



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 27 OF 2014 CONSOLIDATED WITH CIVIL APPEAL NO. 43 OF 2014**

**JAPHETH ARTHUR MWANGI.....APPELLANT**

**AND**

**VICTORY CONSTRUCTION.....RESPONDENT**

**(Appeal against Judgment and decree in CMCC No. 5221 of 2008 (Milimani) By Amdanyi Francis, SPM Delivered on 29<sup>th</sup> January, 2014)**

**JUDGMENT**

These appeals are consolidated. In the lower court the appellant in Civil Appeal No. 27 of 2014 was the plaintiff while the respondent was the defendant. In Civil Appeal No. 43 of 2014 the appellant was the defendant while the respondent was the plaintiff. From their respective Memorandum of Appeal the two parties were not satisfied by the decision of the lower court.

The suit in the lower court followed what the plaintiff alleged to have been a breach of contract by the defendant following some construction works assigned to the defendant by the plaintiff. It was the plaintiff's case in the lower court that he was entitled to damages following breach of contract as a result of the actions of the defendant.

There are several grounds of appeal set out by both parties, but it shall not be necessary for me to go through each and every ground as laid down, because it is the end result of the lower court that appears to have aggrieved the parties herein. That is, the order that the respondent pays the sum of Kshs. 431,740.70, and that the court was wrong in apportioning liability at 70% on the part of the defendant and 30% on the part of the plaintiff.

A lot of emphasis has been laid on whether or not consent was given by the City Council of Nairobi for the construction of a new septic tank but in my view, that is a secondary issue because the thrust of the plaintiff's case in the lower court centred on the breach of contract as a result of either poor workmanship or wrong advice or failure to complete the construction works.

In the judgment of the lower court, it is obvious that the trial court was faced with a difficult situation of balancing credibility and veracity of the testimonies presented by both sides. This is clear from the following extract of the judgment; the court stated,

**“The plaintiff appears to me a well learned person. The way he prosecuted his case with alacrity, the correspondences he sent to the defendant in his own writing are testimony to this. I would also find that from the way he made payment for the works upfront, he was genuinely interested in the work being done well. But in the end, he allowed the construction of the septic tank to go on without the necessary city council permission. Was he really misguided by Mr. Avtar or he just overlooked to obtain it.**

**Mr. Avtar equally strikes me as a honest person who was out to do a good job for the plaintiff. His company did most of the work to the plaintiff's satisfaction. Save for the failure to obtain the permission for the septic tank, I believe he would have completed his work satisfactorily.**

**In effect each of these witnesses is pulling the rope towards his end. There is a conflict of evidence by the witnesses from either side. The court must however come to a conclusion one way or the other. This now depends on the credibility of the witnesses. In my assessment and from my observation above, there is nothing much else to comment on either witness's demeanour. The two seem to me to carry the same portrait in terms of credibility. I would not say that I can believe one and not the other on the issue of obtaining the permission for the construction of the septic tank.....**

**In my assessment I have to the conclusion that the two may have agreed that they proceed with all the internal work without seeking the permission. ....**

**I have ventured into this speculation because I am unable to believe either of the witnesses on why the permission for the construction of the septic tank was not obtained..... I have found that neither of the parties has adduced evidence to satisfy the court that the other was to blame for that illegality. However, the plaintiff had constructed the defendant to do a professional job. As a professional, the defendant must be taken to be aware of all the legal requirement pertaining to the work it was to undertake. One of them was that permission be obtained from the city council. It was its duty to advice the plaintiff appropriately. In embarking on the work well aware that the permission had not been obtained it was proceeding on an illegality.**

**The plaintiff must also be culpable as the owner of the works that had to be undertaken but this is to a lesser degree because he must be taken to have relied upon the professional competent of the defendant. If the defendant would have declined to proceed with the works until the permission was obtained, the illegality would not have been committed.”**

In view of the foregoing, the trial court assigned liability against the plaintiff at 30% and 70% against the defendant.

