Matumbawe Investment Limited v Centofanti (Civil Appeal E100 of 2022) [2024] KEHC 1646 (KLR) (14 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1646 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E100 OF 2022

DKN MAGARE, J

FEBRUARY 14, 2024

BETWEEN

MATUMBAWE INVESTMENT LIMITED ..... APPELLANT

AND

SARA CENTOFANTI ..... RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of the Hn. Martha Mutuku, CM, given on 1/7/2022 in Mombasa CMCC E001 of 2021. The Appellant was the Defendant in the matter.

2. The Appellant filed a 9-paragraph argumentative Memorandum of Appeal. The same is too verbose and prolixious. This is contrary to Order 42 Rule 1, which provides as doth: -

> " 1. Form of appeal –
>
> 1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading. (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

3. The court of Appeal had this to say in regard to rule 86 of the Court of Appeal rules (which is pari materia with order 42 Rule 1) in the case of Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR: -

> " We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the

grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR) and Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR. In the latter case, this Court lamented:

> "We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs." The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues..."

4. In the case of Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR, the Court of Appeal observed that : -

> " Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In William Koross V. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013, this Court stated:
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> > "The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."

5. The rest of the issues are ancillary, repetitive, prolixious and a waste of judicial time. The question this court will have to deal with is whether the magistrate's court had jurisdiction to hear and determine this dispute. This is the only issue addressed in submissions before the court below and before this court.

Duty of the first Appellate court

6. 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.

7. In the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:

> " ...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to

take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

8. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968] EA 123, where the law looks in their usual gusto, held by as follows;-

> " .. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

9. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

10. In the case of Peters vs Sunday Post Limited [1958] EA 424, court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

11. What must be remembered is that the aspect of special damages and liquidated claims are well litigated. Special damages were in the locus classicus case of in the case of David Bagine Vs Martin Bundi [1997] Eklr, the court of Appeal stated as follows: -

> " It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684: "....special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177 thus:
>
> > "Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it"

12. The issues raised in the appeal relate to a quantum meruit -vis-à-vis the actual work done. The issues raised in these pleadings are:-

    a. Whether was breach of contract on part of the Appellant.

    b. Ownership of the designees

    c. Scope of works.

The pleadings

13. The Respondent stated pleaded that she Appellant contracted the Respondents to design a residual building erected on land parcel No. Plot 1910 Kwale situate along Diani beach.

14. The consideration as agreed was Euros 35,000. The payment was to be a 6 installments, 5 of which are for Euro 5000/= while the last and final Euro 10,000/=. The Respondent pleaded that she designed drawings and sent for approval.

15. It was the Respondent's case that she provided design services from October 2018 to September 2019 and invoiced Euro 30,000. The Respondent made the following claims: -

    a. Outstanding amount 20,000 Euros

    b. Quantum Meruit Euro 20,000/=

    c. Damages

16. It is not clear whether both outstanding and Quantum (I presume she meant Quantum Meruit) were claimed from the pleadings or they were alternative claims.

17. The Defendant filed defence and stated that the Respondent lacked capacity to contract. They stated that there was no work done. The designs produced were from the contractor and not the plaintiff. They stated that the Respondent cannot claim that there was quantum meruit, when she claims on certain amount of money.

Proceedings

18. The applicant sated that she was an interior design but is not licensed. She was an employee of Continental Homes Ltd who were contractors. She stated that she received Euro 15,000/= and claimed for the balance of Euro 20,000/=. She did not attach the designs.

19. The appellant's witness Thorsten Rosenhohm testified. The Respondent was to prepare a mood board. He paid 15,000/=.

20. The work was not done. The drawings were from condiment homes. There were no mood boards. The case was closed.

21. The Appellant submitted that the lower trial Court grossly misdirected itself on the issue of Quantum Meruit and relied on the case of Stephen Kinini Wang'odu v the Ark Limited [2016] eKLR in which the High Court pronounced itself on the definition and application of Quantum Meruit. It is their case that the principle in Quantum Meruit demands that reasonable payment be made only to the extent of the actual work done by the Respondent in respect of the agreed contractual obligation.

