Jajuha Civil Contractors & Engineers Ltd v ABM Holdings Ltd (Civil Case 41 of 2019) [2024] KEHC 1287 (KLR) (15 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1287 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL CASE 41 OF 2019

HK CHEMITEI, J

FEBRUARY 15, 2024

BETWEEN

JAJUHA CIVIL CONTRACTORS & ENGINEERS LTD ..... PLAINTIFF

AND

ABM HOLDINGS LTD ..... DEFENDANT

JUDGMENT

1. The plaintiff filed this suit claiming judgement against the defendant as hereunder:-
   (a) A declaration that the actions by the defendant were negligent and amounted to breach of contract
   (b) Specific performance to conduct the valuation.
   (c) Special damages as particularised under clause 36 herein above.
   (d) General damages for breach of contract.
   (e) Interest in (a), (b) and (c) above.
   (f) Costs of this suit
   (g) Any other relief that this court may deem fit to grant.
2. The defendant on its part filed its defence and counterclaimed against the plaintiff praying for the following reliefs;
   (a) That the sum of kshs 126,039,850 together with interest thereon at courts rates from 22nd September 2016 until payment in full.
   (b) Costs of this suit together with interest thereon at court rates from the date of filing until payment in full.

(c) Any other relief that the court may deem fit to grant.

3. When the matter came up for directions the parties agreed that the same be disposed by way of oral evidence. Each of them called one witness and closed its case. They did file their written submissions and the list of authorities.

4. The court shall summarise the evidence as presented and thereafter the submissions and the issues raised before arriving at its conclusion.

Plaintiff's case

5. The plaintiffs witness Amardeep Jajuha relied on the statement on record and the bundle of exhibits which were already on record. He testified that the plaintiff and the defendant entered into a contract in which the plaintiff was to construct an industrial facility for purposes of producing concrete electricity poles. The said contract was signed on 11th May 2016 and its value was kshs 81,261,354.

6. It was his evidence that the plaintiff proceeded with the said exercise and the defendant would pay the certificates it raised as per the work already completed. Such certificates were seven in number including the penultimate one.

7. It was his case that the defendant added more and extra work to the plaintiff contrary to the written agreement.

8. That the defendant in the cause of the construction caused delay over the same when its Architects and Valuers were late in assessing the work done and this caused delay of the work. Eventually it was his case that the final certificate was not issued by the defendant despite taking over the site and carrying on with the work of making concrete poles.

9. The plaintiff blamed the defendant for not complying with the contract terms and instead chose to frustrate the plaintiff by making payments late and varying the contract terms.

10. In the premises the plaintiff prayed that judgement be entered as prayed in the plaint and that the defendant's counterclaim be dismissed for the reason that what it claims was purely a loss of tender opportunity and that there was no evidence that it would have won the tender.

Defendant's case

11. The defendant's witness one Kevin Akiki Asembo blamed the plaintiff for failing to provide surety as per the contract terms despite the defendant paying it an advance payment of kshs 12million.

12. He conceded that the plaintiff would raise certificates after each stage of the work as long as it was approved by the architect and the valuers.

13. In this regard it was his case that the certificates which amounted to seven were duly paid by the defendant and that the plaintiff however delayed in finishing the work which caused the defendant to suffer loss and damage. The defendant blamed the plaintiff for the loss of Kenya Power tender which it could have bided had the plaintiff completed the work.

14. It was in this Kenya power tender that the defendant counterclaimed against the plaintiff. He said that the defendant had partially assumed the site despite non completion by the plaintiff.

15. It was his case therefore that judgement ought to be entered against the plaintiff as prayed in the counterclaim and the plaintiff's suit be dismissed with costs.

Plaintiffs submissions.

16. The plaintiff identified six issues for determination. The first issue was whether the project was completed or not.

17. The plaintiff submitted that indeed the same was completed as the defendant took over the site and issued a certificate of practical completion and that if it had not done so the said certificate would not have been issued. In any case it was the satisfaction by the architect who was the main person overseeing the entire work courtesy of the defendant that issued the same having satisfied itself of the work done.

18. It went on to submit that in fact the period of defect liability went comfortably without any complaint from any quarters including the defendant.

19. The second issue was whether there was delay in completing the project. The plaintiff submitted that the work was to take 19 months with effect from 19th May 2016 and was to end on 22nd September 2016.

