



Matili Technical Training Institute & 2 others v Ramagon Construction Company Limited (Civil Appeal 1 of 2023) [2024] KEHC 94 (KLR) (15 January 2024) (Judgment)

Neutral citation: [2024] KEHC 94 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL 1 OF 2023
DK KEMEL, J
JANUARY 15, 2024**

BETWEEN

MATILI TECHNICAL TRAINING INSTITUTE 1ST APPELLANT

**THE PERMANENT SECRETARY, MINISTRY OF HIGHER
EDUCATION 2ND APPELLANT**

THE ATTORNEY GENERAL 3RD APPELLANT

AND

RAMAGON CONSTRUCTION COMPANY LIMITED RESPONDENT

(An appeal arising from the judgment of Honourable Gesora (CM) delivered on 16/12/2022 in the Chief Magistrate Court of Bungoma, Civil case No. 239 of 2020)

JUDGMENT

1. This Appeal arises from the judgment and decree issued by Hon. Gesora CM in Bungoma CMCC No. 239 of 2020 delivered on 16/12/2022. The Respondent in this appeal was the plaintiff in the trial court whereas the appellants were the defendants.
2. By a plaint dated 29/8/2020, the plaintiff now Respondent claimed That on or about the year 2011, the 2nd defendant advertised a tender for the proposed erection and completion of twin workshop complex at Matili Technical Training Institute Tender No. MTTI/MoHEST/ESP/6/2010-2011/1 for a contract sum of Kshs 29,311,659.64/-. The respondent applied and was awarded the tender. It accepted the offer vide a letter dated 18/18/2011. The project at the 1st respondent's institution was being carried out in phases.
3. The 2nd appellant advertised for another tender No. MMTI/2/2011-2012 phase 1 which comprised substructure works up to completion of the ground floor slab for a contract price of Kshs 6,502,512.24/-. The respondent applied for the tender and was successful. The 1st appellant further



- advertised for phase 2 of the tender which comprised reinforced steel works, walling and roofing and which was awarded to the respondent. The parties signed agreements for the projects.
4. Pursuant to clause 6.5 of the tender documents, the respondent signed and executed a performance bond and further secured financial facilities in the sum of Kshs 9,000,000/- from First Community Bank Limited to facilitate the execution of the project. Meanwhile, the respondent completed the Bill of Quantities which contained items for construction, installation, testing and commissioning of the work done and which the respondent would be paid for the quantity of work done at the rate specified therein.
 5. During the execution of the contract, the entire design of the project substantially and the contract amount for tender No. MTTI/MoHEST/ESP/6/2010-2011/1 was revised to Kshs 37,167,191.12/- and phase 2 revised to Kshs 15,328,149.52/-, The respondent averred That it prepared and submitted to the project manager its final accounts for the projects undertaken at a total sum of Kshs 58,997,852.88/-. The respondent claims to have been paid Kshs 49,926,154.64/- only up to practical completion. The outstanding balance as at practical completion was Kshs 9,071,698.24/- which remains unpaid. On 17/1/2014 the respondent wrote a letter to the 1st appellant demanding payment of the outstanding amounts plus interest as stipulated under clause 23.3 of the contract. The 1st appellant responded and promised to pay the debt in the sum of Kshs 500,000/- every term starting May 2014. The 1st appellant did not honour its proposal on account of the board having a new chairman who had sought the documentation for the project. On 16/11/2016, the 1st appellant wrote to the respondent informing it That the full board of governors had resolved to pay the outstanding amounts but first paying it Kshs 1,000,000/- then paying Kshs 600,000/- per term. The 1st appellant did not honour the terms of its undertaking. The respondent claimed That there had been a breach of contract and enumerated the particulars of loss and damages as follows:
 - a. Kshs 9,071,698.24/- being the outstanding amount at practical completion of the contracts.
 - b. Kshs 4,249,551y,73/- being the interest calculated as per clause 23 of the contract since September, 2012 to December 2018.
 - c. Kshs 4,000,000/- being the interest paid towards repayment of the loan facility from First Community Bank Limited.
 - d. Loss due to paralyzed business operations resulting from the non-payment of the contractual sum.
 - e. Loss of prospective investments as a result of lack of trust with suppliers, financiers and other partners who remain unpaid despite offering services to the respondent.
 6. The appellants in their defence and counterclaim dated 1/10/2020, denied the respondent's claim in toto. The appellants admitted That the respondent was only awarded a contract for the sum of Kshs 29,311,659.64/-. According to the appellants, the variation of contract sum from Kshs 29,311,659.64/- to Kshs 37,167,191.12/-was never approved by the 1st appellant. If there was any variation, the same was illegal and contrary to the Public Procurement and Disposal Act. It was advanced That the respondent was paid Kshs 57,285,804/- which was an overpayment as the respondent misrepresented and misled the appellants That there was some amount owing with respect to the contractual sum.
 7. The appellants further counter claimed for a sum of Kshs. 27,974,144.82/- being the difference between the contractual amount and the overpaid amount or Kshs 4,790,463.82/- being the overpaid amount after the non-approved variation; general damages for breach of contract, interests and cost.