22. Their case was the documents Respondent at trial relied on documents which she could not attribute as her own work. The documents relied upon were prepared by, and remitted from, Continental Homes Limited and not the Respondent herein. The Respondent testified under oath that she had not provided evidence that she was an employee of Continental Homes Limited; neither did she attach the actual drawings referred to in the aforesaid email communication to prove without a doubt that what was contained therein were actual interior designs prepared by her.

23. The Appellant stated that in the case of Stephen Kanini Wang'ondu v The Ark Limited [2016] eKLR the Court stated as follows on the rationale of Quantum Meruit principle :-

The rationale for the above principle is that many circumstances spring up in which the law as well as justice demands a person to conform to an obligation, in spite of the fact that he might not have committed any tort nor breached any contract. Such obligations are described as quasi-contractual obligations. Simply put, Quantum 3 meruit is the reasonable price for the services performed. In the context of contract law, it means 'reasonable value of services.'

24. It was their case that Quantum meruit is the measure of damages where an express contract is mutually modified by the implied agreements of the parties, or not completed. The term "quantum meruit" actually describes the measure of damages for recovery on a contract that is said to be "implied in fact."

25. To the appellant, the law imputes the existence of a contract based upon one party's having performed services under circumstances in which the parties must have understood and intended compensation to be paid.

26. The respondents filed submissions where they relied on parties' submissions in the lower court. The relied on the case Narok County Government v Prime Tech Engineering Ltd [2017] eKLR, where justice (Rtd Bw'onwong'a stated as doth: -

    17. In the instant application, there is absolutely no evidence to show that when the contract was mutually terminated and the contractor paid off following the resolutions of the meeting of 27/8/2014, the parties entered into another contract to continue works on Motonyi-Pimbiniet road. I accept as persuasive the authority of British Steel Corp v Clevaland Bridge & Engineering Co. Ltd 1 All ER 504 that for payments to be made on the basis of quantum meruit, four elements must be established. First, that valuable service was rendered. Second, that the services were rendered to the defendant. Third, that the services were accepted by the defendant. Fourth, that the defendant was aware that the plaintiff in performing the services, expected to be paid by the defendant.

    18. The facts in the instant application are distinguishable from those in British Steel Corp v Clevaland Bridge & Engineering Co. Ltd, supra.

    19. In the instant application, the contract for works done had been terminated and paid for. Furthermore, the Government was not aware that the contractor had re-started works on Motonyi-Pimbinet road, after the mutual termination. The services of the contractor were not accepted by the Government following the mutually agreed termination of 27/8/14 by the two parties.

27. They stated that the respondent carried out her obligation as an interior designer and the Appellant has since take possession and moved in. secondly, they stated that if the contactor delayed or did not provide for services it is not an issue for the respondent as the two are separate legal entities.

28. They relied on the decision of the court of Appeal in the case of Kenya Hotels Ltd v Oriental Commercial Bank Ltd (Formerly known as The Delphis Bank Limited) [2019] eKLR, [Ouko, (P),Gatembu & Kantai, JJ.A], where the court stated as doth; -

    11. Before this Court, the appellant unsuccessfully sought to introduce, through an amendment to its memorandum of appeal, the complaint that the transaction was void by reason of section 6 of the *Land Control Act*. That attempt was rejected in a ruling delivered by M'Inoti, J.A in this matter on 23rd February 2018 with which the full court in a reference concurred in a

ruling delivered on 25th January 2019. In rejecting the proposed amendment, the learned Judge expressed that:

> "if the applicant is merely introducing a ground of appeal that is properly founded on the evidence that was adduced and canvassed before the trial court, which it is alleged the trial judge ignored or misapplied, the Court will more readily allow the amendment. Different considerations will however apply if the applicant is seeking to introduce a totally new ground of appeal that was not pleaded, evidence adduced, canvassed and determined by the trial court."
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> [Emphasis added]

And later,

> " Where the applicant seeks to introduce an entirely new point, there are well known strictures that seek to ensure firstly, that an appellate court does not, in disguise, metamorphose into a trial court and make first instance determinations without the benefit of the input of the court from which the appeal arises."

29. The quotation is wrongly elongated to include a quotation in vacuo. They stated that the respondent was independent of the contractor. This was raised since, the director of the contractor was according to the evidence a spouse of the Respondent.

