



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MALINDI

CIVIL SUIT NO. 80 OF 2001

**CHARLES MURIUNGI T/A C.M. STEEL ERECTORS & GENERAL
BUILDING CONTRACTORS.....PLAINTIFFS**

-VERSUS-

**ELIZABETH KUHER-HEIER
DELE HEIER.....DEFENDANTS**

JUDGMENT

Charles Muriungi t/a C. M. Steel Erectors and General Building Contractors (referred to as the plaintiff), has filed this suit against Elizabeth Kuher-Heier (1st defendant) and Detlef Heier (2nd defendant) seeking for judgment to be entered against the defendants in the sum of Kshs. 667,560 (six hundred and sixty seven thousand five hundred and sixty shillings only). He also prays for costs of the suit and interest.

The genesis of this matter is that on 8th May 2001, the parties entered into a written agreement where the plaintiff was to build a five roomed bungalow on the defendant's plot No. 177 Watamu, and completed.

There were subsequent additional specifications which the plaintiff made and he handed over the house to the defendants in September 2001.

These extra works and materials were carried out and supplied to the defendants in accordance with the defendant's instructions subsequent to, in variance of and in addition to the written contract. When demand was made for the sum stated, defendants refused to pay.

The 1st defendant confirmed entering into a contract with the plaintiff to build and complete the house but say it was to be completed by 8th August 2001. However it was not completed until October 2001. They state that at no time did they agree to any additional work, material or specifications and deny varying the original written contract.

It is the defendant's claim that on 1st May 2001, she entered into a building contract with the plaintiff and she showed him a sketch plan of the house, she then took the sketch plan to the architect who prepared a building plan using the same specifications in the sketch plan and that is the plan plaintiff used to build and complete the house without additional measurements.

The 2nd defendant states he is a stranger to the suit and wonders why he has been sued.

It is further pleaded on a without prejudice basis that the only amount owing to the plaintiff by the 1st defendant is the sum of Kshs. 8400/- being the value of seven (7) sockets, which has so far been paid for

and there is no other liability.

The 1st defendant has filed a counterclaim stating that the entire contractual works was to be completed within three (3) calendar months from 8th May 2001 to 8th August 2001 – instead the house was completed on 6th October 2001 and the plaintiff was in breach of contract, so she also prays for costs of the suit and interest.

At the hearing, Mr. Ochieng appeared on behalf of the plaintiff, while Mr. Lughanje represented the defendants. This matter begun on 16th December 2002 before Hon. Justice Onyancha then sitting in Mombasa. He was eventually transferred and there seems to have been some inactivity after the plaintiff had testified – leading to the dismissal of the suit, then the dismissal orders were set aside and the same proceeded for further hearing before me.

When the plaintiff testified before Hon. Onyancha (J) he stated that there was indeed a written agreement with the 1st defendant, and there was a plan attached to the agreement – both were produced in court as exhibit 1 and exhibit 1(a). He was to build a house covering an area of 100sq. meters with a verandah of 30 sq. meters. Furnishings were to be

Floor – Galana

Wall to toilet – Galana

Double shutter to main house and all singles inside

The shutters were to be hardwood, ceiling to be hipped concrete tiles, wall finishes to be white emulsion, varnish to all woodwork

The electrical fittings were to be 3 in each room, main gate grilled – two leavers. He begun work on 8-5-01 and confirmed that he was to complete the work within 90 days.

Payments were to be as follows

20% at commencement

30% - ground floor level

30% at roof

20% upon completion

The plaintiff did the three stages and received 80% payment without any problem. During the work progress, the defendant created variations with the plaintiff's consent. These were not put down in writing but were oral and included the following:

- (1) Extension of size of building from original drawing to read 11.2 metres by 12.1 metres so as to bring total area to 135.52 sq. metres from the original 1100 sq metres.
- (2) Verandah increased from 9 sq. metres to 15.6 sq. metres – measuring there was 6.6 metres extra.
- (3) Galana paving around building amount 50.6 square metres.
- (4) Electrical works increased from – 3 outlet points to 7 outlet points i.e 4 extra in the living room
 - Bedrooms increased outlets from 6 to 8 (i.e 2 extra).
 - Bathroom – added 3 shower units which were not in the original plan
 - Verandah – 1 extra outlet

- (5) Plumbing work:-
- (a) Additional hot water heating system costing 10,000/-
 - (b) Mercury floating switch costing kshs. 5000.-

All the additional works were included in a document entitled "Extra works produced as Ex.2. The cost of the extra work amounted to kshs. 667,560 as per plaintiff's fair evaluation. He explained that the extra work arose at the setting stage when defendant realized she needed large space and extra related extensions.