8. The respondent responded filed a reply to defence and defence to counterclaim by which it denied the allegations of breach of contract made against it and maintained That it was the appellants who were in breach of contract.

The Evidence

9. Abdi Barre Abdi (Pw1) testified That he is the director at the respondent company. He adopted his statement dated 27/8/2020 as his evidence in chief. Pw1 in his statement reiterated the contents of the plaint. On cross-examination, he testified That he completed the works on 16/7/2013 and filed the suit in the year 2020. He testified That according to the CR12, he is a director and the other directors gave him the authority to testify. He told the subordinate court That they acquired a loan facility to finance the construction. He testified That they were claiming Kshs 22 million and That only 9 million was paid. Pw1 testified That they have interim certificates indicating That they were paid. He denied waiving any interest in favour of the 1st appellant. He explained That they had a meeting with the 1st appellant where it was agreed That if the 1st appellant could pay the amount in one script, then they would give them a 50% waiver on interest. However, they never paid. Pw1 further testified That approvals for variation were made but the same did not go beyond the required percentage.
10. The respondent relied on the evidence of Jescah W. Ngichabe (Dw1), Dr. Billy G. Ng'onga (Dw2) and Silungi Humphrey (Dw3).
11. Dw1 was the 1st appellant's internal auditor who adopted her statement dated 23/9/2022 as her evidence. She testified That as per their records, the respondent was paid a sum of Kshs 57,285,804.46 as indicated in the bank statements from August 2011 to April 2017. That the respondent was paid per the interim certificate as indicated in the 1st appellant's list of documents. That the 1st appellant overpaid the respondent by a sum of Kshs 4,790,463.82/- since the contractual amount was Kshs 52,495,340.64/- yet it was paid Kshs 57,285,804.46/-. On cross-examination, she testified That although she joined the 1st appellant in 2020 and the project started in 2011-2012, she had studied the records and concluded That the respondent was paid in full. That the 1st appellant never issued receipts.
12. Dw2 testified That between 2011-2012 he worked for the 1st appellant and was a member of its Audit Committee. He adopted his statement dated 22/7/2021 as his evidence in chief. He testified That the board was not aware of the claim by the respondent until 2016. It then informed That the then principal had committed the Board to pay the respondent. The board then directed the new principal to investigate the claim by the respondent. The respondent was requested to furnish the board with documents to support its claim but it failed to do so. They then found records which revealed That the respondent was owed Kshs 8,264,611.60/- and engaged the ministry on how they could settle the sum. The sum was later paid by the institution. The board never considered the issue of interest as the same was waived by the respondent on account of his Muslim faith. Dw2 maintains That the board was not aware of any variation of the contract and That there was no approval given. Dw2 testified That the respondent did not act in good faith as it waited until 2016 to raise the claim yet the contract was completed in 2012. When examined under cross-examination, Dw2 testified That there was a document on variation.
13. Dw3 testified That he was the County Works Officer, Bungoma. He was familiar with R.C. Ruto who prepared the interim certificate 1-12. He testified That he took over from R.C. Ruto in 2016. He explained That the project was done in two sub-contracts and That the project had variations. The first project was varied from Kshs 29,311,659/- to Kshs 37,167,191/-. The second contract was varied from Kshs 12,003,042 to Kshs 15,328,149.8/-. The third contract was never varied and stood at the sum of Kshs 6,120,058/-. The drawings changed the sum and the variations were captured in the minutes.



