REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO.141 OF 2019

COUNTY GOVERNMENT OF MIGORI.....APPELLANT

-VERSUS-

HOPE SELF HELP GROUP.....RESPONDENT

(Being an appeal from the judgment of Hon. Munguti

P.M in Migori CMCC No. 528 of 2018 delivered on 23/10/2019)

JUDGMENT

The County Government of Migori, the Appellant herein, was sued by **Hope Self Help Group**, the Respondent herein in **Migori Chief Magistrates Civil Case No. 528 of 2018** (hereinafter **'The Lower Court Suit)** for breach of contract. The Respondent claimed a contractual sum of **KShs. 1,323,144/-,** interests thereon as well as costs of the suit.

The Trial Magistrate rendered his judgment on **23/10/2019**. The trial court found that the Respondent had proved its case and was entitled to the sum claimed, interest and costs of the suit.

The Appellant was aggrieved by the said decision hence the instant appeal. It filed The Record of Appeal on **20/07/2020**. It founded its Memorandum of Appeal on 10 grounds which can be summarized into the following 6;

> ***1. The trial magistrate erred in law and fact by allowing the suit despite evidence that the Respondent failed to prove liquidated sum by way of receipts or invoices.***
>
> ***2. The trial magistrate misdirected himself and misapplied the law by failing to appreciate that acceptance of an offer can be manifested and/or validated by conduct of either of the contractual parties. It need not expressly be communicated in writing by the offeror.***
>
> ***3. The Trial Magistrate misdirected himself and misapplied the law by failing to appreciate that performance of an act in response to and in accordance with the terms of a prevailing offer constitutes acceptance of offer.***
>
> ***4. The Trial magistrate erred in law and in fact by failing to take into account that the Respondent by conduct of continuing to work under varied contractual price of KShs. 148,500/- and receiving the sum without protest, inferred an acceptance of the offer made by the Appellant to vary the contractual price.***
>
> ***5. The Trial Magistrate erred in law and in fact by failing to appreciate that the Respondent was at liberty to withhold its part of the bargain and to treat the contract as repudiated in light of the protest they registered but elected to renew the contract with the Appellant herein and also continued accepting payment on varied terms.***
>
> ***6. The Trial magistrate erred in law and fact by taking into account the fact that the interest rate of 14% awarded to the Respondent was not part of the contract and unfairly enforcing it against the Appellant.***

Directions were taken on 04/11/2020 and it was ordered that the appeal be canvassed by way of written submissions. Neither party wished to exercise their right to highlight.

The Appellant's written submissions are dated 19/10/2020/. They were filed in court on 22/10/2020. It is argued that the appellant entered into a contract with the Respondent on 15/10/2013 for collection and clearing of garbage in the County at an initial monthly price of **Kshs.**

204,188/- from 15/11/2013 to 15/06/2014 for the financial year 2013-2014.

The Appellant submits that vide their letter dated **23/01/2014**, it communicated to the Respondent that it had reviewed the monthly price down to **KShs. 148,500/-.**

The Appellant contends that that since the Respondent was notified of the variation and continued to receive the reviewed payment albeit in protest, it endorsed the variation thus making it valid and enforceable.

The Appellant found support in the case of **Curtis -vs- Cleaning & Dyeing Co. Ltd. (1951), ALL ER 631** and **United Kingdom Supreme Court decision in RTS Flexible Systems Ltd -vs- Milkorei Alis Muller GmbH & Co. KG (UK Production) (2010) UKSC14** where in the latter, it was observed that;

> **"…**Whether there is a binding contract between the parties and if so upon what terms depends upon what they have agreed. It depends not on their subjective state of mind but upon consideration of what was communicated between them by words or conduct and whether that leads objectively to a conclusion that they intended to create legal relations…"

From the foregone; the Appellant argued that the Respondent through their conduct acknowledged and accepted the variation by continuing to receive payment of KShs.148,500/- per month thus binding themselves to the varied contract in its entirety.

The Appellant argued that there was no breach of contract and as such damages are not payable to the Respondent; that the Trial Magistrate unlawfully relieved the Respondent from its bargain in the varied contract despite endorsing it not only by conduct but also by receiving payment and continuing to deliver services. To that end, reliance was placed on the Court of Appeal decision in **Civil Appeal No. 330 of 2003, Hussamudin Gulamhussein Pothiwalla administrator, Trustee and Executor of the Estate of Gulamhussein Ebraihim Pothiwalla -vs- Kidogo Basi Housing Cooperative Society Limited and 31 Others** where it was held;

> "A court of law cannot re-write a contract between the parties. … it is clear beyond peradventure that save for those special cases where equity may be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain."

