



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 44 OF 2018**

**TANATHI WATER SERVICES BOARD.....APPELLANT**

**-VERSUS-**

**QARA AGENCIES LTD.....RESPONDENT**

***(Being an appeal from the judgment of Hon. E.M Muiru (RM) in the Senior***

***Resident Magistrate's court at Kilungu, civil case No.160 of 2016, delivered on 17<sup>th</sup> May 2018)***

**JUDGMENT**

1. The Respondent filed a suit in the lower court seeking payment of Kshs.822,000/= plus interest and costs for what it averred was breach of contract entered into with the Appellant on 10<sup>th</sup> August 2010, to drill a borehole in Kitaingo area.

2. The Appellant filed a statement of defence and denied the claim. The matter was heard and judgment delivered. The learned trial magistrate entered judgment in favour of the Respondent as prayed.

3. Aggrieved by the decision, the Appellant filed this appeal and listed 16 repetitive grounds which I have summarized as follows;

a) *That the learned magistrate erred in law by only analyzing the evidence of the Respondent to the exclusion of the Appellant's evidence.*

b) *That the learned magistrate erred in law and fact by finding that there was a contract between the parties and that services were rendered under the contract.*

c) *That the learned magistrate erred in law and fact by failing to recognize that the Appellant was not in breach of any contract.*

4. It was agreed that the appeal be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.

**Appellant's Submissions**

5. The Appellant (Tanathi) submitted that there is no borehole at the specific area alleged or at any other place in the vicinity. That there is no contract on record or even with its office documents. That the Respondent sought to rely on an internal memo whose authenticity cannot be verified and being an internal document, the Respondent could not explain how it got possession.

6. Tanathi submitted that even if there was such a contract, no borehole was drilled at the alleged place or its environs. That even if the borehole was drilled at a different location, the Respondent did not install all the accessories as per its letter dated **24/08/2010** hence a substantial non-performance. It submits that there was a radical breach whose only remedy is repudiation and rescission of the entire contract.

7. It further submitted that despite the Respondent's insistence on existence of a contract which it could not prove, it admitted having not done any installations including casing shafts etc.

8. It submitted that being a public entity, it has no reason to refuse paying for services rendered but has a duty to ensure value for taxpayer's money.

**Respondent's Submissions**

9. The Respondent submitted that on **10/08/2018**, it was awarded a contract to drill a borehole at Kitaingo sub location within Makueni county. That the contract was for Ksh.1,469,500/= and was captured in a document called Local Service Order (LSO) No. 0283, ref. No. TAWSB/09/2010-2011, dated 10/08/2010.
10. It submitted that it drilled the borehole but upon reaching the required 160 metres, the water yield was low and the borehole was classified as dry. That accordingly, it did not install the capping and casing and the quotation was reduced to Kshs.822,000/= to reflect the actual work done.
11. It identified the issues for determination as per the summarized grounds above and submitted on each of them as follows;
12. On ground **(a)**, it submitted that the trial court clearly summarized the evidence of both parties and submissions. It referred this court to specific pages in the record of appeal to buttress this submission.
13. On ground **(b)**, it submits that the Local Service Order (LSO) was a contract and that Dw1 confirmed that indeed the Respondent was contracted by the Appellant to drill a borehole in Kitaingo area. That the judgment of the trial court shows that it was very much alive to the issue of whether there was a contract or not and made a determination based on the evidence tendered.
14. On ground **(c)**, the Respondent submitted that the consideration for drilling the borehole was Ksh.1,469,500/= but since it did not install the casing an accessory, it only claimed the actual cost of drilling the borehole which was Ksh.822,000/=.
15. The Respondent is a borehole drilling contractor registered in 2009 and was the Plaintiff before the lower court. Its director Daniel Kilonzi Muthani testified as Pw1. He testified that the Appellant issued it with a Local Service Order (*exhibit 2*) dated 10/08/2010 directing it to drill a borehole at Kitaingo area for a total cost of Kshs.1,469,500/=.
16. That the Appellant gave them a hydrological survey report (*exhibit 3*) compiled by **Robert Matei Musyimi (Pw2)** which bears the coordinates on the physical location of the project. That they drilled the borehole from 22/08/2010 - 24/08/2010 and the works were supervised by Pw2.
17. They encountered some water at 70m and it was never the contractor's guarantee on acquisition of water.
18. In cross examination, Pw1 explained that the borehole was dry as it had insufficient water and was therefore condemned by the hydrogeologist. He added that the hydrological report is not addressed to them. He further stated that casing was not put on the borehole as it was dry. The area co-ordinates are not in the LSO.
19. He said they were required to install a generator or pump. He agreed that they did not carry out everything indicated in Exhibit 5(quotation for services), and that Exhibit 6 (*Borehole completion record issued by WaRMA*) does not indicate the borehole number, name and does not have coordinates. That he did not know whether Pw2 was a principal at the Appellant's facility as he never filed documentation on the deposit paid.
20. **PW2** was **Robert Musyimi**. He testified that he was a geologist working with the ministry of water and irrigation and that at one time, he was seconded to the Appellant's board in 2008. That in 2010, there was a project at Kitaingo and he was sent to the site as the community had been requested to offer land for developing a water source. That they surveyed and got a site. That he prepared the hydrological survey before court and signed it as he was the one in charge. He recommended that the borehole be drilled up to 160m and the borehole was actually drilled.
21. He wrote a memo on 24/08/2010 and the subject was 'final report of borehole drilling at Kitaingo area'. He confirmed that the borehole was drilled to the recommended depth but did not yield the expected amount of water. They were however not surprised because even during their survey, they noted that the area had low levels of water.
22. He stated that the coordinates in **Mr. John Bosco Nyanga's** report (*Dw2*) was similar to the coordinates in their report. That they visited the site on 24/08/2010 and Dw2 visited it 7 years later. In his report, he had recommended casing which was not done and the borehole could have been covered up.
23. In cross examination, he said that when he went to the site, he found the Respondent and was told that they had been given work by the Appellant. They surveyed using GPS and the coordinates were right. That the internal memo was addressed to the finance manager as a report of their field investigations and he did not know how the memo got to the Respondent. He said it was not part of his work to award the contract to the Respondent. That if top casing is put on a borehole, it can be there for eternity but to put casing on a dry borehole would be a waste of money.
24. **DW1** was **Fredrick Tito Muomati**, the chief manager of the Appellant. He testified that they engage contractors through a procurement process, and a contract signed by both parties. He explained that in the case of drilling a borehole, the contractor is expected to drill on a surveyed area given by coordinates indicated in the hydrological report after which he is expected to do casing and finalize with capping. That he could also do a pump and generator depending on the extent of the contract. He said he did not sign a contract with the Respondent.
25. He stated that deviating from the coordinates amounts to breach of contract as the deviation would not have water. That at the coordinates relied on by the Plaintiff/Respondent, there was no borehole, no capping and no casing. It was his evidence that a LSO is not a contract and an internal memo is only a document for use within the organization.
26. In cross examination, he said that after drilling, another report is done to verify the works done. That the internal memo shows that there

