



IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. 3 OF 2018

CORAM: D.S. MAJANJA J.

BETWEEN

PASACON GENERAL CONSTRUCTION &

ELECTRICAL SERVICES LIMITED.....APPELLANT

AND

TOTAL KENYA LIMITEDRESPONDENT

(Being an appeal from the Judgment and Decree of Hon J. Kasam, SRM dated 8th December 2017 at the Chief Magistrates Court in Mombasa in Civil Case No. 1306 of 2016)

JUDGMENT

1. This is an appeal from the decision of the trial magistrate dismissing the appellant's claim for Kshs. 611,378/- for contract works done at the Jomo Kenyatta Total Service Station within Mombasa county. Where necessary, I shall refer to the parties in their respective capacities before the subordinate court for ease of reference.

2. According to the plaint, the defendant engaged the plaintiff on 14th July 2010 to carry out additional contract works involving excavations, pipe sleeves laying, storm water drainage, manholes and mild steel covers and forecourt bollards. It avers that it completed works on 24th September 2010 and issued a job completion form duly executed by the plaintiff and a representative of the defendant. It claims that despite notice of intention to sue, the defendant failed to settle the claim giving rise to the suit.

3. In its defence, the defendant denied that it owed the plaintiff Kshs. 611,378/= as alleged. It stated that:

[T]here was not or has there being any contract between the Plaintiff and the Defendant do carry out any additional works at the Defendant's Jomo Kenyatta Total Service Station in Mombasa ...

4. At the trial, Paul Odhiambo (PW 1), the plaintiff's managing director testified while the respondent called its maintenance engineer, Sammy Genchu (DW 1). The issue framed by the trial court for determination was, "Whether parties entered into a contractor at all". On this issue the trial magistrate concluded as follows:

It is obvious that there were (sic) no any form of writing from the Defendant to the Plaintiff. The person who is purported to have instructed the Plaintiff, Engineer Collins Kipkorir was not invited as a witness to testify and clarify which procedure the Defendant followed when it invited the Plaintiff to undertake the additional works. The Defendant's witness confirmed in evidence that he was not in employment either at the time of the initial works or the additional works and therefore without any proof of a Purchase Order the Defendant cannot be submitted to pay....

The trial magistrate then concluded that:

I am satisfied that the Plaintiff has not proved his case against the Defendant on a balance of probability and I agree with the Defendant, that without a Local Purchase Order no such payments can be made. Further, an absolute offer and acceptance of a previous offer does not make a subsequent contract binding it is not in writing...

5. It is this judgment that has precipitated this appeal. The thrust of the appeal is set out in the Memorandum of Appeal dated 19th January 2018 is that the trial magistrate failed to find that the appellant had been given oral instructions for additional works by the respondent through its employee and the instructions were binding on the respondent. That indeed the instructions were carried out satisfactorily and that there was no reason to refuse to pay the appellant for work done. Counsel for the appellant further submitted that at all times the contract was

performed at the behest of the respondent and the works were done satisfactorily and duly acknowledged.

6. Counsel for the respondent took the position that from the evidence and documents produced by appellant, no contractual relationship was established hence the trial magistrate reached the correct conclusion that the case had not be proved by the plaintiff on the balance of probabilities.

7. As the trial magistrate pointed out, the only issue is whether there was a contract between the appellant and respondent for additional works as stated in its claim. In considering this issue I am alive to the duty of the first appellate court to review all the evidence afresh and reach its own independent conclusion as to whether to uphold the judgment bearing in mind that it never heard or saw the witnesses (see ***Selle v Associated Motor Boat Co. [1968] EA 123***).

8. It is not in dispute that certain works were done at Jomo Kenyatta Total Service Station and were indeed done satisfactorily. The appellant produced a job completion form signed by Jomo Kenyatta Service Station/Salis Investments Limited dated 26th September 2010. On the same date a delivery note confirming the works was addressed to Total Kenya Limited setting out the completed works. The document was received by Jomo Kenyatta Total Service Station/Salis Investments Limited. The appellant, through its counsel, addressed a demand letter to the respondent.

9. In his testimony, PW 1 stated that he had been contracted to do some work by the respondent for which he had been given a Local Purchase Order (LPO). Before he completed the works he was requested to do additional works which are the subject of the suit. He completed the work and handed over the site. In cross examination, PW 1 stated that the works were requested and approved by Engineer Collins Kipkorir.

10. DW 1 stated that he was not at the site at the time the works was done. He testified that for any payment to be effected by the defendant, there must be an LPO setting out the details of the works to be done. In cross-examination, he admitted that Engineer Collins Kipkorir had been in charge of the construction at the site and he was not there when the works were done.

11. I have considered the entire evidence and I find as follows. The appellant was a contractor for the respondent when he was requested to do additional works at the site he had been working. The documents produced show that the works requested were additional, a fact not denied by the respondent. The request was made by Engineer Collins Kipkorir who also was an employee of the defendant and who according to PW 1 was supervising the construction. In my view, the trial magistrate failed to take into account the fact that Engineer Collins Kipkorir was an agent of the respondent and had ostensible authority to bind the respondent given that that the appellant was already working at the site on a previous contract and the contract was in fact termed as a contract for, “*additional works*.”

12. Further, the employment or otherwise of Engineer Collins Kipkorir was a fact within the knowledge of the respondent and which it did not rebut. Hence under **section 112** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***, the court could not make an adverse inference against the plaintiff. On the contrary, the allegation having been made and the fact of employment of Engineer Kipkorir having been admitted, I would draw the adverse inference against the defendant. Since it was the respondent’s agent who requested for the works, the respondent could not interpose its agent’s ostensible authority with its internal procedures like insisting on an LPO had to be produced before payment when in fact the contract was oral.

13. Lastly, the trial magistrate erred in holding that there was no written agreement. An agreement for such works is not required in law to be in writing and no authority was cited to that effect. A contract may be oral or may be inferred from the circumstances as those I have set out in this case.

14. The totality of the evidence is that the appellant proved on a balance of probability that it was contracted to do additional works by the respondent. I therefore allow the appeal, set aside the judgment dismissing the suit and substitute the subordinate court’s judgment with judgment for the appellant against the respondent for Kshs. 611,378/- with costs and interest on the principal sum at court rates from the date of filing suit until payment in full.

15. The respondent shall bear costs of this appeal assessed at Kshs. 60,000/- only.

DATED and DELIVERED at MOMBASA this 28th day of AUGUST 2018.

D.S. MAJANJA

JUDGE

Ms Lyoo instructed Kiarie Kariuki and Company Advocates for the appellant.

Ms Okata instructed by V. Okata & Company Advocates for the respondent.