Diana International Ltd & another v Vishnu Builders & Developers Ltd (Civil Appeal E813 of 2021) [2025] KEHC 4873 (KLR) (Civ) (24 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4873 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E813 OF 2021

TW OUYA, J

APRIL 24, 2025

BETWEEN

DIANA INTERNATIONAL LTD ..... 1ST APPELLANT

CONTRAQ CONSULT LTD ..... 2ND APPELLANT

AND

VISHNU BUILDERS & DEVELOPERS LTD ..... RESPONDENT

(Being an appeal against the judgement and decree of the Hon. E.M. Kagoni (PM) delivered on 15th November, 2021 in Nairobi Milimani CMCC No. 447 OF 2019)

JUDGMENT

Background

1. This appeal emanates from the judgment delivered on 15.11.2021 by the lower Court in Nairobi Milimani CMCC Com. No. 447 OF 2019 (hereinafter the lower Court suit). The lower Court suit was instituted via a plaint by Vishnu Builders Developers Ltd, the plaintiff in the lower court (hereinafter the Respondent), as against Diana International Ltd and Constraq Consult Ltd, the defendants in the lower court (hereinafter the 1st and 2nd Appellant/Appellants) seeking inter alia a declaration that the Appellants indeed breached the agreement entered into with the Respondent; general damages for breach of contract by the Appellants; the principal sum of Kshs. 3,118,345.07 together with interest thereon at 18% per month from the date of the agreement until payment in full; interest on the above at commercial rates for such period as this honorable Court may deem fit to order; costs of the suit and any other just and equitable relief as this honorable Court may deem appropriate.

2. It was averred that the at all material times to the suit, the 1st Appellant was an employer of the Respondent whereas the 2nd Appellant was an agent of the 1st Appellant duly retained as a Quantity

Surveyor, technical representative and project manager. That on or about April 2018, the Respondent entered into an agreement with the 1st Appellant for proposed renovation works in Residential Development on Block No. 99/254 (hereinafter suit premises) to be done in phases, to wit, the 2nd Appellant was appointed as the latter's Quantity Surveyor to perform regular valuations after every phase in order to ascertain the payment to be made to the Respondent.

3. It was further averred that it is upon the aforementioned that the Respondent performed its work in respect of the suit premises to the Appellants satisfaction up to four (4) valuations, whereas, the agreement provided that after every phase a payment valuation was to be carried out by the 2nd Appellant and upon recommendation to the 1st Appellant, the latter was required to remunerate the Respondent. That in blatant breach of the agreement, the 1st Appellant knowingly refused to pay the Respondent and the Appellants omission has been an absolute failure of consideration for the principle sum of Kshs. 3,118,345.07 for work done, of which, the Respondent claims together with interest thereon at 18% per month from the date of the said agreement.

4. In response the Appellants filed a statement of defence deny the averments in the Plaint and or that the works were carried out diligently or thoroughly. Contemporaneously, the 1st Appellant lodged a counter-claim as against the Respondent seeking inter alia Kshs. 4,727,570.58/- being compensation for losses incurred by the 1st Appellant on account of breach of contract, re-doing and engagement of another contractor to re-do the works the Respondent has been engaged to carry out, interest on the afore-captioned amount at Court's rate from 28.12.2018 until payment in full, costs of the suit and counterclaim.

5. The suit proceeded to full hearing, during which the respective parties called evidence in support of the averments of their pleadings. In its judgment, trial Court; made a declaration that the Appellants breached the agreement between the parties by failing to pay the Respondent Kshs. 2,654,197; awarded the Respondent the sum of Kshs.2,654,197; dismissed the Respondent's claim for general damages and interest at 18%, dismissed the 1st Appellant's counterclaim; awarded the Respondent costs of the suit and interest on the sum of Kshs. 2,654,197 from date of filing suit; and interest on costs from date of judgment.

