Charry Business Ventures Limited v County Government of Kwale (Civil Appeal E073 of 2023) [2024] KEHC 17083 (KLR) (9 May 2024) (Judgment)

Neutral citation: [2024] KEHC 17083 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E073 OF 2023

DKN MAGARE, J

MAY 9, 2024

BETWEEN

CHARRY BUSINESS VENTURES LIMITED ..... APPELLANT

AND

COUNTY GOVERNMENT OF KWALE ..... RESPONDENT

(Appeal from the Judgment and Decree of the Hon J B Kalo, on 9/3/2023 in Mombasa, E496 of 2020.)

JUDGMENT

1. This is an appeal from the Judgment and Decree of the Hon J B Kalo, on 9/3/2023 in Mombasa, E496 of 2020. The Appellant was the plaintiff in the lower court.

2. The Appellant was the Plaintiff in this matter. The court heard the case and found the same not merited and dismissed the suit. The Appellant was aggrieved and filed this Appeal. In the memorandum of Appeal the Appellant raised 5 grounds of Appeal, that is:-

    a. The learned magistrate erred in law and in fact by holding that the Appellant had not proved its aces on a balance of probability.

    b. The learned trial magistrate erred in law and in fact in failing to consider that the Respondent did not adduce any evidence at the hearing and hence the Appellant's evidence was uncontroverted.

    c. The learned trial magistrate erred in law and in fact by formulating a defence for the Respondent where non existed as non-had been adduced.

    d. The learned trial magistrate erred in law and in fact by failing to consider the totality of the evidence adduced by the Appellant.

e. The learned trial magistrate erred in law and in fact by holding that the contract was frustrated yet none of the event was beyond the powers of the parties to remedy hence arriving to any wrong decision.

f. The learned trial magistrate erred in law and in fact by misapprehending the position of the law regarding frustrating of contract.

3. They prayed for the court for Orders that: -

i. This appeal be allowed with costs.

ii. The judgment of the lower court be set aside and this Court to issue any other appropriate orders it may deem fit and just.

4. The appellant filed suit on 22/5/2020, claiming that there was a contract CGK/KWL/740584/2018 – 2019 for proposed landscaping of the Diani Beach road at Ukunda ward. They stated that on 16/3/2020 the Respondent issued an irregular Default Notice No. 1. They stated that the defendant invoked irrelevant clauses. The contract was terminated on 14/4/2020. They blamed the Respondent for their failure. They stated that they suffered damages.

5. They claimed a sum of Kshs. 16,569,513.30 among others. This sum was not claimed as part of the body of the Plaint. This was prayed for at the prayer section. What constituted the said sum of Kshs. 16,569,513.30 remains a mystery to date.

6. Upon hearing the case, the court found that the Appellant did not prove their case. A dismissal order followed as a corollary.

Analysis

7. 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.

8. In the case of Mbogo and Another v 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."

9. 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 v 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."

10. 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.

11. In the case of Peters v 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..."

12. In Nyambati Nyaswabu Erick v Toyota Kenya Ltd & 2 Others [2019] eKLR, Justice D.S Majanja held as doth:

> " General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same."

13. The duty of the court regarding damages is settled that the state of the Kenya economy and the people generally and the welfare of the insured and injury public must be at the back of the mind of the trial Court.

14. The foregoing was settled in the cases of Butter v Butter Civil Appeal No. 43 of 1983 (1984) KLR where the Court of Appealed held as follows as paragraph *8*.

> " In awarding damages, a Court should consider the general picture of all prevailing circumstance and effect of the injuries of the claimant but some degree of .....is to be sought in the awards, so regard would be paid to recent awards in comparable cases in local Courts. The fall of value of monies generally, the levelling up and down of the facts of exchange between currencies...should be taken into consideration."

15. Finally, in deciding whether to disturb quantum given by the Lower Court, the Court should be aware of its limits. Being exercise of discretion the exercise should be done Judiciously conclusively are circumstances to ensure that the award is not too high or too low as to be an erroneous estimate of damages.

16. The Court of Appeal, pronounced itself succinctly on these principles in Kemfro Africa Ltd v Meru Express Servcie v A.M Lubia & Another 1957 KLR 27 as follows: -

> " The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages.

17. The foregoing statement had been ably elucidated by Sir Kenneth 'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Counsel, that is Nance v British Columbia

Electric Co Ltd, in the decision of Henry Hilanga v Manyoka 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages: -

> " The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance..."

18. Therefore, for me to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure.

19. So my duty as the appellate court is threefold regarding quantum of damages: -

    a. To ascertain whether the Court applied irrelevant factors or left out relevant factors.

    b. To ascertain whether the award is too high as to amount to an erroneously assessment of damages.

    c. The award is simply not justified from evidence.

