

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 588 OF 2013

GERMAN AGRO.....APPELLANT

VERSUS

GODFREY GICHUKI GACHIE T/A

GIKAWA ENGINEERING AND SUPPLIES.....RESPONDENT

Being an appeal from the judgment and decree of the Magistrate's Court of Kenya at Nairobi (Hon. T.S.Nchoe SRM) delivered on 24th October, 2013 in Civil Case No. 6524 of 2009)

JUDGMENT

This appeal arose from the judgment of the lower court delivered on 24th October, 2013 in favour of the respondent. The appellant was aggrieved by the decision of the lower court and filed this appeal. The respondent was contracted by the appellant to deliver some building stones and an agreement to that effect was executed. However, the appellant alleged that the respondent delivered some substandard stones, 600 of which were rejected. Payment was therefore withheld and the respondent sued for the sum due and payable.

In the memorandum of appeal the lower court was faulted in the way it arrived at the decision of the distances covered and for allowing the respondents claim for rejected stones.

As the first appellate court, it is my duty to evaluate the evidence adduced in the lower court and arrive at independent conclusions. In the judgment of the lower court the trial court set out the facts as contained in the plaint and the evidence adduced. In the end the judgment reads as follows,

“I have considered the testimonies of all the witnesses, the defendant’s statements of defence and the exhibits adduced before this court and I am satisfied that the plaintiff has proved his case on a balance of probabilities.

Reason wherefore I enter judgment for the plaintiff against the defendant as prayed in the plaint.”

Order 21 Rule 4 of the Civil Procedure Rules states as follows,

“Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.”

The judgment of the lower court appearing at pages 74 to 75 of the record of appeal did not meet those standards. In fact one may conclude it was not a judgment at all. I would have recommended a retrial had it not been for the fact that this is a very old case. Therefore I decided to determine it on the evidence adduced.

There is no doubt a contract existed between the two parties. In delivering the stones, further payments were to be factored where the distance was beyond a radius of 60 kilometres past Hola town. There was evidence that in some cases the distance went up to 186 kilometres. This was factored in the invoices drawn by the respondent to the appellant.

There was an acknowledgement that the stones were received in good order and condition. At the delivery site, quality and sizes were approved in the presence of a storeman and workers. There was no endorsement or information of any rejects. D.W. 1 did not know if the respondent was informed of the rejected stones. His statement that this was communicated immediately did not find support from the record.

There is also his statement that he did not know if the respondent picked the rejected stones. The respondent, according to D.W. 2, was supposed to be informed if any stones were rejected. This was not done. In the absence of any evidence to the contrary then the respondent’s evidence stood unchallenged. Proof in civil proceedings is on a balance or probabilities. Going by the pleadings and the evidence on record, the respondent achieved that standard. The claim set out in the plaint supported by the evidence was proved and therefore the appellant cannot resist the same.

I find that this appeal is lacking in merit and therefore dismissed with costs to the respondent.

Dated, signed and delivered at Nairobi this 10th Day of April, 2019.

A. MBOGHOLI MSAGHA

JUDGE