Muthami t/a Qara Boreholes Services v Mutisya (Environment and Land Appeal E048 of 2021) [2024] KEELC 6914 (KLR) (16 October 2024) (Judgment)

Neutral citation: [2024] KEELC 6914 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT AND LAND APPEAL E048 OF 2021

A NYUKURI, J

OCTOBER 16, 2024

BETWEEN

KILONZO MUTHAMI T/A QARA BOREHOLES SERVICES ..... APPELLANT

AND

MUSEMBI MUTISYA ..... RESPONDENT

(Being an appeal from the judgment of Honourable H. Onkwani, Principal Magistrate, in Mavoko in ELC Case No. 10 of 2019 delivered on 7th October 2021)

JUDGMENT

Introduction

1. This appeal was filed by Kilonzi Muthami T/A Qara Boreholes Services challenging the judgment of Honourable H. Onkwani delivered on 7th October 2021 in Mavoko ELC CMC Case Number 10 of 2019. In the impugned judgment, the trial court allowed the plaintiff's (respondent herein) claim for the sum of Kshs 1,300,000/- paid to the appellant for the drilling of a borehole.

Background

2. In a plaint dated 22nd February 2019, the plaintiff averred that on 19th February 2018, the plaintiff and defendant entered into a contract for drilling and equipping of a borehole on land known as LR No 162 in Mavoko area at a consideration of Kshs 1,300,000/- which the plaintiff paid in full. According to the plaintiff, the defendant was to drill a borehole at the recommended depth of 200 meters; and undertake 6" casings, development, test pumping, water analysis and submission of the borehole completion report.

3. The plaintiff's complaint was that the defendant failed to complete the work as agreed, and breached the contract. Therefore the plaintiff sought the following orders;

a. An order for specific performance directing the defendant to do borehole flashing, 6" casing installation, borehole development, test pumping, water analysis and to submit a completion report for the borehole on LR No 162 Mavoko area within 30 days of judgment.

b. In the alternative, the defendant be ordered to refund the plaintiff Kshs 1,300,000/- being the contract sum paid for uncompleted works.

c. Costs plus interest of this suit at court rates.

d. Any other or further relief that this honourable court may deem fit to grant.

4. In a statement of defence dated 5th November 2019, the defendant denied the plaintiff's claim and averred that the plaintiff engaged an independent, registered hydrologist to conduct hydrological survey on the land for purposes of drilling a borehole and prepared a hydrological survey report dated 20th February 2018 and pin pointed the specific drilling site on the plaintiff's plot. That the defendant drilled upto the depth of 200 metres but contrary to expectations, the borehole did not discharge water at that depth which led them to drill further to a depth of 230 meters but that at that depth, the borehole only discharged very little water with very poor recharge capacity.

5. He stated that parties agreed to suspend the drilling and that the plaintiff reengaged the hydrologist who advised against drilling beyond 230 meters and stated that there was no other point on the plaintiff's plot that could be drilled to produce more water. He stated that the plaintiff had refused to engage the defendant to calculate the amount owing to the plaintiff for work not done. They therefore sought for dismissal of the plaintiff's case.

6. In a rejoinder, the plaintiff filed a reply to defence dated 12th November 2019 stating that he was a stranger to allegations of the defendant to the effect that the plaintiff engaged an independent hydrologist who made two reports and that the hydrologist adviced against drilling beyond 230 meters.

7. The matter proceeded to hearing. Both the plaintiff and the defendant presented one witness each, although it appears from the record that the defendant's witness left court before completion of cross examination.

Plaintiff's evidence

8. PW1 was Musembi Mutisya, the plaintiff in this case. His testimony was that he entered into an agreement with the defendant for the latter to drill a borehole on his land at a cost of Kshs 1,300,00/- which he paid in full, but that the defendant abandoned the project before completing it. He sought to be compensated.

9. On cross examination, he stated that he used to visit the site during the drill but that the hydrologist did not visit the site. He also stated that they agreed that if at 200 meters water was not found, he would drill until water is found. He denied a suggestion that the hydrologist wrote a second report and stated that no negotiations were initiated by the defendant. That marked the close of the plaintiff's case.

Defendant's case

10. DW1 was Kilonzi Muthami who alleged to be the registered proprietor of Qara Borehole Services. He stated that in February 2018, the plaintiff approached him and sought his assistance to sink a borehole in his property in Mavoko area of Machakos. That the plaintiff informed him that he did not know the procedures for acquiring necessary authorizations and permits, which he assisted the plaintiff. He further alleged that he gave the plaintiff the contacts of a registered hydrologist one Joseph Nzomo

to assist the plaintiff carry out a hydrological survey and determine the appropriative point where the borehole could be drilled.

