REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 40 OF 2011

JOHN KIMANI ……. APELLANT

VERSUS

WILLIAM KIPKURUI

T/A WILKORI BUILDING CONTRACTORS ….....……. RESPONDENT

(An Appeal from the Judgment and Decree of the Senior Resident Magistrate Honourable G.A MMASI (PM), in Eldoret CMCC No. 324 of 2005, dated and delivered on 8.2.2011)

JUDGMENT

1. The appellant was the plaintiff in the Eldoret Chief Magistrate's Court Civil suit No. 324 of 2005 while the respondent was the defendant.

   In his plaint dated 11th April, 2005, the appellant pleaded that pursuant to an agreement executed between him and the respondent on 9th December, 2002 for painting works at the Kenya Tea Packers Limited premises at Kericho, he was entitled to payment of Ksh 378,208. He thus prayed for judgment against the respondent in the sum of Kshs. 378,208, interest at commercial rates together with costs of the suit.

2. In his amended defence and counterclaim, the respondent denied having entered into a contract with the appellant on 9th December, 2002 and denied owing the appellant Kshs. 378,208 or any other sum. In the alternative and without prejudice to his denial of liability, the respondent averred that if he owed the appellant Kshs. 378,000 as alleged, he had already paid him Kshs. 308,000 which sum the appellant had acknowledged; that the appellant was liable to refund him a sum of Kshs. 313,000/- which he had already recovered from the respondent.
3. In his counter claim, the respondent pleaded that on 9th December, 2002, he entered into a sub contract with the appellant in which the appellant was to carry out painting works on the premises belonging to Kenya Tea Packers Limited (the company) at Kericho for an agreed cost of Kshs. 350,000; that it was a fundamental term of the sub contract that the appellant undertook the painting works diligently and in proper workmanship as per instructions from the company; that the appellant breached this term of the contract leading to frustration of the contract; that on 14th December, 2002 through a letter copied to the respondent, the management of the company threatened to terminate the suit contract as a result of which the respondent was compelled to hire another sub-contractor at a cost of Kshs. 150,000 in order to sustain his contract with the company.

   Consequently, the respondent claimed for damages for breach of the sub-contract dated 9th

December, 2002; special damages being the cost of hiring another sub-contractor; costs of the counter claim and interest.

4. The appellant filed a reply to the defence and defence to the counter claim. It is dated 16th February, 2010. In the reply to the amended defence, the appellant denied all the allegations contained in the amended defence and maintained that he performed his part of the contract and he was entitled to the sums claimed. In his defence to the counter claim, the appellant averred that the counterclaim was time barred; that the contract for the sum of Kshs.350,000 was later adjusted upwards to Kshs.440,000 and that the defendant breached the terms of that contract by failing to pay an outstanding sum of Kshs. 277,700; that the contract was never frustrated but was fully executed professionally and diligently and that as he never abandoned his work, the issue of contracting another person to do the same work did not arise.
5. After a full trial, the learned trial magistrate entered judgment for the appellant against the respondent in the sum of Kshs. 70,000 plus costs of the suit.

   She also held that the counter claim had not been proved on a balance of probabilities and she accordingly dismissed it with no orders as to costs.

6. Both the appellant and the respondent were dissatisfied with the judgment and decree of the lower court. The appellant filed his memorandum of appeal on 20th June, 2013 while the respondent filed a cross appeal on even date. In his memorandum of appeal, the appellant raised the following grounds of appeal;

i. ***The honorable magistrate erred in law and fact in entering judgment in favour of the appellant for Kshs. 70,000 instead of Kshs. 230,000/-.***
ii. ***The honorable magistrate erred in law and fact in failing to award the appellant costs of the counterclaim.***
iii. ***The honorable magistrate erred in law and fact in failing to award the appellant interest on the decretal sum.***
iv. ***The honorable magistrate erred in law and fact in failing to assign any reasons for her decision.***

7. The respondent in his cross appeal enumerated five grounds of appeal which are reproduced hereunder;

   i. The learned magistrate erred in law and fact in failing to consider the Defendant/Respondent submission.

   ii. That the learned magistrate erred in law and fact in failing to find that the agreement had been frustrated.

   iii. The learned magistrate erred in law and in fact in having found that there were plaintiff's/Appellant's claim failed to dismiss the same.

   iv. The learned magistrate erred in law and fact in finding that the counterclaim has not been proved and dismissing the same.

   v. The learned magistrate erred in law and fact in failing to justify the award of Kshs. 70,000/- despite finding that the contract was not competed.

