



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 111 OF 2013

JEREMIAH MBUGUAH KARIUKI

T/A DELIGHT PLUMBERS PLAINTIFF/APPLICANT

VERSUS

SWAHILI BEACH RESORTS LIMITEDDEFENDANT/RESPONDENT

JUDGMENT

1. The plaintiff claims the sum of Kshs. 27,880,600/= for various works he alleges to have done in the defendant's premises pursuant to an agreement dated 5th May, 2007. The plaintiff, Jeremiah Mbugua Kariuki, the owner of Delight Plumbers, testified as PW1. He stated that he has been a plumber for 35 years. He testified that he was contracted by Kelley Kassim alias Barendar Kalsi to undertake plumbing works for Swahili Beach Hotel, South Coast. They signed an agreement for the sum of Kshs. 10,020,260.00 which was exclusively for indoor works. He produced the agreement as plf. exh. 2. The said agreement had a breakdown of the works reflected in an invoice that he produced as plf. exh. 1.

2. He testified that paragraph 10 of the agreement provided that any additional works would be paid as per "**hour quotation**". He stated although they had agreed that the defendant would pay him Ksh. 2,000,000/= to facilitate him to start the work, he was not paid the said amount. Clause 9 of the agreement provides that the defendant would pay him Kshs. 50,000/= on a weekly basis. He informed the court that the second quotation covered outdoor works at a cost of Kshs. 25,773,585.00, thus the total cost of the works was Kshs. 39,398,585.00/=. PW1 produced the documents numbered 5-25 in his bundle of documents as plf. exh. 3. He further testified that after the hotel became operational in the year 2010, he undertook maintenance work for 2 years. He was paid part of the maintenance fees. The amount agreed for maintenance was Kshs. 250,000/=. He stated that inclusive of the outstanding maintenance fees, the amount the defendant owed him was Kshs.27,880,600/=. He produced a schedule of the outstanding balance as plf. exh. 4.

3. PW1 explained that the defendant would pay a little at a time. He would at times buy the materials required and at times PW1 would use his own money. PW1 stated that he would engage between 20 to 60 people to do plumbing work depending on the demands of work. He would look for money to pay them for their labour. He testified that he vacated the site later on and started pursuing his payment but the defendant failed to pay his outstanding dues and instructed guards at Swahili Beach Hotel not to let him into the premises. He recounted having done work for many beach hotels for which he was paid.

4. It was PW1's evidence that upon completion of the plumbing works, he was given a certificate of completion for internal plumbing, mechanical services, construction of swimming pools and maintenance,

fixing of solar heater systems and fixing of pressurized systems. The said certificate is dated 18th October, 2012. He was issued with another certificate of completion on 23rd May, 2013. The plaintiff stated that Mr. Amer Kalsi a son of Kassim Kalsi who was one of the Directors of the defendant, issued him with a certificate of completion on 29th April, 2013. PW1 produced the documents marked as No. 29 in his bundle of documents as plf. exh. 6. He produced a demand notice addressed to the defendant as plf. exh. 7. PW1 explained that he drew mechanical drawings because no engineer had done so. The Architect approved the said drawings which PW1 used for doing the plumbing works. He produced the mechanical drawings as plf. exh. 8. He also produced a bundle of photographs as plf. exh. 9. One of the said photographs was taken during his and Mr. Kalsi's visit to China where they had gone to buy plumbing materials. Some photos show the progress of the plumbing works. He explained that photograph No.18 shows the hotel after completion, including the swimming pool.

5. PW1 further testified that Mr. James Wilson, the General Manager of the defendant wrote him a letter where they agreed to pay him Kshs. 250,000/= and later, on PW1's request the amount was increased to Kshs. 400,000/=. The payments were however inconsistent. The plaintiff prayed for payment of the outstanding fees and interest as well as costs of this suit.

6. On cross-examination, PW1 stated that Robert Nyamongo constructed the swimming pool. As per their agreement of 5th July, 2007, Mr. Kelley was to provide all the materials. PW1 was to provide labour and plumbing. They agreed that the cost would be Kshs. 50,000/= weekly, which figure was to go up as work progressed. He indicated that he was not paid a down payment of Kshs. 2,000,000/=. He stated that he requested for the payment of Kshs.250,000/- per month. They agreed that additional work would be paid for as "**per hour quotation**". He confirmed having been paid Kshs. 10,871,000/= as per the agreement.

7. PW1 indicated that the outstanding balance from the defendant is Kshs. 27,880,600/=. He admitted that the documents he had produced in support of his claim did not show that they were addressed to the defendant. They also bore no rubber stamp impression to show that they were received. PW1 stated that he had no other quotation for additional work save for the one dated 1st May, 2007. He had invoices for maintenance and plumbing works dated 20th May, 2013 for Kshs. 1,550,000/= and Kshs. 26,330,000/=:, respectively. PW1 indicated that before the hotel was opened, he had given the defendant all the documents for the outstanding payment.