20. It submitted that there was some delay which was caused by the defendant's architects failing to submit the drawings early enough. That the other cause of the delay was the failure on the part of the architect and quantity surveyor to provide their reports on time.

21. The third issue was whether there was additional work apart from what was contained in the contract. The plaintiff enumerated several additional works which the defendant added post the contract. This included the gantry beam, sceptic tank, replacing English toilets with Asian toilets among others.

22. It was its submissions that the said works were not paid for and that the quantity surveyor ought to have valued the same before the defendant could take over the facility.

23. The next issue was whether the valuation of the project was undertaken. This was in the negative as admitted by DW1. The said witness however blamed the plaintiff for being unavailable to have the exercise carried out.

24. The fifth issue was whether the plaintiff was paid the amount due. It submitted that the amount that was to be paid was essentially after a valuation had been undertaken. In this case since the same was not done the full amount had not been paid and that what was due therefore was to be calculated as the difference between the final valuation of the project and the amount already paid.

25. On the issue of the counterclaim it submitted that the same was not tenable as the amount claimed was speculative and based on uncertainty as there was no evidence that the defendant was in any way going to win the tender to supply Kenya power the concrete poles it was tendering.

26. Further that the said counterclaim was not supported by a verifying affidavit which was contrary to the provisions of Order 4 rule 1 and Order 7 rule 5 of the *Civil procedure rules*. On this account alone the same ought to be dismissed.

27. The plaintiff concluded by asking this court to find that it had proved its case on a balance of probability and the same ought to be allowed and the defendant's counterclaim be dismissed with costs as well.

Defendants submissions

28. The defendant identified five issues for determination. The first issue was whether the plaintiff had breached the contract. It was its submissions that the plaintiff breached the contract when it failed to provide a bank guarantee as stipulated in the contract despite the defendant paying the down payment of kshs 12million.

29. That the plaintiff failed to meet its part of the contract when it failed to complete the project within the period agreed and despite extension by the defendant it continued failing to complete which led the defendant suffer great loss and damage.

30. It accused the plaintiff of abandoning the work at 97% despite being granted the extension. The defendant accused the plaintiff of using substandard materials like ballast which failed to meet the KEBS criteria.

31. On the second issue of whether the defendant was responsible for the delay in completion of the work, the defendant submitted on the negative. It submitted that clause 34 of the contract outlined the process of payment which required among others that the Quantity Surveyor undertakes the valuation which was to be approved and thereafter a certificate is issued.

32. It was the defendant's case that the delay if any was occasioned by the plaintiff and not the defendant.

33. On the issue of additional work, the defendant submitted that there was no such additional work and if there was then it ought to have been part of the main contract. That there are clauses in the contract dealing with variations and if there was any then the parties would have agreed in writing as provided under clause 30 of the contract.

34. The fourth issue was whether the defendant suffered any loss as a result of the breach of the terms of the agreement. The defendant while relying on the case of *Hydro Water Well (K) ltd. v. Nelson Mukara Sechere & 2 Others* (2021) eKLR submitted that the delay by the plaintiff in completing the work within the stipulated time caused it to suffer loss.

35. This loss included the loss of business opportunity and in particular the loss of tender NO KP1/9AA-3OT/18/16-17 for the supply of concrete poles to Kenya power. It submitted that were it not for the delay it could have been in a position to bid for the said tender. It therefore submitted that the amount which it would have made ought to be paid by the plaintiff.

36. In conclusion it submitted that the plaintiff was not entitled to the prayers sought and that the suit ought to be dismissed with costs and the counterclaim allowed as prayed with costs.

Analysis and determination.

37. Having perused the pleadings herein as well as the submissions by the parties the issues that needs determination and were well captured by the parties include; whether there were any delays in the works and who caused the same; whether there were any variations in the plans hence extra work by the plaintiff; whether there was any delayed or pending payments; whether the counterclaim was meritorious and who is entitled to costs.

38. It is evident that there was no final report to ascertain whether the plaintiff did or did not conclude the project as there was no final certificate as per clause 1.3 of the contract. This was admitted by both parties who laid blame on each other. The plaintiff argued that the Architecture and the Quantity surveyor did not turn up despite many pleas to do so. On the other hand, the defendant argued that the plaintiff left the site and were forced to take it up because of the urgency of the matter as they were already late in beginning the work.

