Rural Electrification Authority v Jomush Enterprises Limited (Civil Appeal 64 of 2023) [2024] KEHC 4309 (KLR) (Civ) (2 May 2024) (Judgment)

Neutral citation: [2024] KEHC 4309 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYANDARUA

CIVIL

CIVIL APPEAL 64 OF 2023

CM KARIUKI, J

MAY 2, 2024

BETWEEN

RURAL ELECTRIFICATION AUTHORITY .... APPELLANT

AND

JOMUSH ENTERPRISES LIMITED .... RESPONDENT

JUDGMENT

1. The Appellant, being aggrieved by the judgment of Hon. Vincent Kiplagat, Senior Resident Magistrate delivered on 27th May 2021 in Nyahururu Civil Suit No. 46 of 2017, appealed the same vide the memorandum of appeal dated 2nd June 2021 on the following grounds: -

    i. That the learned magistrate erred in law and misdirected himself in holding that the Respondent had proved its case against the Appellant to the required standard.

    ii. That the learned magistrate erred in law and, in fact, in holding that it was not a mandatory requirement in law for the Respondent, being a limited liability company, to produce before the Court a valid resolution authorizing the Respondent to instate the suit.

    iii. That the learned magistrate erred in law and, in fact, by allowing the Respondent to adduce a resolution authorizing the institution of the suit as an annexure to the Respondent's written submissions, a document not produced as an exhibit during the trial.

    iv. That the learned magistrate erred in law and misdirected himself in evaluating the evidence before the Court.

    v. That the learned magistrate erred in law and misdirected himself in failing to find that in terms of clause 15 (vi) of the subject contract, the sum payable to the Respondent under the agreement was the amount certified as actual work done.

vi. That the learned trial magistrate erred in law and fact and misdirected himself in finding that the Appellant's case that the Respondent ought to be paid in terms of clause 15 (vi) of the contract amounts to an attempt to revise the subject contract.

vii. That the learned magistrate erred in law and misdirected himself in finding that the Service Purchase Order that specified the scope of the works under the contract was an extraneous document that ought not to be considered in construing the contract.

viii. That the learned magistrate erred in law and misdirected himself in finding that the distinction between the interim and final certificate of works under the contract by the Appellant was not justified under the contract.

ix. That the learned magistrate erred in law and misdirected himself in relying on the Completion Certificate dated 1st December 2014 tendered by the Respondent and disregarding the Completion Certificate dated 13th April 2015 tendered by the Appellant without any basis or justification.

x. That the learned magistrate erred in law and misdirected himself in awarding interest to the Respondent running from the date of institution of the suit despite contrary evidence and submissions by the Appellant.

xi. That the learned magistrate erred in law and misdirected himself in awarding costs to the Respondent despite the contrary submission by the Appellant.

2. Reasons wherefore, the Appellant prays that:-

i. The appeal should be allowed, and the trial's court decision should be set aside.

ii. The Respondent is condemned to pay the costs of this appeal and the costs at the subordinate Court.

3. Appellant's Written Submissions

i. In their submissions, the Appellant submitted that the key issues arising for determination can be summarized as:-

ii. Whether the service purchase order that specified the scope of the works under the contract was an extraneous document should not be considered when constructing the contract.

iii. Whether the Appellant's case that the Respondent ought to be paid in terms of clause 15 (vi) of the contract amounts to an attempt to revise the subject contract.

iv. Whether it was not a mandatory requirement in law for the Respondent to produce before the Court a valid resolution authorizing the Respondent to institute the suit and whether such an omission could be cured by adducing the resolution by way of submissions

v. Whether the Respondent is entitled to costs and interest running from the date of the institution.

4. On issue no. 1, the Appellant asserted that the service purchase order, though it cannot replace the contract, specified the subject matter of the contract for Kshs. 2,943,761.17. Item 1.24 provided the installation of 190 transformer welding at a contract rate of Kshs. 1,900,000; however, the actual number executed by the Respondent was only 1, not 190. Each transformer welding was priced in the service purchase order at Kshs. 10,000/-

5. It was contended that the Project Material Reconciliation and the Construction Payment Certificates show that the transformer installed is only one and not 190. The Respondent and Appellant's witnesses, PW1 and DW1, agreed in their testimony that only one transformer was installed and not 190 as indicated in the Service Purchase Order informing the contract sum. They both agreed that 190 transformers could not fit in 4.2 kilometers, and the Respondent's PW1 stated that installing 190 transformers in the area is impractical.

6. Because of the above, the Appellant argued that the contractor is only entitled to Kshs. Ten thousand for that particular component of the service purchase order and not Kshs. 1,900,000 that was claimed.

