



**REPUBLIC OF KENYA**

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

**CIVIL DIVISION**

**HIGH COURT CIVIL APPEAL CASE NO. 122 OF 2010**

**JACKSON WIYAMA IBWAGA.....APPELLANT**

**T/a DAGA CONSTRUCTION**

**VERSUS**

**ANDREW SUNKULI.....1<sup>ST</sup> RESPONDENT**

**SYLVIA SUNKULI.....2<sup>ND</sup> RESPONDENT**

**(Being an appeal from the Judgment delivered on 10<sup>th</sup> March, 2010 by Hon. L. Arika (Senior Resident Magistrate) Chief Magistrate's Court at Milimani Commercial Court in CMCC No. 4592 of 2007).**

**JUDGMENT**

1. The Appellant filed suit against the Respondents in the Lower Court vide a plaint dated 18<sup>th</sup> May, 2007. The claim was for Ksh.579,710/= alleged to be the balance of the payment for construction works carried out on the Respondents' house by the Appellant as per the agreement between the parties.

2. The claim was denied as per the statement of defence filed by the Respondents. It was pleaded that if any construction works were undertaken by the Appellant, the same were carried out outside the agreement. That the Appellant was paid a sum of Ksh.300,000/= for the work done as per the contract. It was further averred that the cause of action was premised on breach of a contract and was time barred under the Limitation of Actions Act Cap 22 Laws of Kenya.

3. The Appellant filed a reply to the defence and joined issues with the defence. The contents of the plaint were reiterated.

4. The trial magistrate held that the Appellant's case was time barred and dismissed the case with costs. The trial magistrate further held that had the Appellant's case not been caught up by limitation of time, the Appellant would have been awarded the sum of Ksh.579,710/= pleaded in the plaint.

5. The Appellant was aggrieved by the said judgment and appealed to this court on the following grounds:

**1) The learned trial magistrate erred in law and in fact in finding that the suit herein was filed out of time yet there was uncontroverted evidence that the cause of action arose on completion of the contractual works in November, 2001.**

**2) The learned trial magistrate erred in law and in fact by finding against the Plaintiff yet the Plaintiff's evidence was not controverted.**

**3) The learned magistrate erred in law and in fact by failing to appreciate that the cause of action in this suit arose on or about 10<sup>th</sup> November, 2001 when the contractual works were completed and the debt fell due.**

6. During the hearing of the appeal the counsels for the respective parties opted to file written submissions. The Appellant's side filed theirs. The Respondent did not file any. I have considered the submissions filed.

7. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

**“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)”.**

8. On 4<sup>th</sup> November, 2009 the case proceeded *ex parte*. The record reflects that the Respondents were served but absent. Jackton Wiyama Imbwaga (PW1) testified on the Appellant’s side. His evidence was that on 21<sup>st</sup> October, 1999 he agreed with the 1<sup>st</sup> Respondent to carry out some repair works at a garage. That the agreement was for 30,000/= inclusive of the materials and Labour. That he was paid 10,000/= on 24<sup>th</sup> October, 1999. That the Appellant and the 1<sup>st</sup> Respondent then agreed on 6<sup>th</sup> December, 1999 for the Appellant to renovate the Respondents’ house at Lenana Road at a cost of Ksh.37,830/= in total. That on the same date (6<sup>th</sup> December, 1999) the 1<sup>st</sup> Respondent gave him work at a cost of Ksh.294,935/= inclusive of labour and materials. That on 21<sup>st</sup> December, 1999 the 1<sup>st</sup> Respondent gave him a cheque of Ksh.150,000/= and another cheque of Ksh.35,000/= on 7<sup>th</sup> January, 2001.

9. That on 17<sup>th</sup> January, 2000 the 1<sup>st</sup> Respondent gave the Appellant more work to construct a perimeter wall at a cost of 380,000/= inclusive of labour. That the work was completed and the Appellant paid a sum of Ksh.50,000/= through a cheque which was dishonoured by the bank. That thereafter the 1<sup>st</sup> Respondent issued a cheque of Ksh.100,000/= dated 23<sup>rd</sup> February, 2000 which went through. That on 10<sup>th</sup> February, 2000 the 2<sup>nd</sup> Respondent gave him a cheque of Ksh.10,000/= which bounced. That a further cheque of Ksh.120,000/= bounced upon presentation to the bank on 16<sup>th</sup> March, 2000.

