



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 48 OF 2018

THOMAS MBOYA ODERA

T/A NYANZA TROWELLERS.....APPELLANT

VERSUS

COUNTY GOVERNMENT OF KISUMU.....1ST RESPONDENT

CITY MANAGER- CITY OF KISUMU.....2ND RESPONDENT

KISUMU CITY MANAGEMENT BOARD3RD RESPONDENT

[An Appeal from the Judgment and Decree by the Learned Chief Magistrate Hon. J. K. Ng'arng'ar delivered on 31st May 2018 in the original Kisumu CMCC No. 435 of 2014]

JUDGMENT

The trial court awarded to the Plaintiff, the sum of Kshs 340,924/= plus interest thereon at court rates from the date of filing the suit.

1. However, the trial court rejected the Plaintiff's claim for General Damages.
2. The costs of the suit were awarded to the Plaintiff.
3. Although he was successful, the Plaintiff, **THOMAS MBOYA ODERA** Trading As **NYANZA TROWELLERS**, was dissatisfied with the judgment, and he lodged an appeal to this court.
4. In his Memorandum of Appeal, the Appellant raised the following four grounds of appeal;

"1. The learned trial magistrate grossly misdirected himself by failing to appreciate that there were two contracts, thus treating the evidence and submissions on breach of contract superficially and consequently coming to the wrong conclusion.

2. The trial court failed to consider the appellant's contract and proceeded to deliver judgment on no evidence.

3. The learned trial magistrate erred in law and fact in failing to find that the appellant herein had proved all his prayers on a balance of probabilities.

4. The judgment was against the weight of evidence."

5. It was the Appellant's prayer to this court, that the dismissal of his claim for General Damages be set aside, and that that aspect of the judgment be substituted with an award of General Damages in the sum of Kshs 5,370,872/=.

6. When canvassing the appeal, the Appellant submitted that there were two contracts as follows:-

(a) Contract Ref. MSK/LASDAP/06/2011-2012

That was for the construction of 2 classrooms at CENTRAL PRIMARY SCHOOL.

(b) Contract Ref. MCK/GRF/14/2010-2011

That was for the construction of 4 offices at the TOWN HALL.

7. The Appellant submitted that his claim was in respect to the 2 contracts; and that in relation to each of the said contracts he had a claim for Damages for Arrears, as well as a claim for Damages for Breach of Contract.

8. The Appellant drew this court's attention to **Clause 23.3** of the contract, which stipulated that the Municipal Council of Kisumu was to pay the Contractor, the amounts certified by the Project Manager within 30 days from the date of issue of each certificate.

9. **Clause 23.3** further stipulated that;

“Interest shall be calculated on the basis of number of days delayed at a rate three percentage points above the Central Bank of Kenya’s average rate for base lending prevailing as of the first day the payment becomes overdue.”

10. The Appellant submitted that because the Respondent did not pay the sums due, interest continued to accrue on the unpaid sums.

11. In his evidence, the Plaintiff testified that his case was in relation to work which he was to do in 2 contracts.

12. The Appellant submitted as follows;

“He clearly stated that the Respondents undertook to pay for the services as were rendered by the Appellant, through Credit Bank Ltd, but failed to pay, leaving him with a loan arrears of Kshs 3,006,942.56 as at 22nd July 2014.

The learned trial court failed to capture all this. The court treated the Appellant’s evidence superficially rendering an injustice to the case.”

13. In answer to that aspect of the appeal, the Respondents submitted that the evidence tendered by the Appellant did not support the pleadings.

14. The second point that was canvassed by the Appellant was that the trial court had failed to give any consideration to the evidence and the submissions which he had tendered, and which proved that the Appellant was owed a total of Kshs 7,721,394.8.

15. As far as the Respondent was concerned, the trial court had evaluated all the evidence on record, and had reached a reasonable and fair conclusion.

16. In his further submissions, the Appellant said that he did the work in accordance with the contract and that a Certificate of Completion was issued for it. Therefore, as the Respondents had not paid for the services rendered, the Appellant submitted that he was entitled to an award of General Damages.

