

w.e.f 1/1/88 to 31/8/88 -

Kshs 16,769/-

TOTAL

Kshs 403,414/-

Balance

Kshs 229,183/-

The defendant denied the claim and raised a counterclaim.

The defendant admitted the existence of the agreement to construct the building aforesaid. He however says in the defence that he instructed the plaintiff to temporarily stop working for him as he (the defendant) had run short of money to purchase building materials. He further stated that the plaintiff breached the agreement and subjected the defendant to loss. He also added that he was the one who did all the transportation of the construction materials to the site and not the plaintiff.

With regard to the counterclaim the defendant refers to a subsequent agreement of 8th January, 1988 between the parties herein for the completion of the building. It is the defendant's case that the plaintiff failed to comply with all the conditions of the said agreement and exposed the defendant to a lot of inconvenience damage and loss to wit 260 bags of cement at a cost of Kshs 85/- per bag. He therefore counterclaimed the sum of Kshs. 17,000/- being the cost of the cement plus Kshs3,000 being the cost of transporting the cement making a total of ksh. 20,000/-.

Both parties testified and called witnesses to support their respective pleadings. Learned counsel appearing for the parties have also made their submissions which I have on record.

I have also looked at the issues framed vis a vis the evidence adduced. The documents produced in evidence by both parties also speak for themselves.

The plaintiff abandoned his claim under paragraph 5(ii) (iii) and (iv) and so the total sum of Kshs.229,183/- was revised downwards to Kshs. 157,214/-. this altered the issues framed and which appear on the record. I will adopt the issues as framed by the learned counsel for the plaintiff in his written submissions.

My first observation from the material before me is that there is a telling departure from the defendant's pleadings and the evidence presented. In the pleadings the defendant alleged that the plaintiff was instructed to stop working as the defendant had ran short of money to purchase the building materials. In evidence he said the plaintiff abandoned the project. Both versions cannot be true. One must be to the contrary. He further stated that the sum of shs. 38,614/- was the sum due and payable after the plaintiff resumed work to be done not for work already done. In addition he said work stalled for over a year after which he looked for someone else to complete the work.

There is evidence that the plaintiff issued receipts for every payment made by the defendant and it is reasonable to assume that the defendant would question any departure from that practice. That he did not, confirmed the plaintiff's assertion.

It is the plaintiff's case that after the supplementary agreement was signed he continued with work but was not paid. The defendant on the other hand said the plaintiff did not resume work at all.

I have already observed that the defendant contradicted his statement of defence in his evidence in court. He even denied the averments of his defence and counterclaim under cross-examination. On the other hand, the plaintiff remained consistent in line with his pleadings and calculations as presented.

This brings me to the question of credibility. A party who changes course midway or abandons his pleadings during the trial is not likely to be telling the truth. If the pleadings have not been abandoned, or amended, a party is bound by them. This is because, the essence of any pleading is to put the other party on notice of what to expect in the trial. The inconsistency of the defendant, his hesitant manner when giving evidence has destroyed his credibility.

Further to the foregoing whereas the defendant says that after the agreement of 8/1/88 the plaintiff did not resume work, until a year later when another person took over there is evidence that between February, 1988 and July, 1988 he purchased some cement. Why would he do so if no work was going on?

I saw the plaintiff testify and observed his demeanour. I believe what he said was the truth. I believe that the sum of Kshs. 38,614/- was due and payable before the second agreement to made the total of Kshs. 225,000/-.

When the plaintiff called the quantity surveyor, it was to secure his interest. There was nothing wrong with that. In any case he was to value only what the plaintiff had done upto September 1988 when work stopped for non-payment. Above all, the defendant was also at liberty to call professional evidence to counter that presented by the plaintiff. He did not.

When all is said and done, it is the defendant and not the plaintiff who breached both agreements. The evidence is clear. I find that the defendant is liable to the plaintiff for that breach.

The sum of Kshs. 157,214/- for work done by the plaintiff at the instance of the defendant has been arrived at by mathematical precision and, in my judgment, should be awarded to the plaintiff.

There was a claim for general damages. With respect, not a good case has been made for the same. At most, it is speculative and in any case, in a contract such as the one between the parties herein, an award of general damages would be misplaced. I am unable to award the same.

In respect of the counterclaim raised by the defendant, I find that he has not prove hte existence of the 200 bags of cement or the value thereof. Further no proof was given that the same were damaged if at all. the counterclaim is therefore dismissed.

In the end, I find for the plaintiff. There shall be judgment for the plaintiff in the sum of Kshs. 157,214/- plus interest at court rates from the date of filing this suit until payment in full. The plaintiff shall also have the costs of this suit.

Orders accordingly.

Dated and delivered at Nairobi this 28th day of September 2000

A. MBOGHOLI MSAGHA

JUDGE

Judgment delivered in the presence of Mr. Muriithi for the defendant and Mr. I'Inoti holding brief for Mr. Kibe for the plaintiff.