7. On issue no. 2, the Appellant stated that they have upheld the position that the Respondent is to be paid for the actual work done as certified by the Appellant's representatives as per clause 15 (vi) of the contract. The contract sum pleaded by the Respondent was Kshs. 2,943,761.17; however, the actual work done was certified at Kshs—1,627,221.64, which is the sum that was certified as payable.

8. It was asserted that it is the Appellant's interpretation of the contract clauses that although the contract price was Kshs. 2,943,761.17, this amount was subject to adjustments by the Appellant, who would certify the amount payable on actual work done. In effect, the Respondent was seeking Kshs. 1,900,000 for installing 190 transformers, for which only one is installed, which is against the terms of the contract. Reference was made to the Attorney General of Belize Limited [2009] 2 ALL ER 1127 as cited by Robert Williamson v Football Kenya Federation [2016] eKLR.

9. The Appellant asserted that after re-measurement of the actual work done by the Respondent, the Appellant certified the work done at Kshs. 1,167,221.64, which was the sum certified as payable. That material difference between the contract price and the actual work done is because, at the point of checking and approval of the preliminary construction payment certificate, it was noted that Kshs had inflated some components in the same. 1,900,000 due to the transformers that were not installed.

10. The Appellant submitted that the amount due to the Respondent is the final certified amount, Kshs. 1,167,221.64. that to allow the Respondent's claim of Kshs. 2,943,761.17 would allow unjust enrichment for work done and would violate the explicit terms of the contract between parties.

11. On issue no. 3, the Appellant states that PW1 admitted during cross-examination that the Respondent had not produced a resolution in Court but that the Respondent authorized the institution of the suit. Being a jural person, i.e., a limited liability company, the Respondent should have filed the appropriate resolutions authorizing this suit in Court with its pleadings. Reliance was placed on Assia Pharmaceuticals vs. Nairobi Veterinary Centre Limited Nairobi (Milimani) H.C. No. 391 of 2000

12. It was argued that the Respondent later filed the resolution as an annexure to the written submissions contrary to Order 3 Rule 2 and Order 11 Rule 7 of the Civil Procedure Rules. It was averred that this Court has a constitutional mandate to ensure that a trial will be fair and, therefore, retains the power to disallow one party from tabling evidence not provided to the other party as contemplated by the rules. Reliance was placed on Raila Odinga & 5 Others vs. IEBC & 3 Others Supreme Court of Kenya, Petitions Nos—no—291 of 2013.

13. The Appellant averred that they have always been ready and willing to pay for the certified amount of the work done, which is Kshs. 1,167,221.64 by the Respondent has refused to comply with the final certificate issued and revise the amount it had invoiced to enable payment processing—the non-payment of Kshs. 1,167,221.64 is legitimately due to the Respondent's refusal to submit the credit note reflecting the aforesaid amount despite constant and numerous pleas by the Appellant.

14. Reliance was placed on Section 27 of the *Civil Procedure Act*, Republic vs. Rosemary Wairimu Munene, Exparte Applicant vs Ihururu Dairy Farmers Co-operative Society Ltd, Judicial Review Application No. 6 of 2014

15. Lastly, it was stated that the Appellant should not be saddled with costs, yet it was ready to pay the Respondent for the work done as per the contract's provisions. Had the Respondent cooperated with the Appellant's efforts for payment, this suit would have been unnecessary. Reliance was placed on the cases of New Tyres Enterprises Ltd vs. Kenya Alliance Insurance Company Ltd [1988] KLR 380 & Orix Oil (Kenya) Limited vs. Paul Kabeu & 2 Others [2014] eKLR

16. Respondent's Written Submissions

    i. The Respondent asserted that the following issues stand out for determination: -

    ii. Whether failure to attach the decree to the record of appeal is fatal

    iii. Whether the Respondent had proved its case on a balance of probability to warrant the grant of Kshs. 2,943,761.17, interest and costs by the trial court

    iv. Whether the trial suit is fatal and should be struck out for lack of a resolution authorizing the institution of a trial suit.

17. On issue no. 1, the Respondent contended that the Appellant's failure to attach a decree to the record of appeal was fatal to the Appellant's case and rendered the appeal incompetent. They relied on Order 42 Rule 2 and Rule 13 (4) (f) of the Civil Procedure Rules, Bwana Mohamed Bwana vs. Silvano Buko Bonaya & 2 Others [2015] eKLR & Chege vs. Suleiman [1988] eKLR

18. It was concerning issue no. 2, it was asserted that the Respondent proved its case on a balance of probability and that it was not in dispute that the Appellant constructed the Respondent to construct a distribution system to supply electricity at Diarra Market located at Kipipiri Constituency at an agreed sum of Kshs. 2,943,761.17. The Respondent produced a contract sum; clause 2 provided a construct sum of Kshs. 2,943,761.17/-

19. The Respondent stated that it was not in dispute that the Respondent constructed the said distribution system to the satisfaction of the Appellant and that there were no defects or complaints. After inspection by the Appellant's representative, they were issued a certificate of completion of works and a construction payment certificate from Kshs. 2,943,761.17. it was averred that the Appellant's submissions of Dexh1 and 2 are an afterthought to deny the Respondent rightful contract sum due, interest, and costs.