17. In his considered view, the absence of a clause in the contract, requiring the defaulting party to pay General Damages, cannot be the basis for rejecting his claim.

18. Being the first appellate court, I am obliged to re-evaluate all the evidence on record, and to draw my own conclusions. Of course, I have to bear in mind the fact that I did not have the benefit of observing the witnesses when they testified. Therefore, if any issue was determined by the trial court, on the basis of the demeanour of a particular witness, this court could not fault the learned trial magistrate's evaluation of the conduct or the demeanour of the said witness.

19. At paragraph 5 of the Plaintiff dated 3rd September 2014, the Plaintiff said;

“The plaintiff avers that on or about the 29th August 2012 the Plaintiff entered into an agreement with the 2nd defendant for the construction project of 2 classroom block at Central Primary School Ref. No. NSK/LADSDAP/06/2011-2012 and construction of 4 offices at Town Hall slab

Ref. No. MCK/GRF/14/2010-2011.”

20. Even in the Amended Plaintiff, dated 11th November 2018, paragraph 5 was retained in the same wording.

21. Clearly, the Plaintiff made reference to “an agreement”, as opposed to 2 contracts or 2 Agreements. It was **ONE** Agreement, which was entered into on or about 29th August 2012.

22. In his Witness Statement, the Plaintiff reiterated that there was an Agreement.

23. At page 10 of the Record of Appeal there is an Agreement dated 10th August 2012, which was executed (at page 12), on 29th August 2012.

24. The said contract states that it was for the construction of 2 classrooms at Central Primary School. That contract does not mention any other structures which the Appellant was to put up.

25. However, there is another Agreement at page 55 of the Record of Appeal, which cites the task to be undertaken as being;

“..... construction of four new offices on Town Hall Slab.”

26. I perused the entire record of appeal but did not find the complete document, constituting either the Agreement for the 2 Classrooms at Central Primary School or the 4 Offices at the Town Hall.

27. Nonetheless, the Respondent did not deny the existence of the Agreement for the construction of the 2 classrooms or the 4 offices.

28. If anything, there is ample correspondence exchanged between the parties, which attest to the existence of an agreement (or agreements) for the 2 separate tasks.

29. In his submissions, the Appellant stated that;

“There is also no dispute that work was done and a certificate of completion issued for it.”

30. In his testimony in court the Plaintiff said;

“I have executed up to and including walling level of classroom and up to beam level.

I seek to say that the work has not been Finalized. I am seeking for final payment as per work I had done.

The project was finally stopped.”

31. If, as the Plaintiff said, the work had not been completed, there cannot have been a Completion Certificate.

32. I find that the Appellant was not entitled to receive payment for the entire contract, as he did not complete the tasks that he was required to undertake.

33. The Appellant was right when he testified that he was only entitled to payment in respect to the work he had undertaken.

34. Pursuant to **Clause 23.3** of the Agreement, the Appellant was entitled to receive payment of amounts that had been certified by the Project Manager.

35. The Appellant has exhibited one Interim Certificate, which was issued on 29th August 2012. It is for the sum of Kshs 340,924/=.

36. I find that in the absence of any other Interim Certificates or Completion Certificate, the Respondent was not under any legal obligation to pay any more money to the Appellant.

37. As regards the claim for General Damages, the Plaintiff identified the same at paragraph 10, as follows;

“ PARTICULARS OF LOSS AND DAMAGES

a) The plaintiff has been deprived the means to complete other construction projects that they were undertaking, since all the money they had was tied in the projects in question.

b) Credit Bank Limited has on several occasions written to the plaintiff threatening to institute recovery proceedings against the plaintiff thereby denying the plaintiff any further funding to their projects.

c) The plaintiff has had to incur damages for breach of contract by the (Kisumu City Council) an entity of County Government of Kisumu, causing all his suppliers to suspend further supplies to his other contracts.

d) The plaintiff is to pay the loan without reaping the fruits of his hard work.

e) The plaintiff has been listed as a defaulter with the Credit Reference Bureau and is therefore not eligible for credit from any bank thereby suffering immeasurably.

f) The security offered to the plaintiff belonging to a 3rd party, for credit from the bank has now been advertised and sold in recovery process.”