The original work and extension work were carried out together and the rates for the extra work remained the same as per the original contract. Any other extension work was directly related to the additional size of the premises. When he demanded payment for the extra work, the defendants refused to pay.

On cross-examination plaintiff stated that he has sued the 2nd defendant because he interfered with the contract but he does not demand payment from him and that he should not have joined him as a party. He confirmed that the plan was drawn by an architect on the defendant's instructions and before the plan was made, he accompanied the defendant for a visit to the architect.

On being shown another similar plan which had some variations in the measurements, plaintiff denied that he altered the measurements without the defendant's instructions. He explained that he did not demand for the variations to be put in writing because at the time, the parties trusted each other.

As regards delay in completing the work, plaintiff stated that was due to an overhead cable belonging to Kenya Power and Lighting Company (KPLC) and he wrote a letter dated 15-9-01 (exhibit 4) giving the reasons for the delay. The other cause of the delay was the unexpected heavy rain which fell in July. The plaintiff produced a letter (Ex.5) saying they agreed on the extensions and 1st defendant wrote ex. 5 and as far as he is concerned the delay was for only one month and he completed the works by September 2001, even though defendant paid him in October 2001. However an agreement was shown to the witness indicating completion date as 6-10-01.

On re-examination, plaintiff insisted that the defendants were aware of the variation from day one as they are the ones who gave him instructions to vary the measurements. He says 2nd defendant is the one who threw him out of the suit property and brought someone else to do the grills.

The second defendant told this court that he was not involved in the building and contracts because his English is poor. He denies throwing plaintiff out of the site, saying at all times, the plaintiff dealt and had discussions with his wife. He however confirms that the grills in the house were done by one Mr. Garama.

The first defendant confirms entering into a contract with the plaintiff saying the contract she signed is Ex.1B.

As for the one which plaintiff seeks to rely on marked Ex.1A, she says that differs from what they had agreed on because it has changed measurements.

She confirms that, on the ground, the house has the bigger measurements than what plaintiff claims to have been initially instructed on, and her explanation is that, this is because the house was constructed exactly according to the plan Ex.1B which was drawn by Mr. Mawali. It is her testimony that, from the beginning when she signed the contract, there were no variations nor did she sign a document accepting to pay for extensions and variations. She further points to document (D.ex.2) dated 11th October 2001, written to her advocate confirming a final payment of the original contract in the sum of Kshs. 350,000/-, then it adds a list of extras totaling to Kshs. 667,506/- and her view is that plaintiff was changing the figures so as to ask for more money.

When the plaintiff handed over the house to defendants, he did not give them an occupation certificate,

and defendants had to hire a lawyer to write several demand letters and even filed suit, before plaintiff finally handed over the certificate, the defendants then stopped the case they had filed.

She categorically stated:-

“The extras listed were contested because the house is not bigger than what we signed and paid for”

She maintains that apart from what they agreed on there is no extra work done, the extra sockets were within the contract and the building on site is as per D. Ex.1.

As for the explanations regarding delay, she says that is really up to the plaintiff because he lives in Kenya and knows the seasons, and is infact the one who suggested the three months so if he knew he would meet challenges then he should have suggested 5 or 6 months. Defendants poke holes at the excuse about KPLC saying there was an old house on the plot, which had power and power was just connected from the old house to the new one.

On cross-examination DW1 confirmed that although she is aware of the weather fluctuations in Kenya, that cannot be used as an excuse for plaintiff failing to meet the stipulated time frame because she did not force plaintiff to suggest 3 months – it came straight from him.

The only extra she is aware of were not structural but incidentals being, mosquito nets, but she paid for those.

At the request of the plaintiff, the court visited the locus in quo and took note of the measurements on the ground and the extras which plaintiff referred to, both parties agreed that the 1st and 2nd bedrooms have one extra unit each. It was also agreed that the water heating system has a mercury sensor to control water from the ground (which was not in the contract). Then plaintiff said this cost him Kshs. 10,000/- to do the mercury and fitting – the mercury cost him kshs. 5000/-.

