



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 662 OF 2013**

**CARLA VIEZEE.....APPELLANT**

**VERSUS**

**GATA-AURA TEJINDER SINGH .....1<sup>ST</sup> RESPONDENT**

**GATA-AURA HARPINDER SINGH**

**(Trading in the name and style of DEZINE PORT).....2<sup>ND</sup> RESPONDENT**

*(Being an appeal from part of the judgment delivered by Honourable C. Obulutsa (Mr.) (Ag. Chief Magistrate) on 28<sup>th</sup> November, 2013 in CMCC NO. 3464 OF 2009)*

**J U D G E M E N T**

1. The appellant who was the plaintiff before the trial court instituted a suit against the respondents vide a plaint dated 3<sup>rd</sup> June, 2009 and amended on 19<sup>th</sup> January, 2011. Therein, she sought for the sum of Kshs. 1,550,000/= and special damages of Kshs. 2,001,397/= together with interest on the above and costs of the suit and interest thereon.
2. It was pleaded in the amended plaint that sometime in September, 2007 the parties herein entered into a contractual arrangement whereby the respondents would undertake developments and carry out extensions on the appellant's property known as Land Reference Number 1870/IV/86 within a period of nine (9) weeks from the date of the contract. That the parties subsequently signed a written agreement dated 16<sup>th</sup> September, 2007.
3. The appellant also pleaded that on various dates between 16<sup>th</sup> September, 2007 and 25<sup>th</sup> November, 2007 she made deposit payments amounting to Kshs. 1,550,000/= to the respondents in fulfilment of her contractual obligations but that the said respondents refused or otherwise neglected to carry out the works stipulated in the contract thereby forcing the appellant to engage the services of another contractor and in which case she incurred loss, damage and additional costs totaling Kshs. 2,001,397/=.
4. In response thereto, the respondents put in a statement of defence dated 5<sup>th</sup> August, 2009 and amended on 3<sup>rd</sup> February, 2011 essentially confirming the terms of the agreement as set out in the amended plaint and further confirming receipt of the deposit sum of Kshs.1,550,000/= from the appellant.
5. However, the respondents denied having breached the contract and instead pleaded that it is the appellant who breached the said contract by chasing away their workers from the site and thus preventing the completion of the works. The respondents further pleaded that by the time their workers were being chased out, 70% of the contractual works had been done and there were materials worth Kshs.250,000/= still on the site.
6. In the course of the hearing, the appellant called two (2) witnesses for the plaintiff's case while the 2<sup>nd</sup> respondent testified as the sole witness for the defence case. At the close thereof, parties filed written submissions.
7. Upon considering the above, the trial court eventually entered judgment for the appellant in the sum of Kshs.140,000/= plus costs and interest thereon.
8. The appellant, being aggrieved with the aforesaid judgment, has now appealed to this court by way of a memorandum of appeal dated 18<sup>th</sup> December, 2013 establishing the following grounds:

***(i) THAT the learned trial magistrate erred in law and in fact by holding that the appellant was to blame for the delay in the construction.***

**(ii) THAT the learned trial magistrate erred in fact and in law by finding that the appellant had failed to have a quality survey done before introducing another contractor and hence the wrong approach adopted.**

**(iii) THAT the learned trial magistrate erred in law and in fact by finding that the delay did not go to the root of the contract.**

**(iv) THAT the learned trial magistrate erred in law and in fact by making a finding that the agreement should have provided for penalties in the event of breach.**

**(v) THAT the learned trial magistrate erred in law and in fact by failing to award the sum of Kshs.1,550,000/= being sums paid to the respondents.**

**(v) THAT the learned trial magistrate erred in law and in fact by failing to award the special damages in the sum of Kshs.2,000,379/=.**

9. Parties filed written submissions on the appeal which were then highlighted. I have carefully considered the rival submissions and arguments on appeal as well as the authorities cited respectively. I have also re-evaluated the evidence adduced before the trial court in addition to having perused the judgment being challenged.

10. I will now address *ground (i)* of appeal. The appellant in her submissions denied contributing to the delay in construction, submitting that even after making alterations to the original plan, she gave the respondents various extensions of time to complete the works but that the said respondents failed to comply accordingly. More specifically, the appellant submits that whereas the construction was initially to commence on 17<sup>th</sup> September, 2007, the commencement date was extended to 24<sup>th</sup> September, 2007 and the completion period equally extended to 26<sup>th</sup> November, 2007. This was restated by *Miss Kemunto*, counsel for the appellant in her oral arguments.

