



**REPUBLIC OF KENYA**

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

**CORAM: D.S. MAJANJA J.**

**CIVIL APPEAL NO. 31 OF 2016**

**BETWEEN**

**REV. DOMINIC OCHOO t/a**

**BALA MERCY CHILDREN CENTRE (BMC).....APPELLANT**

**AND**

**JAMES ODHIAMBO ORICHO.....RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. J. M. Njoroge, CM dated 5<sup>th</sup> May 2016 at the Chief Magistrates Court at Kisii in Civil Case No. 376 of 2012)*

**JUDGMENT**

1. The appellant appeals against the judgment entered against him for Kshs. 1,282,000/-, interest and costs in favour of the respondent. For ease of reference, I shall refer to the parties in their respective capacities before the trial court where the context so admits.

2. As this is a first appeal, I must point out that I am guided by the principle that it is my duty to reconsider the evidence, evaluate it and reach my conclusion bearing in mind that it is the trial court that saw and heard the witnesses testify and was able to assess their demeanour (see *Selle v Associated Motor Boat Co. [1968] EA 123*).

3. The plaintiff's case was that following a successful bid, the parties entered into a contract dated 5<sup>th</sup> June 2011 for the Construction of the Foundation Stage of the Children's Dormitory and Matron's Quarter ("the Contract") at an agreed consideration of Kshs. 3,700,000/-. The plaintiff moved onto the site and completed the foundation stage on or about 25<sup>th</sup> August 2011. The plaintiff claims Kshs. 3,273,336/- against the defendant. Part of the claim is made up as follows:

- Balance of the contractual sum not paid      Kshs. 385,636/-
- Value of construction material deposited at the construction site and converted by the defendant without the plaintiff's authority      Kshs. 644,500/-

4. The plaintiff also pleaded that following the completion of the construction, the defendant failed or neglected to inspect the project for a period of two months during which time he incurred loss and damage as follows:

- Cost of keeping machines and equipment including the generator, toolbox, watertank, wheel barrows and site office and store on site      Kshs. 637,500/-
- Cost of keeping labour on site      Kshs. 810,700/-
- Loss of profit for loss of alternative engagements      Kshs. 675,000/-
- Cost of security      Kshs. 120,000/-

5. The defendant denied the plaintiff's claim and contended that the Contract did not have a provision that upon completion of the contract, the defendant was obliged to inspect the construction and thereafter take possession of the premises. He also denied that he owed the plaintiff KShs. 385,636/- being the balance of the contractual sum.

6. The trial magistrate heard the testimony of the plaintiff (PW 1), the defendant (DW 1), Elisha Otieno Polo (DW 2), a security guard and Maurice Otieno Munde (DW 3), a contractor. In the judgment, the trial magistrate dealt with each claim. He allowed the claim for the material left on site. The magistrate held that since there was a delay in site inspection, the claim for idle equipment was justified. The claims for labour, security and loss of profit were dismissed as they were not proved to the required standard. The court also found that the full contract price had been settled.

7. Arising from the reliefs which the trial magistrate granted, there are two issues for consideration in this appeal. First, whether the respondent is entitled to KShs. 644,500/- for conversion of material left on site. Second, whether the respondent was entitled to claim for KShs. 632,500/- for idle plant and equipment.

8. On the first issue, Ms Anyango, counsel for the appellant, submitted that the conversion of the material, its quantity and value was not proved to the required standard and that the claim was not supported by any evidence. In addition, she contended that the Contract did not provide for how excess material should be dealt with hence the claim lacked any basis. In any case, she urged that what remained on the site were remnants of the construction. On the second aspect of the claim, counsel submitted that the Contract did not have any basis for the respondent remaining on site as there was no issue regarding inspection as this was done by the Architect and that he had been paid.

9. Counsel for the respondent, Mr Onchwangi, supported the judgment and submitted that the court appreciated the evidence and came to the correct conclusion regarding both claims. He pointed out that inspection was provided for in the contract and that when the respondent made a demand for his material, plant and equipment, the appellant failed to respond to the same confirming that the appellant was in fact liable.

10. On the first issue, the Contract at Clause 5.2(b) provides that, "*The Contractor will be responsible for the ordering, supplying, delivery, storage on site, administration and surveillance of any material required to properly execute the building works in accordance with the schedule.*" Under Clause 1.1(b) of the Contract, "*Removal and carting on the proper site of all the debris,*" is an obligation of the Contractor. The obligation was thus on the plaintiff to purchase the material for the contract and thereafter remove all the debris upon completion.