The Appeal

6. Aggrieved with the outcome, the Appellants preferred the instant appeal challenging the finding by the lower Court premised on the following grounds in their memorandum of appeal as itemized hereunder: -

> " 1. The trial Court erred in law and in fact in considering the 2nd Appellant as an "employee" of the 1st Appellant whilst it was common ground that the 2nd Appellant is a Quantity Surveyor with vast experience since 1998 and hence an independent entity that had been wrongly joined in the suit.
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> 2. The trial Court erred in law and in fact in holding that the "employer" i.e. the 1st Appellant had "not disputed" and or expressed "displeasure" in the quality of the works carried out by the Respondent notwithstanding that the 1st Appellant had filed a counterclaim in respect thereto and which was on record.
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> 3. By dwelling on the absence of documentary evidence and proceeding to hold that there was no requirement for the works to be completed in September 2018, the trial Court erred in law and in fact in disregarding the admission

by the Respondent's own witness in cross-examination that the Respondent was fully aware that the works were to be completed by "08.09.2018 i.e. as per the contract" in default of which the Respondent would have to pay "Kshs. 100,000 every week".

4. In absence of a certificate of completion, evidence of handing over the site by the Respondent and the uncontroverted evidence that the Respondent left the site in December 2018, the trial Court grossly erred in law and in fact in holding that there had been no delay on completion of the works carried out by the Respondent as well as delay in completion of the works.

5. Upon acknowledging that the parties were long time business partners "which most times was based on trust and occasionally made formal", the trial Court erred in law and in fact in dismissing the 1st Appellant's counterclaim solely on the basis that there was no formal correspondence between the parties regarding the quality of the works carried out by the Respondent as well as delay in completion of the works.

6. The trial Court erred in law and fact by entering judgment in favour of the Respondent whereas the Respondent did not adduce any evidence to show that it carried out the works satisfactorily or that it completed the works within the agreed period.

7. The trial Court erred in law and fact by disregarding cogent and uncontroverted evidence by the Appellants that the Respondent was wasteful, carried our defective works deforming the 1st Appellant's property and delayed completion of the works and that the 1st Appellant incurred loss and damage as a consequence thereof.

8. The trial Court erred in law and fact on misapprehending the dispute placed before it, misconstruing the evidence on record, applying the wrong principles of law to the dispute and thereby arriving at a decision unsupported by evidence on record and hence manifestly wrong.

9. The trial Court erred in law and fact in finding that the 2nd Appellant was in breach of contract with the Respondent despite there being no contract between them.

10. By entering judgment in favour of the Respondent against both Appellants, the trial Court grossly erred in law and in fact in purporting to impose upon the 2nd Appellant contractual obligations in respect to a contract which it is not privy to.

11. The trial Court erred in law and fact in allowing the Respondent's suit and dismissing the Counterclaim against the gradient of the evidence on record.

7. In light of afore-captioned grounds of appeal, the Appellants seeks before this Court, orders to the effect that: -

"a) The appeal herein be allowed with costs.

b) The judgment and decree of the trial Court be set aside in entirety and substitute with an order dismissing the Respondent's suit and allowing the 1st Appellant's counterclaim with costs.

Submissions

8. Directions were taken on disposal of the appeal by way of written submission of which parties had an opportunity to highlight. That said, I have taken the liberty of considering the respective parties' lengthy written submissions.

Disposition

9. At this juncture, it would be apt to observe that the instant appeal was disposed of as part of the Judiciary Rapid Result Initiative (RRI) matters. That said, the original lower Court record did not form part of the record before this Court. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate Court in Selle –Vs- Associated Motor Boat Co. [1968] EA 123. Further, it is trite that an appellate Court will not ordinarily interfere with a finding of fact made by a trial Court unless such finding was based on no evidence, or it is demonstrated that the Court below acted on wrong principles in arriving at the finding it did. See Ephantus Mwangi & Another vs Duncan Mwangi Wambugu [1982 – 1988] 1 KAR 278. That said, a revisit of the memorandum of appeal and submissions by the respective parties before this Court it is evident that the appeal turns on the singular issue whether the Respondent was entitled to the award of Kshs. 2,654,197/- on accord of a finding of breach of contract on the part of the Appellants.

10. Pertinent to the determination of issues before this Court are the pleadings, which formed the basis of the parties' respective cases before the trial Court. See;- Court of Appeal decision in Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91. This Court had earlier in its judgment outlined the gist of the respective parties' pleadings, as such it serves no purpose restating the same at this juncture. Further, having identified what the disputation before the trial Court twirled on, the key query for determination is whether the trial Court's findings on the issues falling for determination before it, were well founded.

