Ministry of Lands, Housing and Urban Development & 2 others v Hatu Engineering Service Limited (Civil Appeal E065 of 2023) [2024] KEHC 6046 (KLR) (20 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6046 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E065 OF 2023

RE ABURILI, J

MAY 20, 2024

BETWEEN

MINISTRY OF LANDS, HOUSING AND URBAN DEVELOPMENT .... 1ST APPELLANT

HON ATTORNEY GENERAL ..... 2ND APPELLANT

MINISTRY OF INTERIOR & COORDINATION OF NATIONAL GOVERNMENT ..... 3RD APPELLANT

AND

HATU ENGINEERING SERVICE LIMITED ..... RESPONDENT

(An appeal arising out of the judgment of the Honourable W.K. Okunya in the Chief Magistrate's Court at Kisumu delivered on the 12th April 2023 in Kisumu No. 603 of 2015)

JUDGMENT

Introduction

1. Vide an amended plaint dated 11th May 2020, the respondent Hatu Engineering Services Limited sought the following orders against the appellants:
    i. General damages
    ii. Declaration against the 1st defendant to fulfil its obligations under contract
    iii. Special damages in the sum of Kshs 2.002,019.45
    iv. Costs and interest
2. It was the respondent's case that the 1st defendant awarded Uholo Building construction a service sub contract Tender No. POL/N/02 to be carried out at the Divisional Police Headquarters in

Kisumu sometime in the year 2006. The respondent averred that Uholo Construction delegated the construction works to the Respondent which information was communicated to the 1st appellant vide a letter dated 9th December.

3. The respondent averred that it completed the construction works and was enlisted to perform further works some of which were not specified in the contract but despite this knowledge, the 1st and 3rd appellant maliciously and wrongfully declined to pay to the respondent an outstanding balance of Kshs. 2,002,019.45

4. In response, the appellants filed an amended defence dated 8th December 2017 denying all the respondent's allegations.

5. The trial magistrate in his judgement found that the plaintiff had proved on a balance of probabilities that he was entitled to Kshs. 404,352 being amount due to it for extra works done. The trial magistrate however found that the respondent had not adduced evidence in proof of the claim for general damages and the sum of Kshs. 138,463.45.

6. In his judgment, the trail magistrate proceeded to grant the respondent special damages of Kshs. 411,352 together with interest at court rates as well as a declaration that the 1st appellant fulfills its obligation under the contract.

7. The appellants being dissatisfied with the decision of the Trial Court filed a Memorandum of Appeal dated 8th April 2023 raising the following grounds of appeal;

    i. The learned trial magistrate erred in both fact and law by ignoring the defendant's evidence that the extra works amounting to Kshs. 404,325 was part of the additions done by Uholo Construction Limited and were factored in together with omissions in the working out at inception of the contract between Hatu Engineering Limited and 1st Appellant thus arriving to an outstanding payment 875,340 which was paid in the interim certificate 18.

    ii. The learned trial magistrate erred in both fact and law by holding that extra works were undertaken by the respondent based on no evidence and as against the evidence tendered by the appellant that the extra works were done by Uholo Contraction Limited and not Hatu Engineering Service Limited.

    iii. The learned trial magistrate erred in both fact and law by ignoring the defendant's preliminary objection and submissions showing that the suit against the 3rd defendant was filed outside the time presented by the law and that leave to enjoin the plaintiff did not amount to extension of limitation.

    iv. The learned trial magistrate erred in both fact and law by awarding special damages to the respondent against no evidence from them proving that they undertook any extra works thus awarding the respondent money that they were already paid amounting double compensation against public policy.

    v. The learned trial magistrate erred in both fact and law awarding respondent Kshs. 7,000 for retention as against the appellants' evidence that all retention was paid.

    vi. The learned trial magistrate erred in both fact and law in failing to consider the appellants' written submissions, evidence and cited authorities copies of which were availed.

8. The appeal herein was to be canvassed by way of written submissions.

The Appellants' Submissions

9. The appellants' submitted that the magistrate relied on no evidence in concluding that the respondent was owed for extra works carried out as the respondent did not plead the kind of extra works carried out or the amounts, if any. It was submitted that the amount of Kshs. 404,352 was derived from the calculations done by the project manager which factored the work that was done by the first contractor and not the respondent. It was submitted that awarding the respondent the amount claimed for extra works amounted to double compensation as the same had been factored in the earlier payments made.

