



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 93 OF 2013**

**KUJU CONSTRUCTION & TRADING CO. LTD. .... APPELLANT**

**VERSUS**

**SINOHYDRO CORPORATION LTD. ....RESPONDENT**

(Being an Appeal from the Judgment and decision of Lower Court, Mrs Lucy W. Gitari Chief Magistrate on the 25th September 2013 in the original Kisumu CMCC NO. 244 of 2012)

**J U D G M E N T**

On 26th June 2010 Kaju Construction & Trading Co. Ltd., the appellant, and Sinohydro Corporation Ltd., the Respondent, entered into a sub-contract wherein the appellant was to construct offices for Oluch Irrigation Scheme Lots – 2 initially at a consideration of Kshs.12,787,773/= which sum was later revised downwards to Kshs.12,230,689/=.

According to the appellant the contract sum was payable to it in stages upon the appellant submitting measurement sheets of completed structures and until the final completion of the construction of the offices. The appellant claims that despite completing the construction the Respondent did not keep its part of the bargain as it did not pay a sum of Kshs.2,996,920/70. It therefore sued the Respondent for that sum.

In its defence the Respondent denied the claim and contended that it was awarded a contract by the Ministry of Regional Development Authorities to undertake major civil works for Kimira Oluch Irrigation Scheme Lot 2 which for commercial expediency it desired to sub-contract. It therefore invited for tenders and the appellant submitted a tender through one John Otieno Ogero who presented himself as a Director and sole authorized representative of the appellant company. The Respondent then entered into negotiations with the said John Otieno Ogeroh in his capacity as a Director and once an agreement had been reached a formal contract dated 26/6/010 was drawn and it was executed by the Respondent on one part and John Otieno Ogero on behalf of the appellant company. The Respondent averred that the said John Otieno Ogero negotiated the terms of the sub-contract with the Defendant in such a way that it was reasonable for the Defendant to infer from his conduct the appellant's consent and authority to act on its behalf. It further averred that the said John Otieno had the appellant company's actual or ostensible authority to act on its behalf and for its benefit and also to receive payments on its behalf; That indeed the Respondent made cheque payments to John Ogeroh amounting to Kshs.6,660,000/=, advanced materials to the appellant through him in the sum of Kshs.246,903/= and made cash payments of 1,450,000/=.

The Respondent further averred that the final payment of Kshs.2,835,330.88 was paid in full to John

Otieno Ogeroh on 16th December 2011 and that only Kshs.611,53.45 was withheld being the retained sum as per clause 6(d) of the sub-contract. A further Kshs.366,921/= was paid directly to the Kenya Revenue Authority in respect of 3% tax fees.

At the hearing both sides called one witness each. Dickens Ouma Okoth a Director of the appellant company asserted that upon completion of the construction the appellant only received Kshs.8,622,233.85 and was claiming the balance of Kshs.2,996,020/70 including the retention fee of Kshs.611,534/45. He contended that the cheque paid to Otieno Ogeroh on 9th July 2011 did not reach the appellant company. He conceded that they had allowed John Otieno Ogeroh to receive money on their behalf save that the respondent would call to get authorization to so pay. He also testified that Otieno Ogeroh worked for the appellant as a site agent and conceded that it was Otieno Ogeroh who tendered and also negotiated the contract and further that he signed the sub-contract as an authorized representative of the company.

Celoy Niu testified on behalf of the Respondent. He reiterated the averments in the defence while taking the Court through all the payments made to the respondent both in form of materials, cash and cheques. He contended that all these were made through John Otieno Ogeroh and as directed by him. It was his evidence that whereas the Respondent acted through their Chief Engineer the appellant acted through John Otieno Ogeroh and as far as he knew John was a Director and the respondent dealt with him from the beginning to the end. He produced a receipt showing that tax was paid and contended that the respondent does not owe the appellant anything.

After considering the evidence by both sides the trial Magistrate found that the appellant had not proved its case on a balance of probabilities as it had inter alia been demonstrated that the final payment of 2,835,330/= had been paid in three cheques – two of which were drawn in the name of the appellant company and paid to John Otieno Ogeroh and the other drawn in the name of one Sammy Jura Onyuro on the instructions of the said John Otieno Ogeroh. She found that the appellant had not proved that John Otieno Ogeroh had no authority to receive money either in his name or to direct the defendant who to pay; that the Respondent had no reason to doubt that John Otieno Ogeroh was a director of the appellant company with authority to act for and on behalf of the company and further that the appellant is estopped from asserting any lack of actual or ostensible authority by John Otieno Ogeroh by virtue of the doctrine of agency by estopped as well as the doctrine of apparent ostensible authority. She concluded that the appellant must bear the loss occasioned by their failure to formally or otherwise inform the respondent of the limits of authority if any to John Otieno Ogeroh and that it had not been proved that the respondent had breached the contract in any way.