38. The Appellant submitted that the trial court erred when it held that he was not entitled to General Damages, as such a claim was not

embodied in the contract.

39. In my considered opinion, the parties had expressly stipulated a process through which the Appellant was to be compensated by the Respondent, in the event of a default on the part of the said Respondent.

40. Pursuant to **Clause 23.3** of the Agreement, the Respondent was obliged to pay interest on any money which was due, if such money was not paid within **30** days from the date when each certificate was issued by the Project Manager.

41. In my considered opinion, by inserting that provision in the agreement, the parties were satisfied that payment of interest would constitute sufficient compensation to the contractor, in the event of delays in the payment due from the employer.

42. In any event, the Appellant did not prove how his failure to complete other projects was a loss or damage attributable to the actions or omissions by the Respondent.

43. In the event that the Appellant received threats from the Credit Bank Limited, that the bank would institute recovery proceedings, the Appellant should have stood-up against such threats if the same were considered unwarranted.

44. And if the threatened proceedings were instituted by the Credit Bank Limited, it would have been open to the Appellant to take out Third Party proceedings against the Respondents, if the Appellants believed that the Respondents were liable for the default by the Appellants.

45. When a customer of a bank is in default, the bank is obliged, by law, to report the defaulting customer to the Credit Reference Bureau.

46. Therefore, if the Credit Bank Limited notified the Credit Reference Bureau about the Appellant's defaults, the bank would have been discharging its lawful obligation.

47. In any event, by a letter dated 8th October 2012, the City Council of Kisumu wrote to Credit Bank Limited and said that it would channel all payments due to the contractor, through that bank.

48. However, the letter made the following position clear;

“As we accept and oblige his instructions, we would wish for this letter to be a binding agreement between all the parties to the said payment, and to have all funding to the Contractor done in stages: This will, preferably, be based on the production of an interim certificate/Report by our Resident Engineer.”

49. I understand that to mean that the obligation to remit payment through the Appellant's account at Credit Bank Limited would only arise upon the production of an Interim Certificate or Report by the Resident Engineer of the Council.

50. In this case, only one Interim Certificate was provided by the Appellant.

51. The Respondents had no obligation to remit payments to the Plaintiff's account at Credit Bank Limited until and unless such payment was in terms of an Interim Certificate or the Completion Certificate.

52. In the case of **SECURICOR COURIER (K) LTD Vs ONYANGO & ANOTHER [2008] KLR 252**, at page 263 the Court of Appeal provided the following reminder concerning the award of General Damages for breach of contract;

“As for the award of Shs 25,000/= as general damages for breach of contract, this Court repeatedly held that general damages are not awardable for breach of contract. (See Dharamshi V. Karsan [1974] E.A. 41.)”

53. I am bound by that decision, and can do no better than to adopt the same.

54. The Appellant had indicated that interest on the late payments should be at a rate that is 3% above the Central Bank of Kenya's average base lending rate, prevailing on the first day when payment became overdue.

55. The Central Bank of Kenya used to publish prevailing base lending rates.

56. Therefore, when the Appellant wanted the court to award to him the actual rate of interest, I hold the considered view that the Appellant was obliged to make available evidence to prove the actual published interest rate.

57. That is a matter of factual evidence. It is not an issue about which a party simply makes legal submissions.

58. In this case, the Appellant introduced the

“Current Central Bank Lending Rate”

through his submissions. I find that evidence cannot be introduced into a case through legal submissions.

59. The attempt to introduce evidence through submissions was irregular, and therefore the said evidence was inadmissible.

60. In the final analysis, I find no merit in the appeal. It is therefore dismissed, with costs to the Respondents.

DATED, SIGNED and DELIVERED at KISUMU This 27th day of February 2020

FRED A. OCHIENG

JUDGE