20. It was pointed out that whereas dex-1 and 2 provided for payment of Kshs. 1,162,221.64/-. Dexh-3, an email dated 8/7/2015, called for a credit note amounting to Kshs. 1,776.539.53/-. These disparities may amount to the Respondent casting doubts on the sincerity of the Appellant. That amount due for payment under the contract is of Kshs. 2,943,761.17, and they urged the Court to hold them as such.

21. The Respondent argued that there was no provision for preliminary and final certificate of completion of works and that the certificate of completion of works and construction payment certificate relied upon by the Respondent did not state that they were preliminary certificates and that it was an error on the Appellant's part to indicate 190 transformers on the service purchase order instead of one. Further, the service purchase order cannot substitute the contract. Reliance was placed on National Bank of Kenya Ltd v. Pipe Plastic Samkolit (K) Ltd & Another [2002] EA 503

22. Regarding the third issue, the Respondent contended that the lower court matter should not be struck out due to the Respondent's lack of resolution in initiating the suit. That the same was a procedural technicality that should not go to the core of the substance of the matter. Reliance was placed on Article 159 (2) (d) of *the Constitution*, Order 4 Rule 1 (4) of The Civil Procedure Rules, Livestock Research Organization vs. Okoko & Another (Civil Appeal 36A of 2021) [2022] KEHC 3302 (KLR), Republic vs. Registrar General and 13 Others Misc. Application No. 67 of 2005 [2005] eKLR, Peeraj General Trading & Contracting Company Limited, Kenya & Another vs. Mumias Sugar Company Limited [2016] eKLR, Makupa Transit Shade Limited & Another vs. Kenya Ports Authority & Another [2015] eKLR etc.

23. Further, the Respondent asserted that the Appellant did not raise the issue of lack of resolution in its pleadings (defense) until cross-examination. The Respondent did not have an opportunity to do so. Reliance was placed on Galaxy Paints Co. Ltd vs. Falcon Guards Ltd [2000] 2 EA 385 and Standard Chartered Bank of Kenya Limited vs. Intercom Services Limited & 4 Others Civil Appeal No. 37 of 2003 [2004] 2 KLR 183.

24. In summation, the Respondent urged the Court to dismiss the Appellant's appeal herein with costs and uphold the finding of the trial court.

25. Analysis and Determination

26. Having carefully considered the evidence adduced before the trial court in its entirety and the judgment by the learned trial magistrate, the grounds of appeal, the written submissions filed by both parties together with all the authorities cited, the main issue that arises for determination from both the Appellant's and Respondent's case is whether the learned trial magistrate erred in awarding the Respondent a sum of Kshs—2,943,761.17, interest and costs.

27. In Gitobu Imanyara & 2 Others v Attorney General [2016] eKLR, the Court of Appeal stated that;

> " An appeal to this Court from a trial by the High Court is by way of retrial, and the principles upon which this Court acts in such an appeal are well settled. Briefly put, this Court must reconsider the evidence, evaluate it, and draw its conclusions. However, it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect."

28. Further, in Peters v Sunday Post Ltd [1958] EA 424, the Court held that;

> " While an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had gone wrong, the appellate court will not hesitate so to decide."

29. Similarly, in Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR, the same stated with regard to the duty of the first appellate Court;

> " 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."

30. Having perused the trial court file, it is apparent that the Respondent instituted a suit against the Appellant dated 4th June 2015 seeking 3,675,887.19/-, costs, and interest for the breach of contract. It was their case that it entered into two different agreements with the Appellant for the construction of an electricity distribution system to supply Diarra Market on one part and Kiteei Yekanga, Kimudi, and Yikithuki Primary Schools on the other. The Respondent asserted that they duly performed the works as per the contracts, the Appellant's representative duly inspected the works, and the certificates of completion were duly issued in favor of the Respondent and construction payment certificates.

31. Further, the Respondent asserted that despite having compared the works, the Appellant refused to pay the contractual amount despite the Respondent making several reminders for payment, which is why they filed Nyahururu CMCC No. 46 of 2017. On the other hand, the Appellant denied the Respondent's case and averred that the Respondent was to be paid for the work done, not the contract sum as alleged in the plaint. Additionally, the Appellant argued that the Respondent refused to present a credit note that reflects the final certificate of works as requested by the Appellant and that the invoice of Kshs. 2,943,761.11 was based on a preliminary construction payment certificate. That upon rectification and adjustment, the works duly done by the Respondent were certified for Kshs. 1,167,221.17/- which amount the Appellant was willing to pay the Respondent.