11. According to the witness, the hydrologist met the plaintiff and carried out survey works and prepared the hydrological survey report dated 20th February 2018 and pin pointed the specific point for drilling the borehole. He stated further that on 19th February 2018, the parties herein signed a contact for drilling the borehole. That he mobilized equipment, personnel and materials to the site in April 2018 and that the plaintiff personally supervised the drilling works. He maintained that his team drilled to the agreed depth of 200 meters but contrary to expectations, the borehole did not discharge water which led them to drill to the depth of 230 meters but that the borehole discharged very little water with very poor recharge capacity.

12. It was further his testimony that the parties agreed that he suspends the drilling works and reengage the hydrologist to repeat the survey to determine the viability of drilling beyond 230 meters and that in a second hydrological survey report dated 16th July 2018, the hydrologist advised against drilling beyond 230 meters depth. He stated that they were unable to proceed to install casings or do any other works as the borehole was dry. He stated that the plaintiff had refused to engage him so that he could calculate the amount of money due to the plaintiff for work not done.

13. In cross examination, he stated that he had the relevant skills and experience in drilling and that the first scope of his work was to facilitate a hydrological report, survey and drill upto 200 meters while the second part required him to use development and prepare completion report which he did not do. He stated that they agreed with the plaintiff for him to introduce Nzomo the hydrologist to the plaintiff and that the defendant received Kshs 50,000/- to be paid to the hydrologist as the money was received on behalf of the hydrologist. At that point, the matter was adjourned as the witness left the court during cross examination; and after the same was severally adjourned, the defence counsel closed the defence case before conclusion of cross examination and reexamination of DW1.

14. It is upon consideration of the pleadings and evidence that the trial court in its judgment delivered on 7th October 2021 found that the plaintiff having paid the agreed consideration for the defendant to drill a borehole on this land, the defendant breached the contract and that the prayer for specific performance being untenable, the court ordered the defendant to refund the consideration of Kshs 1,300,000/- paid by the plaintiff to the defendant for breach of contract.

15. Being aggrieved with the judgment of the trial court, the appellant filed the appeal herein vide a memorandum of appeal dated 22nd October 2021 and amended on 3rd May 2023 citing the following grounds;

    a. That the learned trial magistrate erred in law and in fact by failing to take account that the appellant had produced in his list of documents two hydrogeological survey reports which he relied on while giving his testimony which have allowed the court to effectively and effectually determine the issues.

    b. That the learned trial magistrate erred in law and in fact in failing to appreciate and consider, in the very least, the legal doctrine of frustration as submitted by the appellant, and which rendered complete performance of the contract by the appellant an impossibility.

    c. That the trial magistrate erred in law and in fact in finding that the appellant was liable for breach of contract and ordering that he refunds the whole contractual amount of Kshs 1,300,000/-.

d. That the learned trial magistrate erred in law and in fact by failing to take into account that the appellant had partly performed the contract.

e. That the learned trial magistrate erred in law and fact by failing to take into consideration that the appellant had tried to mitigate the matter by inviting the respondent for a meeting to deliberate/engage/review and calculate the amount (if any) owing to the respondent for the work that was not done but the respondent declined.

f. That the trial magistrate misdirected herself by concluding and accepting the respondent's case as proved without taking into consideration the appellant's case which was a clear departure from the provisions of the *Constitution* of Kenya 2010 in regards to fairness.

g. That the decision of the trial magistrate occasioned a manifest miscarriage of justice.

16. Consequently, the appellant sought the following orders;

a. This appeal be allowed.

b. The judgment of the magistrate court dated 7th October 2021 be varied, vacated and or set aside.

c. The costs of this appeal be awarded to the appellant.

17. The appeal was canvassed by way of written submissions. On record are the appellant's submissions dated 3rd May 2023 and the respondent's submissions dated 30th October 2023.

Appellant's submissions

18. Counsel for the appellant submitted that the trial court failed to take into account the fact that the appellant had produced among others two hydrogeological survey reports which evidence was not challenged. Counsel argued that while the trial court found that the hydrological reports were not produced, when the proceedings in regard to the defence evidence show that the two reports were part of the exhibits produced by the appellant hence the trial court was wrong in its findings.

19. Counsel further contended that the trial court was wrong in not finding that the contract between the parties herein was frustrated and that performance of the contract became impossible. Reliance was placed on the case of *Charles Mwirigi Miriti v Thananga Tea Growers Sacco Ltd & another* [2014] eKLR for the proposition that where performance of a contract is impossible for no fault of either party, then such contract is said to be frustrated. Counsel argued that the appellant relied on the findings of the hydrological report as seen in the terms of the agreement dated 19th February 2018. Counsel argued that the trial court was wrong to order the appellant to refund the entire Kshs 1,300,000/- when the contract had been partly performed.

20. It was further submitted for the appellant that the trial court failed to take into account the fact that the appellant tried to mitigate the matter involving the respondent to a meeting to review and calculate the amount owed to the respondent for work not done. Counsel argued that the respondent's insistence that the borehole had to produce water is a matter that was not guaranteed.