30. The respondent further relied on the case of Bahange v. School Outfitters (U) Ltd (2000) E.A. 20 (CAU) where the court of Appeal sitting I Kampala stated that: -

> " One of the basic principles in law of contract is that the parties have freedom to fix the terms of their own bargain. The courts do not concern themselves with the question whether "adequate" value has been given or whether the agreement is harsh or one-sided. The fact that one person pays "too much" or "too little" for a thing may be evidence of fraud or mistake or it may induce the court to imply or to hold that the contract has been frustrated. But it does not in itself affect the validity of the contract. Thus in the absence of fraud, duress, undue influence, mistake or misrepresentation the courts will enforce a promise so long as some value for it has been given."

31. Most of the decisions relied on by the respondent were foreign decision. These many years after independence, the duty to develop indigenous jurisprudence is sacrosanct. I say no more.

32. They also relied on the decision of Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited [2017] eKLR Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited [2017] eKLR, where the court, Waki, Makhandia & Ouko, JJ.A, stated as doth: -

> " 38. We are alive to the hallowed legal maxim that it is not the business of courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved. See National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd [2002]2 EA 503. The primary task of the court is to construe the contract and any terms implied in it. See Megarry, J. in the case of Coco vs A. N. Clark (Engineers) Ltd. - [1969] RPC 41.

Analysis

33. What came out was that there appear to have been a contract to carry out interior design. The main works were being done by Continental Homes Limited, whose director is the Respondents husband. Other have documents from Continental Homes Limited there was nothing to show what was done.

34. It was agreed that the mood house was to be a desired prototype for the interior. It was also found that work was not completed. There appears to be an exchange of emails where the respondent is giving various excuses for not doing her work.

35. She stated that her work was not to carry out work but to design. She did not produce a single report on any design. There is no evidence of what was done. This then leads the court to conclude that the question of Quantum meruit is thus settled. There was no proof of the same. This is the single most important burden the Respondent had. Sections 107-109 of the *evidence Act* provides as follows: -

> " 107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
>
> 108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
>
> 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

36. The Respondent failed in that duty. The court had no evidence to order quantum meruit. 11. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 as follows:

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

37. In Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR, the judges of Appeal held that:

> " Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -
>
> > "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept,

where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained."

38. The next issue is the liquidated or special damages incurred. There needs to be pleadings on the extent of works done. No such pleadings existed. It is not enough to tender evidence. A party must first plead before tendering evidence. Parties are bound by this pleading.

39. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

> "…..it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded……
>
> ...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

40. In the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR the supreme court as follows:

> "In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings……'"

41. The Respondent was under duty to proof 3 aspects to succeed.

    a. Breach of contract/fault

    b. Quantum

    c. Performance of her part of the bargain.

42. The scope of the works was not pleaded. It is not for the court to sift through papers to find what parties agreed. The Respondent was unable to place documents on record regarding the contract between herself and the Appellant. When the Respondent states that she provided design services between October, 2018 and 17/9/2019, this court is left with the question on what services were rendered and the extent thereof.

43. Though there is no doubt there was a contract for interior design, there is no evidence that it was carried out by the Respondent and breach. The court erred in finding that there was performance. Secondly, it was not open to the court to find that the Appellant breached the agreement between the parties. There was no pleading to that effect. Under Order 2 Rule 10(1) of the Civil Procedure Rules provides as doth: -

> " 10. (1) Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing—
>
> (a) particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies; and
>
> (b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.

44. Without pleading on breach and particulars thereof, there was no case before the court. The court relied on the Appellant's authority of Stephen Kinini Wang'ondu v The Ark Limited [2016] eKLR, for the measures of damages under quantum meruit. There however, must be specifically set out in the pleadings. The court stated as follows: -

