



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 134 OF 2014

JOSEPH O. OMBOK.....APPELLANT

VERSUS

JOSEPH M. SAVA t/a

JOSA GENERAL CONTRACTORSRESPONDENT

(An appeal from the Judgment of L.K. Gatheru, Resident Magistrate, delivered on 30th September, 2014 in Mariakani Senior Resident Magistrate's Court Civil Case No. 165 of 2011).

JUDGMENT

1. The plaintiff (appellant) instituted a suit by filing a plaint on 31st October, 2011 before the lower court. He prayed for Judgment against the defendant (respondent) herein for the sum of Kshs. 92,900/=, general damages for breach of contract, costs and any other relief the Honourable court deems fit to grant.
2. The respondent filed a defence dated 15th December, 2011 alleging that it was the appellant who breached the terms of the contract by not financing the construction of the house in issue as agreed which fact caused the construction to stall. He further alleged that there was no communication from the appellant for more than two years and that he only financed the construction to a tune of Kshs. 275,000/= which could not have finalized the contract as agreed.
3. The respondent prayed for the suit to be dismissed with costs as well as an order for an award of Kshs. 275,000/= as prayed in the counter-claim. The Trial Magistrate made a finding in favour of the respondent and dismissed the suit in the lower court, with costs being payable by the appellant.
4. The appellant being dissatisfied with the decision of the lower court moved this court through a memorandum of appeal filed on 24th October, 2014 wherein he raised the following grounds of appeal:-
 - (i) That the Trial Magistrate erred in law and fact in holding that the plaintiff had not proved his case on a balance of probabilities;
 - (ii) That the Trial Magistrate erred in law and in fact in failing to properly consider and evaluate the evidence before it and arrive at a decision in favour of the plaintiff;
 - (iii) That the Trial Magistrate erred in law and in fact in arriving at a decision which was not supported by the evidence on record and especially that of the plaintiff and his exhibits;
 - (iv) That the Trial Magistrate erred in law and in fact by failing to properly consider the exhibits produced by the plaintiff in support of his case and therefore failed to arrive at a decision in favour of the plaintiff;
 - (v) That the Trial Magistrate erred in law and in fact by failing to consider the plaint as against the defence and the reply to defence and the fact that the respondent did not adduce any evidence in support of his case.

Submissions

5. The appellant's Counsel filed submissions on 20th April, 2017 which were highlighted by his Learned Counsel, Miss Mwainzi. She submitted that the Honourable Magistrate erred by holding that the appellant had not proved his case on a balance of probabilities. She stated

that the appellant incurred costs in demolishing a building constructed by the respondent.

6. Counsel further submitted that the Hon. Magistrate acknowledged that there was a contract between the parties but found that there was no breach of contract. She contended that the said Magistrate applied a higher threshold than on a balance of probabilities.

7. It was argued for the appellant that although the respondent filed pleadings before the lower court, he did not attend court to give evidence and that in doing so, he failed to controvert any evidence adduced by the appellant. It was also stated that although the claim for special damages had been proved, the trial court did not make an award on the same.

8. The appellant's Counsel further contested the submissions filed by the respondent whereby the issue as to whether the suit was filed in time was raised. Ms Mwanzi submitted that the contract between the parties was dated 19th August, 2008 and the suit was filed on 31st October, 2011 within the period provided by law. She prayed for this court to:-

(i) Allow the appeal with costs;

(ii) Set aside the Judgment by the Senior Resident Magistrate in Mariakani SRMCC No. 165 of 2011; and

(iii) Enter Judgment in favour of the appellant against the respondent.

9. The respondent filed his written submissions on 5th February, 2018. He did not attend court at the time the appeal came up for hearing. This court was satisfied that he had been served with a hearing notice through his agent one Mutinda, as per the affidavit of service filed on 29th March, 2018.

10. The respondent in his written submissions argued that the Hon. Magistrate was correct in dismissing the suit as during the lower court trial he filed a statement indicating that the appellant was to finance the construction but he failed to do so despite the respondent herein spending Kshs. 163,900/= on the said construction.