Being aggrieved the appellant filed this appeal. In his submissions the appellant reduced the issues in contention to 3 as follows:-

- a) Whether John Otieno Ogero signed the contract dated 26th October 2010 as a Director of the appellant company with knowledge of the appellant?
- b) Whether John Otieno Ogero as agent of the appellant had to receive money/cheques in his name or direct the Respondent who to pay?
- c) Whether the sum of 366,921/= was rightfully deducted by the Respondent as tax?

Counsel for the respondent however objected to this last issue and submitted that it had not been raised in the memorandum of appeal and neither was leave sought to urge the same. On this he relied on Order 42 rule 4 of the Civil Procedure Rules.

As the first appellate Court I have analyzed, reconsidered and evaluated the evidence so as to arrive at my own conclusion. I have done so bearing in mind that I did not have the benefit of seeing the witnesses give evidence. I have also fully considered the rival submissions.

The sub-contract in issue is exhibited at pages 1 to 3 of the Respondents bundle of documents. It clearly shows that Jiang XIAODONG Chief Engineer signed on behalf of the respondent and that John Otieno

Ogeroh signed on behalf of the appellant. John Otieno Ogeroh's designation is given as Director. The sub-contract has a rubber stamp of the appellant company with 28th June 2010 which was two days after execution meaning that had John Otieno Ogeroh wrongly or unlawfully held himself out as a Director of the appellant company the company would have raised its objection. Clearly much as the said John Otieno Ogeroh may not have been a director of the appellant the company held him out as such to the respondent and are there estopped from saying otherwise. That answers the first issue.

On the second issue it is noteworthy that the appellant company only raises issue with the last batch of payment but not the payments of Kshs.8,385,333/85 made to the John Ogeroh both in cash and cheques or even the sum of 246,903/= advanced to him by the respondent in terms of materials. The appellant's witness conceded that John Otieno Ogeroh received money on behalf of the appellant company. He however contended that the Directors had to authorize such payments on phone. He however gave no details of any such authorization or even tender any document to demonstrate that the respondent was to first seek authorization before paying John Otieno Ogeroh. The amounts conceded as paid through John Otieno Ogeroh are to be found at the appellant's exhibit 5 and add up to Kshs.8,622,233.85 and the appellant's witness did admit that even the two payments made in cash to John Otieno Ogeroh were received by the appellant. The Respondent has demonstrated that it issued three cheques on 16th December 2011 to cover the balance. Except for one cheque of 900,000/= made out to Sammy Juro Onyuro the other two were drawn to the appellant company and were as in the previous payments released to John Ogeroh Otieno. Having held him out as their agent and having not objected to the other payments made to him the appellant cannot now be heard to say that he had no authority to receive payment on its behalf. Being their agent they were bound by his acts as he clearly acted within the scope of his authority as such. Indeed to the Respondent he was more than an agent: he was a Director of the appellant and was held out as such by the appellant itself when they appended their stamp on the contract. If a sum of 1,990,000/= was paid to the stranger called Sammy Juro Onyuro it was because John Otieno Ogeroh authorized it. In cross-examination the appellant's witness testified as follows:-

**"John Otieno Ogero is the one who was in-charge of the work at the site and communicated to Sinohydro how payments could be made. He held authority to collect money on behalf of Kaju Construction. He had a duty to account for money he collected from Sinohydro to Kaju Construction. If he borrowed money it was Kaju Construction who was liable to pay....."**

I agree with counsel for the Respondent that the appellant cannot approbate and reprobate and that answers issue number (b).

As for the tax I agree that it was not raised in the memorandum of appeal and so ought not to have been urged without the leave of the Court. Be that as it may payment of tax is statutory and in this case there is proof that Kshs.366,921/= was paid to the Kenya Revenue Authority as tax which the Respondent was obligated to do.

In conclusion I find that this appeal has no merit and dismiss it with costs to the respondent.

**Signed, dated and delivered at Kisumu this.....25th..... day of.....June....2015**

**E. N. MAINA**

**JUDGE**

**In the presence of:-**

Otieno D. Advocate for the Appellant

N/A for Advocate for the Respondent

CC: Moses Okumu