was drilling done, and this was communicated within the organization. He was not at the site when the drilling was done.

27. DW2 was **John Bosco Nyanga**, a hydrogeologist. He testified that he works with the Appellant as a ground water specialist. He stated that he went to Kitaingo area with his GPS and there was no borehole at the place it was supposed to be. A contractor is supposed to be given a hydrological survey report and taken to the site.

28. That after drilling, the supervisor is supposed to issue a works completion certificate after doing the final inspection. The said certificate is then signed by the supervisor and contractor then taken to head of department for signing after which the contractor is paid. The processes mentioned were not done as no borehole was drilled. He said an internal memo is not used to process payments.

29. In cross examination, he said that he visited the site 7 years after the borehole had been allegedly drilled. He said if a borehole is found dry, a surface casing ought to be done. This was recommended by the supervisor, (Pw2). The LSO bears the Appellant's logo and is addressed to the Respondent. That the hydrological report shows that a borehole was drilled as per the LSO, but could not be left open and so casing ought to have been done. He did not find any borehole on the ground.

30. I have considered the rival submissions and the entire record. I find the issues falling for determination to be as captured in the summarized grounds *to wit*;

- a) Whether the learned trial magistrate failed to analyze the Appellants evidence.
- b) Whether there was a contract between the parties.
- c) If (b) above is answered in the affirmative, whether there was breach and by who.

**Whether the learned trial magistrate failed to analyze the Appellants evidence.**

31. In her analysis and determination, the learned trial magistrate stated as follows;

*“The court has duly read the pleadings on record and analyzed the evidence adduced by the parties and also taken into consideration both counsels written submissions....Dw1 did admit in his statement that they did contract the plaintiff however in his testimony in court, he denied ever having entered into a contract with the plaintiff....no evidence was tendered by the defendant to suggest or indicate that the said document was not authentic. Hence the court having considered the evidence of both parties....Dw2 testified that he visited the site....the court did observe that the coordinates relied by Dw2....Dw2 did admit that surface casing could only have been done with the recommendation .....*”

32. From the above extracts, it is evident that the Appellant's evidence was analyzed by the learned trial magistrate who made her findings on that. This ground therefore lacks merit”.

**Whether there was a contract between the parties**

33. **Chitty on Contracts, 32<sup>nd</sup> Edn, Vol.1, pg 13**, defines a contract as an agreement giving rise to obligations which are enforced or recognized by law.