10. The appellants submitted that the court erred in law when it failed to consider their preliminary objection regarding the locus of the 3rd appellant as the respondent initially filed the suit without including the 3rd appellant and that in its application seeking to enjoin the 3rd appellant was only limited to an amendment and did not enlarge time when the 3rd appellant could be sued and thus the suit against the 3rd appellant ought to have been dismissed with costs as it was not properly sued. Reliance was placed on the cases of Peres Atieno v Moses Angura Omoro & Another [1985] eKLR, Jamleck Kamau v Royal Media Services Ltd t/a Citizen TV (Nairobi Civil Case No. 378 of 2015) eKLR and that of Francis Njenga v James Murya & Attorney General [2021] eKLR.

The Respondent's Submissions

11. It was submitted that that the joinder or non - joinder of the 3rd Appellant/Respondent would not defeat the suit given that the Attorney General was issued with the necessary notice of institution of suit and was sued from the word go, alongside the 2nd Appellant, who gave out the tender and further that the Attorney General was sued on behalf of the Government under whom both ministries fall in particular, the 1st Appellant who had awarded the tender the subject of this suit and who together with the 3rd Appellant were responsible for the contract.

12. The respondent submitted that even if the court were to find that the suit against the 3rd Defendant/Appellant was statutorily time barred, it would still stand as against both the 1st and 2nd Appellants, who are jointly and severally sued together with the 3rd Appellant.

13. It was submitted that the Respondent proved has proved his case on a balance of probabilities for non-payment of the extra works of Kshs. 404,352 and the balance of retention sum of Kshs. 7,000 totaling to Kshs. 411,352 as found and awarded by the Hon. Learned Trial Magistrate.

Analysis and Determination

14. This being a first appeal, this Court has the duty to analyze and re-examine the evidence adduced in the lower Court and reach its own conclusion but bear in mind that it neither saw nor heard the witnesses testify and make due allowance for the said fact.

15. In Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, the Court stated as follows-

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

16. Having perused the record hearing as well as the submissions made by both parties herein, it is my opinion that the issues for determination are;

> Whether the respondent's claim against the 3rd appellant was statute barred?
>
> Whether the trial magistrate erred in awarding the respondent special damages for extra works done?

17. As to whether the respondent's claim against the 3rd appellant was statute barred, the appellants argued in support of this stating that the respondent initially filed the suit without including the 3rd appellant and that in its application seeking to enjoin the 3rd appellant was only limited to an amendment and did not enlarge time when the 3rd appellant could be sued and thus the suit against the 3rd appellant ought to have been dismissed with costs as it was not properly sued.

18. In response, the respondent argued that even if the court were to find that the suit against the 3rd Defendant/Appellant was statutorily time barred, it would still stand as against both the 1st and 2nd Appellants, who are jointly and severally sued together with the 3rd Appellant.

19. I note that vide an application dated 28th January 2020 the respondent sought to amend the plaint to include the 3rd appellant. The said application was allowed and the respondent was allowed to enjoin the 3rd appellant. Indeed, the appellants are right that in the aforementioned application, the respondent did not seek extension of time to sue the 3rd appellant as they were out of time to institute proceedings against it by virtue of Section 3 (2) of the *Public Authorities Limitation Act* which provides that:

> No proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date on which the cause of action accrued.

20. It is not lost to this court that by the time that the 3rd defendant was being enjoined to the suit, three years had already lapsed. It is worth noting that time-Barred Suit Must Be Dismissed Even if plea of limitation is not raised as a defence. See V.M. Salgaocar and Bros. v. Board of Trustees of Port of Mormugao and Another, (2005) 4 SCC 613 where the Supreme Court of India observed that as per the mandate of Section 3 of the Limitation Act, the court has to dismiss any suit instituted after the prescribed period of limitation irrespective of the fact that limitation has not been set up as a defence.

21. Albeit the Attorney General acting on behalf of the appellants acquiesced to proceeding with the trial even after the enjoinment of the 3rd appellant, the law is clear that estoppel cannot operate against statutory provisions. Thus, the Doctrine of promissory estoppel cannot be applied to aid to compel Government to carry out a representation or promise which is contrary to law, there being no promissory estoppel against law. Furthermore, the 3rd appellant herein was enjoined to the suit because it was the benefactor of the construction project as the Ministry of Housing was only the project manager and supervisor.

22. Further, the respondent clearly testified that the extra works were done on the directives of the 3rd defendant and not the 1st or 2nd defendants. It follows that the respondent enjoined the 3rd defendant with full knowledge that the 3rd defendant was the one to be ordered to pay for the extra works allegedly performed by the respondent at the former's instructions. The respondent clearly pleaded that it was enlisted to perform further works some of which were not specified in the contract but that despite this knowledge, the 1st and 3rd defendants maliciously and wrongfully declined to pay to the respondent an outstanding amount of Kshs 2,002,019.45.

23. As submitted by the respondent, he had knowledge of the proceedings and proceeded with them to conclusion. He had the opportunity to raise an objection to the inclusion of the 3rd appellant all through the trial but failed to do so.

