26. The respondent admitted that he had not gone for site visits as provided in the contract. He testified that the project manager had excused him from attending the meetings. He also dismissed the claim that he had failed to conduct the compaction tests as a false hood in his written statement and stated that there were minor depressions in the car park which were common for such projects were rectified by the contractor.

27. Having perused the appellant's pleadings and evidence, I did not find any nexus made between the loss claimed by the appellant and the alleged breach by the respondent. The appellant averred that it had not paid the respondent's balance on the project due to his failure to attend site meetings but failed to discharge its duty to prove the loss it had suffered due to the said breach.

28. In the end, I find that the trial court reached the right conclusion on the matter. I hereby uphold the trial court's judgment and dismiss the appeal with costs to the respondent.

Dated, signed and **delivered** at **Nairobi** this **27th** day of **February, 2020.**

A. K. NDUNG'U

JUDGE