8. On re-examination, PW 1 indicated that plumbing included laying the pipes, constructing the drainage manholes and septic tanks. It also included construction of the drainage for suction and laying the pipes in the swimming pools. He referred to photograph 4 that showed the swimming pools under construction. He indicated that he also fixed the pump, filters and laid the pipes in the filter room. He also checked the pressure of the inflow and outflow. He stated that there are 2 main swimming pools and that 7 small swimming pools are adjacent to the main swimming pool.

9. In respect to the quotation he stated that it has the date of 1st May, 2008 on page 1 but he made a mistake when dating it. PW1 stated that the document at page 18 of his bundle of documents was addressed to the defendant and it shows the outstanding amount for additional works as Kshs. 27,880,600.00. He indicated that the documents numbered 5 to 10 and 12 to 15 bear his signature and a stamp impression of Delight Plumbers.

10. PW2, James Njenga Meria an Architectural Assistant who was employed by T. Gaal Architects at the time of construction of Swahili Beach Hotel produced plf. exh. 5(a) which is a certificate of completion of work dated 23rd May, 2013 which he issued to PW1. It showed that PW1 had completed all the works at Swahili Beach hotel. He explained that Mr. T. Gaal suffered a stroke and could not walk. He went back to Austria.

11. On cross-examination, PW2 indicated that he replicated a certificate of completion that Mr. Gaal had issued to PW1. He stated that he was authorized as an Assistant at T. Gaal Architects to issue such certificates.

12. PW3, Peter Ngari Kariuki testified that he worked for PW1 from the year 2006 to 2013 at Swahili Beach Hotel as PW1's foreman. They laid pipes for the swimming pools, did internal plumbing and drainage. He stated that the plaintiff did 2 years of service but he told PW3 that he was not being paid. They left Swahili Beach Hotel in the year 2013.

13. On cross-examination, PW3 stated that they laid pipes in the swimming pool and installed pumps for the said pools. He indicated that plumbing of the swimming pools took about 3 months. They had 20 to 25 workers working for PW1 day and night.

14. PW4, David Kamau Njuguna supported the evidence of PW1 and PW3 to the effect that PW1 was engaged by the defendant to do plumbing works at Swahili Beach Hotel from the year 2006 to 2013 which included laying of pipes in the swimming pools. He stated that PW1 told them that he was not being paid by the defendant. They removed their tools and left.

15. On re-examination, he stated that they did maintenance for 2 years after the hotel was opened in the year 2011.

16. The defendant's witness, DW1 was Singh Kelsi alias Kelley. He informed the court that he is the owner of Swahili Beach hotel where he is a major shareholder. He is also a Director. It was his evidence that he entered into an agreement with PW1 for building of septic tanks in the compound, piping inside the rooms, drainage work and laying of waste pipes in the rooms, staff area and the public area at a cost of Kshs. 10,871,000/=. In reference to clause 11 of the agreement, he stated that quotations were to be availed for work that was to be done outside the rooms, subject to mechanical drawings. He denied having received a quotation for work done outside the rooms and for additional hours worked as provided in the agreement.

17. DW1 stated that a company known as Site Systems constructed the swimming pools. He indicated that his son Amer Kalsi issued PW1 with a reference letter. He admitted that the PW1 installed the main pumps and the pressurized water system. He indicated that the pumps for the swimming pools were installed by a specialist and the installation of solar heater systems was done by someone else. DW1 stated that the PW1 was at the time paid Kshs. 50,000/= weekly which was varied to Kshs. 250,000/= monthly. He indicated that PW1 asked for variation of the payment from Kshs. 250,000/= to 400,000/= monthly but did not indicate if there was any outstanding amount.

18. DW1 further stated that he retained some of PW1's staff for maintenance when the hotel became operational. One and a half years later, he received documents from the plaintiff in which he claimed Kshs. 26,000,000/=. He also informed the Court that the documents relied on by PW1 were a fabrication save for the agreement. He denied owing the plaintiff any money. He stated that he was shocked to receive an invoice for the sum of Kshs. 26,330,000/= from PW1.

19. On cross-examination, DW1 stated that he owns Swahili Beach Hotel together with Manmonhan Kalsi and 2 of his children. He indicated that in clause 10 of the agreement dated 5th May, 2007, the cost of Kshs. 10,871,000/= was for internal works only. He conceded that manholes and septic tanks are external works and that piping from rooms would extend externally for discharge of waste. Piping therefore included external areas as well. External work would be quoted as they got to mechanical drawings. It was agreed that additional work would be ***paid as per hour quotation***, thus no other agreement was to be signed. DW1 denied receiving quotations from the plaintiff. He stated that they always paid PW1 by cheque but had no documentation to show how the payments were made.

