



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO 16 OF 2015**

**TAIDY'S RESTRAURANT.....APPELLANT**

**VERSUS**

**GERFAS OTIENO SAMMY t/a**

**NYANCO INVESTMENT CONTRACTORS.....RESPONDENT**

*(Being an appeal from the judgment and decree in Kericho Chief Magistrate's Court Civil Case No 199 of 2014 ( Hon. J Nyagol, (RM) dated 13<sup>th</sup> May 2015.*

**JUDGMENT**

1. The appellant was the defendant in Kericho CMCC No 199 of 2014. In the plaint which is undated but was filed in court on 13<sup>th</sup> June 2014, the respondent, who was the plaintiff in the suit, lodged a claim for Kshs 2,631,609.67. This sum, according to the plaintiff, was the contractual sum for construction of a culvert by the plaintiff for the defendant. The plaintiff averred that he had performed his part of the contract within the agreed period but had not been paid in full. He was therefore claiming a sum of Kshs 831,609.67 against the defendant, together with costs of the suit and interest.

2. In a defence dated 14<sup>th</sup> July 2014, the defendant denied the averments in the plaint and averred that there was no contract between it and the plaintiff. It further averred that the plaintiff was a mere employee and not a contractor and put him to strict proof of his allegations. At paragraph 5 of the defence, the defendant denied that it owed the plaintiff any monies as alleged and averred that the plaintiff had been paid in full.

3. The case was heard by Hon Nyagol RM. The plaintiff/respondent testified and called no witnesses, while the defendant/appellant called one witness. In the judgment delivered on 13<sup>th</sup> May 2015, the trial court entered judgment in favour of the respondent as prayed, hence the present appeal.

4. The appellant raised 14 grounds of appeal in the Memorandum of Appeal dated 21<sup>st</sup> June 2017:

*1. That the learned trial magistrate erred both in fact and in failing to give a concise statement of the case, points of determination, the decision thereon and reasons for her judgment pronounced on the 13<sup>th</sup> day of May 2015.*

*2. That the learned trial magistrate erred both in fact and in law in failing to consider the fact that the appellant did not accept nor sign the Bill of Quantity and thus the said Bill of Quantity should not have been taken as enumerating the work done and the cost thereof.*

*3. That the learned trial magistrate erred both in law and in fact in failing to consider that there was no written agreement for the respondent to claim that there were certain express terms in the agreement.*

*4. That the learned trial magistrate erred both in law and in fact in disregarding that the burden of proof lay on the plaintiff to prove the allegations pleaded in the plaint which the plaintiff failed to do.*

*5. That the learned trial magistrate erred both in law and in fact in disregarding the Appellant's pleadings vide his defence and also his testimony.*

*6. That the learned trial magistrate erred both in law and in fact in disregarding the respondent's testimony that he is a long time contractor who always entered into written agreements yet in this instance he did not sign any agreement.*

*7. That the learned trial magistrate erred both in fact and in law in relying on a document, that being a Bill of Quantity, which was not agreed upon nor signed and or attested to by the Appellant.*

*8. That the learned trial magistrate erred both in law and in fact in failing to ascertain and or get prove as to the amount claimed by the respondent.*

*9. That the learned trial magistrate erred both in fact and in law in failing to ascertain and or get prove as to the amount claimed by the respondent.*

*10. That the learned trial magistrate erred both in fact and in law in failing to consider the appellant submissions and the authorities cited.*

*11. That the learned trial magistrate erred both in law and in fact in holding that the appellant delayed in payments yet the appellant clearly stated in his testimony in court that the payments were being made in stages until completion of the work.*

*12. That the learned trial magistrate erred both in law and in fact in failing to find that the case was not proved to the required standard of law.*

*13. That the learned trial magistrate erred both in law and in fact in misinterpreting he evidence presented by the plaintiff.*

*14. That the learned trial magistrate did not apply the principle of law applicable in deciding the mater/issue before her thereby arriving at wrong findings.*

5. The evidence before the trial court was as follows. The plaintiff, Gervas Otieno Sammy, was a contractor, his construction company being known as Nyanco Investment Contractors. He produced documents showing that he was so registered, as well as documents showing that he was registered by the National Construction Authority and the Public Works and Water Ministries. He had entered into an agreement with the defendant to construct a car park, which he did, and sent an invoice. He produced a bill of quantities for the work showing that the cost would be Kshs 2,631,609.67 (exhibit 4 and 5).

