REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 496 OF 2006

BETWEEN

BOC GAS (KENYA) LIMITED……..……..……..…APPELLANT

AND

ENVIRONMENT COMBUSTION CONSULTANT LIMITED…….....……..……..……RESPONDENT

(Appeal from the Judgment of the Senior Principal Magistrate at Milimani Commercial Courts (Mrs. R. N. Kimingi), issued and read on 27th June, 2006 in Civil Case No. 9 of 2004)

BOC GAS (KENYA) LIMITED…….……..…..……PLAINTIFF

AND

ENVIRONMENT COMBUSTION CONSULTANT LIMITED……..…….....…….…..……DEFENDANT

JUDGMENT

The Respondent in its plaint dated **6th January, 2004** filed suit against the appellant claiming Kshs.1, 005,613.30 for works carried out of disposal of obsolete hazardous material from the appellant's premises. The respondent also sought interest and cost of suit. The respondent claimed that it was contracted by the appellant to facilitate the disposal of industrial hazardous waste from the defendant's premises in a safe an environmentally friendly manner but upon completion the appellant deliberately failed, refused or neglected to pay the plaintiff the total sum claimed.

The appellant in its defence dated 3rd February 2004 on their part admitted that they had the agreement dated 28th August 2003 for the disposal of the industrial hazardous waste materials but denied liability for reasons that the respondent was in breach of terms of the agreement. Upon hearing the parties the Learned Trial Magistrate entered judgment in favour of the respondent in the amount of Kshs. 1,005,613.30 plus costs and interests.

This being a first appeal am required to re-evaluate the evidence and arrive at my own independent findings and conclusions of the matter (see the case of ***Dr Mustafa S Rahim vs Abdullaq Khanddalla Civil appeal [1991].)***

The Respondent in its case called PW1 Philip Mwambe the Managing Director of the Plaintiff/Respondent Company who testified that all waste materials were delivered to the plaintiff's site

and was sorted to ascertain the method of disposal and they prepared a list dated 26th September, 2003 after the segregation; that throughout the process there were representatives from the appellant's company and that as per the agreement the Plaintiff/Respondent was to be issued with an L.P.O after the waste was disposed. However, later on the Financial Controller one Mr. Kimurwa sought to renegotiate the payment to Kshs. 25/- per Kg of waste subsequently after completion of the said disposal which he estimates took 3 months. They were not issued with an L.P.O but PW1 sent an invoice for Kshs.1, 105,613/- which the appellant never paid necessitating this suit.

DW1 Rita Wairimu Ndonye testified that the Plaintiff/Respondent was to collect the waste take it to its premises awaiting the appellant's approval of disposal of the waste after sorting; that the appellant refused to pay for the disposal as it did not get an opportunity to confirm the quantity and had not witnessed the disposal and refuted the computation of the weight by the plaintiff as they did know how the amount was arrived at. She testified further that she saw part of items taken from the defendant's site at the plaintiffs premises and added that the contract with the respondent was for disposal not storage contract and that she did not witness the disposal of the material the respondent collected.

The appellant aggrieved by the Lower Court's decision filed its Memorandum of Appeal dated 25th July 2006 on the grounds that;

1. **The Learned trial Magistrate erred in law in failing to appreciate that the Respondent's claim was for special damages, which ought to have been specifically pleaded and proved. The learned trial Magistrate misdirected herself in failing to follow the authorities cited by Counsel for the Appellant and failing to explain how the authorities were distinguishable from the matter before her.**
2. **The learned Magistrate failed to appreciate that the agreement between the Appellant and the Respondent was expressly clear that the disposal had to be physically witnessed by a representative of the Defendant.**

   In holding that the Appellant participated in the disposal as per the agreement and only refused to pay after the disposal was complete by refusing to issue the L.P.O", the learned Magistrate was in effect re-writing the contract between the parties, which was not permissible in law.