20. To be able to do this, I need to consider similar injuries, take into consideration inflation and other comparable awards.

21. Similarly in the duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya v Republic [1957] EA 336 is as follows: -

> " On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may havfidelite decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

22. The foregoing statement had been ably elucidated by Sir Kenneth O'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Council, that is, Nance v British Columbia Electric Co Ltd, in the decision of Henry Hilanga v Manyoka 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

> " The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance..."

23. For the appellate court, to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure. in United

India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd [1985] E.A, in which Madan J.A (as he then was), expounded the principles as follows:

> " The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

24. The first issue is that the Appellant prayed for Kshs. 16,569,513. 30. This amount was not particularized on how it arose. It is just thrown to the court. In the case of in the case of David Baginev 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 v 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"

25. The Court could not have granted prayers that are not in the plaint even if the appellant has proved liability, this is because parties are bound by their pleadings. Before proceeding to pray for certain reliefs, they must be pleaded. In the case of in the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, A C Mrima stated as follows: -

> 11. 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. v Stephen Mutinda Mule & 3 others [2014] eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) v 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."

26. The Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another v IEBC & 2 others [2017] eKLR found and held as follows in respect to the essence of pleadings in an election petition: -

> " 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.....'"

27. The second aspect is the question of reinstatement of a contract. The contract was to be performed after consents were obtained from KENHA, Kenya power and lighting among other entities. This was not obtained. Without the consent of the owners of the road, KENHA and power distributer Kenya power, the contract was incapable of performance. This is what is typically referred to as frustration. IN the case of Samuel Chege Gitau & another v Joseph Gicheru Muthiora [2014] eKLR, Justice J. L. Ongutostated as doth: -

> " As has emerged from case law, the basis and principles of that doctrine can be summarized in the following words:-
>
> "The doctrine of frustration was evolved to mitigate the rigour of the common law's insistence on literal performance of absolute promises ... The object of the doctrine was to give effect to the demands of justice, to achieve a just and reasonable result, to do what is reasonable and fair, as an expedient to escape from injustice where such would result from enforcement of a contract in its literal terms after a significant change in circumstances ... (2) Since the effect of frustration is to kill the contract and discharge the parties from further liability under it, the doctrine is not to be lightly invoked, must be kept within very narrow limits and ought not to be extended ... (3) Frustration brings the contract to an end forthwith, without more and automatically. (4) The essence of frustration is that it should not be due to the act or election of the party seeking to rely on it ... A frustrating event must be some outside event or extraneous change of situation ... (5) A frustrating event must take place without blame or fault on the side of the party seeking to rely on it ..."
>
> Those were the words of Lord Bingham MR in the case of J. Lauritzen AS v Wijsmuller BV (The Super Servant Two) [1990] 1 Lloyd's Rep 1,8 the case of a drilling rig transportation contract which was claimed to having been frustrated by the sinking of the agreed transportation vessel, which vessel was the one the transporter had designated for performance of the contract. Those words and the set principles were recently applied in the case of Blankley v Central Manchester and Manchester Children's University Hospital NHS Trust [2014] 1 W.L R 2683. The principles are relatively clear.

28. Further, in the case of Five Forty Aviation Limited v Erwan Lanoe [2019] eKLR, the Court of appeal (Waki, Nambuye & Kiage,JJA) stated as follows: -

In the case of Kenya Airways Limited v Satwant Singh Flora (supra), the Court set out the following guidelines when determining rights and obligations of parties where one party pleads alleged illegality of the contract as justification for refusal to be bound under such a contract:-

(i) No person can claim any right or remedy whatsoever under an illegal transaction in which he/she has participated. The Court is bound to veto the enforcement of a contract once it knows that it is illegal whether that knowledge comes from the statement of the guilty party or from outside.

(ii) If the statute prohibits the contract, it is unenforceable whether the parties meant to break the law or not.

(iii) No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of the contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the Court ought not to assist him."

(iv) No Court ought to enforce an illegal contract where the illegality is brought to its notice and if the person invoking the aid of the Court is himself implicated in the illegality.

(v) In order for the doctrine to act as a defence to the claim, there must be illegal performance of the contract by one party to the contract and knowledge that illegal performance and participation in it by the other party to the contact."