24. As to whether the trial magistrate erred in granting the respondent awards for extra works carried out, PW1 testified that extra work was done in the new temporary cell and main building on 5.5.2010 at Kshs. 404,352 having taken over works from Uholo who had handed over the completion of the initial contract to the Plaintiff vide a letter dated 9.12.2009. PW1 testified that his company, the respondent herein rendered extra works to the toilets and pipe works to collect rain water at a cost of Kshs. 404,000. On cross-examination PW1 confirmed that the bill of quantity did not list any other extras, that Mr. Kimeli recommended that he be paid Kshs. 1,489,807.48, that he was paid retention money in the 2016, leaving a sum of Kshs. 7,700, that he could not have been paid the retention money if the Defendant did not owe him. PW2 corroborated PW1's testimony.

25. On their part, the respondent called DW1 who testified that what the plaintiff was claiming had been fully paid as they were not stand alone amounts but were part of the mechanical contract. In cross-examination DW1 testified that there were alterations in the toilets from Asian type to English which came under Hatu, the Respondent herein, that in the Plaintiff's further list of documents filed on 9/9/2019, there is indication of additional works of Kshs.4040,352, He also confirmed that there were additions although he did not have a list of extra works by Hatu, the respondent herein.

26. From the evidence on record, I agree with the respondent that DW1 contradicted himself by stating on one hand that extra works were not tabulated and on the other hand that extra works were balanced off by the omissions and contingencies after he confirmed that a certificate of completion was issued and when he said he could not tell the amount of extra works. It is further clear to this court that despite DW1's allegation of the respondent being overpaid; he was unable to substantiate the same when examined on the same.

27. The question is whether the respondent was entitled to be paid for the extra works undertaken, with the finding above that the joinder of the 3rd defendant who directed the additional works to be done was done after the three years. the answer is NO. this is because firstly, the alleged directives were made orally by a person who was not a party to the contract which enabled the respondent to carry out the works. The contract which the respondent was performing was a continuation of that entered into between the 1st appellant and Uholo. This is because there was no new contract entered into between the respondent and the appellants.

28. Again, I say no new contract because the oral directions by a Chief Inspector of Police to the respondent could not amount to a contract since an oral contract cannot vary a written contract. This is what section 98 of the *Evidence Act* stipulates. There were no correspondences between the appellants and the respondent on the alleged extra works and therefore none of the appellants were party to the oral directives. There was permission sought from the appellants for variation of the initial contract entered into with Uholo for the extra works or variations on the toilets. No addendum was entered into to suggest that indeed the appellants intended to have the initial contract varied to bring on board changes directed by the Chief Inspector.

29. It follows that although DW2 on his part equally contradicted DW1 by saying that the extra works were done by Uholo and that it was Uholo that was paid this amount, that in itself did not change the situation. This position is supported by the case law cited below.

30. The Court of Appeal in Nairobi Civil Appeal 155 of 1992 Kukal Properties Development Ltd v Tafazzal H. Maloo & 3 others [1993] eKLR had occasion to consider the effect of variation of contract both prior to reducing to writing and after. It observed that:

> " Evidence of negotiations is never admissible to vary the terms of the written contract. However, where there is a latent ambiguity, extrinsic evidence may be given of surrounding facts to explain the ambiguity. But certainly no evidence or correspondence on prior negotiations may be admissible. It is assumed that the intentions of the parties to a written contract are embodied in a written contract itself. I have used the phrase "priority negotiations" because subsequent correspondence may affect the written contract where it is clear from the wording that the parties intended such subsequent correspondence to affect the written contract. For instance, subsequent correspondence may vary the terms of the written contract if it is clear from the correspondence that the parties intended to vary the contract".(underline mine)

31. The court further stated that:

> " In the instant case, it is common ground that the correspondence varying the terms letter of 23/1/2004, was done after negotiations and execution of the contract and past performance. It is also not in contest that the same was done by one party and whereas the Appellant says it bound the Respondent, this court has been unable to find evidence to demonstrate that both parties intended the variation."

32. The Court of Appeal found further guidance in Halsbury's Laws of England, Vol 4, 4th Edition in Paragraph 1135 at page 574 which states:

> " Except in the case of a contract under seal, consideration is necessary to support a contract. A promise of additional payment for work already included in the contract is given without consideration and it is unenforceable but where there is uncertainty as to whether or not an item of work falls within the original contract, a provision for additional payment to perform the work is enforceable.
>
> Any other variation of the terms of the contract will generally be unenforceable unless supported by fresh consideration ....."