3. **The learned trial Magistrate erred in law in failing to appreciate that the requirement for physically verification of the weight of the waste by a personnel from the Appellant before disposal was a crucial term of the contract and that the Respondent had failed to comply with the terms of the contract.**
4. **The Magistrate erred in failing to appreciate that the Appellant's witness DWI Rita Wairimu Ndonye evidence that she witnessed the material being taken from the Defendants site to the Plaintiffs site and that after the Plaintiff indicated that the material was disposed she did not see the material at the Plaintiffs site was not confirmation that the Plaintiff disposed of the material. In holding that this was confirmation that the material had been disposed the learned Magistrate was in effect re-writing the contract between the parties, which was not permissible in law.**
5. **The learned Magistrate misdirected herself in holding that the Appellant should have produced a response to the Plaintiff's demand and supporting documents. In so holding, the learned trial Magistrate failed to appreciate that the burden to prove that the materials were disposed as per the express terms of the agreement was on the Respondent throughout the trial.**
6. **The learned Magistrate erred in law and fact in failing to decide the case on the facts and evidence adduced before her and deciding the case on irrelevant matters.**
7. **The learned Magistrate erred in law and fact in failing to appreciate that the Respondent had not proved its case on a balance of probability.**

Parties proceeded to argue the appeal through written submissions. The appellant submitted that the learned trial Magistrate erred in law as regards the respondent's claim for special damages in that there

were no particulars pleaded or particularized as regards how the amount was arrived at as the contract was for disposal of waste upon which payment was to be made to the respondent per Kilogram plus VAT. Further that the verification of the quantities was a material requirement of the contract forming a basis upon which the payment was to be computed at the agreed rate of Kshs. 40. Counsel argued that the trial Magistrate erred is not stating in her view that the claim raised by the plaintiff was for special damages based on terms of a written contract. On this Counsel relied on the case of ***ABUDI ALI MADHANI V MADHANI SAIDI MSA CA 212/ 98*** and the case of ***OUMA V CITY COUNCIL 1976 KLR,*** where it was held that ***for special damages to be awarded, they must be pleaded and proved, that failure to particularize a special damage claim warranted a dismissal and that for a plaintiff to succeed on a claim for special damages, he must specifically plead it with sufficient particularity and must prove it by evidence.***

It was further submitted that there was no evidence as regards how the amount claimed was arrived at in terms of the weight of waste allegedly disposed of and how many Kilograms of waste was disposed of to entitle the respondent amount claimed; that there was no evidence adduced by the respondent to show compliance with any or all of the contractual conditions though the plaintiff's witness admitted the contract terms as applicable to the relationship between the parties. It was then submitted that the respondent failed to prove compliance with the express mandatory contractual provisions prior to disposal to warrant payment in that the weight of the waste for disposal had not been verified by the appellant who would have subsequently issued the respondent with an L.P.O which would have set out the mutually agreed weight and determine the amount payable. It was further submitted that it was wrong for the learned Trial Magistrate to assume that the respondent was to proceed with disposal before an L.P.O was issued, this the appellant argues is an admission by the respondent that the disposal was carried out before the contractual terms had firmed up and agreed to; that the contractual agreement was not complete without a mutual agreement on the weight of the waste and it was wrong for the trial court to have made a finding that there was a complete contract. Counsel relied on the case of ***Bakshish and Brothers v Panafric Hotels Ltd [1987] KLR***, where it was held that, "*an agreement which some crucial point of contract matter is left undetermined or … for parties to agree the critical point later (and they never do) is o contract at all."*

It was further submitted that it is trite law that acceptance of the terms of a contact must be unconditional and complete; that the visit by the appellant's representative was before the agreement was entered into on 27th August 2003 which was before the removal of the waste from the appellant's site and that the gate passes were not evidence enough to show that the appellant witnessed the disposal or verified its quantities; that it is trite law that he who alleges must prove and that the respondent omitted to give material evidence on the disposals that took place or their quantities but was relying on an inventory unilaterally prepared by them which was not final; that the forwarding letter did not in any way suggest that disposal had taken place but only made reference to the sorting and weighing of the waste; that the contract provided for issuance of certificate of disposal but none was issued and that the appellant was not present to ascertain or verify the disposal and as such the respondent did not meet the contractual provisions to warrant payment as such the Court could not re-write the terms of the contract but was bound only to consider the express terms which it failed to do. It was further submitted that in assuming that by the respondent failing to respond to the checklist, an L.P.O would be issued as failure to respond to a demand cannot be deemed to be an admission; that the burden of proof was on the Respondent and not on the Appellant to prove that it complied with the terms of the contract to warrant the payment claimed.