The Appellant further faulted the Trial Magistrate for awarding the Respondent the sum of **KShs. 1,323,144/-,** yet the same was not specifically pleaded and strictly proved. They asserted that it was not clear from the Plaint how that sum and the 14% interest was arrived at by the Respondents and as such, the blanket award by the Trial court was capricious, extortive and unproven amounting to unjust enrichment. To buttress their position, reliance was placed on the decision in **Banque Indosuez -vs- DJ Lowe & Co. Ltd (2006) 2KLR 208.**

Further support was found in the Court of Appeal decision in **Kenya Tourist Development Corporation -vs- Sundowner Lodge Limited (2018) eKLR** where it was observed;

> **"…**what was suffered or was believed to have been suffered, the damage that it, to be compensated by way of damages, could only be known to the Respondent and it claimed it in specific terms which, in the event, it was unable to prove. To award it anything else would be to engage in sympathetic sentimentalism as opposed to proof based on judicial determination."

The Appellant referred the Court to page 20 and 21 of the Record and submitted that there are inconsistencies in the evidence tendered by the Respondent in arriving at the sum of KShs. 1,323,144/=.

In conclusion, the Appellant challenged the propriety of the lower court suit for failure to comply with the provisions of Order 1 Rule 13(1)(2) of the Civil Procedure Rules. It argued that there was no authority to sue that accompanied the Plaint thus making it fatally defective. For the proposition, counsel relied on the decision of **Ithanguri Mwireri Women Group vs Virginia Wanjiku Kamundia (2017)eKLR** where the court held that a suit by a women group should be filed through its office bearers. It prayed that the appeal be allowed and the lower court decision be set aside.

The Respondent filed its submissions on 01/12/2020. It argued that the Appellant owed the respondent money as evidenced by the minutes of the meeting held by the County Secretary produced as Exhibit 9. It was submitted that according to Clause 4, the contract price was **KShs. 204,188/=.**

It was further stated that there was an extension of the original contract without variation of the contractual sum. On the claim of 14% interest, the Respondent stated that as per the provisions of section 140 of the Public Procurement and Asset Disposal Act (hereinafter **'PPADA'**), unless the contract so provides, the procuring entity shall pay interests on all overdue payments.

The Respondent stated that at the time of filing suit, it was owed KShs.902,144/- together with interest as per section 140 of PPADA of KShs. 421,000/- extending to the present time.

The Respondent denied that the claim was varied. It relied on the principle in Contra-proferentem rule which requires that vague contracts are construed against the party relying on them. Counsel submitted that had the parties intended to alter the terms, it would have been represented expressly in the terms and the letter purporting to alter the terms was invalid.

In closing, the Respondent asserted that it proved that it provided services and was entitled to the sums as pleaded in the Plaint.

From the foregone discourse, the issues that emerge for determination are as follows;

i. Whether there arose a valid contract upon variation of contractual terms.

ii. Depending on (i) above, whether the Respondent's claim was specifically pleaded and strictly proved.

iii. Whether Order 1 Rule 13, (1), (2) of the Civil Procedure Rules was complied with by the Respondents.

Analysis and Determinations

This court's role on appeal was settled in case of **Selle & Ano. -vs- Associated Motor Boat Co. Ltd (1968) EA 123;** It is duty bound to revisit the evidence on record, evaluate it and reach its own conclusions. It must not, nevertheless, interfere with findings of fact by the trial court unless they were based on no evidence at all, or on a misapprehension of the law or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was also the holding in **Mwanasokoni –vs- Kenya Bus Service Ltd. (1982-88) 1 KAR 278 and Kiruga –vs- Kiruga& Another (1988) KLR 348).**

Evidence

Richard Okumu Odongo (PW1) who described himself as the claimant of the plaintiff filed his statement and list of exhibits which he adopted in evidence. He stated that the respondent was contracted by the appellant to do garbage collection and clearing of designated sites for a sum of 204,188/= per month and the contract document was duly executed and was to run from 2013 to 2014 financial year but was extended to February 2015; that the respondent was only paid for three months after which they received a letter dated 23/1/2014 purporting to review the payments on the contract to Kshs. 148,500/= per months but by the letter dated 13/2/2014, they protested but the variation, they continued to render services.

