THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 466 OF 2015

GICHEHA FARM LIMITED.....APPELLANT

VERSUS

KIMANI NGUGI T/A TAKINA SERVICES &

SUPPLIES ENTERPRISES.....RESPONDENT

(Being an Appeal from the entire Judgment and Decree of Hon. Mbugi, Chief Magistrate at the Chief Magistrates Court Thika in CMCC No. 35 of 2013 delivered on 29th May, 2015)

JUDGMENT

The appellant herein was the defendant in the lower court while the respondent was the plaintiff. The appellant had engaged the respondent to undertake the supply and installation of materials in the appellant's farm at Ruiru. The respondent in the plaint dated 25th January, 2013 pleaded that the appellant voluntarily agreed to the terms and conditions of payment which were made clear to it.

The respondent undertook the works agreed, the appellant paid part of the charges levied but refused to pay the balance due and owing. This led to the filing of the suit in which the respondent claimed Kshs. 3,503,678.90. The respondent prayed for interests at 25% from the time the sum became due until payment in full.

The appellant denied the respondent's claim and pleaded in the defence that in fact, it was the respondent who was in breach of the agreement and therefore the amount was unpaid, withheld and or utilized by the appellant with the full knowledge of the respondent owing to breach, poor performance and or non – performance of the contract by the plaintiff.

After a full hearing the trial court found in favour of the respondent and gave judgment in sum of Kshs. 2,418,303.90 plus costs and interest at court rates from the date of judgment until payment in full.

Aggrieved by the said judgment the appellant filed this appeal faulting the trial court as set out in the Memorandum of Appeal, the summary of which I will detail shortly herein below. On the other hand, the respondent was aggrieved by that decision and filed a cross appeal faulting the lower court for not awarding the sum claimed in the plaint. Both parties have filed submissions in the argument of the appeal which I have noted.

From the record, this dispute generated serious contention by both parties. Looking at the nature of the dispute and the submissions of parties, it is my observation that this is a matter that should have been subjected to some arbitration proceedings or mediation. I say so because, nature of the appellant's activities and the respondent's services are interrelated, and perhaps the parties would find themselves engaged in future. That however did not happen and therefore this matter ended up in court.

The trial court addressed the issues which involved analysis of several documents in resolving the issues that stood out as presented by both parties. As the first appellate court, it is my duty to consider and evaluate the evidence adduced before the trial court with a view to arriving at independent conclusions. – see **Wakim Sodas Limited Limited vs. Sammy Aritos (2017) e KLR**.

The appellant has correctly summarised its appeal in the following terms; the respondent overpriced the value of the materials supplied which were found to be substandard and un merchantable; invoicing for materials not fitted and or carted away by the respondent; demanding payment on the basis of LPOs as opposed to actual goods delivered as agreed by the parties.

The lower court was faulted for failing to consider the evidence presented by the appellant in its defence which showed that the amount claimed by the respondent was made up of excess materials invoiced, but not installed as confirmed by the drip irrigation audit report; retention of money refundable on completion of the project and which was not completed; items not satisfactorily installed and or removed and watering charges as a result of delay in the completion of the project.

The summary presented by the respondent in the written submissions appears to agree with the issues raised in the Memorandum of Appeal. In the cross appeal the respondent faulted the trial court for failing to award the balance of the total of the invoice amount for goods actually delivered, while at the same time finding the property was delivered and passed to the appellant, which amounted to a contradiction. It is the respondent's position that a seller is entitled to be paid for the full price of the goods delivered. It is also the respondent's case that it is entitled to demand the outstanding balance of the sum of goods delivered and labour charges.

Having adduced evidence that the sum of Kshs. 3,503,678.90 was due and owing, the court is faulted for awarding Kshs. 2,609,220.90. There was also no evidence that any goods were ever collected from the appellant's store, and therefore the court was wrong to find that the appellant was entitled to a credit note of Kshs. 157, 563/=. The lower court was also faulted to allowing a credit note of Kshs. 4,500/= for an item that was allegedly delivered but not requested for in the LPO. This is because, even if it was not requested the same was delivered and utilized by the appellant. There is no evidence that the same was returned to the respondent. The appellant was therefore not entitled to any credit note to that effect.

In arriving at the conclusions that appear in the judgment, the trial magistrate set out the issues before analysing the evidence that was basically documentary. I have gone through the documents presented in the lower court, the contents thereof as related to the pleadings, evidence adduced, the witnesses called during the trial and the final judgment by the trial court. The analysis by the trial court was in agreement with the said documents and since the contents of any document speak for themselves, the court may not overstep the said contents to arrive at different conclusions.

A few observations however stand out. A court may not rewrite a contract between the parties. Where goods are delivered and acknowledged for a particular consideration, the court may not assume that there was rejection, return or price adjustment without any evidence to that effect. I have not seen any evidence in the record showing prices were disputed by the appellant. There was no condition attached to the acknowledgment. There was analysis clarification on invoices which appears at page 198. There was no cross analysis or dispute thereof.

I have looked at the audit report. While there is not a serious dispute relating thereto, that report may not rewrite the contract between the parties. In any case, save for PRVs which were said to be interfering with pressure, once this was attended to the project was found to be satisfactory. At page 310 of the record there is a certificate of completion dated 22nd October, 2011. It is stamped by the appellant. It was received without any protest. It is binding upon the appellant.

The watering charge has been subjected to scrutiny by both parties and upon scrutiny of the material presented, I have found that it has no place in the contract expressed or implied. In fact I am in total agreement with the trial court when it was observed as follows,

> ***"I have not seen any document saying that planting was to commence when the project was still on going. If the defendant elected to plant the trees before the completion of the project then they should bear the attendant costs….. since there is no evidence to show that it is the plaintiff who was to bear the costs I will have no problem in finding that the defendant without consulting the plaintiff decided to plant the trees. The plaintiff cannot be made to pay for costs he was not party to. Therefore I do find that the defendant is not entitled to a credit note of Kshs. 1,018,613/=."***

I have already found that there is no evidence that any goods were returned after delivery. Since there was no dispute of receipt of the pipes, the credit note in favour of the appellant finds no justification from the evidence. The credit notes of Kshs. 157,563/= and Kshs. 4,500/= have to be set aside.

The evidence both oral and documentary pointed to the plaintiff's claim limited to Kshs. 2,609,220.90. After discounting what the magistrate held to be an oversupply and goods alleged to have been carried away, plus what was said to have been paid to KRA the final figure that remained was Kshs. 2,418.303.90. I have already observed that the defendant was not entitled to any credit note amounting to Ksh. 162.063/=. If that amount is added to the sum in the judgment the total is Kshs. 2,580,366.90. In my judgment that is what the respondent was entitled to.

There was no evidence to justify a commercial interest of 25% claimed by the respondent. It is true that interest is awardable but in the absence of any evidence, for example that the respondent borrowed this money at bank rates or that the rate was factored in the agreement expressly or by implication, the rate of interest applicable is at court rates. This was a claim for a liquidated sum. Interest shall run from the date of filing the suit.

The end result is that the appeal by the appellant is dismissed and equally the cross appeal by the respondent is also dismissed except the additional sum of Kshs. 162,063/= added to the sum awarded by the lower court.

This suit would not have proved necessary had the appellant agreed to compensate the respondent for goods sold and delivered and work done at its farm. The costs of the suit therefore shall be paid to the respondent.

Orders accordingly.

Dated, signed and delivered at Nairobi this 22nd day of May, 2018.

A. MBOGHOLI MSAGHA

JUDGE