11. In her submissions, the appellant denied chasing away the respondents' workers from the site, carefully adding that no such evidence was ever tendered before the trial court for consideration.

12. The appellant further contends that she was at all material times keen on having the respondents complete the project even after the completion date but the said respondents exhibited both a lack of commitment and co-operation.

13. In their opposing arguments, the respondents have argued that going by the witness accounts given by the 2<sup>nd</sup> respondent as DW1, it is clear that the appellant contributed to the delay and thus the learned trial magistrate was correct in apportioning blame. To reinforce these arguments, *Mr. Ndolo* counsel for the respondents urged this court to support the trial court's finding drawing from the delayed payments and change of the scope of works.

14. I now turn to the typed proceedings constituting the record of appeal and more specifically, the evidence of the respective witnesses. The appellant who was PW1 testified that she did not deny the respondents access to the plot. She also admitted during cross examination to having changed the original designs but added that this did not contribute to the delay since extensions of time were given to the respondents.

15. On his part, the 1<sup>st</sup> respondent being DW1 stated that construction could not begin immediately as the respondents had to first remove the appellant's flowers which process took about one (1) week. The witness further stated that after the first five (5) weeks of construction, the appellant delayed in making payments and thereafter decided to expand the rooms which meant destroying the walls already in place. The 1<sup>st</sup> respondent also gave evidence to the effect that during the construction, he had to take time off to attend to his ailing mother.

16. Ultimately, the trial court determined that both parties were in breach of the agreement and were to blame for the delay.

17. From the foregoing, it is evident that the respondents have admitted to having contributed to the delay. As concerns the appellant, whereas she denies having delayed the progress of the project or chasing away the respondents from the site, I have noted that she does not deny having made alterations to the project while construction had already begun. In my view, such alterations would have a direct impact on the original plan and agreement, inevitably delaying the original completion date of the construction. Likewise, the appellant did not dispute the argument that she had delayed in making certain payments as per the schedule agreed upon by the parties. In the circumstances and contrary to the appellant's submission that it was only the appellant who was found to be in breach of the contract, the trial magistrate arrived at the finding that all the parties were responsible for the delay and hence in breach of the contract. I therefore find no basis in this ground.

18. Concerning *ground (ii)* of appeal, the appellant submits that the loss and damage suffered could be ascertained from the report prepared by the contractor who took over the project from the respondents. Furthermore, *Miss Kemunto* contended that the said report found on page 263 of the record of appeal shows the work that had been done and subsequent works done.

19. In their counter arguments, the respondents submitted that the report prepared by the subsequent contractor in no way resembled theirs, neither was there a provision of figures to ascertain the value of works done by the said respondents. In summary, they took the view that the report cannot be taken to be a reliable quantity survey report.

20. In his rendition, the learned trial magistrate opined that at the time the respondents ceased with the construction, no survey report was done by an expert to ascertain what had been done as well as the costs, thereby reprimanding the appellant for bringing a second contractor on board.

21. On my part, I have perused the record of appeal and in particular, the report dated 30<sup>th</sup> August, 2010 found on page 262-263 of the record of appeal. It is true that the same sets out the status of the works as at the time the second contractor came on board. However, there is no

way of determining how much was done by the respondents and at what cost given that no copy of a survey report was availed before the trial court for consideration. Moreover, PW2 being the contractor who took over the construction in question admitted to having no prior knowledge or history of the site or a site valuation.

22. To my mind and I believe the learned trial magistrate was of a similar view, it would have been prudent to have the works done by the respondents valued or assessed before handing over the project to another contractor. I therefore see no reason to interfere with the learned trial magistrate's finding in this respect. This ground of appeal cannot stand.

23. On the third ground of appeal, the appellant simply submits that failure on the part of the respondents to complete the construction in full and within the timelines stipulated in the agreement, constituted a breach which goes to the root of the contract and that the learned trial magistrate ought to have arrived at such a finding. Resultantly, it is the appellant's view that she was entitled to terminate the contract. The cases of *Hassan Zubeidi v Patrick Mwangangi Kibaiya & another [2014] eKLR* and *Rose Onyango Ongecha & 9 others v City Council of Nairobi [1982] eKLR* in support were relied on.