8. The appeal and cross appeal were prosecuted by way of written submissions. Both the appellant and the respondent filed their respective submissions on the same day namely the 16th July, 2014.
9. This is a first appeal to the High Court. In the premises, it is an appeal on both facts and the law. See: ***Selle V Associated Motor Boat Company Ltd [1968] E.A 123; Williamson Diamonds Ltd V Brown [1970] E.A 1.***

   I have carefully considered the grounds of appeal in both the memorandum of appeal and the cross

appeal, the pleadings, the evidence produced before the trial court; the judgment of the learned trial magistrate as well as the written submission filed on behalf of both parties. Having done so, i find that it is not disputed that the appellant and the respondent entered into a sub contract for the painting of premises belonging to the company in Kericho on 9th December, 2002. The consideration was Kshs. 350,000. The claim by the appellant that this amount was adjusted upwards to Kshs.440,000 was denied by the respondent and it was not proved by any tangible evidence in the course of the

trial.The letter produced in evidence by the plaintiff as Pexhbt 3 in support of this claim was clearly incapable of proving the same as it had no indication that it had been authored by the respondent nor was it dated or signed.

It is therefore my finding as was the finding of the learned trial magistrate that the consideration for the painting works was Kshs.350,000.

10. The evidence on record shows that the appellant received from the defendant part of this contracted sum though each gave different versions of what amount was paid in advance and what amount remained outstanding. PW1 (the appellant) admitted in his evidence that he had received Kshs.163,000 from the respondent. The respondent (DW1) on his part claimed that he had paid the appellant through petty cash vouchers a total sum of Kshs. 303,080.

I have carefully gone through the said petty cash vouchers. I have noted that in some of them namely Dexbt 2f; Dexbt 2(g); Dexbt 2(h); Dexbt 2(l) it was clearly indicated that the sums paid were not meant to be in satisfaction of the amount payable to the appellant on basis of the sub contract. DExbt 2k evidenced payment of overtime to Ketepa workers while the appellant did not acknowledge payment of Kshs. 3,000 allegedly paid through Dexbt 2n.

11. The aggregate of the total amounts shown in the petty cash vouchers that were either not paid towards part payment of the contracted sum or was not acknowledged by the appellant adds up to Kshs. 83,080 while the amount shown as paid to the appellant amounts to Kshs. 216,000. Based on this documentary evidence and considering that the appellants claim that he had received only Kshs. 163,000 was not substantiated by any evidence, i find that the respondent had already paid the appellant Kshs. 216,000 out of the contracted sum of Kshs.350,000. The amount that the appellant was then entitled to from the respondent assuming that the contract was performed satisfactorily is Kshs.134,000.
12. In view of the foregoing, i am satisfied that the trial magistrate erred in not analysing the evidence contained in the petty cash vouchers and in relying on the demand letter issued to the respondent to find that the sum owing to the appellant was Kshs. 70,000 and not the sum which the evidence on record disclosed was truly owed to the appellant by the respondent which was Kshs. 134,000.The trial magistrate ought to have entered judgment for the appellant against the respondent in the sum of Kshs. 134,000.
13. I now wish to turn to the allegation that the contract between the parties was frustrated and that the trial magistrate erred in not finding that the contract had been frustrated and in dismissing the respondent's counterclaim. After evaluating the evidence tendered by the respondent, it is my considered view that the said evidence did not prove to the required standard that the contract had infact been frustrated. It was the respondent's case that the management of the company wrote him a letter threatening to terminate their contract owing to the appellant's shoddy workmanship as a result of which the appellant had to leave the premises without having completed his work; that as a result the respondent was forced to hire DW2 to complete the work left undone at a cost of Kshs.150,000.
14. However, the said letter was not produced in evidence to prove the respondent's allegations and from the evidence of DW2, it is clear that though he was hired to undertake some work originally assigned to the appellant, he was hired on a different contract independent of the one signed with the appellant. DW2 recalled that DW1 had confided in him that he was not terminating the contract entered into with the appellant and that he continued paying him money which he used to pay the workers undertaking the painting works on site and that the appellant continued doing so

till the works were completed. This piece of evidence appears to give credence to PW1's and his witnesses' evidence that the agreement between him and the respondent was not frustrated but was performed to the end.