The Respondent in its written submissions submitted that vide a letter dated 21st August 2003 it confirmed its capacity to offer the disposal services sought by the appellant leading to the agreement dated 27th August 2003; that it was a term of the contract that the waste would remain intact until disposal stage when a representative from BOC would be present; that the waste was hazardous and non-biodegradable and was ideally to be disposed of through high temperatures by incineration and the same took place for 24 hours for a period of 3 months and was impractical to have stayed through the duration or make frequent visits. It was submitted that the check list entailed the material that had been sorted out their respective weights and measures. This was to be verified to facilitate the issuance of an L.P.O. but this was not so and the appellant despite receiving the checklist and forwarding letter did not respond. It

was submitted that the respondent did not in any way breach the contract but it was the appellant who breached the contract by failing to pay for work done and no grievance was raised as to their workmanship.

The Respondent submitted further that the waste consisted of waste in various forms both in liquid and bio-degradable and there was nothing specific other than weights; that the contract was for the entire consignment therefore the same should not be specifically pleaded as a truck could contain so much but disposal would be done at a go and in measurable quantities for a long period as in this case 3 months on a 24 hours basis; that it is the reason why the respondent claimed for work done to which work the appellant was availed a checklist to verify quantities and that the agreement did not specify at what stage the weight and measures were to take place now that the whole exercise was continuous. The Respondent further added that the Safety Health and Environment Quality Manager with the present appellant visited the site to confirm that the materials reached the respondent's premises a fact she refutes in her sworn affidavit and that the agreement did not specify who between Ms. Rita and Mr. Kimura was to give instructions; that on one hand Mr. Kimura denies receipt of the Checklist while Ms. Rita Ndonye in her testimony stated that she never saw the checklist but heard it from Mr. Kimura.

I have considered the submissions, the grounds of appeal the evidence in the Lower Court and the Judgment of the Lower Court.

From the plaint that was filed the Respondent at paragraph 5 claimed the sum of Kshs. 1,005,613.30 for works that had been done. The basis of their contract was the letter dated 27th August 2003. This letter gave the terms of the agreement on how the disposal waste was to be stored verified disposed of and the cost of such disposal per Kilogram. In the Judgment at page 16 lines 13 the learned trial Magistrate held that the Respondent's claim was not for special damages. The amount that was being claimed was for waste that was to be quantified and disposed. The gate passes which form pages 64 to 70 of the appeal record clearly show the waste that was being collected for disposal. The Respondent's claim was specifically for disposal of this waste which was to be weighed and paid for at the agreed cost. The Respondent's claim was therefore a special damage claim for works that had been done as per the contract. The Respondent should have specifically pleaded and particularized the works that had been done as per the gate passes exhibited at pages 64-70. If pleaded, the appellant could have known the quantity or weight that have been carried out and costed it with the agreed sum of Kshs 40/= per kg.

I agree with the appellant submissions that the Learned Trial Magistrate erred in holding that this was not a special damage claim. The claim was for special damages based on the terms of contract. In the case of ***OUMA V CITY COUNCIL 1976 KLR,*** the late Justice Chesoni held that; ***"the terms general and special damages are used with different meanings. They refer, firstly to liability; secondly to proof; thirdly to pleading and fourthly to the meaning of special damages only. For special damages to be awarded they must be pleaded and proved….special damages on the other hand are such as law will infer from nature of act. They do not follow in the Ordinary course but are exceptional in their character, and therefore they must be claimed specifically and proved strictly."***

In the case of ABUDI ***ALI MADHANI V MADHANI SAIDI (supra)*** a Court of Appeal decision, it was held that, "***It is trite law that for special damages to be awarded, they must be pleaded and proved. The failure to particularize its claim warranted a dismissal."***

The 1st ground of appeal therefore succeeds as I find that the Learned Trial Magistrate erred in finding that the claim was not for special damages.