The court also observed that there was pavement built round the house (referred to as a Galana) which measured 50.6sq. metres and plaintiff stated that what was originally agreed on was only the building, not the pavement. The 1st defendant however says that the Galana was a suggestion by the plaintiff who said that to make the place beautiful, he would construct a pathway measuring 50.6m and he never said he would charge the defendants for it. She says plaintiff did not provide the Galana stones as they came from the old house. As for the Water heater and mercury defendant says the plaintiff told her it was standard, meaning it came with the house they were buying and plaintiff would pay for it.

As for the extra lighting points 1st defendant confirms that they agreed to add more sockets than what was in the contract but insists that they paid for the extra sockets being Kshs. 8,400/-.

There is no dispute that the parties entered into a contract where plaintiff was to construct a bungalow for the defendants, and the latter agreed was three months completion. The work begun on 8th May 2001 but wasn't completed in 3 months. What is in dispute is:-

- (a) Whether there was extra work and materials carried out and supplied to the defendants in variance or in addition to the written contract
- (b) Is the plaintiff entitled to payment for the purported extra work
- (c) Which is the actual building plan or document the parties agreed on – was I Ex.1A or Ex. 1B
- (d) Did the delay in completion amount to a breach of contract entitling the defendant to damages

Miss Chepkwony urges this court to find that the parties made a variation to the written contract, introducing structural changes in terms of measurements and electrical works as well as the water heating system

She also points out that although there was delay in completion, the same was adequately explained as the cause for delay were factors beyond the plaintiff's control i.e a natural cause by the elements namely rain, and the delay by KPLC to fix the cables on time. Their counterclaim by the defendants is seen as an afterthought which was only introduced after plaintiff filed suit.

Mr. Lughanje submits on behalf of the defendant that although they entered into a written contract with plaintiff, with a building plan having bigger measurements, what plaintiff presented for approval at the Municipal council, was a different building plan with smaller measurements than those they had agreed on in the contract, so that what he council approved is not what is on site. He argues that plaintiff prepared two different building plans and he has no offered any explanation for this and that in fact when the court visited the site, it transpired that what is cited as extra works did not tally with the measurements that were done in the presence of the court at the site.

It is Mr. Lughanje's contention that any person relying on a written agreement will not be allowed to add or vary it with an oral agreement.

He submits that the extras on the electrical works and the water heating system were in the contract and plaintiff is not entitled to make an extra claim on them.

He reiterates the position adopted by defendants regarding the late delivery of the works and urges court to make a finding in favour of the defendants in the counterclaim Exhibit 1A which the plaintiff seeks to rely on bears the approval stamp from the Municipal council of Malindi whereas exhibit 1B does not bear any approval stamp. The measurements in exhibit 1 A are smaller than the ones for Ex.1B – Did the plaintiff have two separate plans – one prepared to hoodwink defendant and the other one prepared to later defraud defendant. If that was the case, I think nothing would have been easier than the defendant calling H. S. Mwawali who drew the plan to confirm which of the two plans he had prepared because surely he must have a true record of what he drew. It is also instructive that it is the defendant who introduced exhibit 1B during cross-examination of plaintiff – by referring to the works as extra – then it naturally means they were not included in the initial agreement – and to make matters worse, what is on the ground does not conform with what is in the document.

Indeed when the court visited the house it was confirmed that the Galana pavement was done with the approval of the defendants, although it had not been included in the contract document. The defendant seems to have a mixed stand as regards the electrical works – in one breath she says plaintiff had confirmed that those were standard provisions which came along with the usual construction, then back she claims that they paid for the extra sockets although no receipts were produced in support of that.

With regard to oral evidence versus written evidence (Chitty on Contracts Vo. 1 Pages 624 – 626 paragraph 2-094 states:

“It is often said to be a rule of law that “if there be a contract which has been reduced to writing, verbal evidence is no allowed to be given ... so as to add to or subtract from, or in any manner to vary or qualify the written contract.” Indeed, 1987, Lord Morris accepted that “[p]arol testimony cannot be received to contradict, vary, add to or subtract from the terms of a written contract, or the terms in which the parties have deliberately agreed to record any part of their contract.” This rule is usually known as the “parol evidence” rule. Its operation is not confined to oral evidence: it has been taken to exclude extrinsic matter in writing, such as drafts, preliminary agreements, and letters of negotiation. The rule has been justified on the ground that it upholds the value of written proof, effectuates the finality intended by the parties in recording their contract in written form, and eliminates “great inconvenience and troublesome litigation in many instances.”