As the appellate court I have evaluated the evidence as required of me in order to arrive at independent conclusions. The trial magistrate had the advantage of seeing the witnesses testifying and assessed their respective demeanour. That is an opportunity any appellate court does not have. The conclusion of the trial court in that regard therefore, are hard to controvert.

This was a technical contract. Technical in such a way that expertise of such works was supposed to be provided by the defendant. in the event the plaintiff insisted on any works that were not in line with the defendants scope, experience and advice the defendant was at liberty to correct or decline such an assignment. The defendant cannot abandon that duty and blame the plaintiff for anything that may go wrong.

When the plaintiff raised concern about poor workmanship and called the defendant’s representative for meetings, the defendant’s representative refused and or neglected to attend. The correspondence in the record attests to that.

The record also confirms that the defendant offered advice to the plaintiff. That appears in several letters in particular a letter dated 12<sup>th</sup> March, 2007 which said in part as follows,

**“We suggest and I.B drain with 2 sides slabs along the plot wall and one at the rear road terminating to the open drain on the other side of the marram road. There would be 2 NO. Open manholes at the corners and a piped culvert under the road.....**

**A rough hand sketch is attached outlining the proposals.**

**The sewers need attention and re design but we can quote if you desire.”**

In yet another letter dated 23<sup>rd</sup> March, 2007 the defendant wrote to the plaintiff as following,

**“The present septic tank is full and all man holes are over flowing or chocked. They system is not working as it should. We also note that the septic tank was built on high ground thus losing almost half of the capacity to hold affluent. ....**

**It is not feasible to rectify the present system as it is beyond repair and also in use. We suggest that a new septic tank be built near the servant quarters to overcome this problem and drainage lay out be done afresh....**

**The cost includes new pipe lines, new man holes, gulleys, new waste connections externally, septic tank and a soakage pit with the necessary vent pipe installed to the whole system...**

**We also attach a rough hand sketch of the lines to be laid for a general idea and hope this will meet your approval.”**

**It would appear that the defendant offered expert advice to the plaintiff from the tenor and context of the above correspondence. At some point in a letter dated 9<sup>th</sup> October, 2007 addressed to the defendant by the plaintiff a meeting had taken place and it was the plaintiff directive to the defendant to stop the construction because “it would seriously worsen an existing illegality.” Thereafter the parties fell apart. This is evident from the correspondence that followed thereafter and especially a letter by the plaintiff to the defendant dated 12<sup>th</sup> December, 2007 which said in part as follows,**

**“As for the septic tank I have consistently informed you that the construction was and remains illegal. In this connection, my letters dated 9<sup>th</sup> and 30<sup>th</sup> October, 2007 among others are relevant.... All these means that the septic tank you built has to be demolished. You have been unwilling to discuss the matter with me.**

**Since you were entirely responsible for the construction, I am now asking you to demolish it and refund me all the money I paid to you within the next 10 days, failing which I shall seek appropriate legal remedy.”**

I have quoted extensively from the correspondence on record to appreciate where the blame is to be placed in this dispute. It is clear that the defendant offered to undertake the construction works from a professional point of view. He offered advice, as clearly set out in the extracts of the letters above. Notwithstanding the plaintiff is the owner of the property, he relied on the defendant’s professional advice and execution of the project at a consideration which he paid.

It is clear therefore that, the breach that was alleged was substantially attributable to the defendant. Having said so and considering the approach the trial court adopted in terms of credibility and assessment of the evidence, the defendant was more to blame in that regard and therefore, the apportionment of liability may not be faulted.

On the other hand, the order on costs has to be tied to the conclusion of the entire dispute in that, costs follow the events. The plaintiff is therefore entitled to 70% of the costs due and payable following the determination of this matter. If the costs are not agreed then they have to be subjected to taxation. To that extent only the two appeals are determined. For avoidance of any doubt the respondents appeal No. 43 of 2014 fails and is dismissed in its entirety while that of the appellant No. 27 of 2014 is allowed with costs as stated.

Orders accordingly.

*Dated, signed and delivered at Nairobi this 31<sup>st</sup> day of May, 2018.*

**A. MBOGHOLI MSAGHA**

**JUDGE**