On the 2nd, 3rd, 4th and 5th grounds of appeal I find as follows; I have read the letter dated 27th August 2003 which formed the basis of the contract between the parties. The letter states that;

- ***"All waste and absolute materials for disposal received by Environmental and Combustion Consultants Limited, from BOC Kenya Limited shall be stored away in a safe and secure environment until such time that personnel from the Company physically witness the disposal. Tampering of these materials will therefore not be permitted.***

- ***That all such waste will remain intact until the disposal stage where a BOC representative will be present***
- ***That a checklist will be used to verify that all material given out for disposal is intact after being sorted by you.***
- ***That BOC Kenya limited has access to the storage and disposal site whilst such wastes and packages are in your custody.***
- ***That all information and records on how the waste has been handled and disposed of will be available to a BOC representative on request.***
- ***That a certificate of disposal will be issued in accordance with proper waste management practice in line with the National Environmental Laws and Regulations***
- ***That cost of such disposal will be at Kshs. 40 per Kilogram plus VAT.***
- ***As soon as we verify the quantities, we will make arrangements to send you an L.P.O of the same."***

These were the express terms of the contract which the parties agreed to comply with. The parties agreed as per paragraph 2 of the letter that the materials were to be stored in a secure environment until such time a personnel from the Company, (the Company here being BOC Gas) physically witnessed the disposal. Further that the waste would remain intact until a BOC representative would be present and that the Checklist would be used to verify the materials after it was sorted out. It was the evidence of Rita Wairimu Ndonye that they were not called to witness the disposal. To argue that a representative of the appellant company was not required to be present would be re-writing the contract. I find no evidence from the proceedings of the Lower Court that this term of the contract was complied with. The terms were very clear and the respondent ought to have ensured that before disposal of any of the materials the representative of the appellant was present. The LPO was to be sent once the verification of the quantity was done. It was upon the trial Court to interpret the Contract as agreed upon by the parties. The appellant has referred me to the Court of Appeal decision which binds this Court that of ***Bakshish and Brothers v Panafric Hotels Ltd (supra)*** where it was held that, ***"an agreement which some crucial point of contract matter is left undetermined or … for parties to agree the critical point later (and they never do) is not a contract at all."***

The issue here is not the period of disposal but what was to be done at the time of disposal. The checklist referred to was sent via a letter dated 26th September 2003. In the said letter the respondents were informing Miss Rita that they had competed sorting out and weighing the waste collected from their appellant's factory. The letter did not inform the appellants when the goods were to be disposed of. It was not upon the appellants to prove their presence during the disposal of the waste. Ms. Rita who dealt with the respondent denied being present or having verified the waste that was being disposed of. I agree with the appellant's submissions that evidence on how the waste was handled was crucial and how the disposal took place daily was essential and that he who alleges must proof his case. Parties are bound by the terms of the contract and it was not for the lower Court reach a decision that was contrary to the contents of the letter. Further this Court is guided by the Court of Appeal decision **in National Bank of Kenya Limited –vs- Pipeplastic Samkolit (K) Limited C.A No. 95 of 1999** where it was held that,"…….*a court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud and undue influence are pleaded and proved*." It was therefore wrong for the trial magistrate to shift the burden of proof to the appellant. All in all the appeal is allowed with costs. The Judgment of Honourable R. N. Kimingi is set aside and the Respondent's suit in the Chief Magistrate's Court at Milimani Commercial Courts Nairobi is dismissed with costs.

Orders accordingly

Dated, signed and delivered this **17th** day of **September 2014.**

R.E. OUGO

JUDGE

In the Presence of:-

……..……..……For the Appellant

…….…….For the Respondent

…….Court Clerk