20. On the certificate of completion issued by his son Amer Kalsi to PW1, DW1 stated that his son was deceived to issue the same. DW1 admitted that PW1 did maintenance work for him at Swahili Beach Hotel. He denied having seen the documents produced in court by PW1 to support his case apart from the agreement of 5th May, 2007. He stated that he never sat down with PW1 to reconcile the accounts after receiving the invoice for Kshs. 26,330,000/= as he had not informed him of any underpayments and outstanding payments for a period of 1 year and 4 months. He had also not received the statements from PW1, which he was shown in court.

21. DW1 stated that PW1 did plumbing works in the swimming pool and fixed piping for the solar heating systems. He informed the court that the 3 certificates of completion contain half-truths and half-lies.

22. DW2 was Samuel Kihonge Thuo. He worked as a general foreman at Swahili Beach Hotel when it was under construction. He confirmed that the plaintiff laid pipes for plumbing and internal works in bathrooms and toilets. He added that PW1 laid pipes in the swimming pools, connected pumps and jets for the said pools.

23. DW2 informed the court that PW1 would at times tell him he had been paid and at other times that his payment was delayed. He worked at the hotel from the year 2007 to December, 2011.

24. On cross-examination, DW2 reiterated that PW1 did plumbing in the swimming pools, connected the pumps, pipes and jets. He further stated that PW1 connected pipes to the water solar system.

ANALYSIS AND DETERMINATION

On 21st November, 2013, the plaintiff filed the following list of issues;-

- (i) Whether the plaintiff was engaged by the defendant;
- (ii) Whether the defendant paid Kshs. 13,625,000/=
- (iii) Whether the defendant's outstanding balance is Kshs. 27,880,600;
- (iv) Whether the plaintiff's work done totaled to Kshs. 42,504,600/= ; and
- (v) Whether the defendant is in breach.

The defendant filed its list of issues on 11th June, 2014 as follows:-

- (i) Whether the plaintiff entered into a contract dated 5th May, 2007;
- (ii) What were the terms of the contract;
- (iii) Whether the plaintiff signed the contract;
- (iv) Whether the parties signed any other contract;
- (v) Whether the defendant breached any term of the agreement, dated 5th May, 2007; and
- (vi) What order as to costs.

Issues No. (i) by the plaintiff and issue Nos. (i), (ii), (iii) and (iv) by the defendant will be addressed together for they are inter-related.

25. It is evident that the plaintiff and the defendant entered into a contract on 5th May, 2007 which PW1 produced as plf. exh. 2. It was duly executed by the plaintiff and DW1, a Director of the defendant company. The contract explicitly stated that the defendant would provide all pipes and fittings in good time, he would provide sanitary fittings, manhole covers, sand and cement for building all tanks. On his part, the plaintiff would do piping work in all rooms and test the said piping. He would do the drain work and waste pipes in the rooms, staff area and public area at a cost of Kshs. 10,871,000/=. This payment was to be for internal work only. The agreement provided for a down payment of Kshs. 2,000,000/- when work commenced and for a weekly payment of Kshs. 50,000/=. The said amount would be varied upwards as the work continued. The agreement further provided that work outside the rooms would be

quoted as they got to mechanical drawings. The agreement expressly provided that "**additional work would be paid as per hour quotation.**". The plaintiff and DW1 did not dispute having signed the agreement dated 5th May, 2017 and it therefore holds true. The evidence adduced in court shows that no other contract was signed by the plaintiff and the defendant save for the initial agreement.

Whether the defendant was paid Kshs. 13,625,000/= and if the balance outstanding is Kshs. 27, 880,600/=.

26. The above relates to the plaintiff's issue Nos. (ii) and (iii). The plaintiff admitted in his evidence in chief that he was paid the sum of Kshs. 10,871,000/= which payment was made in the years 2007 to 2011. The plaintiff produced statements of accounts to show the amount the defendant paid him annually and the amount that remains unpaid to date. He also produced his bank statement to show the amount he was paid by the defendant.

27. DW1 admitted in his evidence that apart from indoor plumbing, the plaintiff did carry out external plumbing at the premises. External works included laying of pipes, drainage, laying of pipes in the swimming pool, fixing of pumps for the swimming pools, putting in place a pressurized system for the swimming pools and filter system for the said pools. The extent of the work done by the plaintiff was supported by the evidence of PW3 and PW4 as well as the defendant's witness, DW2 who stated that the plaintiff also installed the piping for the solar water system. The foregoing evidence was proof enough that the work that the plaintiff did was not restricted to the initial agreement but additional work was done.