21. Counsel also contended that the trial court failed to take into account the appellant's case, resulting in miscarriage of justice. Counsel further submitted that the respondent did not dispute the fact that the appellant had began the work, hence the trial court failed to consider the two survey reports.

Respondent's submissions

22. Counsel for the respondent relied on the case of *Selle & another v Associated Motor Boat Co. Ltd* [1968] EA and submitted that this court was duty bound to reanalyze and reevaluate the entire evidence on record and make its own finding as to whether the trial court was wrong in finding that the appellant breached the contract. Counsel argued that contrary to the appellant's position, only one hydrological report dated 20th February 2018 was produced in evidence and the report of 16th July 2018 was never produced at the trial. Counsel argued that the appellant's insistence that the later report was produced at trial is misguided and aimed to steal a match on the respondent. Counsel argued that the trial court could not rely on a document not produced at the trial hence the court was right in its findings.

23. On the question of frustration of contract, counsel submitted that the appellant failed to disclose that it was the respondent's uncontroverted evidence in court that throughout the entire drilling process, the respondent relied on the appellant's expertise as the latter represented himself as an expert in hydrological survey and borehole drilling. Counsel referred to the case of *Combe v Combe* [1951] 2 KB 215 for the proposition that where one party relies on the other party's representation, promise or assurance the other party cannot be allowed to revert to previous legal relations.

24. Counsel argued that the agreement of the parties placed on the appellant the duty to procure borehole authorization and permits which include having a hydrological survey report as a key requirement in obtaining permits from the relevant authorities. Counsel argued that the appellant could not be heard to rely on the irregularities committed by its own officer and or acquittances to allege frustration of the contract.

25. Reliance was placed on the case of *Alghussein Establishment v Eton College* [1991] 1 ALLER 267 for the proposition that unless there are contrary expressions in a contract; it should not be presumed that the intention of the parties was to entitle a party to take advantage of his own breach against the other party. Counsel maintained that the respondent denied contracting a hydrologist and stated that it was the appellant that informed him that the hydrologists report was positive on water availability at the drill site.

26. Further, counsel submitted that the appellant could not be heard to allege frustrate when he made misrepresentation to the respondent that they had struck water and even demanded final payment to enable the appellant purchase the necessary equipment for completion of the process. Counsel further argued that although the down payment was made on 26th February 2018, the appellant commenced the drilling in April 2018 which was outside the agreed time of 7 weeks.

27. Supporting the trial court's finding that the appellant had breached the contract, counsel submitted that the evidence showed that the appellant abandoned the project without installing the casings. Counsel contended that the trial court was right in its findings having considered the totality of the evidence and determining the legal consequences of the appellant's actions. Counsel submitted that the appellant did not present evidence of frustration. Counsel argued that the recommended depth of the borehole was 230 meters and the appellant was to develop until water was clear but this was not done.

28. Regarding the appellant's contention that the trial court did not take into account the fact that the appellant attempted mitigation of the matter, counsel submitted that this position amounted to an admission by the appellant that there was work that had not been done by him, which is a breach of the contract. Counsel argued that the respondent's uncontroverted testimony was that the appellant did not invite him for any negotiations as no evidence was tendered in court to show that the appellant reached out to the respondent.

29. Regarding the appellant's contention that the appellant's evidence was disregarded by the trial court, counsel refuted those claims and submitted that the judgment reflected the fact that the trial court thoroughly considered the facts and the law and arrived at a proper and just decision as the trial court's reasoning was evident in the judgment.

Analysis and determination

30. The court has carefully considered the appeal, parties' rival submissions and the entire record of the trial court. The nine grounds of appeal raise the following issues;

    a. Whether the trial court disregarded the appellant's evidence in arriving at its decision.

    b. Whether the appellant proved that the contract between him and the respondent had been frustrated.

    c. Whether the trial court was wrong to order the appellant to refund the entire consideration when the agreed works had been partially done.

31. The duty of this court as a first appellate court is to reassess, reanalyze and reconsider the evidence before the trial court and make its own independent conclusions bearing in mind that it had no opportunity to see or hear witness and make due allowance for that. (See the case of *Selle & another v Associated Motor Boat Company* [1968] EA 123).

32. On whether the trial court disregarded the appellant's evidence, the appellant argued that he produced two hydrological reports by the independent hydrologist contracted by the respondent. The two reports are dated 20th February 2018 and 16th July 2018. This court has considered the record. The proceedings before the trial court of 23rd September 2020 show that the defendant adopted his witness statement dated 5th November 2019 as his evidence in chief and produced documents filed on the list of documents dated 5th November 2019 and the supplementary list of documents dated 17th December 2019 as exhibits. The record shows that the appellant's list of documents dated 5th November 2019 had two hydrological reports that of 20th February 2018 and another report of 16th July 2018. The record also shows that the two documents were produced by the appellant without objection from the respondent. Therefore the respondent's argument that the report of 16th July 2018 was not produced is without basis and incorrect. In the premises, the trial court's findings that the appellant did not produce two hydrological reports was wrong.

