



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL CASE NO. 62'B' OF 1998

[Being an appeal in the CM's court at Bungoma No. 348 of 1996 by I. Indeche [SPM] on 7th September 1998]

**WILBERFORCE GABRIEL WEKESA t/a WENYOLA GENERAL
CONTRACTORS...APPELLANT**

VERSUS

KANTILAL N. MALDE.....RESPONDENT

JUDGEMENT

1. By an amended plaint dated the 23rd October, 1996 the plaintiff **WILBERFORCE GABRIEL WEKESA** sued **KANTILAL N. MALDE** claiming a sum of kshs. 245,344.30/= being the balance of sums due and owing the work done and a further sum of kshs. 35,010/= for cost of tolls. It was his claim that he commenced the construction work on the 19th of October, 1995 at the defendants premises and worked up to the 22nd of December, 1995 where he raised a bill of Kshs. 367,334.30/= out of which the defendant only paid Kshs. 122,000/-.

2. The defendant on his part filed a statement of defence and a counter claim on the 17th June, 1996. In the defence the defendant stated that he had an agreement with one W.G. Wekesa of Best building Contractors. He contended further that he paid the said contractor the sum of kshs. 139,300/= and that the contractor abandoned the site and took away all his property. In the counter claim the defendants claim to have over paid the plaintiff by kshs. 53,964/= and claimed for a refund of the same.

3. In his evidence in court the appellant stated that he carries on business in the name and style of Wenyola General Contractors and a certificate to that effect was produced as exhibit 3. He further stated that he also is registered since 1996 as a building contractor with the Ministry of Works. He testified further that on 8th May, 1995 as he was constructing at St. Joseph Primary school the respondent approached him to do construction work at his site in Webuye. He then prepared an estimate of the bill and save the Respondent. He started work before an agreement was signed between the two of them. That as at December he had completed the first stage and he issued a bill of Kshs. 367,334.30/= but only received Kshs. 122,000/= leaving a balance. He was therefore unable to pay his workers and he fled from the site as the workers were agitated and he left his tools on site. He claimed for a total of kshs. 284,344.30/= for work done and cost of his tools. It was also his evidence that he was to be paid kshs. 3.29 million for labour. In cross examination he admitted to have signed for kshs. 139,360/-

PW2 John Lubisia stated that at the material time he worked on the defendant's site as an employee of the plaintiff. That on a month he could not recall the plaintiff failed to pay them. The plaintiff still owes them. That he realized that he had not paid as the plaintiff had not been paid by the defendant. He

said further that the tools they were using belonged to the plaintiff. At the time the plaintiff left some of the workers left the site while others remained.

4. On his part the defendant stated that indeed he had approached the plaintiff. They had an oral agreement that the work was to be done in sections. The defendant was to buy the materials. They agreed on labour charges of kshs. 215,000/=. He stated further that the plaintiff started the work but stopped at some point because his people asked to be paid. At the point the plaintiff only did the foundation and left the slab undone. He had paid ksh. 139,360/- which the plaintiff signed for. Further that the plaintiff left the site on his own volition and while there the plaintiff had a store next kept to the office where he kept his wares. On the plaintiff leaving he got one Wanyama to assess the work done and make a report. He produced an agreement between them. Exhibit 6. Where in the plaintiff acknowledged receipt of the sum of Kshs. 136,300/-. The defendant claimed kshs. 53,964/=-, as an overpayment. He said that the plaintiff did not leave any of his property and that his engagement was with N.G. Wekesa of Best Contractors.

DW2 Reuben Wanyama - is a building contractor. He knows the defendant who asked him to assess some done work at Webuye near Barclays Bank. There was a foundation and hard core had been laid the work was unfinished. He estimate the cost of work done at Kshs. 85,396/-. He confirmed that he is not a quantity surveyor.

DW3 Bonface Twabwai – He worked for the plaintiff at the defendant's site as at 21.9.1995. The plaintiff abandoned work and left. He did not pay Kshs. 3000/=. The plaintiff left with his tools.

5. This being the first appellate court it has to consider the evidence afresh, analyze and evaluate the same in order to arrive at an independent opinion **Selle Vs. Associated Motor Boat Company Ltd. [1968] E.A @ 123.**

There is no dispute between the parties that there was some work done by the plaintiff for the defendant. The issue is whether the parties had an agreement, the level of work done and payment due and owing to the plaintiff and if there was an over payment.

6. The plaintiff in his evidence said that there was no written agreement and that he had been asked to estimate the cost which he did vide bill of quantities dated October, 16 1995. That on the 22nd of December, 1995 in accordance with the bill of quantities he raised his bill of Kshs. 367,334.30/=- and the defendant only paid kshs. 122,334.30/=- a balance of Kshs. 245,334.30/=- was due. The defendant's case is that the plaintiff commenced work without an agreement. He provided the material and the plaintiffs provided labour. Later they entered into an agreement Exh. 6. A look at the agreement reveals that the agreement was between W.G. Wekesa who is obviously the plaintiff and the defendant for works to be done at the defendant's site. It is signed by both parties W.G. Wekesa who signed for Best Building Contractors which the plaintiff confirmed were also his names. In the same the contractor was to be paid Kshs. 180,000/=- for labour for construction of a 4 roomed building from foundation to floor bed concrete. The work included,

- i. Foundation excavation
- ii. Top soil removal
- iii. Back filling
- vi. Columns, underground beam, concrete work and its machines to floor bed.
- V. Hardcore binding BRC

Both parties signed the said agreement. Parties have also agreed that a sum of Kshs. 139,360/=-. According to DW2, there was a foundation wall, hard core had been laid, murrum as well but the slab had not been cast. The defendant argues that the work was not complete by the time the plaintiff left the

site and claims an over payment based on the assessment report of DW2.

7. The plaintiff states that he had concluded the work. The defendant states otherwise. DW2 says the slab had not been laid meaning the work was not complete. The plaintiff said that his tools were left on the site, however his witness did not verify this. He placed a cost on the tools but did not produce evidence of purchase and cost of the said items.

8. DW2 is not a quantity surveyor although I am prepared to believe his evidence corroborating that of the defendant that the job was incomplete, but I am of the view that he was not qualified to assess the same and I will therefore disregard his assessment.

9. The plaintiff gave an estimate prepared on October 16, 1995 for construction of plot No. 7996/97b. The same was inclusive of labour and material Both parties agree that the defendant was to buy his own material and the plaintiff was to provide for labour. The handwritten agreement Exh. 6 refers to labour cost of the foundation for the same property. The said exhibit has no date, it was not disputed by either part and it shows a sum paid of Kshs. 136,000/= leaving a balance of Kshs. 44,000/=. The total sum of the cost of the phase under discussion was to be Kshs. 180,000/=. On the other hand although the defendant claims he over paid he also failed to prove the over payment although the court formed the opinion that the plaintiff did indeed leave the site having not completed the work as per Exh. 6.

For the reasons enumerated above I would have like the trial court dismissed the plaint and the counter claim.

The appeal is therefore dismissed with costs.

Dated at Bungoma this 1st day of August 2016.

ALI-ARONI

JUDGE.