REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ELC NO. 94 OF 2012

THE CHAIRMAN SCHOOL COMMITTEE

KIOMAKONDO D.O.K PRIMARY SCHOOL……..…..……PLAINTIFF

VERSUS

H. YOUNG & COMPANY (EA) LIMITED...…….……..…….. DEFENDANT

JUDGMENT

On or about 26th October, 2009 the Plaintiff entered into an agreement with the defendant through which the Plaintiff leased to the defendant a portion measuring 3.57 acres of all that parcel of land known as Central Kitutu/Mwabundusi/563 (hereinafter referred to as the suit property") for a period of 12 months for the purposes of excavating natural gravel (murram) on the terms and conditions that were set out in the said agreement. The said agreement provided in its material clauses as follows:-

> **"2. That the area measuring 3.57 acres (approx. 14,469 sq. metres as per attached sketch, be excavated for murram (natural gravel) with a view to level ground as per clause No.8."**
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> **3. That the company shall pay the owners a total of Kshs.400,000.00 (in words Four Hundred Thousand Shillings only) and supply 2 (two) lorry loads of 0.6mm quarry dust to the school for the entire period of the lease shall be in force without any further claim whatsoever.**
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> **8. That the company shall level the entire excavated area after extraction of murram and cover with top soil or overburden material removed before the start of excavations upon the expiry of the lease(i.e 150-200mm of top soil or overburden to make a gentle slope) as per material available."**

The Plaintiff brought this suit against the defendant claiming that the defendant had breached the terms of clause 8 of the said agreement that the plaintiff had entered into with the defendant set out above by failing to level and cover the excavated area with top soil as had been agreed. The Plaintiff averred that as a result of the defendant's breach of the said agreement the plaintiff had suffered damage. The Plaintiff sought judgment against the defendant for specific performance of the said agreement dated 26th October 2009, general damages and costs of the suit.

The defendant entered appearance and filed a statement of defence on 15th May 2012. In its statement of defence, the defendant admitted that it entered into a lease agreement with plaintiff in respect of a portion of the suit property and that it was under a duty in terms of the said agreement to level the entire excavated area after the excavation of murram and to cover the same with top soil or overburden material

that had been removed prior to the start of the excavation. The defendant denied however that it had breached the terms of the said agreement. The defendant averred that after completing the excavation works on the suit property, it leveled the entire excavated area with available top soil thereby turning the hitherto steep slope to a level ground. The defendant denied that the plaintiff had suffered loss and damage as a result of the alleged breach of contract. The defendant averred that it had met its obligations under its lease agreement with the plaintiff and as such the plaintiff's claim has no merit.

When the suit came up for hearing, the plaintiff called two witnesses while the defendant called one witness. The plaintiff's first witness was **ISAACK MOMANYI NYASANI (PW 1)**. PW I was the chairman of the plaintiff as at the time of giving evidence. He reiterated the contents of the plaint. He told the court that the Plaintiff and the defendant entered into an agreement whereby the defendant was to extract murram from the suit property at a consideration of Kshs.400,000/=. He stated that it was a term of the said agreement that after the defendant had extracted murram,it was to fill the excavated area with top soil. He stated that before the defendant started extracting murram from the suit property, the suit property was grassy and had a slope. He stated that the suit property was being used by the pupils as a play-ground. He stated that after excavating murram, the defendant left the suit property in a worse state than it was at the commencement of the murram extraction exercise. He stated that the defendant failed to level the excavated area which became waterlogged when it rains. The defendant also left the area stony and in a state which could no longer be used by the pupils of plaintiff. PW 1 stated that the plaintiff lodged complaint with National Environment Management Authority (NEMA) against the defendant and NEMA directed the defendant to take remedial measures to make the area from which it had extracted murram environmental friendly. PW 1 stated that the defendant failed to comply with the said directions. PW 1 stated that the portion of the suit property from which the defendant had extracted murram could no longer be used by the Plaintiff's pupils. He stated that the Plaintiff had consulted a quantity surveyor to advise it of the cost for restoring the affected portion of the suit property to a useful state.

The plaintiff's second witness was **VINCENT MACHOKI (PW 2)**. PW 2 told the court that he is a Civil Engineer and a director of a company known as Harmonet Investment Limited. He stated that in the year 2013, his company Harmonet Investments Limited was instructed by the plaintiff to prepare a bill of quantities in respect of the portion of the suit property that had been affected by murram extraction. The bill of quantities was for leveling the area and earthworks. He stated that he visited the suit property with his members of staff to carry out the exercise. On site, he found the ground rocky and the slope uneven. He stated that the affected area required backfilling with soft material and compaction to make the ground stronger. He stated that it was also necessary to build gabions to protect the soil from erosion. He stated that the bill of quantities was for the works that would give the affected portion of the suit property a gentle slope and a softer ground. He stated that from their assessment, the restoration works would cost Kshs.23,690,140. He produced a copy of the bill of quantities that was prepared by his said company as exhibit.