However the parol evidence rule is and has long been subject to a number of exceptions. In particular, since the nineteenth century, the occurs have been prepared to admit extrinsic evidence of terms additional to those contained in the written document if it is shown that the document was not intended to express he entire agreement between the parties. So, for example, if the parties intend their contract

to be partly oral and partly in writing, extrinsic evidence is admissible to prove the oral part of the agreement. In *Gillepsie Bros. & Co. v Cheney, Eggar & Co.*, Lord Russell C.J. stated.

“...although when the parties arrive at a definite written contract the implication or presumption is very strong and such contract is intended to contain all the terms of their bargain, it is presumption only, and it is open to either of the parties to allege that there was, in addition to what appears in the written agreement, an antecedent express stipulation not intended by the parties to be excluded, but intended to continue in force with the express written agreement.”

It cannot therefore be asserted that, in modern times, the mere production of a written agreement, however complete it may look, will as a matter of law render inadmissible evidence of other terms not included expressly or by reference in the document. “The court is entitled to look at and should look at all the evidence from start to finish in order to see what the bargain was that was struck between the parties.”

Scope of the rule. It follows that the scope of the parol evidence rule is much narrower than at first sight appears. It has no application until it is first determined that the terms of the parties’ agreement are wholly contained in the written document. The rule “only applies where the parties to an agreement reduce it to writing, and agree or intend that the writing shall be their agreement.” Whether the parties did so agree or intend is a matter to be decided by the court upon consideration of all the evidence relevant to this issue. It is therefore always open to a party to adduce extrinsic evidence to prove that the document is not a complete record of the contract. If, on that evidence, the court finds that terms additional to those in the document were agreed and intended by the parties to form part of the contract, then the court will have found that the contract consists partly of the terms contained in the document and partly of the terms agreed outside of it. The parol evidence rule will not apply. If, on the other hand, the court finds that the document is a complete record of the contract, then it will reject the evidence of additional terms. But it will do so, not because it is required to ignore the additional terms or the evidence said to prove them, but because such evidence is inconsistent with its finding that the document does contain the whole terms of the parties’ agreement. No doubt, in practice, where a document is produced which appears to be a complete contract, a party will experience considerable difficulty in proving, on the balance of probabilities, that further contractual terms were agreed outside the written terms of the document. But extrinsic evidence of such terms is not ipso facto excluded.”

While it is true that a written agreement takes precedence and ordinarily will not be altered by an oral agreement, here there is more than just oral claims, there is the actual conduct of the parties – the defendants in fact confirm the existence of certain extra works which were not contained in the written agreement, and which they consented to. I make a finding as a fact that the Galana and extra socket units were extras which did not form part of the earlier written document, and just by that confirmation, I am persuaded that there were extra works carried out:

The extra works were:-

(1) The extra socket units in each bedroom. The defendant’s claim to have paid kshs. 8400/- for them, but there is no receipt produced to confirm such payment. The counsel for plaintiff places a cost of Kshs. 1200/- and plaintiff gave a breakdown of such cost in the letter he wrote to defendant’s advocate and produced as exhibit 2.

(2) The court also noted at the site as informed by the defendants that there were indeed 3 extra points at the shower unit and one extra point at the verandah.

(3) The cost for the unit at the verandah was given as 1200/- but the socket units are shown as costing Kshs. 3000/- each. The receipts were produced by the plaintiff to confirm these prices. The four extra points in the living room were not contested during site visit by the court and plaintiff stated the standard provision is 2, what was proved is the 4 units, extra a Kshs. 1200/- each is 4,800. No receipts were given to guide me, then I take the figure of kshs. 1200/- as reasonable and for each of the units assess cost of

kshs. 1200/- which I presume includes labour to give a sum of kshs. 3,600/-. The shower units were said to be three – it is confirmed there are three bathrooms – each unit is said to cost kshs. 3000/- again no receipts produced, so I will use $\frac{1}{2}$ the figure given to be $1500 \times 3 = 4,500/-$ (four thousand five hundred only)

(4) For the Galana, defendants claim the same was constructed using stones from their old house which had been demolished, but admit that plaintiff used cement purchased at his own cost. Unfortunately it is not indicated how many bags of cement were used. The Galana pavement measured 50.6sq. metres even confirmed by the court at the site. Surely even if the defendants produced the stones (which I note is not denied), wasn't the plaintiff entitled to cover costs for the cement he purchased, even if he wasn't charging for labour as claimed by the defendant?