Dw3 testified That the payments were not complete and pointed out That there were provisions for delayed interest. A certificate of delayed interest payment was never issued and That R.C. Ruto waived the interest. On cross-examination, he testified That the payment certificate dated 27/8/2013 had the variations to the contract.

14. After the hearing before the subordinate court, the trial magistrate found That the counterclaim had not been proved. It further concluded That the appellants owed the respondent the sum claimed and entered judgment in favour of the respondent.
15. The appellants dissatisfied with the finding of the trial magistrate have filed their memorandum of appeal dated 12/1/2023 on the following grounds:
 1. That the learned trial magistrate erred in law and fact in finding That the respondent had proved its case against the appellants.
 2. That the learned magistrate erred and misdirected himself in law and fact by failing to appreciate sufficiently or at all, consider and correctly analyze the evidence tendered by the parties in determining the suit.
 3. That the learned magistrate erred and misdirected himself in law and fact in finding That the Appellants counter claim against the respondent had not been proved and dismissing the same with costs which was against the weight of evidence and therefore manifestly erroneous.
 4. That the learned magistrate erred and misdirected himself in law and fact by failing to consider or sufficiently consider the appellants position as set out in their pleadings, written submissions and evidence thus reaching manifestly erroneous finding against the appellants.
16. The appeal was dispensed by way of written submissions. Both parties have complied.

Appellants' Submissions

17. The appellants relied on their submissions dated 11/4/2023 which were filed by Principal State Counsel, Mr. Nyauma on behalf of the appellants. He identified the following issues for the court's consideration:
 - a. Whether the learned trial magistrate erred in law and fact in finding That the respondent had proved its case against the appellants.
 - b. Whether the learned trial magistrate erred and misdirected himself in law and fact by failing to appreciate sufficiently or at all consider and correctly analyze the evidence tendered by the parties in determining the suit.
 - c. Whether the learned trial magistrate erred and misdirected himself in law and fact in finding That the Appellants counter claim against the respondent had not been approved and dismissing the same with costs which was against the weight of the evidence and therefore manifestly erroneous.
18. It was submitted That the respondent did not discharge the burden in civil cases as provided under section 107 of the *Evidence Act*. The onus was on the Respondent to prove That it had not been paid the full contractual amount as per the contract and That the appellants owed it Kshs 9,071,698.24/-. The respondent failed to tender evidence showing That he was only paid Kshs 49,926,154.64/-. The appellant submitted That the respondent was paid Kshs 57,285,804.46/- which was proved through bank statements produced by Dw1. The respondent was also not entitled to Kshs 4,000,000/- as interest from the loan facility it took from First Community Bank as there was no evidence That the



loan was taken. Even if there is evidence That a loan was taken from First Community Bank, there was no evidence That the loan was used to finance the project.

19. On whether the trial court failed to analyze the evidence by the parties, Mr. Nyauma, submits That the trial court failed to consider the bank statements produced by Dw1 which showed That Kshs 57,285,804.46 was paid. The court also failed to note That the respondent had not produced an interim payment certificate worth Kshs 58,997,852.88/-. The Appellants urged the court to allow the appeal as well as the Appellant's counterclaim against the Respondent.