> Quantum meruit is a Latin phrase meaning "what one has earned." In the context of contract law, it means something along the lines of "reasonable value of services". The elements of quantum meruit are determined by the common law. For example, a plaintiff must allege that (1) defendant was enriched; (2) the enrichment was at plaintiff's expense; and (3) the circumstances were such that equity and good conscience require defendants to make restitution.[1]
>
> Quantum meruit is the measure of damages where an express contract is mutually modified by the implied agreement of the parties, or not completed. The concept of quantum meruit applies in (but is not limited to) the following situations:-
>
> a. When a person hires another to do work for him, and the contract is either not completed or is otherwise rendered un-performable, the person performing may sue for the value of the improvements made or the services rendered to the defendant. The law implies a promise from the employer to the workman that he will pay him for his services, as much as he may deserve or merit.
>
> b. The measure of value set forth in a contract may be submitted to the court as evidence of the value of the improvements or services, but the court is NOT required to use the contract's terms when calculating a quantum meruit award. (This is because the values set forth in the contract are rebuttable, meaning the one who ultimately may have to pay the award can contest the value of services set in the contract.)
>
> c. When there is an express contract for a stipulated amount and mode of compensation for services, the plaintiff cannot abandon the contract and resort to an action for a quantum meruit on an implied assumpsit. However, if there is a total failure of consideration, the plaintiff has a right to elect to repudiate the contract and may then seek compensation on a quantum meruit basis.

The rationale for the above principle is that many circumstances spring up in which the law as well as justice demands a person to conform to an obligation, in spite of the fact that he might not have committed any tort nor breached any contract. Such obligations are described as quasi-contractual obligations. Simply put, Quantum meruit is the reasonable price for the services performed. In the context of contract law, it means 'reasonable value of services.'[2] Quantum meruit is the measure of damages where an express contract is mutually modified by the implied agreements of the parties, or not completed.

The term "quantum meruit" actually describes the measure of damages for recovery on a contract that is said to be "implied in fact."[3] The law imputes the existence of a contract based upon one party's having performed services under circumstances in which the parties must have understood and intended compensation to be paid.[3] To recover under quantum meruit one must show that the recipient:- (1) acquiesced in the provision of services; (2) was aware that the provider expected to be compensated; and (3) was unjustly enriched thereby.[4]

45. The main objective of pleadings is to narrow down dispute in a more profound way to issue for determination. The court can never decide a case by way of conjecture. In the case of the case of Raghbir Singh Chatte v National Bank of Kenya Limited [1996] eKLR, where the court of Appeal stated as doth: -

> " The main object of this rule and r.14 is to bring the parties by their pleadings to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing (per Jessel M. R. in Thorp v Holdworth (1876) 3 Ch. D. 637). This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him. Thus, in an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible", (underling supplied).
>
> I will also add that the crucial deficiency of a general denial which I have already described, also applies to the evasive, inconsistent and contradictory alternative general traverse in the appellant's defence. This was that if the respondent had extended any overdraft facilities without stating the amount involved, to the appellant which was moreover, denied, then the same and here again, without stating how and when, had been paid.

46. Quantum meruit is an equitable remedy. It must only be invoked in the clearest of cases. There is no evidence of works commensurate to 20,000/= Euros sought. This was also the full sum for the contract. It cannot be that Quantum Meruit is for the whole sum. There was no evidence of the position of works done.

47. In the case of Gurbaksh Singh & Sons LimitedvNjiri Emporium Ltd[1985] eKLR, the Court of Appeal stated as hereunder: -

> " Farwell LJ in Lagos v Grunwaldt, [1910], 1 KB 41, 48 (CA) which was a claim for a sum for professional fees or charges, declared that though it was not a debt or liquidated demand arising under a contract:
>
> > "…. It is a claim for quantum meruit. In my opinion that is within the rule. I think the words "debt or liquidated demand" point to the old division of common law actions to be found in Bullen and Leake, 2nd edition page 28. The old

> indebitatus counts which have from time to time been rendered more and more concise and designated with little difference of meaning by the terms indebitatus counts, money counts or common counts; the expression common counts or common indebitatus counts being often used to designate those of more frequent recurrence, viz where the debt is for goods sold and delivered, goods bargained and sold, work done, money lent, money paid, money received, interest, and upon accounts stated; and the expression money counts being sometimes used to particularize those for money lent, money paid, and money received. The most appropriate name seems to be "indebitatus counts." And the learned authors go on to say, "there were also formerly in use counts known as quantum meruit and quantum valebat counts, which were adopted where there was no fixed price for work done or goods sold etc. These counts, however have fallen into disuse, and have been superseded by the general application of the indebitatus counts." In my opinion that is the true view: everything that could be sued for under these counts come within the description of debt or liquidated demand."