The plaintiff claims kshs. 60,720/- based on kshs. 1200/- per square metre. The contract document did not provide for that assignment so I will use the law of averages as follows:-

Defendant provided stones, plaintiff provided cement and labour and they share the expenses at half – so the plaintiff is entitled to $60,720/2 = 30,360/-$ (Thirty thousand, three hundred and sixty shillings only).

There is the claim of extra 6.6 m work done on the verandah and for which plaintiff claims kshs. 59,400/- worked at shs. 9000/- per square metre. The contract document read “verandah 30m squared @ 9000/- per square metre”

At the site, the plaintiff stated that originally the verandah was to measure 10 x 10 x 3 but that physically it measured 10.9 x 10 x 0.3 – meaning there is an extra 0.3metres at one end of the verandah and 0.9 square metres extra length – which in total would give 6.6square metre extra by 10.9 – working by the figure agreed in the contract then being kshs. 9000/- per square metre, then the sum of kshs. 59,400/- is justified and I so award.

As for the main house, the original measurements were 10 x 10, but a physical measurement taken showed it now measures 10.-9 – all round, meaning there is an extra 0.9 square metres – resulting in 10.9 x 4 (i.e the four dimensions). The contract signed showed the floor area was to measure 100 square metres i.e 10 x 10 @ Kshs. 14500 per square mere, so for the extra 0.9 x 4 = 3.6square metres and not 35 square metres as claimed.

In fact what is worked out would mean that it was 9.square meters extra and not 0.9 square metres extra – the sum due then is $14,500 \times 3.6 =$ kshs. 52,200/= (fifty two thousands, five hundred only).

The contract document does not refer to a water heating system with a mercury sensor to control water from the ground.

At the site, the parties agreed that there are three bathrooms and each bathroom has a unit. However, 1st defendant states plaintiff had expressed to her that water heater and mercury were standard.

If this was a standard provision meaning in every construction work one would find these as it came with the house, then nothing would have been easier than for defendants to simply get an independent contractor to confirm that or even a plumber. The total cost is given as Kshs, 15000/-. Again no receipts to back that expense, so I will use the principle of averages and award kshs. 7500/- (seven thousands, five hundred). On the plaintiff's suit I enter judgment in favour of plaintiff as against the 1st defendant being Kshs. 157,560. The claim against the 2nd defendant is not proved and is accordingly dismissed with costs.

The 7500 – mercury and water heater
3,600 – socket
4,500 – shower units
30,360 – Galana
59,400- verandah

52,200- main house

The claim against the 2nd defendant is not proved and is accordingly dismissed with costs. As regards the counterclaim by the defendant's

There is no doubt the work was not completed within the agreed period – whatever the explanation those were the risks plaintiff undertook when he bound himself to the agreement and the court cannot begin to vary the contract by saying the counterclaim is misplaced, when the same is a fact.

I make a finding that plaintiff was in breach of the agreement by failing to complete the assignment within the period agreed and he in fact signed a document confirming delivery was on 6th October 2001.

The defendant is therefore entitled to damages as per the counterclaim and my assessment – which will be pegged to the prevailing economic conditions that existed in 2001, is that general damages in the sum of kshs. 20,000/- (twenty thousands) only is appropriate and I so award.

The plaintiff and 1st defendant will each bear their own costs, in the respective claims.

The plaintiff bears the costs of the 2nd defendant as his claim against 2nd defendant has failed.

I award interest on the sums awarded each party at commercial rates with effect from the date of filing suit until payment in full.

Read, dated and delivered on this 9th day of **December 2010** at Malindi.

H. A. Omondi

JUDGE

Miss Chepkwony for plaintiff

Mr. Shujaa holding brief for Lughanje for defendant