REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

APPELLATE SIDE

CIVIL APPEAL NO. 400 OF 2001

CHARLES MWARIRI KAHUTHU …….APPELLANT

VERSUS

J. MURURI CHEGE ……..RESPONDENT

J U D G M E N T

During the month of November, 1996 the respondent requested the appellant to make doors and windows for a house he was constructing at a place called Zimmerman in Nairobi.

According to the appellant the doors and windows were made but that though the respondent received delivery of the 6 windows and paid Kshs.30,000/= for them but when 6 doors were ready, he wanted to collect them before paying Kshs.42,000/= but the appellant could not agree to this.

Using this disagreement, the respondent went elsewhere where he was made similar doors, thus leaving the appellants doors.

The respondent, however, avers that he first entered into an agreement with the appellant to be made 25 steel windows for Kshs.30,000/=. That these were properly made and delivered, and he paid for them.

That when he found the windows were very well made, he ordered for 6 steel doors to be made by the appellant too.

But according to him, he gave the appellant two weeks to make these doors but the time limit was not met.

That his foreman followed up the matter to see if the doors could be ready in another two weeks but this was not to be either.

He went elsewhere and was made similar doors within a good time and he paid for them. This is why the case subject to this appeal was filed in the court of the Resident Magistrate Sheria House.

Each of the parties called one witness. On the appellant's side was Midikai Owuor Owiti hired by him to make the doors for the respondent which he could not pay for and the appellant refused to deliver without payment of Kshs.42,000/=, while on the respondent's side was Gerald Njuguna, his foreman. Each supported the version of either the appellant or the respondent.

In his plaint dated 20th May 1997 the appellant had sought various orders against the respondent; namely:

(a) That the defendant do collect the 6 finished steel doors and pay the plaintiff the balance of the purchase price of Kshs.42,000/= and storage charges at the rate of Kshs.200/= per day from the date of invoice to the date when the doors will be collected from the plaintiffs workshop;

(b) Costs of the suit,

(c) Interest on (a) and (b) above

(d) Any other relief that the Honourable Court may deem fit to grant.

When the magistrate (P. Wekesa (Miss) wrote and delivered her judgment on 9th July 2001, she dismissed the suit on the ground that the appellant had not proved his claim on a balance of probabilities. That the appellant refused to deliver the doors to the respondent for non-payment of the purchase price and could not come to court for an order to compel the respondent to take possession of the same doors.

The appellant was not satisfied with this decision and he lodged an appeal in a memorandum of appeal dated and filed herein on 2nd August 2001 in which he listed five (5) grounds of appeal.

The appeal faulted the learned magistrate for failing to find that the appellant had proved his claim on a balance of probabilities, that after rightly finding that there was a contract between the parties to make 25 steel windows and 6 steel doors misdirected herself in ruling that the appellant could only be paid for the doors on delivery to the respondent; that she erred in failing to find that the completion of the contract was on payment of the balance of the contract sum and delivery of the remaining goods, namely, the six doors; that she erred in failing to consider that the plaintiff demanded to be paid the balance of the contract sum before he could release the remaining goods and this formed the mode and terms of payment for the balance and that she erred in failing to appreciate that the plaintiff's case was that the defendant after ordering for unique doors later refused to collect and pay for them and the plaintiff wanted him to be compelled to specifically perform his part of the contract.

Though the counsel for the appellant., after fixing the appeal for hearing, served a hearing notice upon the respondent's counsel, when the case was called to hearing on 25th September 2002 neither the respondent nor counsel appeared to contest the appeal and counsel for the appellant was allowed to proceed exparte.

He submitted on the appeal in detail to discount the magistrate's finding that there was no sufficient evidence to support the appellant's case.

According to counsel, once the lower court agreed that there was one contract, once the respondent paid a deposit, the common practice would have been that he would have been expected to pay the balance on collection of the remaining items.

That since the appellant had allowed the respondent to take possession of the windows, it was only prudent that he asks for the balance to be paid before the collection of doors.