33. The appellant having presented the two hydrological reports, the trial court was bound to interrogate the said evidence before arriving at its decision and I therefore find that the trial court was wrong in disregarding the evidence of the hydrological reports. The trial court ought to have considered the reports alongside other evidence as the court was not bound by the expert report of the hydrologist, which were expert opinions.

34. The appellant raised the question of frustration of contract and maintained that the appellant could not complete the agreed works as the 2nd hydrological report pointed to the fact that water was not available to be drilled on the respondent's land.

35. The question of who contracted the hydrologist was a substantive issue raised by the respondent who pleaded that he was a stranger to allegations by the appellant of him contracting the hydrologist. That question is key as it appears the drilling was based on the first hydrologist's report that confirmed availability of water and the stoppage of the works were based on the latter hydrologist's report that stated that there was no water at the site. Clearly, it is apparent that one hydrologist gave two

contradicting reports. The first one before drilling that there was water and the second report after finding that water was not available to the effect that there is no water.

36. Therefore this court ought to find out who between the parties herein contracted the hydrologist as the contract was allegedly based on a go ahead report which was allegedly recanted five months later by the same hydrologist, who appears to have been gambling over the same.

37. Section 109 of the *Evidence Act* places the burden of proof of a fact on the person alleging the existence of such fact and states as follows;

> The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

38. As the appellant is the one who alleged that the hydrologist was contracted by the respondent, a fact refuted by the respondent who alleged that he was a stranger to these allegations, the burden of proving the allegations of the hydrologist having been contracted by the respondent squarely lay on the appellant. Although the hydrologist recorded his statement supporting the appellant's allegations he did not attend court and present his evidence. The reason for his non attendance is unknown.

39. Apart from alleging that the hydrologist was contracted by the respondent and that the appellant's role was limited to linking the hydrologist and the respondent, the appellant did not present any evidence of the respondent's instructions to the hydrologist. In the appellant's evidence on cross examination, he conceded that he was to facilitate hydrological survey and the report thereof, and that he received Kshs 50,000/- from the respondent on behalf of the hydrologist. He further testified in chief as per his witness statement that the respondent informed him of his lack of knowledge of the procedures for obtaining the relevant authorities and permits and that the appellant assisted the respondent in obtaining the same. The respondent denied having any contract with the hydrologist. It is therefore clear that the appellant is the one who chose and contradicted the hydrologist to conduct the hydrological survey and only asked the respondent to bear the cost of the survey.

40. That being the case, the reliability of the hydrologist's survey report was entirely the appellant's responsibility and therefore any loss or liability occasioned by the hydrologists report vicariously became his liability as he owed the respondent the duty of care of availing a reliable hydrologist not one who gives go ahead in February and in July of the same year he is essentially recanting his earlier position. In the premises, I find and hold that the hydrologist was contracted by the appellant and the liability occasioned by his reports must be borne by the appellant. As the agreement herein was done on 19th February 2018, and the first hydrological report is dated 20th February 2018, it is apparent that the agreement was done before the hydrological survey was done.

41. On the issue of frustration of contract, the appellant relied on the hydrologist's report of 16th July 2018 which concluded that the borehole should be completed at 230 meters and developed till the available water is clear; if the formation is stable rock, it should be left as an open hole in order to maximize on the yield; and quality analysis should be carried out before the water is put to domestic use. Clearly, the conclusions in the report of 16th July 2018 do not tally with the appellant's testimony that the hydrologist stated that water was not available on the entire land of the respondent as no such information is stated in the hydrologist's report of 16th July 2018. The appellant has not demonstrated compliance with the conclusions made in the report of 16th July 2018 and therefore cannot claim frustration.

42. On whether the court was wrong to order refund of the entire consideration of Kshs 1,300,000/- on the basis that there was no calculation when part of the works had been done, the appellant did not avail

any calculations of his own over the work done and the undone work and cannot fault the court for not lacking the calculations. The appellant did not provide expert evidence on the quantum of what had been done. In any event, drilling without ensuring the respondent got the water was an exercise in futility and therefore the appellant who was the expert was to ensure first that there was an expert report that there was water, before embarking on the drilling. This was not done. The appellant having failed to show that the contract could not be performed, cannot state that he ought to pay partial payments.

43. In the premises, I find no merit in the appeal which I dismiss with costs to the respondent.

44. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 16TH DAY OF OCTOBER, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr. Watuka for respondent

Mr. Kiluva holding brief for Mr. Makundi for appellant

Court assistant – Josephine