32. Consequently, the parties entered into a consent form, withdrawing the claim for payment as regards one of the contracts for reasons that payment was made during the pendency of the suit. Therefore, payments regarding the contract for constructing an electricity distribution system to supply the DIARRA Market for the contract sum of Kshs were agreed to. 2,943,761.11.

33. Subsequently, the matter was heard and determined in the Respondent's favor, and the Appellant, dissatisfied by the trial magistrate's judgment, filed the instant appeal.

34. First and foremost, the Appellant asserted that the Respondent's failure to produce a valid resolution authorizing the Respondent to institute the suit before the Court was fatal. On the other hand, the Respondent contended that the lower court matter should not be struck out due to the Respondent's lack of resolution in initiating the suit. That the same was a procedural technicality that should not go to the core of the substance of the matter. In my considered opinion, I agree with the Respondent's position on the same. The Respondent's failure to file the resolution when filing the suit was a curable defect and a procedural technicality that, in the interest of justice, cannot be relied on as grounds to dismiss a suit.

35. In the case of Spire Bank Limited v Land Registrar & 2 others [2019] eKLR, it was stated that:-

36. It is essential to appreciate that Order 4 Rule 1 (4) intended to safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf. This addressed the mischief of unauthorized persons instituting proceedings on behalf of corporations and obtaining fraudulent or unwarranted orders from the Court. The company's seal, which is affixed under the hand of the directors, ensured that they were aware of and had authorized such proceedings together with the persons enlisted to conduct them. And where evidence was produced to demonstrate that a person was unauthorized, the burden shifted to such an officer to demonstrate that they were authorized under the company seal. With this in mind, we dare say that the provision was not intended to be utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized.

37. The Appellant asserted that the learned magistrate erred in law and misdirected himself in failing to find that in clause 15 (vi) of the subject contract, the sum payable to the Respondent under the contract was the amount certified as actual work done. Further, the learned magistrate erred in law

and misdirected himself in finding that the Service Purchase Order that specified the scope of the works under the contract was an extraneous document that should not be considered in construing the contract. Additionally, the Appellant argued that the learned magistrate erred in law and misdirected himself in finding that the distinction between the interim and final certificate of works under the contract by the Appellant was not justified under the contract.

38. Accordingly, I have perused the trial record. Regarding the certificate of completion, the Appellant produced a certificate dated 12/4/2015, while the Respondent made a certificate of completion dated 11/2/2014. However, during cross-examination, DW1 stated that the project could not be commissioned twice. They also did not deny the first certificate of completion. Moreover, I agree with the learned trial magistrate that the Appellant only referred to it as a preliminary certificate of completion. This term did not exist in the contract agreement.

39. Furthermore, the Appellant inspected the work done by the Respondent and then issued the Respondent a certificate of completion, indicating that they were satisfied with the work they had done as per the contract terms. Therefore, the Appellant's attempt to rely upon and replace the contract with the service purchase order can not suffice. Consequently, I agree with the learned trial magistrate that the service purchase order cannot replace the contract. Under no circumstances can the contract agreement, which did not mention the number of transformers, be replaced. In any case, there was no way the Appellant would have expected 190 transformers to fit in the said radius distance.

40. That being the case, it is undisputed that the Appellant and Respondent entered into a contract to install an electricity supply system at an agreed sum of Kshs. 2,943,761.11. The Respondent was consequently issued the certificate of completion signed by the Appellant company of the said amount. Like the trial court, this Court cannot rewrite parties' contracts. It is well settled that a court of law cannot rewrite a contract between the parties. In Pius Kimaiyo Langat vs. Co-operative Bank of Kenya Ltd (2017) eKLR, the Court of Appeal further stated that;

> We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties; the terms of their contracts bind them unless coercion, fraud, or undue influence are pleaded and proved.

41. (See also National Bank of Kenya Ltd vs. Pipe Plastic Samkolit (K) Ltd (2002) 2 E.A. 503, (2011) eKLR)

42. As a result, having interrogated the terms of the contract herein, I considered that the Appellant was in breach of the contract. The Appellant failed to discharge its duty to pay the Respondent as per the contract terms. At the same time, the Respondent had entirely performed its obligations under the contract. In the circumstances, I find that the appeal lacks merit and thus makes orders.

    i. The appeal is dismissed. The lower Court's decision is hereby upheld.

    ii. The Respondent will have costs in the lower Court and the instant appeal.

DATED SIGNED AND DELIVERED AT NYANDARUA THIS 2ND DAY OF MAY 2024

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CHARLES KARIUKI

JUDGE