33. Citing the author of Hudson's Building and Engineering Contracts, 10th Edition, at page 22 which postulates:

> " A simple contract can be validly varied by the subsequent agreement of the parties, so long as there is consideration to support the variation agreement. If at the time when the variation agreement is made, obligations remain partly unperformed under the original contract by both parties, there will usually be consideration for the new agreement. If, however, one party to the contract has wholly performed his obligations, and therefore agrees without advantage to himself or detriment to the other party to forgo some part of the performance of the outstanding obligations of the other party, there will be no consideration to support his agreement to do so. The variation agreement will therefore be unenforceable if not under seal and the original contract requiring full performance will remain....".[emphasis added]

34. In Housing Finance Co. of Kenya Limited vs. Gilbert Kibe Njuguna Nairobi HCCC No. 1601 of 1999, it was held:

> " ...Courts are not for as where parties indulging in varying terms of their agreements with others will get sanction to enforce the varied contracts. Contracts belong to the parties and they are at liberty to negotiate and even vary the terms as and when they choose and this they must do together and with meeting of the minds. If it appears to the Court that one party varied terms of the contract with another, without the knowledge, consent or otherwise of the other, and that other demonstrates that the contract did not permit such variation, the Court will say no to the enforcement of such contract."

35. In Civil Suit 606 of 2003, Gimalu Estates Ltd & 4 Others -vs- International Finance Corporation & another [2006] eKLR] Justice Emukule cited various English decisions and observed as hereunder:

> " Parties to a contract effect a variation of the contract by modifying or altering its terms by mutual agreement"
>
> ...a mere unilateral notification by one party to the other in the absence of any agreement, cannot constitute a variation of contract. (see. (Cowey –Vs- Liberation Operations Ltd, [1966} 2 Lloyds' Rep. 45).
>
> ...So the form of variation is important to determine whether there has been a mere variation of terms or a rescission. The effect of a subsequent agreement – whether it constitutes a variation or a rescission depends upon the extent to which it alters the terms of the original contract. In the case of MORRIS -VS- BARON & CO. [1918] A.C. 1, 19. Lord Haldane said that, for a rescission, there should have been made manifest the intention in any event of a complete extinction of the first and formal contract, and not merely the desire of an alteration, however sweeping, in terms which leave it still subsisting."

36. Section 98 of the *Evidence Act* is clear that an oral agreement cannot vary a written agreement. The section provides that:

> " 98 When the terms of any contract or grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved."

37. According to section 97 of the *Evidence Act*:

> " No evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to or subtracting from its terms:
>
> Provided that-(ii)the existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved, and in considering whether or not this paragraph or this proviso applies, the Court shall have regard to the degree of formality of the document;(iii)the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property may be proved."

38. Thus, the respondent was not entitled to introduce new terms to the written contract through alleged verbal undertakings or directions by the Chief Inspector of Police. See the case of Kinyanjui and Another v Thande & Another [1995-98] EA 159 where the Court of Appeal held that an agreement

which is by law required to be in writing cannot be amended or varied by oral representations. The same position was taken in Matiri & sons v Nithi Timber Co-operative Society Ltd [1987] LLR 1512 and Deposit protection Fund Board v Sunbeam Supermarket Ltd & 2 Others [2004] I KLR 37 where the court held that Section 98 of the *Evidence Act* is clear that parole evidence shall not be admitted to vary the terms of a document which is required to be in writing.

39. The respondent never adduced any evidence of variation of the contract to allow him to undertake any extra works. .In addition, nothing prevented the respondent from writing to the appellants and seeking for a variation of the original contract terms.

40. On retention which the trial court awarded the respondent being Kshs 7,700, I find no basis for this award as the contract from the beginning was with Uholo and the respondent did not find it necessary to engage the appellants to put it in writing an addendum to the initial contract that the respondent would be paid retention fee. The appellants maintained that they paid the retention fee. I observe that there was no evidence of the exact amount that the appellants were to pay the respondent for the remainder of the contract assigned to the latter by Uholo and no reconciliation statement was prepared by the respondent and placed before the trial court on what was paid and what was not paid, including retention charges. I therefore find that the claim for retention fee was not proved on a balance of probabilities and that the trial court erred in awarding Ksh 7,700 out of the claimed sum.

41. The upshot of the foregoing is that I find that this appeal is meritorious. I allow it and set aside the judgment of the lower court. I substitute that judgment with an order dismissing the respondent's claim against the 1st and second appellants and as against the 3rd appellant, the suit was stale and therefore incompetently filed out of time through an amendment to the plaint to join the 3rd defendant after the lapse of the statutory period, and the 3rd defendant was not privy to the contract between the 1st and 2nd appellants and the respondent; since an oral directive could vary a written contract. The suit is struck out and dismissed with an order that each party shall bear their own costs of this appeal and of the dismissed suit in the lower court.

42. This file is closed.

43. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 20TH DAY OF MAY, 2024

R.E. ABURILI

JUDGE