According to counsel, the evidence of the appellant's witness established that he, the said appellant, had performed his part of the contract and it was wrong for the magistrate to hold that completion of the contract would only be when the respondent collected and took possession of the doors.

That the respondent conduct in hiring the same person who had made the doors at the appellant's workshop to make him similar doors elsewhere was to punish the appellant.

That each party to this transaction had an obligation to perform his part of the contract and that the appellant had performed his part and it was the respondent's responsibility to perform his part by paying

the balance of the contract sum.

Counsel submitted that this was a proper case where specific performance should have been ordered.

He said the doors were of a peculiar design made specifically for the respondent and they could not be sold to anybody else so that the appellant could mitigate his loss.

Counsel urged this court to allow this appeal with costs.

I have heard these submissions by counsel for the appellant. There are no rebutting submissions by the respondent or his counsel because they did not appear to challenge it.

The contract between the parties herein was verbal and it was not easy for the learned magistrate to know what its actual terms were.

The magistrate agreed there was only one contract involving doors and windows and if the respondent was allowed to collect the 25 steel windows because of the deposit of Kshs.30,000/=, then it must have been all along in the appellant's mind that on the collection of the 6 steel doors the respondent would pay for them before such collection.

The magistrate did not dismiss the appellant's suit because he had delayed in completing the work on the steel doors as was the respondent's contention, in which case the time factor would have come into play, but because the appellant refused to deliver them.

The appellant was not one of those big business people where one goes through the process of delivery, invoicing and then paying.

He could be one of those living from hand to month people and if the respondent went or sent his foreman for the delivery of the doors and the appellant told him:-

"Yes here are the doors ready for you. Collect them on payment ."

but the respondent was not able to pay for them, then can it be said the appellant refused to deliver and hand over possession of the doors to the respondent?

If anything, the respondent was unable to pay for the doors on the terms the appellant had in mind and of which the respondent was aware, that is to say. Paying cash on delivery.

Instead of going to another place where he had similar doors made and, probably at the same price, the respondent could even have proposed a date to the appellant when he would be able to pay for the doors and I think the appellant would have agreed to wait for at least a few more days. He never said he gave such proposal!

The learned magistrate by implication, did not believe the respondent's contention that the appellant delayed in completing the work on the doors, otherwise she would have made a finding on this.

The respondent had given specifications for the type of doors he wanted made by the appellant. They were unique as the appellant put it and could not be sold to any other customer.

The respondent did not contest this evidence – yet he deliberately refused to pay for them, for whatever reasons, and went else where to get similar doors.

I would agree with the counsel for the appellant that the respondent failed to perform his part of the contract and that he should have been blamed for the part failure of this contract and that this conduct on his part was intended to punish the appellant. There was no need for this.

This deal was entered into in November, 1996 and aninvoice was not issued until 13th January 1997 – but by then some 8 steel windows had been supplied and another 12 were supplied on 30.1.97.

This was conduct of a business man conscious of the business he was doing.

And if the respondent gave the appellant about 2 months to get delivery of 25 windows without complaining, it would appear malicious for him to give a period of 2 weeks for making of 6 doors.

I am satisfied the respondent failed to perform his part of the contract by failing to pay the balance of Kshs.42,000/= on delivery of 6 door and should have been ordered by the lower court to pay this money.

It is morally wrong to ask somebody exhaust his energy and resources to make 6 steel doors and at the end of it refuse to accept or collect them because you have no money to pay.

I allow this appeal and set aside the lower court dismissal order but instead replace it with one entering judgment for the appellant for Kshs.42,000/= with costs on this appeal and the case before and interest from the date of filing suit.

I cannot order the appellant to take the 6 steel doors but once he pays the money he should decide whether to collect them or not. In the circumstances of this case I cannot order the respondent to pay storage charges as sought.

These shall be the orders of this court.

Orders accordingly.

Delivered and dated this 2nd day of October 2002.

D.K.S. AGANYANYA

JUDGE