From January 2014, they were paid Kshs. 148000/= per month and they claim the difference between the initial figure and the sums paid which totalled 1,322,1444/= as at February 2015, he also claimed interest at 14% in terms of the Public Procurement Act.

Joshua Ngwala Otieno (DW1) the Chief Officer Environmental & Natural Resources, of the appellant admitted to there having been a contract entered into on 15/11/2013 for the consideration of Kshs. 2014,188 per month; that it was extended on 1/7/2014 and that by then there were no arrears; that the initial contract was varied from Kshs. 450/= to 300 for two hours work and that the variation was communicated to the Respondent on 23/1/2014 and that the Respondent accepted the variation because they used to receive the varied sum of Kshs. 148,500/= despite the protest that the contract was again extended to January 2015. The appellants case was that the respondent was fully paid by the time the contract ended.

It is common ground that there was a contract between the appellant and the Respondent. In both their testimonies, PW1 and DW1 agreed to that fact. This court will analyse the issues as have been dealt with before by superior courts of record and The Court of Appeal.

The Court of Appeal in **Nairobi Civil Appeal 155 of 1992 Kukal Properties Development Ltd v Tafazzal H. Maloo & 3 others [1993]** eKLR had occasion to consider the effect of variation of contract both prior to reducing to writing and after. It observed;

> ***Evidence of negotiations is never admissible to vary the terms of the written contract. However, where there is a latent ambiguity, extrinsic evidence may be given of surrounding facts to explain the ambiguity. But certainly no evidence or correspondence on prior negotiations may be admissible. It is assumed that the intentions of the parties to a written contract are embodied in a written contract itself. I have used the phrase "priority negotiations" because subsequent correspondence may affect the written contract where it is clear from the wording that the parties intended such subsequent correspondence to affect the written contract. For instance, subsequent correspondence may vary the terms of the written contract if it is clear from the correspondence that the parties intended to vary the contract.(underline mine)***

In the instant case, it is common ground that the correspondence varying the terms letter of 23/1/2004, was done after negotiations and execution of the contract and past performance. It is also not in contest that the same was done by one party and whereas the Appellant says it bound the Respondent, this court has been unable to find evidence to demonstrate that both parties intended the variation.

This Court finds guidance in **Halsbury's Laws of England, Vol 4, 4th** Edition in Paragraph 1135 at page 574 of Provides: -

"Except in the case of a contract under seal, consideration is necessary to support a contract. A promise of additional payment for work already included in the contract is given without consideration and it is unenforceable but where there is uncertainty as to whether or not an item of work falls within the original contract, a provision for additional payment to perform the work is enforceable.

> ***Any other variation of the terms of the contract will generally be unenforceable unless supported by fresh consideration .....".***

The author of **Hudson's Building and Engineering Contracts**,

In **Housing Finance Co. of Kenya Limited vs. Gilbert Kibe Njuguna Nairobi HCCC No. 1601 of 1999**, it was held:

> ***"…Courts are not for as where parties indulging in varying terms of their agreements with others will get sanction to enforce the varied contracts. Contracts belong to the parties and they are at liberty to negotiate and even vary the terms as and when they choose and this they must do together and with meeting of the minds. If it appears to the Court that one party varied terms of the contract with another, without the knowledge, consent or otherwise of the other, and that other demonstrates that the contract did not permit such variation, the Court will say no to the enforcement of such contract."***

In **Civil Suit 606 of 2003, Gimalu Estates Ltd & 4 Others -vs- International Finance Corporation & another [2006] eKLR]** Justice Emukule made reference to various English decisions observed as hereunder;

"Parties to a contract effect a variation of the contract by modifying or altering its terms by mutual agreement"

…a mere unilateral notification by one party to the other in the absence of any agreement, cannot constitute a variation of contract. (see. (Cowey –Vs- Liberation Operations Ltd, [1966} 2 Lloyds' Rep. 45).

…So the form of variation is important to determine whether there has been a mere variation of terms or a rescission. The effect of a subsequent agreement – whether it constitutes a variation or a rescission depends upon the extent to which it alters the terms of the original contract. In the case of MORRIS -VS- BARON & CO. [1918] A.C. 1, 19. Lord Haldane said that, for a rescission, there should have been made manifest the intention in any event of a complete extinction of the first and formal contract, and not merely the desire of an alteration, however sweeping, in terms which leave it still subsisting."

