



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HC.C.CIVIL CASE NO.5580 OF 1991

TRISHUL CONSTRUCTION..... PLAINTIFF

VERSUS

JOE K. MUCHEKEHU DEFENDANT

J U D G M E N T

The Plaintiff claims a sum of the **Shs.278,838.80** against the Defendant being a sum of **Shs. 224,870=00** in respect of which it is alleged the Defendant's Architect issued a final certificate in respect of the final amount due in respect of building work carried out by the Plaintiff for the Defendant together with interest thereon at 2% per month. The interest is said to be the interest permitted by the Building contract entered into by the parties.

The defendant denied liability on the basis that:-

- (1) The Plaintiff did not carry out the work faithfully or as specified in the contract.
- (2) The Plaintiff was unable to complete the work at the agreed time or at all and the contract period had be extended as a consequence at the cost of the defendant.
- (3) That despite the extension the Plaintiff was unable to complete the work and averred that even the work the Plaintiff did was defective and of poor quality and below acceptable standards, and as result the Defendant suffered loss and damage.
- (4) If any final certificate was issued it was issued without the Defendant's authority and he is not bound by the action of his architects.
- (5) The rate of interest at 2% per is disputed.
- (6) That if any money is due to the Plaintiff then it should be only paid after the Defendant has deducted his direct loss upon the completion of the work and valuation of the same.

The Defendant counterclaimed on the basis contended the matters complained of in paras 3,4 5,6 and 8 of the Defence and claimed

- (a) Cost of completing the work
- (b) Cost of rectifying defects

(c) The difference if any of the value of the work done by the Plaintiff and the sums already paid in regard thereto in the event that the latter is greater than the former.

The Plaintiff's Managing Director Mr. Rabadia gave evidence in support of the Plaintiff's claim. He was unable to produce the agreement in writing referred to in para.3 of the Plaintiff's claim, which the Defendant admitted in para.2 of the Defence, as the Defendant's Architect had not given the same to him. Miss Kiarie objected to an unsigned copy being adduced in evidence and I upheld the objection. The Plaintiff was therefore unable to show the court what the terms of the written agreement were. The witnesses gave evidence that he was expected to build a house at Karen for the Defendant in accordance with plans drawn by Triad Architects who were the Architects for the Defendant. He produced as an Exhibit a letter from the Architects confirming the contract.

The witness produced a copy of a final certificate dated the 20th October, 1990 from the Architects in the sum of Shs.24,870=00 which was annexed to a letter of the 26th October, 1990 from the Architects, the original of which, was to be presented to the Defendant for payment, which the Plaintiff was entitled to receive, within 14 days of presentation. The Plaintiff presented the certificate but the Defendant refused to pay. Exh.18 and 19 are letters from the Plaintiff seeking payment but none came. No reply to those letters was produced by the Defendant and not a letter or other communication from the Defendant as to why the certificate was not paid. The Defendant had however prior to the issue of the final certificate raised a complaint with the Plaintiff. Exh. 9, and 12 are letters sent by the Defendant to the Architects in which the Defendant complained of certain defects. A draft final account was prepared Ex.10. Showing the total sum due but including an amount of **Shs.55,000/=** which was deducted for savings as set out therein.

On the 17th August, 1988 the Architects sent a defects list but to the Plaintiff Ex.11, Ex.11 (a) is a copy of a defects list (but with comments written on it. In cross-examination the witness said that the writing was that of the Architect. He also said the Plaintiff rectified the work and that is why the final certificate was issued. This was after the Architect carried out an inspection and was satisfied, as to the work. The witness was referred in cross-examination to Ex.13, a letter sent by the Plaintiff to the Architects in which the Plaintiff pointed out that the defects could not be dealt with unless the final account was presented. In his reply the witness said that the Plaintiff went on site to do the repair, as the Architect was not issuing the final certificate. It was his contention that the defects should have been dealt with after the final certificate was issued and a 5% retention of the contract price was to be withheld until the defect liability period expired and the defects remedied to the Architect's satisfaction.

The Plaintiff replied to a letter from the Defendant of the 25/10/1989 in which the Plaintiff claimed that the contents were a waste of time. In reply to a question in cross-examination. The witness referred to a letter from the Defendant of the 27th November, 1989 (Ex.16) and said that a meeting took place with the Defendant the Architect and the Plaintiff at which an agreement was reached which led to the issue of the final certificate. From this I gather that the Plaintiff was claiming that the Defendant and Architect had resolved the outstanding disputes, which led to the final certificate being issued. The Defendant was not called to give evidence and his version of the facts was not presented. Having heard the evidence of the Plaintiff's witness I am satisfied that his evidence is truthful and I have no hesitation in accepting it as a correct account of the facts in this matter.

I find that the defects of which the Defendant complained in his defence were either rectified to the satisfaction of his Architect or he was given a monetary allowance by way of way of compensation as referred to in Ex.15. I find that the Plaintiff carried out the work in accordance with the agreement and reject the complaints of the Defendant contained in the defence with regard to alleged defective work. If there were any defects then I am satisfied that these were rectified. The Architect in his letter of the 26th October, 1990 Exh.17 sent to the Plaintiff, asked the Plaintiff to note that a sum of **Shs.64,630.00** was owed to City Plumbing Works, which acknowledged receipt of **Shs.64,630.00** from the Defendant. The Plaintiff's witness agreed this money had been paid. I will now deal with the final certificate and the submission by Miss Kiarie that the Architect lacked authority to issue the certificate. The question of whether or not the Architect was the Defendant's agent or not is a matter of fact. In this present case the Architect on behalf of the Defendant's wrote on the 30th January, 1987 on the instructions of the Defendant to whom the letter was copied accepting the Plaintiff's price.

Through out the matter correspondence was sent to the Plaintiff by the Architect and at no time did the Defendant object to the Architect that he had no authority to write in the Defendant's behalf. It was also admitted that certificates were issued during the course of the work, which were paid by the Defendant. The Plaintiff's witness also gave evidence to this fact and I accept that what he said was correct. Even after the final certificate was issued to the knowledge of the Defendant he did not complain or challenge the Architects' authority to issue the certificate. Although the terms of the agreement in writing was not produced to the court I am satisfied that the certificates and final certificate was issued pursuant to the terms of this written Agreement. In this case I hold that the final certificate issued was conclusive proof of the sum due to the Plaintiff as certified by the Architect.

The Plaintiff claims on his Plaintiff interest at 2% per month on the final certificate from the date of its issue until the filing of the Plaintiff. As the terms of the contract were not proved in this respect, I will not award this interest as claimed. With regard to the sum paid to City Plumbers, this amount if it formed part of the final certificate, should have been paid to the Plaintiff.

The Defendant is at liberty to recover this sum from the City Plumbers if there is double payment.

I find that the final certificate is binding on the Defendant having been issued by the Defendant's Architect and agent and I award the amount thereof namely Shs.224,870,00 to the Plaintiff with interest thereon at court rates from the date of filing of the suit together with the costs of the suit.

Dated and delivered at Nairobi this 14th day of November 2001.

PHILIP J. RANSLEY

COMMISSIONER OF ASSIZE