REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 2 OF 2014

Stephen Kinini Wang'ondu.....……..Appellant

Versus

The Ark Limited.....……..…….....Respondent

(An appeal from the Judgment of Hon. C. Wekesa, Ag. S.R.M. delivered on 9.12.2013 in Nyeri C.M.C.C. No. 263 of 2012)

JUDGMENT

The appellant herein sued the Respondent in the lower court seeking recovery of Ksh. 1,407,080/= being the alleged value for works done. It is common ground that the appellant was contracted by the Respondent to undertake some works as stated in paragraph 3 of the plaint. However, the appellant avers that the Respondent terminated the contract and required the appellant to vacate the site prompting the appellant to bill the Respondent for the works already done but the Respondent failed to pay necessitating court action.

In its defence, the Respondent denied the appellants claim and insisted that the appellant voluntarily terminated the contract for reasons stated in the defence and averred its willingness to pay a lawful sum on a pro rata basis but subject to an independent valuation by a professional in the field in question.

On 27thMarch 2013, the trial court allowed an application by the Respondent and granted orders that a quantity surveyor be appointed to compute and assess the proportion of work done by the appellant subject to the Respondent meeting the costs.

It is admitted that the appellant did some work before the contract was terminated. It is also admitted that the appellant is entitled to compensation for the work done and this brings into sharp focus the applicability and meaning of the doctrine of *Quantum meruit.*

Quantum meruit is a Latin phrase meaning *"what one has earned."* In the context of contract law, it means something along the lines of *"reasonable value of services"*. The elements of *quantum meruit* are determined by the common law. For example, a plaintiff must allege that ***(1)*** *defendant was enriched;* ***(2)*** *the enrichment was at plaintiff's expense; and* ***(3)*** *the circumstances were such that equity and good conscience require defendants to make restitution.**[1]***

Quantum meruit is the measure of damages where an express contract is mutually modified by the implied agreement of the parties, **or** not completed. The concept of *quantum meruit* applies in (but is not limited to) the following situations:-

a. When a person hires another to do work for him, and the contract is either not completed or is

otherwise rendered un-performable, the person performing may sue for the value of the improvements made or the services rendered to the defendant. The law implies a promise from the employer to the workman that he will pay him for his services, as much as he may deserve or merit.

b. The measure of value set forth in a contract may be submitted to the court as evidence of the value of the improvements or services, but the court is NOT required to use the contract's terms when calculating a *quantum meruit* award. (This is because the values set forth in the contract are rebuttable, meaning the one who ultimately may have to pay the award can contest the value of services set in the contract.)

c. When there is an express contract for a stipulated amount and mode of compensation for services, the plaintiff cannot abandon the contract and resort to an action for a *quantum meruit* on an implied assumpsit. However, if there is a total failure of consideration, the plaintiff has a right to elect to repudiate the contract and may then seek compensation on a *quantum meruit* basis.

The rationale for the above principle is that many circumstances spring up in which the law as well as justice demands a person to conform to an obligation, in spite of the fact that he might not have committed any tort nor breached any contract. Such obligations are described as quasi-contractual obligations. Simply put, *Quantum meruit* is the reasonable price for the services performed. *In the context of contract law, it means 'reasonable value of services.'**[2]* *Quantum meruit* is the measure of damages where an express contract is mutually modified by the implied agreements of the parties, or not completed.

The term *"quantum meruit"* actually describes the measure of damages for recovery on a contract that is said to be "implied in fact."[3] The law imputes the existence of a contract based upon one party's having performed services under circumstances in which the parties must have understood and intended compensation to be paid.[3] To recover under *quantum meruit* one must show that the recipient*:- **(1)** acquiesced in the provision of services; **(2)** was aware that the provider expected to be compensated; and **(3)** was unjustly enriched thereby.**[4]*

Applying the above principles to the present case, I find that that the appellant did some work at his expense, that the work was to the benefit of the Respondent but was done at the appellants expense and that circumstances were such that equity and good conscience require the Respondent to make restitution to the appellant. Thus, the only question that follows is the value of the work done.

The appellant asks this court to fault the learned magistrate for holding that the appellant did not prove his claim and for finding that the appellant was only entitled to Ksh. 500,000/=. In arriving at the said decision, the court was persuaded by the evidence of DW1, a professional witness called by the Respondent who assessed the value of the work done by the appellant.

The said witness who was a quantity surveyor appointed pursuant to the court order referred to above opined that Ksh. 455,000/= was adequate for the work done. The Respondent stated that they were willing to pay Ksh. 500,000/=, hence the court awarded the said sum.

The appellants evidence in support of the amount claimed was premised on the strength of a document dated 15th November 2011 prepared by the project manager. The professional qualifications of this witness were not stated nor was he called as a witness.