39. It is therefore clear that what had been done was not concluded as per the contract terms. It is the evidence of the plaintiff that 97% of the work had been concluded and that is why the defendant was able to proceed and carry out the intended work of manufacturing concrete poles.

40. I have perused the bundles of emails rendered as evidence by the parties. The said emails captured the ongoing state of the work which included the question of variations of the plans so as to add the additional work which was not captured in the original drawings and or plans.

41. It appears to me that despite their reservations the defendant fully took over the site and has been carrying out its work. There was no evidence of any defects on the same and if there was any then assuming that it took over from 4th March 2017 when the certificate of practical completion was issued it ought to have raised any complain at least by 2nd September 2017 after expiry of six months.

42. What was to follow was the issuance of final certificate per clause 34.21 of the contract. Of course the same was not issued hence this suit.

43. Of great significance is clause 41.5 of the contract which states as follows:

> "Should the employer take over the whole or any part of the works before the issue of a certificate of practical completion, practical completion shall be deemed to have taken place on the date of taking over of the whole or any part of the works."

44. In my view therefore the work was duly completed by the plaintiff and for the above reasons and specifically that the defendant has since taken over the site and is carrying on with its work. I do not therefore hesitate to conclude that the plaintiff sufficiently completed what it signed for.

45. As a matter of fact, there was no evidence tendered by the defendant to show that the work which was uncompleted was taken over by themselves or any other third party.

46. There was an argument by the defendant that the materials used, specifically the ballast did not meet KEBS standard and thus were substandard. There was no evidence presented neither was it raised within the six months' period before the preparation of the final certificate. In any case the defendant continued to use the factory fully without raising any complaint formerly.

47. Looking at the series of emails between the parties i agree with the plaintiff that there were variations and extra work on the plan. The sets of extra work include the construction of gantry cane beam, the sceptic tank and replacement of English toilets with the Asians once.

48. From the said emails it is evident also that the parties agreed on them thus it relatively caused the delay in completion of the works. I do not however agree that the delay as submitted by the defendant's was inordinate. It appears in my view and reading from the emails on record that both parties contributed in the delays.

49. There were delays for instance in remitting the drawing plans which the plaintiff made a big issue out of it. The delay of about two weeks was not inordinate. The same delay was obviously experienced when the extra work mentioned above was submitted to the plaintiff. Again i do not find the period of the delay inordinate in the circumstances.

50. There was a line of submissions taken by the defendant that the extra work if any done by the plaintiff was not sanctioned by the contract. I find this argument superfluous for the reason that the email correspondences on record clearly indicate that they gave instructions to the plaintiff to carry on with the same. The defendant is therefore estopped as it allowed and or sanctioned the plaintiff to carry out the work despite fully knowing that it was not part of the contract. In essence it made the plaintiff assume that it was to be paid for the extra work.

51. It is true as it was stated in *National Bank of Kenya Ltd Vs. Pipe Plastic Samkolit (k) Ltd* (2002) 2 E A 503, (2011) eKLR, that the court cannot rewrite a contract for the parties. The parties are therefore bound by the terms of the contract unless fraud, coercion or undue influence is detected.

52. In this case the parties save for the original contract went ahead to have some extra work undertaken on the site by the plaintiff with full permission of the defendant. The correspondences alluded above betrays them.

53. What then is the value of these extra work.? There was no evidence of the value presented to these court. The plaintiff claim that it costed kshs 8 million. To the extent that the work was done as found above and despite no evidence of final valuation being undertaken this court shall agree and will go by what the plaintiff submitted. Of course nothing was easier than the defendant permitting the Quantity surveyor from undertaking the valuations even after taking over the site.

54. In any case it was it that took over the site and if it had allowed the valuation it would have counteracted the allegations made by the plaintiff. Consequently, this court finds that the defendant failed to exercise its rights of carrying out valuation and it cannot be heard to complain that no extra works were done in the absence of contrary evidence. In any event it owns the factory and accessing it is its prerogative. The plaintiff cannot do so without its permission.

55. Even for argument sake, had the plaintiff refused to participate it would have valued the said extra work and any other work and thereafter pay off the plaintiff less any work not completed or any other substandard work would have been at the plaintiff's costs.