11. To contextualize the latter, it would be apposite to quote in extenso the relevant facets of the impugned judgment. The trial Court after restating the evidence tendered before it addressed itself as follows; -

> ....I have considered the pleadings filed before this Court, the testimonies, the evidence as well as the parties submissions in arriving at my decision. The issue of whether the parties were in business appears not in dispute. ..... In this matter the issue in dispute is whether the Plaintiff completed the work it was contracted to do on time.
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> ..... DW1 when cross-examined ....told the Court that he did not have any document or letter informing the plaintiff that they delayed in completing the works. In light of this admission, I find that the work was completed on time and satisfactorily since if not, the Court would have some form of correspondence flowing from the 1st or 2nd Defendant expressing displeasure.
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> .....
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> DW1 having been a quality surveyor since 1998 should have keenly executed his work with diligence. If the Plaintiff has not done the work satisfactorily its displeasure should have been made known. .... I have taken note of the issue of the certificate of completion. In my view, the Defendant are undone by the fact that they never fully entrenched every term

of the contract in the agreement. .....The bill of quantities having been prepared by the 2nd Defendant, its deficits and shortcomings have to be visited on it by dint of the doctrine of Contra Proferentum. That in such a situation the contract should be interpreted against the drafter.

.....Since the alleged breach of contract by the Plaintiff was not proved, the counterclaim is hereby dismissed. However, I find the award merited to the plaintiff to be Kshs. 2,654,197/-. This is the sum he admitted in re-examination is owed to him. The Court does not understand how the plaintiff reached at Kshs. 3,118,345/- and submissions have not shed any light.

.....Damages are supposed to take the plaintiff to the position he was before the loss. It has not been explained why the sum of Kshs. 2,654,197/- awarded by this Court should further be increased to include general damages.....The prayer is thus accordingly dismissed. Even the interest of 18.5% per month has not been sufficiently explained.....It is accordingly dismissed." (sic)

12. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. Whereas, it is well-trodden that the same is on a balance of probabilities meaning that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. See Court of Appeal decision in Mumbi M'Nabea v David M. Wachira [2016] eKLR. Hence, the duty of proving the averments contained in the respective parties' pleadings lay with the parties themselves.In Karugi & Another v Kabiya & 3 Others (1987) KLR 347 the Court of Appeal stated that: -

> " [T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. .....The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim." (Emphasis added)

13. As purposefully noted by the trial Court, the issue of whether parties had contracted in respect of the works carried on the suit premises is not in dispute. The issue revolved on whether there was breach of contract by either party with respect to the works in question and whether either party was entitled to damages for the said breach. Unquestionably, the disputation before the trial Court was premised on contract between the parties. The role of a Court in adjudicating a dispute arising between contracting parties is well settled. In the oft-cited decision of National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR, the Court held that;

> " A court of law cannot re-write a contract between the parties whereas its role is limited to interpretation of the same. This is because contracting parties are free to specify the terms and conditions of their agreement, and that when parties do contract, the court does not have the right or ability to substitute its judgment for that of the parties."

14. At the hearing, on behalf the Respondent, Bhimji Mavji Rabadia testified as PW1. He identified himself as a contractor and director of the Respondent meanwhile proceeded to adopt his witness statement as his evidence in chief and proceeded to adduce the documents appearing in his list of documents as PExh. 1-9. The gist of his evidence on cross examination, confirmed that he was to complete the works by 08.09.2018 as per the contract and that if the works proceeded after, he was to pay damages of Kshs. 100,000 every week. He stated the 1st phase of works appertained the structure

and the 2nd phase was with respect to the roof. That he was paid for three (3) certificates however was not paid for the 4th certificate, with each certificate to be paid after the Quantity Surveyor inspects the work and confirms that it has satisfactorily be done. On re-examination, he stated that the extra works were not part of the contract and that he was owed Kshs. 2,654,197 as valued by the Quantity Surveyor. That there was no requirement for practical completion considering what he had been contracted to do. He concluded that he did as contracted whereas the Appellants never explained why they failed to pay him.