6. He alleged that the Bill of Quantities had been signed by the town engineer who had accepted on behalf of the appellant. The amount for the work was partly paid by one Ken Chege, a Director of Taidy's. He produced a copy of his bank statement showing the payment (exhibit 6). After completion of the work, he issued a delivery note and an invoice which were received and stamped by the defendant (exhibits 7 and 8). He was paid in instalments of Kshs 300,000 annually, leaving a balance of Kshs 831,609 which he sought to recover from the defendant.

7. The plaintiff stated in cross examination that his agreement with the defendant was a gentleman's agreement, but that the defendant accepted the Bill of Quantities. He denied that there was an agreement that the defendant would pay him piecemeal pursuant to work done. He was paid two instalments in one month, and later received Kshs 300,000 in February 2014.

8. The defence witness, Kennedy K. Chege, confirmed that he knew the plaintiff and had contracted him in the year 2011 to do a temporary parking lot for Taidy's restaurant. They had not agreed on the manner of payment but that they would pay him when he works. He denied that he owed the plaintiff anything, maintaining that he had paid him in full.

9. In cross examination, he stated that the plaintiff was just a foreman supervising the work, though he conceded that he was supervising his own (plaintiff's) workers. He denied that the plaintiff was a registered contractor but confirmed that the plaintiff was coordinating work at a parking lot which involved a culvert.

10. He further confirmed that the plaintiff gave him a bill of quantities which he did not receive but confirmed that it had been signed and stamped by the town engineer. According to Mr Chege, the total value of the construction according to the Bill of Quantities was Kshs 2,631,609.67. He further confirmed that he did not dispute the Bill of Quantities, and that he had paid the plaintiff approximately Kshs 1,800,000.00. He further confirmed that the work the plaintiff was coordinating was completed to his satisfaction and was worth Kshs 1,800,000.00. He also confirmed that the plaintiff was not an employee of Taidy's. According to Mr Chege, he was the one to determine the worth of work done by the plaintiff.

11. In the written submissions dated 2<sup>nd</sup> May 2018, the appellant argues that there was no proof produced by the respondent that he agreed with the appellant on the amount he was to be paid. The appellant maintained that it paid the respondent for all work done. The appellant referred to the case of **Empower Installations Ltd vs Electricity Generating Co & Anor (2014) eKLR** in which the court relied on section 107 and 109 of the Evidence Act. It was his submission that the respondent presented a bill of quantities to the appellant who declined to sign it as it was too high. It was then agreed that the respondent would be paid after very stage, which is why the appellant paid in bits and stopped paying after the last stage of construction.

12. The appellant further relied on the case of **Pauline Nyawira Nganga vs Jane Wanjohi Mwangi (2013) eKLR** to submit that there was no agreement signed by the parties. He asked the court to set aside the decision of the lower court and allow the appeal.

13. In his submissions dated 23<sup>rd</sup> May 2018, the respondent notes that the appellant had only addressed grounds 3, 4, 6, 7 and 9 which related to the agreement, the Bill of Quantities and the burden of proof, and should accordingly be deemed to have abandoned the remaining grounds in his Memorandum of Appeal. The respondent argues that there was an agreement to make a car park for the appellant, which was done; that there was a Bill of Quantities for the work, which showed the value of the works as Kshs 2,631,609.67; that the work was done to the satisfaction of the appellant and the appellant paid Kshs 1,800,000.00, leaving a balance of Kshs 831,609.67. He queries how the appellant arrived at a sum of Kshs 1,800,000.00 as it was not part of the amount agreed in the Bill of Quantities. The respondent urged the

court to dismiss the appeal.