28. PW2 produced a certificate of completion of the work done by the plaintiff. Mr. Wafula, Learned Counsel for the defendant relied on **Securicor Courier (K) Ltd. vs Benson David Onyango & Another** [2008] eKLR and **Curts vs Chemical Clearing and Dyeing Co. Ltd.** [1951] 1 ALL ER to show that the parties herein were bound by the agreement they signed. The evidence adduced by the plaintiff and DW1 was clear that they understood the terms of the agreement they signed on 5th May, 2007. There is no ambiguity in the said agreement in that additional work was to be done as "**per hour quotation**".

29. In the plaint, the plaintiff avers that he was paid Kshs.13,625,000/= by the defendant. In his evidence in chief he stated that he was paid Kshs. 10,871,000. He claims the sum of Kshs. 27,880,600/= for additional work done and maintenance work at the defendant's premises. It was a term of the contract dated 5th May, 2007 that "**additional work would be paid as per hour quotation.**". The invoice for outstanding work done in the years 2007 to 2013 is for the sum of Kshs. 27,880,600/=. Out of the documents produced by the plaintiff, there is none that bears "**per hour quotations**" as per the agreement signed between the plaintiff and DW1. On calculation of the amount of money the plaintiff was paid by the defendant as per the bank statements he produced, the total comes to Kshs.15,805,180/=. Mr. Kahuthu relied on the case of **Karmali vs Shah**, [2003] 2EA p.392-395, to show that the documents produced by the plaintiff in this case were not challenged as the defendant did not avail any alternative documents giving any version other than what was produced by the plaintiff.

30. The burden of proof in civil cases is on a balance of probabilities. In the case of **D.T. Dobie & Co. Ltd. Vs Wanyonyi Wafula Chebukati** [2014] eKLR, the court stated:-

"The degree is well settled. It must carry a reasonable degree of probability but not so high as required in a criminal case. If the evidence is such that the tribunal can say; we think that it is more probable than not, the burden is discharged, but if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case where a tribunal cannot decide one way or the other which evidence to accept, where both parties explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

31. This court notes that the defendant did not produce any documents on the payments he made to the plaintiff. Although the plaintiff produced documents, it is clear that the plaintiff's record keeping did not

pass muster and it is therefore difficult to ascertain the value of the work done and if there is any outstanding payment. The plaintiff has thrown figures at this court and expects it to accept the same in the absence of adequate supporting documents. This Court holds that even in the absence of documents from the defendant to controvert the plaintiff's claim, the documents relied on by the plaintiff must come across as credible enough to instill faith in the court to pass judgment in his favor. The plaintiff's documents fall way below the required threshold. In light of the foregoing, I hold that the plaintiff has fallen short of proving his case on a balance of probabilities in accordance with the provisions of Sections 107, 109 and 112 of the Evidence Act.

Whether the plaintiff's work done was for the sum of Kshs. 42,504,600/=.

32. It is difficult for this court to establish the actual cost of the work done in light of the plaintiff's failure to produce sufficient documentary evidence to support his claim. In his evidence, the plaintiff stated that the cost of the internal works was Kshs. 10,020,260/- as per the agreement of 5th May, 2007. He said that the total cost of work done was Kshs. 39,398,585/-. The amount he was paid as per his plaint was Kshs. 13,625,000/-. This would leave the balance of the outstanding payment at Kshs. 25,773,585/-. If the payment outstanding as per the work done is Kshs. 27,880,600/- and the plaintiff was paid Kshs. Kshs. 13,625,000/-, it would mean that the total cost of the work done was Kshs.41,505,600/- and not Kshs. 39,398,585/-. The foregoing shows that the plaintiff was uncertain of the amount that he was owed by the defendant and the total cost of the work done.

Whether the defendant is in breach of the agreement dated 5th May, 2007.

33. It was up to the plaintiff to produce documents that would satisfy this court to the required standard of proof that a specific amount of money is owed by the defendant, arising from work done. In the absence of accountable documents to show the quotations for work done in addition to that provided in the agreement of 5th May, 2007, it is my finding that no sufficient facts have been laid before this court that can lead to the conclusion of the defendant being in breach of the contract dated 5th May, 2007.

Costs

34. Having found that the plaintiff has not proved his case on a balance of probabilities, I hereby dismiss his case in its entirety. The evidence adduced herein revealed that the defendant and the plaintiff had a good working relationship until the plaintiff pulled out of the defendant's premises due to alleged non-payment of his dues. At the hearing of the case it turned out that neither the plaintiff nor the defendant kept a good record of the work done. In the circumstances, I am constrained not to condemn the plaintiff to pay costs. Each party shall bear its own costs. It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 17th November, 2017.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Kahuthu for the plaintiff

Mr. Musili holding brief for Mr. Wafula for the defendant

Mr. Oliver Musundi - Court Assistant