

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

H.C. CIVIL APPLICATION NO. 5331 OF 1991

MAVJI DEVJI & COMPANY PLAINTIFF

V E R S U S

CHARANSONS LIMITED DEFENDANT

J U D G M E N T

The plaintiff's firm is carrying on business of supply of building materials and that of excavation contractors. The Defendant company is a Building and Civil Engineering Contractor.

On 10th September, 1996 the Defendant issued an order in favour of the plaintiff. The order reads:

Please supply the following;

Excavate/Cart Away Barclays Plaza Base as follows:

Kom atsu DT Showel (@) 1500/= per hour excluding the Fund

Cart Away @ 450/= per load.

According to the plaintiff. The contract involved the hire of their bull dozer as per the specification at the rate of Kshs.1,500/= per hour and to cart away the excavated material (Black soil) at Kshs.450/= per load. It is not in dispute that the plaintiff did provide the equipment with its driver, that they carried on excavation on the site and carted away the black soil. The Delivery notes prepared at the end of each day so worked duly signed by the Representative of the Defendant, mainly by one Ranjiit Singh, were produced. The plaintiff's witness also produced several cheques which were either unpaid or stopped payment by the Defendant. He deponed that after the plaintiff completed the work ordered they left the site on 5th December, 1990, that the work carried on by them was supervised by the Defendant and that no complaint was made till the date they left the site. The complaint came when the plaintiff started pressing for the payment of the balance which according to them is Kshs.969,850/= with costs and interest and V.A.T. thereon.

In the Cross-examination it was not suggested that it was the plaintiff who were responsible to supervise the manner in which the site was excavated. Furthermore it came out loud and clear that no complaint as to competency of the machine operator provided by the plaintiff or as to the manner in which the excavation was carried out, was made while the plaintiff were on the site. No question was asked on daily delivery notes which were produced and alleged to have been signed from 10th September, 1990 to 4th December, 1990. It was denied that the plaintiff absconded the site.

The Defendant's witness, although deponed that the plaintiff made faulty excavation, that the Structural Engineer informed about the fault and that they were asked to refill the faulty excavation by the employer, nothing was produced to substantiate those averments. His contention that the contractor absconded from the site flies flat on the face of the delivery notes produced. On perusal of those delivery notes I noticed that the last excavation was carried out on 18th October, 1990 and on the remaining days only the work of removing black soil was carried out I cannot thus accept the contentions of the Defendant that it had any right to hold the payment of the balance due to the plaintiff in respect of supply and hire of the excavation machine and carting away the soil so excavated.

On the other hand the plaintiff have substantiated their contentions and claim which are proved to the required standard on balance of probability. The statement and the invoice are produced by the plaintiff and the Defendant in their correspondence has not denied it veracity. What is had stated, is their inability to settle their claim on the basis of over excavation which is not proved.

I therefore hold for the plaintiff and order that the Judgment be entered against the Defendant and for the Plaintiff in the sum of Kshs.969,850/= with costs and interest at court rates. The claim of V.A.T. thereon is not proved and thus is denied.

Dated and delivered at Nairobi this 24th day of July, 2002.

K. H. RAWAL

JUDGE.