10. The Appellant’s further evidence was that on 23<sup>rd</sup> March, 2000 he again entered into an agreement with the 1<sup>st</sup> Respondent to enlarge the garage to fit two vehicles. That the total costs inclusive of materials and labour was Ksh.80,902/= and he was paid Ksh.30,000/=.

11. That on 18<sup>th</sup> April, 2000 they agreed on the carrying out of the repair works in the Kitchen at a cost of Ksh.20,532/= for the materials. That he carried out the work and more work in the kitchen, store and a bedroom and the cost for the materials came to Ksh.32,281 making the total Ksh.52,813/= but was not paid.

12. That on 27<sup>th</sup> April, 2000 they agreed on more work to be carried out in the bathroom at a total cost of Ksh. 26,491/= inclusive of labour and materials but was only paid Ksh.10,000/= on 3<sup>rd</sup> October, 2000.

13. That on 29<sup>th</sup> May, 2000 there was an agreement to repair the roof at Ksh.158,954/= all-inclusive but there was no payment.

14. That on 2<sup>nd</sup> June, 2000 the 2<sup>nd</sup> Respondent gave him more work which included plumbing works and driveway at a total of Ksh.231,000/= paid him Ksh.13,000/= but that the balance was never paid.

15. That on 30<sup>th</sup> June, 2000 the 1<sup>st</sup> Respondent gave him the work of constructing a sentry house at the cost of Ksh.18,075/= but was only paid Ksh.6,000/=.

16. That on 26<sup>th</sup> June, 2001 the Appellant wrote to the Respondents and demanded payment of the outstanding balance. That the 1<sup>st</sup> Respondent wrote to him on 30<sup>th</sup> June, 2001 acknowledging receipt of the letter and asked him to go to his office with the relevant documents which he took to the 1<sup>st</sup> Respondent and left them with him as he said he was busy but would talk to the bank to pay.

17. That on 18<sup>th</sup> August, 2000 a meeting to discuss the payments did not take off and on 10<sup>th</sup> November, 2001 the Appellant who had completed his work left the Respondent premises.

18. The central issue in this appeal is whether the Appellant’s case was filed out of time. Section 4 of the Limitation of Actions Act provide as follows in respect of contracts:

**“(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued-**

**(a) action founded on contract.”**

19. The plaint gives the date 21<sup>st</sup> October, 1999 as the date of the contract between him and the 1<sup>st</sup> Respondent. The plaint also gives the month of November, 2001 as the date of completion of the works. The Appellant’s evidence essentially covers the same dates as to when the works began and were completed.

20. The plaint dated 18<sup>th</sup> May, 2007 was filed on 25<sup>th</sup> May, 2007. Thus going by the date of completion falls within less than six (6) years to the date of filing suit. The six years would have come to an end in November, 2007.

21. Although the 21<sup>st</sup> October, 1999 is the contractual date pleaded in the plaint it appears the agreements were entered into piecemeal for various works carried out as per the evidence.

22. The last payment made to the Plaintiff was on 23<sup>rd</sup> November, 2000 vide a cheque of the same date for the sum of Ksh.13,000/=. The Appellant's evidence is that he remained on site up to 10<sup>th</sup> November, 2001 when he completed his work and his demands for payment were not met. The minutes dated 25<sup>th</sup> August, 2000 in respect of a meeting between the Appellant and the Respondents reflect that there were some works still going on as of that date. The only evidence on record regarding when the works were completed is that of the Appellant who gave the completion date as 10<sup>th</sup> November, 2001 as pleaded. This evidence is uncontroverted by any other evidence. The plaint having been filed on 25<sup>th</sup> May, 2007 same was not filed out of time. Consequently, the Appeal is allowed. Judgment is hereby entered for the Appellant against the Respondents jointly and severally for Ksh.579,710/= interest and costs both in the lower Court and this Court.

**Date, signed and delivered at Nairobi this 24<sup>th</sup> day of July, 2018**

**B. THURANIRA JADEN**

**JUDGE**