In his submissions, counsel for the appellant argued that the defence witness who did the valuation did not interview the clerk of works or the contractor to appreciate the scope of the work done nor did he make reference to the second contractor who completed the work. In counsels view, the said report was tailor made for the purposes of beating off the contractor's claim, and that it was not based on fact but on hypothetical logical extension arising from documents made available. Thus, counsel argued that the report relied upon by his client was close to the truth.

To rebut the above argument, the Respondents counsel cited the case of *Dick Omondi Ndiewo T/A Ditch*

Engineering Service vs Cell Care Electronics[5] where Justice Lucy Njuguna citing *Ali Mohamed Sunkar vs Diamond Trust Bank (K) Ltd*[6] held that expert evidence can only be challenged by evidence of another expert.

The diametrically opposed positions taken by both counsels regarding the expert evidence brings into sharp focus a passage from a judgment by **Sir George Jessell MR** in the case *Abringer v Ashton*[7] where he used the phrase *"paid agents* " while describing expert witnesses. Almost 100 years later **Lord Woolf** joined the list of critics of expert witnesses. In his Access to Civil Justice Report, he said this:-

> *"Expert witnesses used to be genuinely independent experts. Men of outstanding eminence in their field. Today they are in practice hired guns. There is a new breed of litigation hangers-on, whose main expertise is to craft reports which will conceal anything that might be to the disadvantage of their clients."**[8]***

The fundamental characteristic of expert evidence is that it is opinion evidence. Generally speaking, lay witnesses may give only one form of evidence, namely evidence of fact. To be practically of assistance to a court, however, expert evidence must also provide as much detail as is necessary to allow the court to determine whether the expert's opinions are well founded.

While the test for admissibility of expert evidence differs from jurisdiction to jurisdiction, judges in all jurisdictions face the common responsibility of weighing expert evidence and determining its probative value.[9] This is no easy task. Expert opinions are admissible to furnish courts with information which is likely to be outside their experience and knowledge. The evidence of experts has proliferated in modern litigation and is often determinative of one or more central issues in a case.[10]

Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less. To my mind, the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence. Expert evidence is most obviously needed when the evaluation of the issues requires technical or scientific knowledge only an expert in the field is likely to possess. However, there is nothing to prevent reports for court use being commissioned on any factual matter, technical or otherwise, providing; it is deemed likely to be outside the knowledge and experience of those trying the case, and the court agrees to the evidence being called.

While there are numerous authorities asserting that expert evidence can only be challenged by another expert, little has been said regarding the criteria a court should use to weigh the probative value of expert evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account.[11] Four consequences flow from this.

Firstly, expert evidence does not "trump all other evidence".[7] It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision.[9]

Secondly, a judge must not consider expert evidence in a vacuum. It should not therefore be "artificially separated" from the rest of the evidence. To do so is a structural failing.[12] A court's findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the court in forming its views on the expert testimony and *vice versa*. For example, expert evidence can provide a framework for the consideration of other evidence.

Thirdly, where there is conflicting expert opinion, a judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is to be preferred.

Fourthly, a judge should consider all the evidence in the case, including that of the experts, before

making any findings of fact, even provisional ones.[12]

A further criteria for assessing an expert's evidence focuses on the quality of the expert's reasoning. A court should examine each expert's testimony in terms of its rationality and internal consistency in relation to all the evidence presented. In *Routestone Ltd. v. Minories Finance Ltd. and Another**[13]*** Jacob J. observed that what really mattered in most cases was the reasons given for an expert's opinion, noting that a well-constructed expert report containing opinion evidence sets out both the opinion and the reasons for it. The judge pithily commented "[i]f the reasons stand up the opinion does, if not, not." A court should not therefore allow an expert merely to present their conclusion without also presenting the analytical process by which they reached that conclusion. Where there is a conflict between experts on a fundamental point, it is the court's task to justify its preference for one over the other by an analysis of the underlying material and of their reasoning.

It is my view its correct to state that a court may find that an expert's opinion is based on illogical or even irrational reasoning and reject it.[14] A judge may give little weight to an expert's testimony where he finds the expert's reasoning speculative[15] or manifestly illogical.[16] Where a court finds that the evidence of an expert witness is so internally contradictory as to be unreliable, the court may reject that evidence and make its decision on the remainder of the evidence. The expert's process of reasoning must therefore be clearly identified so as to enable a court to choose which of competing hypotheses is the more probable.

It is a trite principle of evidence that the opinion of an expert, whatever the field of expertise, is worthless unless founded upon a sub-stratum of facts which are proved, exclusive of the evidence of the expert, to the satisfaction of the court according to the appropriate standard of proof. The importance of proving the facts underlying an opinion is that the absence of such evidence deprives the court "of an important opportunity of testing the validity of process by which the opinion was formed, and substantially reduces the value and cogency of the opinion evidence". An expert report is therefore only as good as the assumptions on which it is based.