48. Finally, though invoiced, the amounts claimed are claimed per dates not as per work done. All the works were done by third parties and do not relate to the claim herein. There is no evaluation of the work done. other than scribbling in some addendum, there is nothing to show warranting payment of Euro 20,000/=.

49. I am aware that the duty of the court has been litigated upon and settled. It is not my duty to interfere with the freedom to contract. However, when parties do so, they must show that the contract has been carried out and the extent of breach.

50. In the case Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited [2017] eKLR, referred by the Respondent the court of Appeal was of the view that: -

    44. This Court has never shied away from interfering with unconscionable contracts. In Kenya Commercial Finance Company Ltd vs Ngeny & Another [2002] 1KLR it stated:

        > "The court will not interfere where parties have contracted on arms-length basis. However by its equitable jurisdiction, this court will set aside any bargain which is harsh, unconscionable and oppressive or where having agreed to certain terms and conditions, thereafter imposes additional terms upon the other party. Equity can intervene to relieve that party of such conditions."

    45. Halsbury's Laws of England Volume 22 (2012) 5th Edition at Paragraph 298 states of unconscionability:

        > "Even in the absence of duress of persons or undue influence, there has long been jurisdiction to interfere with harsh and unconscionable transactions in several different areas of the law: for instance, in respect of salvage agreements; or against contractual penalties, forfeiture of mortgages, extortionate loans or expectant heirs. ... The jurisdiction of the courts to set aside is based on unconscientious conduct by the stronger party; relief will not be granted solely on the grounds that the transaction is unfair or improvident."

    46. Finally on unconscionability, this Court in the Margaret Njeri Muiruri case (supra) stated:

        > "Courts have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to a procedural abuse during formation of

the contract, or due to contract terms that are unreasonably favourable to one party and would preclude meaningful choice for the other party. An unconscionable contract is one that is extremely unfair. Substantive unconscionability is that which results from actual contract terms that are unduly harsh, commercially unreasonable, and grossly unfair given the existing circumstances of the case (See Black?s Law Dictionary, 9th Edition, Gardner, Ed.).

51. I agree with the respondent's submissions regarding the decision of Mukuru Munge v Florence Shingi Mwawana & 2 others [2016] eKLR, where the court of Appela stated as doth: -

> " It is axiomatic that a cause of action founded on contract accrues when breach takes place and not when damage is suffered. (See CittyonContracts,Sweet & Maxwell, 23rd Ed. Vol. 1 page 732 and Mwangi v. Kiiru [1987] KLR 324). And a breach of contract occurs when one or both parties fail to fulfill their obligations under the terms of the contract."

52. Damages however, must be proved. In order to prove damages, the same must arise from breach by the other party. A party cannot rely on its own breach to found a claim. There was no evidence of breach by the Appellant. It is not enough to place evidence and leave alternatives that if the contractors failed, it is not the business of the respondent. She should have led evidence on when the contractor failed and what work was done upto that time. It was also her duty to prove the scope of works done and the extent this was done. there was paucity of such evidence. Such evidence is usually frowned upon.

53. The court should not be left to grapple with documents not showing what was the scope and extent of performance. Given the admission that delays were caused by the respondent and the contractor did not perform, it was incumbent upon the Respondent to place before the court credible evidence of the loss.

54. The court has said enough to show that the case in the court below was for dismissal. The respondent fell far below the standards required in civil cases. The Appeal is consequently allowed. The case in the court below was not pleaded properly and proved. The suit in the court below is thus for dismissal with costs.

Conclusion

55. The upshot of the foregoing is that the Appeal is merited. I allow the same as doth: -

    a. The appeal is allowed, the judgment in Mombasa CMCC E001 of 2021 on 1/7/2022 is set aside. In lieu thereof, the suit in the lower court is dismissed in *limine* with costs to the Appellant.

    b. The appellant to have cost of the appeal herein of Kshs. 165,000.

    c. 30 days stay of execution.

    d. File is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 14TH DAY OF FEBRUARY, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Mwakireti & Asige Advocates for the Appellant

Tariq Khan & Associates Advocates for the Respondent

Court Assistant - Brian