15. On behalf of the Appellants, Samuel Waiganjo, testified as DW1. He identified himself as a Quantity Surveyor and director of the 2nd Appellant hired by the 1st Appellant to help with project management. He proceeded to adopt his witness statement as his evidence in chief and adduced into evidence the Appellants bundle of documents appearing in the list of documents as DExh.1-13 thereafter urged the Court to allow the counterclaim. The gist of his evidence on cross-examination was that his employer was the 1st Appellant having been engaged to supervise and manage the project in question. That his role was to receive requests for valuation, value and advise on payments. He confirmed that there was no standard form contract signed by the parties whereas there was a letter in respect of roof works with the rest of the works being agreed on orally. On his part he stated that there was no documentation indicating that the works were to be completed by September 2018 whereas the terms captured in PExh.1 in respect of the Kshs.100,000 was limited to the roofing project. He went on to state that his final valuation did not have penalty deductions on advice of the 1st Appellant. That the Respondent left the site in December of 2018. In re-examination, he stated that the contract between the parties was informal, valuation was behind the scenes, to wit, Valuation No. 4 was not for payment purposes but a basis for negotiations, which did not have deductions for delays.

16. Evidently, from the evidence tendered before the trial Court and submissions before this Court, it is not in dispute that the first point of call in respect of engagement between the parties was that the 2nd Appellant as a Quantity Surveyor was contracted by the 1st Appellant, to conduct valuation for works done on the suit premises for purpose of payment approval by the 1st Appellant to the Respondent. It is further not in dispute the initial agreement was in April 2018 and later the one in August 2018 appertained roofing repairs to suit premises going by Pexh.1. However, it is equally notable that the scope of work appears to have expanded to other parts of the premises encompassing Element 1 – Demolitions, Alterations & Preparations Works; Element 2 – Substructure; Element 3 – Superstructure; Element 4 – Walling; Element 5 – Roof and Element 6 – Finishes going by PExh.2, which appears to have been executed in May of 2018.

17. Further it is not in contention that upon works being done on the suit premises the 2nd Appellant carried valuations that totaled four (4) valuations whereas Valuation No. 1 - 3 of the works were not in issue as the same were settled going by PW1's evidence, who was categorical that he was paid for three (3) certificates however was not paid for the fourth (4) certificate. It is equally not in controversy that the parties hereto did not have any written contract as to the terms of reference save for PExh.1, PExh.2 and valuations by the 2nd Appellant that informed payments to the Respondent.

18. As is, it would seem that the parties hereto engaged each other on a good faith basis up until the disputation on none payment of Valuation 4 and the 1st Appellant's claim as against the Respondent on substandard works being carried out on the suit property, to wit, informed the counter-claim. To the afore-stated end, the Court proposes to deal with both claims concomitantly.

19. By DW1's own evidence, there was no indication as to time limitation on completion of the totality of the works by September 2018. The latter of which was a stark contrast to PW1's evidence, who confirmed that works were to be completed by 08.09.2018. It would appear that in light of the above,

this Court deduces that, PW1's statement on the issue must have been anchored on Pexh.1 and not the totality of works entailed in PExh.2. Further, as at 11.06.2019, going Pexh.7, it would seem that 2nd Appellant had valued all the works done as at the latter date to amount to the tune of Kshs. 2,654,197.16 which PW1, confirmed in his evidence as owing to him and not Kshs. 3,118,345.07 as pleaded in the plaint. The latter amount was not disputed by the Appellants evidence or that it had settle in excess the amount due the Respondent instead it was countered that the works carried out on the suit premises had deteriorated and was not as expected thus occasioning the 1st Appellant loss on account of having to engage a third party to carry out rectifications works.

20. With respect to the Respondent's claim, it is undisputed that parties by conduct had agreed on works being carried out in four (4) phases that resulted in four (4) valuations being prepared in respect of works carried out. To the foregoing end, it seems that there was no dispute at to payment of the first three valuations done by the 2nd Appellant and as at 11.06.2019, going by both PExh.7 and PW1's evidence, what was owed to the Respondent as at then was Kshs. 2,654,197.16, to wit, I find it useful to quoted in part the contents of the letter dated 11.06.2019 (PExh.7) by the 2nd Appellant addressed to the 1st Appellant, in order to crystallize the disputation. It stated in part that:

> " We have, in accordance with the contract, valued the work to date (11/06/2019) materials stored on site as at the same date and recommend that the final payment of Kshs. Two Million, Six Hundred and Fifty-Four Thousand, One Hundred and Ninety-Seven, Cents Sixteen (Kshs. 2,654,197.16) be made to M/S Vishnu Builders & Developers Ltd as detailed in the enclosed valuation.
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> You may now issue the contractor with the final payment based on this valuation." (sic)