Applying the above guidelines to the instant appeal, it is our finding that the appellant's failure to comply with the prerequisites in section 45 (2) of the Act did not render the said contract illegal, but gave rise to intervening circumstances which rendered the continued sustenance of the said contract as initially executed between the parties impossible. This is what the Court in the same Kenya Airways Limited case (supra) termed "frustration of a contract". The Court in the said Kenya Airways case Limited (supra), went further and set out the prerequisites for the application of the doctrine of frustration of a contract as follows:-

"....the doctrine of frustration operates to excuse further performance where it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist, or that some particular person will continue to be available, or that some future event which forms the foundation of the contract will take place, and before breach performance becomes impossible or only possible in a very different way to that contemplated without default of either party and owing to a fundamental change of circumstances beyond the control and original comptemplation of the parties. The mere fact that a contract has been rendered more onerous does not of itself give rise to frustration.

(See also Halisburry Laws of England (3rd Edition) Volume 8 page 185(i), on the doctrine of frustration para 320) and Davis Contractors Ltd v Fareham U.D.C. [1956] A.C.696 for the observations inter alia that:

> " Frustration occurs whenever the law recognizes that, without the default of either party a contractual obligation has become incapable of being performed because, the circumstances in which the performance is called for would render it a thing radically different from that which was undertaken by the contract..."

29. A contract that has not obtained all consents is a frustrated one. It is incapable of performance. There is no breach on the side of the Respondent. The appellant was under duty to make necessary applications

for consent. The appellant built on a public road without consent of Kenya National Highways Authority contrary to Section 49(1) of the Roads Act, 2007 which provides as follows: -

> "(1) Except as provided in subsection (2), no person or body may do any of the following things without the responsible Authority's written permission or contrary to such permission—
>
> (a) erect, construct or lay, or establish any structure or other thing, on or over or below the surface of a road reserve or land in a building restricted area;
>
> (b) make any structural alteration or addition to a structure or that other thing situated on or over, or below the surface of a road or road reserve or land in a building restriction area; or
>
> (c) give permission for erecting, constructing, laying or establishing, any structure or that other thing on or over, or below the surface of, a road or road reserve or land in a building restriction area, or for any structural alteration or addition to any structure or other thing so situated."

30. A contract that is illegal is void for ill purposes. In Macfoy v United Africa Co. Ltd [1961] 3 All E.R. 1169, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

31. The other prayer relates to re-tender. The same is governed by the Public Procurement and Disposal Act 205. The same can only be challenged as per the Act. I shall not deal with the same as it is unnecessary.

32. Termination of an illegal contract of a frustrated contract, does not attract damages. In any case there can be no damages, for breach of contract. The Court of Appeal decision in Kenya Tourism Development Corporation v Sundowner Lodge Ltd 2018 eKLR stated as hereunder:

> "The next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This is principle is encapsulated in the Latin phrase restitution in integrum (see Kenya Industrial Estates Ltd v Lee Enterprises Ltd NRB CA Civil Appeal No. 54 of 2004 [2009] eKLR, Kenya Breweries Ltd v Natex Distributors Ltd Milimani HCCC No. 704 of 2000 [2004]eKLR). The measure of damages is in accordance with the rule established in the case of Hadley v Baxendale [1854] 9. Exch. 341 that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see Standard Chartered Bank Limited v Intercom Services Ltd & Others NRB CA Civil Appeal No. 37 of 2003 [2004] eKLR). Such damages are not damages at large or general damages but are in the

nature of special damages and they must be pleaded and proved (see Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others, NRB CA Civil Appeal No. 192 of 92 (UR) and Charles C. Sande v Kenya Co-operative Creameries Ltd, NRB CA Civil Appeal No. 154 of 1992 (UR))".

33. Therefore, the court could not award general damages for breach of contract. There was no contract that was breached. A contract predicated go actions of a third party cannot be said to have been breached, when for whatever reason the third party does not take steps he was to take. KENHA is not a party to this case. They cannot be ordered to do whatever is needed to be done

34. Lastly, I have perused evidence on record. A notice of termination was served on the Appellant. There was no prove of breach of contract. Therefore, the appeal lacks merit. It is accordingly dismissed with costs of Kshs. 650,000/= to the respondent.

35. The Appellant will bear costs for the Appeal herein on the basis of settled law. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases."

36. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award

of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

37. The Appeal lacks merit and is accordingly dismissed as aforesaid.

Determination

38. The upshot of the foregoing I make the following orders: -

    a. The Appeal herein lacks merit and is dismissed in *limine* with costs of Ksh 600,000/= payable to the respondent for the Appeal.

    b. The file is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 9TH DAY OF MAY, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

M/s Nzaku & Nzaku Advocates for the Plaintiff

M/s John Bwire & Associates Advocates for the Respondent

Court Assistant- Brian