56. Having stated so what then is the amount due to the plaintiff? In the absence of a final certificate, courtesy of failure to undertake a final valuation the court shall look at the contract terms. Clause 34.21 spell out what the parties ought to carry out as the final calculations.

57. The same states under clause 34.21.3 that:

> " The difference (if any) between the two sums shall be expressed in the said certificate as a balance due to the contractor from the employer or to the employer from the contractor, as the case may be. Subject to any deductions authorised by these conditions, the said balance as from the fourteen day after presentation of the final certificate by the contractor to the employer shall be a debt payable by the employer to the contractor or by the contractor to the employer, as the case may be."

58. In the premises and based on the above clause i find the prayers by the plaintiff merited. The defendant as found above should have mitigated by undertaking a final valuation of the entire work after issuing the certificate of practical completion. It is thus imperative that the total amount due shall be calculated and subtracted from the amount already paid to the plaintiff.

59. Turning now to the counterclaim, the defendant contented that by virtue of the delay in completion of the project it suffered serious losses. In particular, was the loss of the Kenya Power tender No KPI/9AA-3/OT/18/16-17 valued at approximately kshs183,000,000. That out of it the defendant would have raked in a profit of about kshs27 million or thereabouts.

60. The plaintiff however raised a fundamental legal issue regarding the said counterclaim, namely, that there was no verifying affidavit accompanying the same contrary to Order 4 rule 1(2) and Order 7 rule 5(a) of the *Civil procedure rules*.

61. This argument was not counteracted by the defendant.

62. It is trite law that a counterclaim is a suit on its own. It therefore must come within the four corners of the requirements of any other suit. This is for the simple reason that it enjoys all the trappings of any suit.

63. Orders 4 rules 4(1) (2) and order 7 rule 5 (a) of the *Civil Procedure* provides as hereunder respectively;'

(2) "The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in rule 1(1)(f) above."

Order 7 rule 5 states

"Documents to accompany defense or counterclaim [Order 7, rule 5.]

"The defence and counterclaim filed under rule 1 and 2 shall be accompanied by—

(a) an affidavit under Order 4 rule 1(2) where there is a counterclaim; (b)

a list of witnesses to be called at the trial; (c) written statements signed by the witnesses except expert witnesses; and (d) copies of documents to be relied on at the trial. Provided that statements under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under Order 11. 6. Persons in representative capacity [Order 7, rule 6." (underlining mine)

64. Taking the totality of the above and in the absence of a verifying affidavit I find that the counterclaim is defective for all intent and purposes. There is nothing therefore verifying the correctness of the averments therein and in the premises the same is hereby struck out.

65. The next issue is on the question of costs. Both parties submitted on the same. Is it now clear beyond peradventure that costs follow the event.

66. Taking the totality of the evidence as analysed above the plaintiff has been able to establish that it indeed complied with the contract terms. The court found that there was no inordinate delay as claimed by the defendant. As a matter of fact, the delay was well understood by both parties and there was some mutual extension by the defendant.

67. I do not, respectfully, find the argument by the defendant that lack of a guarantee or surety by the plaintiff caused it to suffer any prejudice or loss. The log books of the vehicles delivered by the plaintiff instead of bank guarantee were duly accepted and were not returned. In any event the amount of Kshs12,000,000 was factored in and the same deducted from the plaintiffs account as the work progressed.

68. There was also some delay in payments of the amount demanded by the plaintiff which was nevertheless paid after certificate had been raised.

69. On the same note this court does not find the counterclaim brought within the legal parameters for want of a verifying affidavit. In any event and without prejudice, the loss of tender at Kenya Power to say the least was purely speculative as there was no evidence that they were going to be awarded the same. The tender was opened to all and sundry and was not preserved for the defendant alone and it could have gone either way.

70. In the premises judgement is hereby entered for the plaintiff and against the defendant as follows:-

(a) Kshs. 44,202,694 together with interest from the date herein till payment in full.

(b) The counterclaim is hereby dismissed.

(c) The plaintiff shall have both costs of the suit and the counterclaim.

DATED SIGNED AND DELIVERED AT NAIROBI VIA VIDEO LINK THIS 15TH DAY OF FEBRUARY 2024.

H K CHEMITEI.

JUDGE