This court has intently considered the contents of the letter dated **23/01/2014** (Exbibit 4) which purportedly varied the terms of the contract. Based on the foregone authorities I have weighed and assessed the question whether the letter amounted to a variation of terms or a complete recission of the contract.

It is undoubtedly clear that the object of the letter is the bringing down the contractual sum. It does not envision any other alteration as to the nature of performance of the obligations as set out in the contract. It is therefore this court's finding that the change constituted a variation on just one limb of the entire contract.

Joshua Ngwala Otieno (DW-1) testified that by operation of their letter varying the terms of payment downwards, the contract stood altered and the new terms were valid and enforceable. It was his evidence that there was consideration and acceptance by the mere fact that the Respondents continued to offer services. This court notes however that consideration did not pass from the Respondent to the Appellant. In fact, the Respondent through its letter dated **13/02/2014**, informed the Appellant of its protest of the reviewed payment. An excerpt will suffice;

> ***"… without any formal notification to the group on the downward review of the wage bill, we were served with a letter dated 23/01/2014 referring to DOWNWARD REVIEW OF TENDER NO. MC/29/2013/2014, a move that we protest as it breaches the contract signed."***

A meeting of minds is an essential component for the formation of an enforceable contract. Variation must be proved to have been arrived at by mutual engagement, as opposed to unilateral imposition of terms by one party upon the other. See **Gimalu Estates Ltd & 4 Others -vs- International Finance Corporation & another (supra)** and **Halsbury's Laws of England, Vol 4, 4th** Ed (supra). The Respondent's letter of protest (Exhibit 4) is enough evidence that there was no meeting of the minds. The argument therefore that there was a valid contract falls by the wayside and this court can not enforce it (see) **Housing Finance Co. of Kenya Limited vs. Gilbert Kibe Njuguna Nairobi (supra).**

The Appellant contends that the Respondents approved the variation by their conduct, by continuing to provide service and receiving the varied amounts, it assented to the new terms. The evidence before the court proves the contrary. Despite receiving the Respondent's letter of protest, the Appellants continued to pay the varied amount. Additionally, even after receiving the protest letter, the Appellant extended the contract in their letter dated 23/06/2014. In the said letter, the Appellant did not mention the varied terms. Before the eyes of this court, it is the Appellant who by this conduct approved the contract in its original terms but did so by this illegally paying the Respondents a contractual sum that was not agreed upon.

As regards the Appellant's contention that the Respondent failed to specifically plead and prove the monies owed, this Court has considered the same and finds no merit. The Respondent did specifically plead its case as regards the amount owed and the interests thereon. It sees no fault in the finding of the Trial court that the Appellant shouldered the burden to demonstrate that it did pay the Respondent which in the premises remained undischarged. Further, the minutes of the meeting held at the procurement office Migori dated **11/05/2016** is a testament that indeed money was owed. As evidenced by agenda entitled '***No/03/11/05/2016- Finding An Agreeable And Lasting Solution'*** it was conceded that as at that time, a total of KShs. 1,261,514.88 was owed to the Respondent.

On the issue of whether Order 1 Rule 13(1), (2) of the Civil Procedure Rules was complied with; Order 1 Rule 13 (1), (2) Civil Procedure Rules provide as follows:

> ***"Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding."***

The counsel relied on the authority **of Ithenguri Mwireri Woman Group v Virginia Wanjiku Kamundia 2017 (eKLR),** where the judge

observed that the plaintiff being a Self Help Group, the suit should have been instituted in the names of the office bearers and that the officials must file an authority bestowing upon them the power to file the suit. Counsel urged that failure to comply with the said provisions rendered the suit incomplete.

I have perused the Respondent's submissions and noted that counsel did not bother to respond to this ground.