11. The respondent further submitted that the appellant's suit was filed after the limitation of time to file suit therein and that the appeal herein was a mere afterthought.

12. It was contended that the appellant failed to tender any specific contract of security between himself and the respondent, which document would have been relevant in establishing his case.

13. The respondent prayed for the appeal to be dismissed for the reason that the appellant failed to tender sufficient facts or evidence to warrant this court to interfere with the lower court's finding. He prayed for the appeal to be dismissed.

Analysis and Determination

14. The issues that call for determination are:-

(i) Whether the appellant proved his case on a balance of probabilities before the trial court,

(ii) Whether the appellant is entitled to special damages in the sum of Kshs. 92, 950/= ; and

(iii) If the appellant is entitled to general damages for breach of contract.

15. In the case of **Mwanasokoni vs Kenya Bus Service Ltd** (1982-88) 1 KAR 278 and **Kiruga vs Kiruga & Another** (1988) KLR 348, the court laid down the principles that an appellate court must consider on appeal, in the following terms:-

“The role of this Court is well settled. This Court is duty bound to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. This Court nevertheless appreciates that an Appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings.”

16. It was further held in the case of **Hahn vs. Singh** (1985) KLR 716 that the appellate Court will hardly interfere with the conclusions made by a Trial Court after weighing the credibility of the witnesses.

17. On the issue of whether the appellant proved his case on a balance of probabilities, the contract between him and the appellant was time specific. It was to last 3 months. The appellant produced documents to support his case. The appellant's evidence was that the respondent deserted the site before he completed constructing a house for him.

18. The appellant further stated that the floors started to get cracks and he reported to the respondent who promised to go and repair. Later, the respondent told the appellant he had been given a contract at Mariakani Polytechnic and could not continue with the appellant's work. Thereafter, the respondent went to Voi. It was the appellant's evidence that one year passed by without the respondent going back to the site and that instead of putting ballast under the floor, the respondent had put grass.

19. The appellant produced photographs of the cracked building, the contract, receipts from Bretland Investments for the cost incurred to

repair the floor and verandah of the house in the sum of Ksh. 92,900/=. He also produced receipts for the sum of Kshs. 200,000/= from the respondent being for the part payment of the construction work, Kenya Commercial Bank cash withdrawal slips for the said sum of Kshs. 200,000/=. The appellant testified that in total he paid the respondent Kshs. 283,000/= but he was not given a receipt for the initial payment of Kshs. 83,000/= as the respondent had no receipt book at the time the said payment was made.

20. After analyzing the facts of the case and the submissions made by the appellant's Counsel and those filed by the respondent, it is my finding that there was a breach of contract on the part of the respondent which led the appellant to incur the costs in demolition of the floor of the house and to repairs of the said floor and verandah.

21. I therefore hold that the special damages pleaded by the appellant were specifically proven as receipts were produced to prove the costs incurred which were paid to a third party to make good the contract. Consequently the appellant is entitled to the special damages as claimed. It is however trite law that general damages are not payable where a claim is quantifiable. In this case, the appellant failed to demonstrate the reason why the court should make the said award. In the case of **Dharamsu vs Karsam** [1974] EA 4, the then Court of Appeal held as follows:-

***“This case has been accepted by this court as an authority for the proposition that general damages cannot be awarded for breach of contract and that proposition makes sense because damages arising from breach of contract are usually quantifiable and are not at large. Where damages can be quantified, they cease to be general*”**

21. In conclusion, the appeal herein has merit. It is partly allowed in the following terms:-

- (i) The appellant is awarded special damages in the sum of Kshs. 92,900/= as against the respondent;
- (ii) The appellant is granted the costs of this appeal and the case in the lower court; and
- (iii) Interest is awarded to the appellant.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 31st day of January, 2019.

NJOKI MWANGI

JUDGE

In the presence of:-

No appearance for the appellant

No appearance for the respondent

Mr. Oliver Musundi - Court Assistant