Respondent's Submissions

20. The respondent filled its written submissions dated 4/5/2023. The respondent in its submissions identified two issues for determination. It invites the court to consider whether the trial court properly rendered itself on the evidence on record in finding in favour of the respondent; and secondly, whether the respondent sufficiently proved its case against the appellants.
21. The respondent submits That it was successful in its bid with the 2nd appellant in regard to three tenders for the agreed contract price of Kshs. 29,311,659.64/-, Kshs 6,502,512.24/- and Kshs 12,003,042/-.
22. On the variation, the respondent submits That the change in drawings necessitated the variations in pricing. Dw2 testified That there was a document on variation, while Dw3 testified That the total project amount was Kshs 58,997,852/-. The project variations were also captured in the minutes of the board meeting held by the 1st appellant on 27/9/2016.
23. On the issue of interest, the respondent submits That the issue of interest on late payment was expressly provided under clause 23.3 of the contract and That the respondent is entitled to the same. Reliance was placed in the decision in Ministry of Environment and Forestry v Kiarigi Building Contractors & Another [2020] eKLR. They also cited the court's decision in Gerald P O Onyango v Co-operative Bank of Kenya Limited [2016] eKLR where the court observed That:

- “ 18. The appellant submitted before the trial court That the charges were not provided for in the contract between the parties, That they were unconscionable and oppressive. As I have stated elsewhere in the judgment, the Conditions of Use provide for a 5% monthly charge under clause 3(i) and a 3% late payment charge under clause 5(i)(a). These were the terms That were agreed upon and this court had no jurisdiction to vary them. This position is supported by the Court of Appeal in National Bank of Kenya v Pipe plastic Samkolit (K) Ltd and Another NRB CA Civil Appeal No. 95 of 1995 [2001] eKLR where it observed That;

“A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge. As was stated by Shah JA in the case of Fina Bank Limited vs Spares & Industries Limited (Civil Appeal No 51 of 2000) (unreported): “It is clear beyond peradventure That save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain”.”



24. It was submitted That no document or evidence was placed before the court indicating That the respondent waived interest on payment. The 1st appellant in collaboration with the rest of the appellants and vide their letter dated 28/4/2017 purported to fraudulently inform the respondent of a non-existent meeting That had been convened on 17/01/2017 where the outstanding balance of Kshs 9,071,698.24 was waived in the presence of H.S. Abdi an alleged director at the respondent company yet the respondent does not have a director by such a name.
25. It was submitted That the interim certificates add up to a total sum of Kshs 44,318,302.20/-. Equally, the bank statements produced add up to Kshs 37,737,650/-. The appellants therefore failed to prove That they had paid a sum of Kshs 57,285,804 as alluded to in their defence and counterclaim.
26. The respondent submits That the dispute arose on 18/6/2018 when the 1st appellant wrote a letter in response to the respondent's demand for payment in its letter dated 4/5/2018. Since the suit had been instituted on 27/8/2020 three months after the cause of action, the same was brought within the required time limit stipulated under section 4 (1) of the *Limitation of Actions Act*. The respondent advanced That at the time of filing the suit the outstanding amount owed to the respondent stood at Kshs 13,321,249.97/-.
27. On the second issue, the respondent submits That the respondent has sufficiently proved its case on a balance of probabilities and That the trial court rightly applied its mind to the evidence on record.

Analysis and determination

28. I have carefully reviewed the evidence on record and considered the submissions by the learned counsels for the parties herein. This being the first appellate court, its duty is well spelt out namely, to re-evaluate the evidence tendered before the trial court and subject the same to an independent analysis so as to come to its own conclusion and to bear in mind That it did not have the opportunity to see or hear the witnesses testifying. See *Selle Vs Associated Motor Boat Co. Ltd* [1968] E.A 123.

As the dispute relates to a transaction which revolved around the domain of procurement and contract variations, I find it is necessary to revert to the salient provision of the *Public Procurement and Asset Disposal Act*. Section 47 thereof provides:

- “ 47. An amendment to a contract resulting from the use of open tendering or an alternative procurement procedure under Part VI is effective only if:
- (a) the amendment has been approved in writing by the tender committee of the procuring entity; and
 - (b) any contract variations are based on the prescribed price or
 - (c) quantitative variations for goods, works and services.”