14. I have considered the record of the trial court and the submissions of the parties. What is not in dispute in this matter is that there was an agreement between the appellant and the respondent. The agreement was in respect of a car park which the appellant's witness confirmed was made to its satisfaction. While the appellant had initially claimed in its defence that the respondent was its employee, it later conceded that the respondent was supervising his workers and had carried out the work, which involved constructing a culvert, to the appellant's satisfaction.

15. Section 107-109 provide as follows:

**107. Burden of proof**

*(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

*(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*

**108. Incidence of burden**

*The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.*

**109. Proof of particular fact**

*The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.*

16. The parties before me agree that there was a contract on the basis of which the respondent was to carry out some construction work for the appellant. The appellant denies that he signed the Bill of Quantities which the respondent argues evidenced the contract between them. In effect therefore, the respondent has established that there was a contract, albeit oral, between him and the appellant.

17. An oral contract is enforceable, except in the circumstances provided under section 3 of the Law of Contract Act, which relates to contracts for sale of land. The terms of the contract can be inferred from the words or conduct of the parties. **Halsbury's Laws of England 4<sup>th</sup> (ed.) Re-Issue Vol. 9(1)** paragraph 602 at page 339 states as follows with respect to the definition of a contract:

*"...the most commonly accepted definition is a promise or set of promises which the law will enforce. The expression 'contract' may, however be used to describe any or all of the following: (1) that series of promises or acts themselves constituting the contract; (2) the document or documents constituting or evidencing that series of promises or acts, or their performance; (3) the legal relations resulting from that series."*

18. The elements of a contract are set out in **Halsbury's Laws of England 4<sup>th</sup> (ed.) Re-Issue Vol. 9(1)** paragraph 603 at page 340 as follows:

*"To constitute a valid contract (1) there must be two or more separate and definite parties to the contract; (2) those parties must be in agreement, that is, there must be consensus on specific matters (often referred to in the older authorities as 'consensus ad idem'); (3) those parties must intend to create legal relations in the sense that the promises of each side are to be enforceable simply because they are contractual promises; (4) the promises of each party must be supported by consideration or by some other factor which the law considers sufficient. Generally speaking, the law does not enforce a bare promise."*

19. In the present case, the parties were in agreement that there was a Bill of Quantities in respect of the construction work that the respondent was required to carry out for the appellant. The evidence indicates that the work was carried out to the satisfaction of the appellant. While the appellant alleges that the work done was to its satisfaction, it contends that the work was worth only the amount of Kshs 1,800,000 that it paid to the respondent.

20. I note that the appellant's defence before the trial court was that the respondent was its employee. This version of facts changed to one in which the respondent did some work, but the value of the work was to be determined by the appellant. One is inclined to find that the appellant was not worthy of credit, which is the conclusion that the trial court came to in accepting the respondent's evidence against that of the appellant.

21. The plaintiff in a civil suit is required to prove his or her case on a balance of probability-see **Kirugi & Anor. -vs- Kabiya & 3 others [1987] KLR 347**. In the present matter, I am satisfied that the trial court properly reached the conclusion that the appellant had entered into a contract for the construction of a car park for the appellant, that the respondent had performed his part of the contract but the appellant had failed to pay the contractual sum, and it properly entered judgment for the respondent. I accordingly find no merit in the appeal, and it is hereby dismissed with costs to the respondent.

**Dated and Signed this 31<sup>st</sup> day of May 2019**

**MUMBI NGUGI**

**JUDGE**

**Dated Delivered and Signed at Kericho this 19<sup>th</sup> day of June, 2019**

**GEORGE DULU**

**JUDGE**