34. **Section 3(1) of the Law of Contract Act, Cap 23** states as follows;

*“No suit shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person unless the agreement upon which such suit is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized”.*

35. I find relevance in the words of Lord Steyn in **G. Percy Trentham Ltd v Archital Luxfer Ltd [1993] 1 Lloyds Rep 25** where he stated as follows:

*“...It is important to consider briefly the approach to be adopted to the issue of contract formation ... It seems to me that **four matters** are of importance. The **first** is that... law generally adopts an objective theory of contract formation. That means that in practice our law generally ignores the subjective expectations and the unexpressed reservations of the parties. Instead the governing criterion is the reasonable expectations of honest men. ... that means that the yardstick is the reasonable expectations of sensible businessmen. **Secondly** it is true that the coincidence of offer and acceptance will in the vast majority of cases represent the mechanism of contract formation. It is so in the case of a contract alleged to have been made by an exchange of correspondence. But it is not necessarily so in the case of a contract alleged to have*

*come into existence during and as a result of performance.... **The third matter** is the impact of the fact that the transaction is executed rather than executory. It is a consideration of the first importance on a number of levels.... The fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations. It will often make it difficult to submit that the contract is void for vagueness or uncertainty. Specifically, the fact that the transaction is executed makes it easier to imply a term resolving any uncertainty, or, alternatively, it may make it possible to treat a matter not finalised in negotiations as inessential. In this case fully executed transactions are under consideration. Clearly, similar considerations may sometimes be relevant in partly executed transactions. **Fourthly**, if a contract only comes into existence during and as a result of performance of the transaction it will frequently be possible to hold that the contract impliedly and retrospectively*

*covers pre-contractual performance.*

36. Guided by what I have cited at paragraph 31,33-15 and applying them to this case, I find the LSO which is duly executed and dated 10/08/2010 to be the Appellant's letter head and is addressed to Qara Agencies, the Respondent. It instructs the Respondent to carry out the services listed therein 'immediately' and to send the invoices immediately to the Appellant. The cost of the service is indicated as Kshs.1,469,500/=. The column for 'description of service' indicates as follows;

*"Being services for borehole drilling 160M depth at Kitango, Mukaa District."*

37. It's my view that, the instructions in the LSO were clear enough to constitute an offer and just as observed by the learned trial magistrate, the authenticity of the LSO was not challenged.

38. As to whether the offer was accepted by the Respondent, Pw1 testified that the Respondent drilled the borehole as instructed but the expected amount of water was not realized at the depth of 160M and it was considered a dry borehole. Pw2 who was once an employee of the Appellant confirmed that indeed the Respondent had drilled the borehole as instructed and on the site identified by the GPS coordinates in the hydrological report.

39. The Appellant did not dispute that Pw2 was its former employee and did not challenge the hydrological survey which he prepared and signed and which was consequently relied upon by the Respondent. His qualifications as a hydrogeologist were also not challenged. One would expect that stern action would have been taken against Pw2 by the Appellant if at all he had made a misrepresentation as to his former employment and involvement in the project.

40. The record shows that a pre-trial conference was conducted and as such, the Appellant was aware of the Respondent's witnesses and the kind of evidence they would give. Accordingly, I am satisfied that Pw2 was a former employee of the Appellant and had capacity to act as he did with regard to the borehole project.

41. The Appellant attempted to show that no borehole was drilled as there was none at the site indicated by the coordinates in the hydrological report. This was as per the evidence of Dw2 who visited the site 7 years later. However, the evidence of Pw2 was that the coordinates in Dw2's report were similar to the coordinates in their report. Indeed, the coordinates in the hydrological survey report and the ones in Dw2's report dated 23/08/2017 are similar.

42. Pw1 admitted that no casing was put on the borehole because it was classified as a dry borehole and Pw2 agreed that it would be a waste of money to put a casing on a dry borehole. Pw1 explained that the claim excluded the cost of the unfitted accessories.

43. From the evidence on record, it is clear that the borehole was drilled as instructed but the expected amount of water was not realized at the depth of 160M. In my view, this failure cannot be attributed to the Respondent and it does not negate the fact that the Respondent executed his part of the bargain. If Dw2 did not find a borehole when he visited the site 7 years later, then the explanation given by the Respondent is plausible.

44. Seven years is a long time and it is highly probable that the borehole was filled up with soil owing to the fact that casing and capping had not been done. I also agree with Pw2 that indeed it would be a waste of money to accessorize a failed project.

45. From the foregoing, it is my finding that the Respondent accepted the offer to render the service of drilling a borehole even though there were frustrations of not realizing the expected amount of water. It was therefore not erroneous for the trial magistrate to find that services were rendered though limited.

46. As for the consideration, it is generally accepted that consideration is the benefit each party receives in exchange for what it gives up in the contract. It is the essential reason for a party entering into a contract. The Ksh.1,469,500/= indicated in the LSO was the consideration for rendering the services of drilling a borehole.

47. From the foregoing, it is clear that all the essential elements of a contract were present and as such, I find that the learned trial magistrate did not error by finding that there was a contract between the parties.

#### **Whether there was breach and by who?**

48. The Respondent drilled the borehole as instructed and based on the hydrological report. It was not its fault that the expected amount of water was not realized. It was therefore entitled to payment for work done and was gracious enough not to claim for the accessories not fitted. By failing to make the payment, the Appellant was in breach of the contract. In my view, there is no error in the trial magistrate's finding that indeed, the claim of Kshs.822,000/= was substantiated and proved to the required standard.

49. The result is that the appeal lacks merit and is dismissed with costs.

Orders accordingly.

**DELIVERED, SIGNED & DATED THIS 8<sup>TH</sup> DAY OF AUGUST 2019, IN OPEN COURT AT MAKUENI.**

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**H. I. ONG'UDI**

**JUDGE**