An expert gives an opinion based on facts. Because of that, the expert must either prove by admissible means the facts on which the opinion is based, or state explicitly the assumptions as to fact on which the opinion is based.[17]

Turning to the evidence in this case, particularly the document relied upon by the appellant to support his claim and the evidence of DW1, a quantity surveyor and the report dated June 2013 and applying the principles discussed above touching on the value to be attached to expert evidence, I arrive at the following conclusions, that is; the document dated 15th November 2011 relied upon by the appellant is not and cannot be taken an having been prepared by an expert, and further, if it was prepared by an expert, no evidence to that effect was tendered and also the author of the document was not called to enlighten the court on how the amount stated therein was arrived at. In this respect, it is safe to conclude that given the nature of the works and the dispute before the court, it was necessary for the appellant to do much more to prove his case. Professional evidence was not an option at all in this case, It was must.

All cases are decided on the legal burden of proof being discharged (or not). **Lord Brandon** in *Rhesa Shipping Co SA vs Edmunds*[18] remarked:-

> *"No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take."*

Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by **Rajah JA** in *Britestone Pte Ltd vs Smith & Associates Far East Ltd*[19] **:-**

> *"The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him"*

Thus, it was necessary for the appellant to adduce expert evidence to assess and establish the value of the work done. Also, the law is clear in that special damages must be strictly proved. I find that the amount claimed in the plaint was not proved to the required standard.

I have carefully examined the report dated June 2013 produced by DW1 and his evidence tendered in court both in evidence in chief and during cross-examination. I have also weighed the probative value of the expert evidence. I have also considered the said evidence together with the evidence tendered by the appellant, and I respectfully conclude that there is nothing to demonstrate that the expert's opinion is based on illogical or even irrational reasoning and I have no basis to reject it. I also find nothing to lead me to conclude that the expert's testimony and reasoning is speculative or manifestly illogical. Though the report has its weaknesses, I find that its contents and the evidence of an expert tendered in court is not so internally contradictory as to be unreliable, hence there is no basis for the court to reject the said evidence and make its decision on the remainder of the evidence. Considering the competing evidence submitted in court, and bearing in mind the standard of prove in civil cases, I find that the expert's process of reasoning is sufficiently clear and capable of enabling the court to choose which of competing hypotheses is the more probable and in this case I find no difficulty in concluding that the evidence tendered by the Respondent was probable in the circumstances. I therefore find no reason to fault the learned magistrates finding based on the evidence of DW1.

On the issue of VAT I find myself in agreement with the submissions tendered by the Respondents' counsel that the said issue cannot be reopened at the appellate stage.

The upshot is that I up hold the decision of the trial Magistrate. Accordingly, this appeal fails and the same is hereby dismissed with costs to the Respondent.

Orders accordingly

Signed, Delivered and Dated at **Nyeri** this **29th** day of **August** 2016

John M. Mativo

Judge

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[1] Quantum meruit | Wex Legal Dictionary / Encyclopedia | LII / Legal Information Institute

[2] Brian A. Blum, Contracts: Examples and Explanations, Aspen Publishers, 240 (2007).

[3] Tipper v. Great Lakes Chem. Co., 281 So. 2d 10 (Fla. 1973).

[4] *Hermanowski v. Naranja Lakes Condominium No. Five, Inc.*, 421 So. 2d 558 (Fla. 3d DCA 1982)

[5] {2005}eKLR

[6] Misc App No. 427 of 2010

[7] {1873} 17 LR Eq 358 at 374

[8] Lord Woolf MR, Access to Justice, Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales, HMSO, London, 1995, p. 183.

[9] Evan Bell, Judicial Assessment of Expert Evidence, Judicial Studies Institute Journal, 2010 Page 55

[10] State v. Pearson and Others (1961) 260 Minn. 477.

[11] Huntley (also known as Hopkins) (a protected party by his litigation friend, McClure) v. Simmons [2010] E.W.C.A. Civ 54.

[12] Jakto Transport Ltd. v. Derek Hall [2005] E.W.C.A Civ. 1327.

[13] Routestone Ltd. v. Minories Finance Ltd. and Another; Same v. Bird and others [1997] B.C.C. 180.

[14] Drake v. Thos Agnew & Sons Ltd. [2002] E.W.H.C. 294.

[15] Gorelik vs. Holder 339 Fed. App 70 (2nd Cir 2009)

[16] Golville vs Verries Pechet et du Cauval Sciete Anonyme (Court of Appeal (Civil Division), unreported, 27 October 1989).

[17] Makita (Australia) Pty. Ltd. v. Sprowles, {2001} N.S.W.C.A. 305

[18] {1955} 1 WLR 948 at 955

[19] {2007} 4 SLR (R} 855 at 59