29. Regulation 31 of the Act provides:

- “ 31. For purposes of Section 47 (b) of the Act, any variation of a contract shall be effective only if:
- (a) the price variation is based on the prevailing consumer price index obtained from Central Bureau of Statistics or the monthly inflation rate issued by the Central Bank of Kenya;



- (b) the quantity variation for goods and services does not exceed ten percent of the original contract quantity;
- (c) the quantity variation of the works does not exceed fifteen per cent of the original quantity;
- (d) the price or quantity variation is to be executed within the period of the contract and
- (e) the cumulative value of all contract variations do not results in an increment of the total contract price by more than twenty-five per cent from the original contract sum.”

30. In *Centurion Engineers & Builders Ltd vs. Kenya Bureau of Standards* [2016] eKLR:

“The Court reaches its decision even in the face of the submissions by the Claimant’s Counsel That the Respondent has benefited from the works while the Claimant has taken out loans to carry them out. The point being made by the Claimant is That to accept the Public Policy argument would be to unjustly enrich the Respondent and to oppress the Claimant. That in itself, it is argued, is contrary to Public Policy. To this argument, the Court says as follows; when unlawful variations are made in respect to Public Contracts there would be two parties participating in the wrong doing. Officers and/or officials of the Procuring Entity on the one hand and the Contractor on the other. The Contractor cannot play ignorance because the law is clear in respect to variations. The Contractor should insist on compliance with the law and refuse to carry out any extra works requested of it without such compliance. If, like here, the law disallows a quantity variation in excess of 15%, then the Contractor has no business acceding to a request to carry out prohibited works without having been properly contracted through fresh bidding. The Contractor must be as vigilant as the Public Entity in the observance of the law.”

31. In *Nairobi Civil Appeal No. 165 of 2007 D. Njogu & Company Advocates vs. National Bank of Kenya Limited* (2016) eKLR the Court of Appeal stated as follows: -

23. Likewise we reiterate That any contract That contravenes a statute is illegal and That the same is void ab initio and is therefore unenforceable.

32. It is trite law That a court of law cannot re-write a contract between parties and That the parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. See *National Bank of Kenya Ltd. V. Pipe plastic Samkolit (K) Ltd and Another* [2001] KLR.

33. From the evidence tendered before the trial court and the exhibits, it is not in dispute That the respondent and the 1st appellant entered into a contract for the construction of premises at an agreed sum. It is also not in dispute That there were variations along the way which were approved by the parties. It is also not in dispute That the Appellants had made various payments along the way leaving a balance of Kshs 9, 071, 698/24. It is also not in dispute That there was a clause (23) in the contract which permitted the imposition of interest on the outstanding sums. It is also not in dispute That the 1st Appellant’s Board of Management made an undertaking to the respondent to pay the outstanding sums by way of instalments prior to the institution of the suit in the trial court. I find the only issue for determination is whether the parties proved their rival claims before the trial court.