24. In reply, the respondents have contended that the contract did not provide for a default clause to offer guidance to the trial court.

25. The learned trial magistrate approached this issue from the viewpoint that whereas there was no provision made in the agreement for consequences of breach, it was clear that both parties had breached the contract.

26. I have had the opportunity of re-evaluating the evidence presented before the trial court and ascertained that the agreement entered into between the parties did not provide for the consequence of breach. That notwithstanding, the learned trial magistrate appreciated that though the appellant may have suffered loss, it was difficult to quantify such loss. As such, I find the appellant's argument to be neither here nor there given that it has already been established that all parties herein were in breach of the agreement and even if the learned trial Magistrate were to specify that such breach went to the root of the contract, no assessment/valuation was done to offer guidance to the court. This ground cannot stand.

27. It is the appellant's submission on *ground (iv)* of appeal that since the contract between the parties did not provide for penal consequences or remedies for breach, it is obvious that the appropriate remedy would have been special damages and a refund of monies paid to the respondents. On their part, the respondents relied upon their earlier arguments made in respect to the first ground of appeal.

28. The learned trial magistrate acknowledged that the agreement between the parties did not offer guidance in terms of consequences in the event of breach. Be that as it may, it is clear that the learned magistrate went ahead to consider the sums claimed by the appellant alongside the sums challenged by the respondents based on the circumstances laid before him. I therefore see no error in the approach taken by the said magistrate.

29. This leaves me with *grounds (v)* and *(vi)* of appeal which I shall address together. The appellant stood firm on her submissions that she is entitled to a refund of the entire sum of Kshs.1,550,000/= paid to the respondents as well as special damages amounting to Kshs.2,001,397/= for additional costs incurred in having the project completed. The same was reiterated in *Miss Kemunto's* oral arguments save to add, *inter alia*, that the learned trial magistrate erred in finding that the receipts for special damages had not been proved.

30. In opposition to the appellant's submissions and in support of the trial court's decision respectively, the respondents argue that since they had done 70% of the works, it would be improper and unjust for the appellant to demand the entire amount paid out to them. As concerns the special damages, the respondents took the view that they cannot be condemned for the costs incurred in the course of the fresh works by the succeeding contractor.

31. In her evidence before the trial court, the appellant sought for the sum of Kshs. 1,550,000/= paid to the respondents, a sum which DW1 confirmed was paid. However, the appellant indicated that in some areas, the respondents had done 30% of the work while in others, they had done 50%. DW1 on his part stated that the respondents had done 70% of the work.

32. The learned trial magistrate took the above into account, reasoning that it is only a quantity surveyor who would have adequately assessed what the appellant ought to have been paid. The said magistrate further noted DW1's testimony that he had received Kshs.40,000/= as well as Kshs.300,000/= for works not done, concluding that the appellant would only be entitled to a refund of 30% since the respondents had done 70% of the works.

33. I find this to be an intricate case given that no assessment or quantification was done in regards to the works undertaken by the respondents. Moreover, the extent of the works done by the respondent is disputed and there is no possible way of ascertaining whether it was 30%, 50% or 70%. I am therefore unable to understand what guided the learned Magistrate.

34. Further to the above, there was a dispute as to whether or not the respondents' materials were left at the site by the time the contract terminated so to speak. I have looked at the numerous documents tendered before the trial court and noted that they are either invoices or quotations, or do not ascertain the sums of money paid out by the appellant. Put another way, the appellant did not prove the special damages or the claim for loss of income and the learned trial magistrate was right in finding so.

35. I therefore find that the learned trial magistrate did not arrive at a proper finding as there was no basis for his calculations made. In my reasonable opinion, the appellant unfortunately did not prove her case against the respondents on a balance of probabilities.

36. In the premises, the appeal is hereby dismissed. Furthermore, guided by my reasoning above, I hereby set aside the learned trial magistrate's judgment and substitute the same with a judgment dismissing the appellant's suit with no order as to costs given the circumstances of the case.

Dated, signed and delivered at NAIROBI this 27<sup>TH</sup> day of JUNE, 2019.

.....

L. NJUGUNA

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondents