Agricultural Society of Kenya v Artesian Kenya Limited (Civil Appeal 705 of 2019) [2025] KEHC 5728 (KLR) (Civ) (24 April 2025) (Judgment)

Neutral citation: [2025] KEHC 5728 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 705 OF 2019

REA OUGO, J

APRIL 24, 2025

BETWEEN

THE AGRICULTURAL SOCIETY OF KENYA ..... APPELLANT

AND

ARTESIAN KENYA LIMITED ..... RESPONDENT

(An appeal from the Judgment of Honourable A.M. Obura (Ms) Chief Magistrate, dated and delivered at Nairobi on 8th November 2019)

JUDGMENT

1. By way of background, the respondent instituted a suit against the appellant, seeking a total of Kshs 5,081,680/- after drilling and equipping a borehole at the appellant's grounds as well as its equipment wrongfully detained by the appellant.

2. The appellant denied the allegations of breach of contract. Instead, it blamed the respondent for breach of contract as it was to do the works within 2 weeks but failed. It accused the respondent of misrepresenting That it could do the work within 2 weeks. In its counterclaim, the appellant claimed for damages from the respondent for misrepresentation. The appellant was therefore forced to source for alternative water, incurring unforeseen costs of Kshs 500,000/-. The appellant, therefore, claimed damages for breach of contract and special damages of Kshs 500,000/-.

3. The trial court, after a full hearing, made the following decision:

> " There was no dispute That the Plaintiff was on site and That the only issue remaining was to pump test the borehole. The Defendant did not adduce evidence to rebut the claim That the Plaintiff was allowed more time by the Defendant's General Manager, Mr. Manyara to briefly stop the work before test pumping. The claim by the Defendant That the Plaintiff

failed to complete the works in 14 days was therefore not convincing. Further, there was no rebuttal of the fact That the Plaintiff was denied access to the site and That his equipment have remained there ever since. DW1 had no proof That they had to buy water for their exhibitors at a cost of Kshs 500,000/-. All this factors make the Defendant's claim doubtful. I am satisfied That the Plaintiff proved his case on a balance of probability.

...there was no evidence to prove entitlement to Kshs 500,000/- claimed. The defence and counterclaim amounts to mere allegation."

4. The appellant, aggrieved by the decision, filed an appeal on the following grounds:

    1. That the learned magistrate erred in law and in failing to consider the entire evidence as presented by the appellant.

    2. That the learned magistrate erred in law and fact in failing to consider the fact That the plaintiff had not provided any evidence to show they had performed their part of the contract in line with the terms of the contract.

    3. That the learned magistrate erred in law and fact in failing to consider the fact That the plaintiff had not provided any evidence to show they had performed their part of their contract in line with the terms of the contract.

    4. That the learned magistrate erred in law and fact in failing to consider That the completion time had been clearly stated in the contract and That the respondent had failed to complete the contract at the completion time as agreed between parties.

    5. That the learned magistrate erred in law and fact by failing to take into consideration the points in law and facts set out in the appellant's submissions.

    6. That the learned magistrate erred in law and fact in failing to appreciate That the appellant was not in fundamental breach of the terms of the contract and/or duty of care as alleged by Respondent.

    7. That the learned magistrate erred in law and fact in not appreciating That the respondent did not faithfully and consistently discharge its obligations in accordance to his contract by breaching the terms of the contract.

    8. That the learned magistrate erred in law and fact by holding the appellant liable for the loss suffered by the respondent even though the respondent did not prove any loss.

    9. That the learned magistrate erred in law and fact by failing to appreciate That the balance of probability tilts in favour of the appellant.

    10. That the learned magistrate erred in fact and in law as the judgment of the court was against the weight of the evidence.

    11. That by reason thereof the entire trial, the proceedings thereof, and the resultant judgment are a nullity.

    12. That the learned trial magistrate erred in law and fact by coming to a finding That was extremely punitive, harsh and excessive without considering the circumstances and evidence surrounding the case.

5. The appellant sought That the judgment delivered on the 8th of November 2019 be quashed and That costs of the appeal and costs in the suit below be awarded to the appellant.

6. The appellant in the submissions argues That the respondent failed to prove its case on a balance of probability. The respondent did not provide any substantial evidence to show entitlement to the prayers sought. The respondent presented an offer to the appellant for the drilling and equipping of a borehole. The contract was not completed within the required time (14 days), nor was there an amendment to the completion time. The contract herein was specifically defined by its purpose and time. In Hudson Building and Engineering Contracts, 12th Edition, Sweet 7 Maxwell (2010) at paragraph 6-008 at page 863 reads:

> " ...where a contract is for a defined work, so That there will be an express or implied obligation to complete, completion within a reasonable time will be implied if no time or date is specified in the contract." Reasonableness is determined in the light of the circumstances, as they actually exist during the period of performance.

7. During the trial, the respondent claimed they had completed the work. This would have been by providing a completion report as solid proof. According to the respondent, they completed the work and handed it over. The trial court overlooked the letter dated 28/9/2009, which revealed That work had not been done. The respondent did not move the court to inspect the work it had done to support its claim. In this case, there was no handover.

8. The appellant produced two hydrological reports as evidence. According to the reports, the borehole was drilled to a depth of 131 metres below ground level, at which point it became completely obstructed by an irretrievable object. It remained dry, having been abandoned before reaching a water source. Furthermore, the contractor's performance was assessed as lacking in professionalism.

9. The appellant faulted the trial court for holding the appellant liable for loss suffered by the respondent. The respondent did not provide evidence That the it lost the equipment due to the appellant holding onto them. They also failed to replace the equipment claimed to have been lost. The law requires the respondent to take all reasonable steps to mitigate loss within reasonable time and failure to do so debars it from doing so. In African Highland Produce Limited v John Kisorio [2001] eKLR Civil Appeal No 264 of 1999 the court held That:

> " The guiding principle of law in mitigation of losses is as follows. It is the duty of the plaintiff to take all reasonable steps to mitigate the loss he has sustained consequent upon the wrongful act in respect of which he sues, and he cannot claim as damages any sum which is due to his own neglect. The duty arises immediately a plaintiff realizes That an interest of his has been injured by a breach of contract or a tort, and he is then bound to act, as best he may, not only in his own interests but also in those of the defendant. He is, however, under no obligation to injure himself, his character, his business, or his property, to reduce the damages payable by the wrongdoer. He need not spend money to enable him to minimise the damages, or embark on dubious litigation. The question what is reasonable for a plaintiff to do in mitigation of his damages is not a question of law, but one of fact in the circumstances of each particular case, the burden of proof being upon the defendant. See Halsbury's Laws of England Vol 11, Page 289, 3rd Edn 1955
>
> ...The prime factor is That he, plaintiff, has a duty to mitigate loss if it is within his means to do so.."

10. It was further submitted That the respondent at the lower court relied on the *Water Act*, Cap 372, however, the statute came into force 8 years after the contract. The Act ought not to have been applied retrospectively.

11. The respondent opposed the appeal. Their submissions were That they were awarded a contract to drill the borehole as per the specifications. They completed the performance of the contract; therefore, the appellant could not purport to cancel the contract That had been fully performed. They pointed out That the second report prepared by the appellant at pages 77-84 was prepared without the respondent's input. The respondent was denied the opportunity to test pump and hand over the borehole to the appellant.

12. It was submitted That time was not of the essence and the 14-day completion period was not contained in the LPO. They submitted That the appellant acted contrary to section 29 of the *Water Act* and against provisions contained in the 5th schedule Part A (e) of the said Act.

13. The appellant's argument That the works would be completed in 14 days was only raised so That the appellant could avoid paying the defendant for work done. In David Mose Gekare v Hezron Nyachae [2007] KEHC 2324 (KLR) the court was guided by the decision of the Court of Appeal in Sagoo –vs- Donarado (1983) KLR 366 where the court held as follows:-

> "
>
> " 1. In contracts of all types, time will not be considered to be of essence unless
>
> (i) Parties expressly stipulate That conditions as to time must strictly complied,
>
> (ii) The nature of the subject matter of the contract or the surrounding circumstances show That time should be considered of essence and/or
>
> (iii) A party who has been subjected to unreasonable delay gives notice to the party in default making time of essence.
>
> I do find That the contract in dispute fails on all the three requirements as to make time of essence. The two parties never expressly in the agreement set out a condition That time must be strictly complied with."

14. According to the respondent , it was not contested That the respondent was denied entry to the site to remove the drilling equipment.

Analysis And Determination.

15. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind That a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

16. Zachariah Njoroge (Pw1) testified That he was an engineer. The appellant withheld their equipment, exposed the tools to rain and they became unusable. The equipment was valued Kshs 3.4 million. He produced the valuation report and photos as Pexh7 and 8. He testified That their quotation was based on a hydrometallurgical report. The appellant failed to provide the necessary authorisation and NEMA approval. They went to the site on 13/9/2009 and delivered a borehole of 310 metres. That they wrote a letter dated 29/9/2009 explaining what they did as per the tender documents. He denied fraud on their part. He testified That the appellant should have availed a government official and an inspector. They should have called a public works official on sight to supervise. On 28/9/2009 they were informed That the show had commenced and That they could not continue with the work. On 5/10/2009 they were denied entry and had to remove his equipment at night when the guards were changing shifts.

17. Kefa Maremi (Dw1) testified That he is the show ground manager. The respondent failed to complete the contract within the 2-week contractual period, so it was entitled to rescind the contract. The respondent failed to observe the timeline while time was of the essence. He failed to complete the borehole and they wrote to him raising their concerns but the respondent did not respond. They incurred extra costs estimated at Kshs 500,000/-. They engaged Testek Water Services which established That the borehole had been dug to 131 metres and there was no water. The walls were not encased and they did not receive the test pumping results and completion report. The respondent was invited for a meeting in October of 2009 and he indicated That he was struggling as the equipment was defective. He testified That they left some equipment, That is, drilling rods.

18. I have carefully considered the judgment of the trial magistrate, and observe That the court did not analyse the evidence before it to arrive at its decision. The trial court held That the respondent proved its case without considering both parties' evidence.

19. In this case, it is not in contention That the appellant and respondent entered into a contract for drilling the borehole as per the tender specifications. This was following the issuance of the Local Purchase Order dated 9/9/2009. The appellant through its general manager, Mr Manyara, wrote to the respondent on 24/9/2009 as follows:

> "According to the tender documents you were supposed to finish the drilling works by 24/9/2006. However, as at 5:00 p.m. on the expected finishing date the drilling works were not completed."

20. This was followed by the respondent's letter dated 28/09/2009 acknowledging That he had not completed the work: "...we have implemented 95% of the contract."

21. From the correspondence between the appellant and respondent, it is clear That the respondent did not complete all the work as per the contract. The dispute between parties is how much work was done by the respondent. According to the appellant and the respondent's bill of costs, the respondent was required to do the following:

    a. Mobilization and shifting

    b. Drilling

    c. Sampling and logging

    d. Supply and installation

    e. Development testing, including test pumping.

    f. Completion entailing supply and emplacement of disinfectant, capping, water chemicals, and bacteriology analysis.

22. It is clear That the respondent went to the site to start works, therefore will be entitled to the costs of mobilization of all plant materials, equipment, and personnel including setting up which according to the bill of quantities was Kshs 30,000/-. The respondent was also to be paid demobilisation costs which entailed the removal of his equipment from the site. However, the respondent was invited to remove his equipment via the appellant's letter dated 4/2/2010 but he failed to do so. The letter stated:

> "Following your request to be allowed to remove your plant/equipment from the site, you were invited to a meeting today at 10:00 a.m. attended by a hydro-geologist... to inspect

the site situation and agree on which items are on site and which you could remove as per discharge of the contract.

Despite your confirmation yesterday That you will attend the meeting, you conveniently stayed away.

...

Regarding the status and propriety of the abandoned work, equipment and toold, there will be a site inspection for the purpose 17th February 2010 at 10:00 a.m. This is your last opportunity to make any representations towards status of the site before the incoming contractor takes the site."

23. The respondent failed to attend the scheduled site visits and therefore was not entitled to the demobilization costs of Kshs 20,000/-.

24. The appellant presented into evidence a borehole inspection report by a consulting hydrologist and the report by Testek Water Services. According to both reports the borehole had been drilled to a depth of 131 metres below surface. According to the Bill of Quantities, the cost of drilling per metre was Kshs 1,800/-, therefore, the respondent having drilled 131 metres below surface was entitled to Kshs 235,800/-.

25. There was no evidence That the respondent had conducted sampling and logging, supply and installation, and gotten to the completion part of his obligations. Pw1 admitted That they did not do the bacterial analysis. The respondent failed to attend meetings to ascertain the status of the site before a new contractor took over. According to the evidence adduced by both parties, it is clear That the respondent failed to perform his obligations as per the contract and is only entitled to part payment. Therefore, the trial magistrate erred in awarding the respondent the whole contract amount. As per my analysis, the respondent was entitled to mobilization costs and the costs of drilling the borehole to a depth of 131 metres. This amounts to Kshs 265,800/-.

26. The respondent further claimed That he was denied entry to collect the equipment on-site. However, the letter from the appellant dated 4/2/2010 shows That the appellant was invited to collect the equipment from the site but failed to do so. Interestingly, in cross-examination, Pw1 testified That he had to remove his equipment at night when guards were changing shifts. Therefore, I do not find That the appellant denied the respondent access to its equipment. The trial magistrate therefore fell into error in awarding the respondent the cost of equipment.

27. The appellant has argued That time was of the essence. The appellant in the letter dated 24/9/2009 indicated to the respondent That they were to complete the drilling before the show which was held on 28/9/2009. However, the respondent's failure to observe the timeline did not terminate the contract. In a letter dated 7/12/2009, the appellant recognized That the respondent failed to fulfill its obligations under the contract and terminated the contract. Although the appellant argued That time was of the essence according to their contract, they did not provide any written documentation to show That time was of the essence. Therefore, they are entitled to pay the respondent for the work done.

28. Consequently, I set aside the finding of the trial court awarding the respondent Kshs 5,081,680/- and substitute it with an award of Kshs 265,800/-. The appellant shall have the costs of the appeal.

DATED, SIGNED AND DELIVERED ONLINE AT BUNGOMA THIS 24TH DAY OF APRIL 2025

R.E. OUGO

JUDGE

In the presence of:

Miss Naazi h/b Mr. Kithii -For the Appellant

Mr. Ahumo h/b Mr. Amuga - For the Respondent

Wilkister -C/A