The defendant witness was **YONA WERE (DW 1)**. He told the court that he is a quantity surveyor and that he was working with the defendant as contracts manager. DW 1 admitted that the defendant had entered into a contract with the Plaintiff under which the defendant was to extract murram from the suit property to use for a road construction. He stated that the defendant was supposed to do back-filling of the portion of the suit property from which it had extractedmurram after the expiry of the contract with top soil and overburden that it had removed before extracting the murram. He stated that the defendant complied fully with the terms of the agreement that it had entered into with the plaintiff. He stated that the defendant was supposed to do backfilling with the material (top soil and overburden) that it had removed from the suit property while extracting murram and not otherwise. He stated that when the defendant was given the site, the same was rocky and had a slope and that after the defendant had extracted the murram, the defendant leveled the same and it was in a state in which the pupils could use it as playground. DW 1 told the court that the defendant had no duty or obligation to make for the plaintiff a playing ground for its pupils. DW 1 took issue with the bill of quantities (P exhibit 6) that was produced by the plaintiff as exhibit. He stated that the prices therein were inflated and that most of the items were unnecessary. He stated further that the bill of quantities was not just for leveling the suit property but for completely new works for the plaintiff. DW 1 produced a number of photographs showing the state in which the defendant was said to have left the suit property.

After the close of the defendant's case the court directed the parties to make closing submissions in writing. Both parties filed their written submissions and the same are on record. I have considered the plaintiff's claim against the defendant as pleaded and the evidence that was adduced in proof thereof. I have also considered the defendant's statement of defence and the evidence that was adduced by the defendant in support thereof. In conclusion, I have considered the parties' respective submissions and the authorities that were cited in support thereof. From the pleadings, the evidence on record and the submissions, the following in my view are the issues that arise for determination in this suit;

i. Whether the defendant breached the terms of the agreement for sale of Murram dated 26th October 2009 between the defendant and the plaintiff?
ii. Whether the Plaintiff is entitled to the reliefs sought in the plaint?

There is no dispute that the plaintiff is the beneficial owner of the suit property which is registered in the name of Gusii County Council. The suit property measures 3.0 ha. There is also no dispute that by an agreement in writing dated 26th October 2009, the Plaintiff granted to the defendant a license to enter onto and extract natural gravel (Murram) on a portion of the suit property measuring 3.57 acres on terms and conditions that were set out in the said agreement. The said terms are also not disputed. The dispute between the parties revolves around the interpretation of clause 8 of the said agreement which provided as follows:-

"**That the company shall level the entire excavated area after extraction of Murram and cover with top soil or overburden material removed before the start of the excavation upon the expiry of the lease (i.e 150-200 mm of top soil or overburden to make a gentle slope) as per material available".**

The Plaintiff's contention is that the defendant breached this clause of the agreement by failing to level the ground and to backfill the same with top soil and overburden. The onus was upon the plaintiff to prove the alleged breach of the agreement aforesaid by the defendant. From the material before me, I am not satisfied that the plaintiff has discharged this burden. There is no evidence of whatsoever nature of the state of the portion of the suit property in dispute prior to the handing over of the same to the defendant. Although the parties are in agreement that the subject portion of the suit property had a slope, the degree or the gradient of the slope has not been given. In the circumstances, the court is unable to determine whether the defendant did level the disputed portion of the suit property in terms of the parties' agreement. In addition to levelling the portion of the suit property, the defendant was supposed to cover the same with top soil and overburden material to a measurement of 150 mm – 200mm so as to achieve a gentle slope. The plaintiff's position is that the defendant did not backfill the excavated area with top soil and overburden. The defendant on the other hand has maintained that it did so. The defendant has contended that its duty under the agreement aforesaid was only to backfill the area from which it had excavated murram with top soil and overburden which it had removed before it started the extraction of murram. The plaintiff on the other hand seems to be of the view that the defendant had a duty to cover the area with top soil until the ground became soft and slope became gentle. From the photographs attached to the plaintiff's bill of quantities (P Exhibit 6) and the photographs by the defendant which were produced in evidence as P exhibit 1(a) to (d), I am satisfied that the defendant back filled the disputed portion of the suit property with top soil and overburden that it had removed from the area before it commenced extraction of murram. There is no evidence of any top soil or overburden lying about or abandoned on the area in dispute. There is also no evidence that the top soil from the area and the over burden that had been removed before the extraction of murram commenced was taken elsewhere by the defendant. The only conclusion the court can make is that the same was used by the defendant to backfill the excavated area. I am in agreement with the defendant that its duty under the agreement was limited to leveling and covering the excavated area with top soil and overburden material <u>removed</u> (emphasis mine) before the start of the excavation.

The agreement between the parties was clear on this. The defendant had no duty or obligation to go out and look for more top soil and overburden to make the area smooth for use by the plaintiff's pupils as a playing field. If the intention of the parties was for the defendant to make for the plaintiff a playing field for pupils, the agreement between the parties should have stated so expressly. It is not the duty of the court to make a contract for the parties. The parties are bound by their bargain. From what I have stated

above, it is my finding that the plaintiff has failed to prove that the defendant breached clause 8 of the agreement dated 26thOctober 2009.

Having reached the conclusion that the defendant did not breach the agreement that it entered into with the plaintiff, there is no basis upon which the prayers sought by the plaintiff herein can be granted. The upshot of the foregoing is that the plaintiff has failed to prove its claim against the defendant on a balance of probabilities. Consequently, this suit is dismissed. Each party shall bear its own costs.

Signed at Nairobi this……..day of ……..2016

S. OKONG'O

JUDGE

Delivered, Dated and **Signed** at **Kisii** this **15th** day of **April** 2016

J. M. MUTUNGI

JUDGE

In the presence of

……..for the Plaintiff

…….…….for the Defendant