11. The plaintiff admitted that he received a letter dated 16<sup>th</sup> November 2011 from the defendant requesting him to clear the site within 3 working days of the letter, in default, the letter stated that, "*failure to which we shall have no option but to remove the materials and other waste left on the site at your cost.*"

12. The basis for the plaintiff's claim, which the trial magistrate accepted was that the defendant did not respond to the plaintiff's demand letter dated 8<sup>th</sup> November 2011 setting out the totality of the claim including the claim for materials on the site as follows:

|                     |                 |
|---------------------|-----------------|
| 85 tons of sand     | KShs. 170,000/- |
| 60 tons of ballast  | KShs. 240,000/- |
| 40 tons of Hardcore | KShs. 20,000/-  |
| 10tons of Gravel    | KShs. 35,000/-  |
| 15 pieces Y16       | KShs. 34,500/-  |
| Soil on site        | KShs. 100,000/- |
| Timber for formwork | KShs. 45,000/-  |

13. The defendant denied that the plaintiff left the aforesaid quantity of construction material on the site. He testified that the soil on site was a result of excavation which the plaintiff was required to remove. In cross-examination, the defendant admitted that there was some sand, ballast, hardcore and debris but he could not estimate the quantity. DW 2 in his statement adopted as evidence in chief stated that the plaintiff left some timber, 7 tons of ballast and 10 tons of hardcore. DW 3, who proceeded to construct the dormitory and matrons house, testified that he found 2 tons of ballast, two heaps of excavated material and other debris at site.

14. I accept that the respondent left material and debris on the constructions site. I however reject the conclusion by the trial magistrate that the letter of demand relied upon was conclusive of the amount of material on the site. Although the amount on the site was not measured, the claim was not untested. There was the evidence of DW 2 and DW 3 which gave an indication of material left and which the trial magistrate did not take into account. It must be recalled that the material brought to the site was to fulfil the construction contract and not as a storage for respondent. I therefore doubt that the respondent left anything over 10 tons on the premises. On the other hand, the price or value of the material as stated by the respondent was not disputed by the appellant. I therefore award the respondent 10 tons of sand (@ KShs. 2000/- per ton), ballast (@ KShs. 4000/- per ton) and hardcore (@KShs. 500/-). I also note that the soil on site was as a result of excavation from the appellant's site. Since it was the respondent's obligation to remove it, he cannot get compensation for it. I therefore assess compensation for the materials as follows:

|                 |                |
|-----------------|----------------|
| 10 tons of sand | KShs. 20,000/- |
|-----------------|----------------|

|                     |                        |
|---------------------|------------------------|
| 10 tons of ballast  | Kshs. 40,000/-         |
| 10 tons of hardcore | Kshs. 5,000/-          |
| 10 tons of gravel   | Kshs. 35,000/-         |
| 15 pieces of Y16    | Kshs. 34,500/-         |
| Timber              | Kshs. 45,000/-         |
| <b>TOTAL</b>        | <b>Kshs. 179,500/-</b> |

15. On the second issue, the claim for the idle plant and equipment is set out in the letter dated 8<sup>th</sup> November 2011 as follows:

|                        |                   |                 |
|------------------------|-------------------|-----------------|
| Generator per day      | Kshs. 2,500/-     | Kshs. 167,500/- |
| Tool Box               | Kshs. 865 per day | Kshs. 57,955/-  |
| Water tank             |                   | Kshs. 43,550/-  |
| Wheel barrows          |                   | Kshs. 301,500/- |
| Site officer and store |                   | Kshs. 67,000/-  |

16. The respondent's claim is that because inspection was not done, he could not remove his plant and equipment from the premises. The issue of inspection is provided for in Clause 5.0 (e) (d) and (e) as follows:

*(d) Retention fee of 20% will be deducted from the total amount and will be retained by the employer as a guarantee fee. The total amount will be released to the Contractor if the final inspection to be due within 2 months after completion of the foundations will be confirmed by Arch. Tommaso Bazechi.*

*(e) The Contractor will be responsible for any unsatisfactory defect that will show up during this period and will provide all necessary fixing at his own expense.*

17. Having reviewed the Contract and evidence, I find that the Contract did not require the respondent to remain on site after completing the foundation pending inspection. There is no evidence that he was prevented from removing his equipment for the premises after completing the Contract. The respondent's only obligation was to remedy defects under the Contract if these were certified by the Architect after inspection. These defects could be remedied whether or not the contractor remained on site. I therefore find and hold that the trial magistrate erred in concluding that the respondent was entitled to this aspect of claim as there was no contractual basis for the claim for idle plant and equipment. I therefore set aside this aspect of the award.

18. For the reasons I have set out, I allow the appeal set aside the judgment of the subordinate court and substitute it with the following:

- (a) Judgment be and is hereby entered for the respondent against the appellant for the sum of Kshs. 179,500/-together with interest thereon at court rates from the date of filing suit before the subordinate court until payment in full.
- (b) The appellant shall pay cost of the suit in the subordinate court.
- (c) The appellant is awarded costs of this appeal assessed at Kshs. 40,000/- exclusive of court fees.

**DATED and DELIVERED at KISII this 28<sup>th</sup> day of November 2018.**

**D.S. MAJANJA**

**JUDGE**

Ms Anyango instructed by Otieno, Yogo, Ojuro and Company Advocates for the appellant.

Mr Onchwangi instructed by Oguttu Mboya and Company Advocates for the respondent.