34. I have perused the contract and note That the construction was to be in three phases which were awarded to the respondent and That the first and second contracts bills of quantities were later varied due to project designs requested by the 1st appellant and approved by the works officer Bungoma (DW3) who testified herein and confirmed That the project amount came to Kshs 58, 997, 852/. The variations are captured in the 1st Appellant's Board meeting held on 27/9/2016. It also emerged That the 1st appellant vide a letter dated 16/11/2016 undertook to pay the balance of the sums (Kshs 9, 071, 698/24) by way of instalments. The refusal by the 1st appellant to pay the same prompted the respondent to lodge this suit. The 1st appellant's letter seeking to pay by instalments has not been withdrawn even as late as the commencement of the trial or production thereof in evidence and therefore is evidence That the claim by the respondent is not farfetched. Again, the same was not on a without prejudice basis and therefore has eligible evidential value. The Appellants did not dislodge the said document in their evidence whatsoever. The evidence of the works officer (Dw3) and the conduct of the 1st appellant left no doubt That the respondent's claim for the outstanding sums of Kshs 9,071,698/24 was a valid claim against the appellants and which was proved on a balance of probabilities.
35. The Appellants main counterclaim is That the respondent had been overpaid by a sum of Kshs 4, 790, 463/82 and That they claimed for the refund of the same. They have also claimed That the respondent should not charge interest and is not entitled to the bank charges as there is no evidence That the same was used in the furtherance of the contract.
36. Going by the observations in paragraph 34 above, and backed by the evidence of Dw3 plus the 1st appellant's letter dated 16/11/2016 undertaking to pay up the outstanding sums of Kshs 9, 071, 698/24 to pay the same in instalments, there is no doubt That the Appellants owed the Respondent the said sum prior to the institution of the suit.
37. As regards the Appellants counterclaim, it is noted That they availed several interim certificates (DMFI-1-12) but which added up to a sum of Kshs 44, 318, 302/20 which was way off the sums claimed by the Respondent and going by the evidence of their witness (DW3) there was no overpayment as alleged by the Appellants. The documents availed by the Respondent established That the Appellants owed it a balance of Kshs 9, 071, 698/24 as at the time of filing suit. Hence, I find That the Appellants failed to prove their counterclaim and That the trial court's finding thereon was quite sound.
38. As regards the issue of interest on delayed payments, the contract agreement vide clause 23.3 provided as follows:

“Payment shall be adjusted for deductions for retention. The employer shall pay the contractor the amounts certified by the project manager within 30 days of the issue of each certificate. If the employer makes a late payment, the contractor shall be paid simple interest on the late payment in the next payment. Interest shall be calculated on the basis of the number of days delayed at the rate three percentage points above the Central Bank of Kenya average rate for base lending prevailing as of the first day the payment became overdue.”

Due to the late payments by the 1st Appellant, the Respondent duly sent demand notices for the outstanding sums plus interest which elicited several responses from the 1st Appellant some of which undertook to pay the same by way of instalments. All these letters were duly availed by the Respondent as exhibits. The Appellants did not challenge the same. It is therefore obvious That the issue of interest on delayed payments was not in dispute. Even though the Appellants attempted to claim That the Respondent had waived interest, the same was challenged by the Respondent who disputed the



existence of an alleged director of its company. Again, the evidence of the Appellants witness (Dw2) put paid the Appellants claim when he stated That the issue of interest was not captured in the contract or That any document had been produced showing That the respondent had waived interest.

33. As regards the interest of Kshs 4 million on the loan facility taken by the Respondent from First Community Bank, the Respondent claimed That due to the delay in the payments, it was unable to repay back the loan in time and was thus penalised by its bankers. The respondent submits That the Appellants counsel did not cross-examine its witness regarding the averments on the loan interest and hence the Appellants claim at this stage is an afterthought. It is not in dispute That the issue of the Respondent and its bankers was a private matter between them and That the Appellant cannot be roped into. As to whether the Respondent failed to meet its bargain under the loan account, the same should not be brought to the desk of the Appellant since they were not parties to it. It was therefore quite erroneous for the learned trial magistrate to load the claim upon the Appellants when there was no nexus between them and the Respondent's bankers. It is possible That the Respondent might have used the loan for other projects. Even though the Respondent was not cross-examined on the issue, the burden of proof still lay with the Respondent to discharge. I am satisfied That the Respondent did not prove the said claim on a balance of probability. The said claim ought to have been rejected.
34. It is noted That the Respondent did not prove the claims vide prayers (d), (e) and (f) and That the same were rightly rejected by the trial court.
35. In the result, it is my finding That the Appellants appeal partially succeeds to the extent That prayer (c) of the Respondent's plaint dated 27/8/2020 is dismissed while prayers (a), (b), (g) and (h) are upheld. The costs of the appeal and in the lower court are awarded to the Respondent.

DATED AND DELIVERED AT BUNGOMA THIS 15TH DAY OF JANUARY 2024.

D.KEMEI

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