21. By the above, the 2nd Appellant was of the unreserved view that as at 11.06.2019, the sum of Kshs. 2,654,197.16 was owing to the Respondent for works done. And this amount for all intents and purposes was to be settled by the 1st Appellant on recommendation by the 2nd Appellant. Given the oral contact between the parties the Respondent was entitled to said amount by dint of the Appellants breach of contract on accord of the manner in which they carried out the contract. Therefore, the trial Court was not in error in arriving at the decision that the sum of Kshs. 2,654,197.16 is merited on the part of the Respondent, given that this was the sum admitted as owing and further evinced as owing going by PExh.7. The trial Court was further justified in denying to award Kshs. 3,118,345 on account of lack of justification as to how the sum claimed in the Respondent's pleadings was arrived at on the backdrop of documentary evidence and oral testimony by PW1 on the sums owing to him on the backdrop of the contract between the parties hereto.

22. As to whether the 1st Appellant was entitled to sum of Kshs. 4,727,570.58 being compensation for losses incurred by the 1st Appellant on account of breach of contract, re-doing and engagement of another contractor to re-do the works the Respondent has been engaged to carry out. It warrants reminder that there was no written agreement between the parties to the instant matter, as renovation works appeared to have been oral save for the roofing works. It is notable from PExh.1, that roofing works was to costs a sum of Kshs. 3,700,000 inclusive of taxes with works to be completed by 08.09.2018 and failure to complete the said works by the stated completion date would attract liquidate damages of Kshs. 100,000. Interestingly, the party who testified on behalf of the Appellants was 2nd Appellant whereas the 1st Appellant as the owner of the project in respect of the suit premises did not call any witness. Further, DW1 on cross-examination confirmed that PExh.1 was limited to roofing whereas there was no letter or protest to the Respondent informing it of breaching the terms captured in PExh.1. Further, save for the averments on particulars of breach in the Appellant's counterclaim, there was no documentary evidence encapsulated in DExh.1-13 demonstrative of the fact that the

Respondent had breached the terms in PExh.1. It would seem that by conducted and subsequently PExh.7, the Appellants had acquiesced and or waived their claim in respect of the terms captured in PExh.1 and cannot now be heard to assert the said claim on liquidated damages of Kshs. 100,000 per week for twelve (12) weeks totaling 1,200,000 for total time lost due to the Respondent not finishing the roof works.

23. On the claim for defective finishing works to the tune of Kshs. 1,246,954.48, reconstruction of 1,380,616 and loss of use of the house attributed to the delays by the contractor for three (3) months at Kshs. 300,000/- totaling Kshs. 900, 000/-, here, the Appellants relied on in DExh.11 and DExh.12 to shore up the above claim. Prior to valuation in PExh.7, it is undisputed that the Appellants did not tender any letter in protest and or defects report in respect of the suit premises. Further, the photographs appearing in DExh.11 do not aid the Appellants cause on visibly demonstrating defected whereas any payment made in DExh.12 ought to have corresponded to the defects captured in a defects report in order to justify the claim as lodged. As is, the Appellants merely threw documents at the trial Court and left it to the trial Court to deduce their correlation to the Appellants counter-claim. It was cavalier of the Appellants to premise their claim based on the DExh.11 and DExh.12 without any detailed and cogent defects report and or report to shore up the claim in its counter- claim. While the legal burden was on the Respondent to prove his claim on a balance of probabilities, it was the evidential burden of the Appellants to demonstrate the defects in question through a proper report for the trial Court to make meaning of the defects complained of. To the foregoing end, this Court is reminded of the dicta by the supreme Court in Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 Others (2014) eKLR in considering the legal vis-à-vis the evidential burden held inter alia;

> " The person who makes such allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue".

24. In the end the trial Court cannot be faulted at arriving at the decision it did. The Respondent discharged its burden of proof on the sums owing whereas the Appellants failed to pick up the gauntlet on their evidentiary burden of proof with respect to their counterclaim as against the Respondent, to wit, the trial Court did not error in dismissing the same. Consequently, this Court is not convinced that it ought not to disturb the decision of the trial Court.

Determination

25. Accordingly, the decision of the trial Court is upheld and the instant appeal is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 24th DAY OF APRIL, 2025.

HON. T. W. OUYA

JUDGE

For Appellant/Applicant.....Miss Ochieng Hb Mr. Ataka

For Respondent.....Ms Muyoka HB Joy Anami

Court Assistant...Doreen Njue