The appellant, was represented in the trial court, but never raised this issue though they had the opportunity to do so. In **Civil Appeal 33 of 1984 Nyangau v Nyakwara (1985)eKLR**, the court of appeal had occasion to consider the effects of raising an issue on appeal for the first time. The Court made reference to its earlier decision in **Kenya Commercial Bank Ltd vs James Osebe CA 60 of 1982** when Hancox JA said:-

> ***""The difficulty I have felt in acceding to Mr Soire's submissions is that in none of the cases in question did the point taken for the first time on appeal go to jurisdiction. In the recent case of Balchin v Buckle (Times) June 1, 1982 (a case relating to the (hitherto overlooked) non-registration of a covenant) it was held that where the right of appeal is statutory it is to be confined to points of law raised before and decided by the trial judge.***

In the case (**Kenya Commercial Bank Ltd -vs- James Osebe (supra) Stephenson, LJ said**:

> ***It (has) been clear for nearly a century and perhaps more, that the litigant could not take a completely new point of law for the first time on appeal and the Court of Appeal had no jurisdiction to decide a point which had not been subject of argument and decision in the county court.***

There were two exceptions to the ban on considering a point not considered in the County Court. If the county court had done something which was illegal or outside its jurisdiction, in either case whether or not the appellant took the point the Court of Appeal could and must reverse the decision of the County Court: Oscroft v Benado [1967] 1 WLR 1087."

Later, in the case of **Wachira v. Ndanjeru (1987), KLR 252** the Court of Appeal spoke to the bar when Platt J.A observed as follows:

> ***"The principles can be summarised as follows: the discretion to allow a point of law to be taken for the first time on appeal will not be exercise unless full justice can be done between the parties. It will not usually be allowed when to do so would involve disputed facts which were not investigated or tested at the trial. Nor will a party be allowed to raise on appeal, a case totally inconsistent with that which he raised in the trial court, even though evidence taken in that court supports the new case. (See Tanganyika Farmers Association Ltd. v Unyamwenzi Development Corporation [1960] EA 620, Overseas Finance Corporation Ltd v. Administrator General (1942) 9 EACA 1). But the court will allow a new question concerning the construction of a document or the legal effect of admitted facts, since no question of evidence arises, and it will usually be regarded as expedient in the interests of justice to do so."***

With respect to the decisions made upon the advent of the 2010 Constitution, the Court of Appeal in **Kenya Hotels Limited v Oriental Commercial Bank Limited [2018] eKLR** is spot on. The learned judges considered governing principles in considering new grounds raised on appeal. It observed;

> ***"Where the applicant seeks to introduce an entirely new point, there are well known strictures that seek to ensure firstly, that an appellate court does not, in disguise, metamorphose into a trial court and make first-instance determinations without the benefit of the input of the court from which the appeal arises…***
>
> ***Due to these fundamental concerns, the Courts have developed fairly elaborate principles that guide it in determining whether or not to allow a new point on appeal. In Openda v. Ahn, (ca 42/1981) this Court identified some of the principles to include that all grounds of appeal must arise from issues that were sufficiently pleaded, canvassed, raised or succinctly made issues at the trial; that the point sought to be introduced must be consistent with the applicant's case as conducted in the trial court, not changing it into a totally different case; the matter must have been properly pleaded and the facts in support of the new point must have come out in the trial court."***

In **Chalicha Farmerss Co-operative Society Ltd v George Odhiambo & 9 others (1887)eKLR** the Court of Appeal dealt with the failure to comply with Order 1 Rule 12 (now 13) Civil Procedure Rules and it reached the conclusion that failure to comply with the said rule does not necessarily void the proceedings.

In this case, the respondent should have sued through its officials which it did not **Richard Okumu Odongo** who described himself as the chairman of the Self Help Group swear the affidavit in support of the claim. From the exhibits produced in court i.e. the letter dated 13/2/2014 which was a protest over received payments on the tender, was signed by the said Richard chairman; the meeting held at the Procurement Office Migori on 12/4/2016, the chairman was one of those present in the minutes for a meeting held at County Secretary's Offices on 11/5/2016, the Chairman one of those representing the Group; the letter dated 10/6/2016, to the County Secretary, was authored by the chairman. Mail to the Group was also addressed to the Chairman. It is clear that the Chairman represented the Respondent on all transactions related hereto.

In my view, though the Respondent did not follow the due process, the appellants have not suffered any prejudice that would render their claim fatal. I find that ground is raised late in the day. Had it been raised in the trial courts, the Respondent would have been accorded on opportunity to amend their pleadings and comply. The irregularity is not fatal to the respondents' case.

In the end, this court finds that the appeal lacks merit in its entirety and is for dismissal. The lower court decision is hereby upheld. The Respondent will have costs both in the lower court and the instant appeal. It is so ordered.

DATED, SIGNED and DELIVERED at MIGORI this 17th day of December 2020

R. WENDOH

JUDGE