15. Going by the evidence on record, I find that there was no clear evidence to prove that the agreement was indeed frustrated. It is trite law that whoever alleges must prove. The respondent in my view failed to discharge the burden of proving that the contract was frustrated. The learned trial magistrate did not therefore err in not finding that the contract had been frustrated.

    It is significant to note that the alleged frustration of the contract formed the foundation of the respondent's counterclaim. It is my view that the respondent's failure to prove that the contract had been frustrated led to the automatic collapse of the respondent's counterclaim more so because there was also no evidence to show that the respondent incurred a further cost of Kshs. 150,000 as a direct result of the appellant's breach of contract. I cannot therefore fault the learned trial magistrate in her finding that the counterclaim had not been proved on a balance of probabilities. I find that the trial court was right in dismissing the counterclaim.

16. Another ground of appeal taken by the appellant is that the trial magistrate erred in not awarding the appellant interest on the decretal amount and in refusing to award him costs of the counterclaim. The appellant had in his plaint prayed for costs and interest on the amount claimed at commercial rates.

    The actual rate of interest sought was however not disclosed. The trial magistrate in her judgment after finding for the appellant in the sum of Kshs.70,000 did not award any amount of interest and no reasons were given for that omission.

17. It is not clear from the record whether this was an oversight or a deliberate omission on her part. It is however my view that the appellant did not prove that he was entitled to interest on the sum claimed at commercial rates. The appellant did not even explain what the commercial rates claimed were pegged on or disclose what specific rate of interest he was seeking from the respondent.The trial magistrate was therefore not wrong in declining to award the appellant interest on commercial rates but nothing would have stopped her from awarding interest at any rate she deemed reasonable under ***Section 26*** of the ***Civil Procedure Act***.
18. Regarding the trial court's refusal to award the appellant costs of the counterclaim, I agree with the appellant that having dismissed the respondents counterclaim, the trial magistrate ought to have awarded the appellant costs of the counter claim. ***Section 27*** of the ***Civil Procedure Act*** provides that the award of costs shall be at the discretion of the court but as a general rule, costs should follow the event unless the court shall for good reason order otherwise.
19. A counterclaim is by all intents and purposes a cross suit against a plaintiff in a civil suit and once it is dismissed, the plaintiff ought to be awarded costs of the counterclaim unless the court in its discretion decides that the plaintiff is not entitled to costs. The trial court's discretion should however be exercised judiciously and reasons ought to be given why a successful plaintiff on a counterclaim should be denied costs. The learned trial magistrate in this case

    fell into error when she dismissed the respondent's counter claim with no orders as to costs without assigning any reasons for her refusal to award costs to the appellant.

20. With regard to the respondent's complaint in the cross appeal that the learned trial magistrate did not consider his submissions in arriving at her final decision, it is my opinion that this complaint is not well founded. The learned trial magistrate indicated in her judgment that she had "perused the final submissions" and in my view, this included the respondent's submissions. The body of the judgment contained some of the issues that the respondent had raised in his written submissions. It is therefore incorrect for the respondent to allege that his submissions were not considered by the trial court.
21. Having taken everything into account, I have come to the conclusion that the appellant's appeal is merited and it is accordingly allowed. The judgment of the lower court is consequently set aside.

It is substituted by a judgment of this court in favour of the appellant against the respondent in the sum of Kshs.134,000. The amount shall attract interest at court rates from today's date until full payment.

I also find that the respondent's cross appeal is devoid of merit and it is hereby dismissed with costs to the appellant.

The appellant is also awarded costs of the appeal, costs in the lower court both in his suit and in the counter claim.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this 22nd day of October, 2015

In the presence of:

Mr. Momanyi for the appellant

Mr. Mwaniki for the Respondent

Mr. Lesinge Court clerk