



**Alfred Mwangi Gathu t/a Geo Eclipse Co. Ltd v Aberdare Safari Hotels Limited
(Civil Appeal 50 of 2022) [2024] KEHC 8757 (KLR) (19 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8757 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL 50 OF 2022
MA ODERO, J
JULY 19, 2024**

BETWEEN

ALFRED MWANGI GATHU T/A GEO ECLIPSE CO. LTD APPELLANT

AND

ABERDARE SAFARI HOTELS LIMITED RESPONDENT

JUDGMENT

1. Before this Court for determination is the Memorandum of Appeal dated 14th September 2022 by which the Appellant Alfred Mwangi Gathu T/a Geo Elipse Co. Ltd seeks the following orders:-
 - a. That the judgement and the decree of the trial court dated 18th August 2022 be set aside and appropriately reviewed with an order allowing the plaintiffs case.
 - b. That there be an order for costs of the subordinate court.
 - c. Costs of the Appeal”
2. The Respondents Aberdare Safari Hotels Limited opposed the appeal. The matter was canvassed by way of written submissions. The Appellant filed the written submissions dated 11th April, 2024, whilst the Respondents relied upon their written submissions dated 17th May, 2024.

Background

3. The Appellant testified in the lower court that on 28th February, 2020 he entered into a service contract with the Defendant to undertake sub-division on the Defendants property being the parcel of land known as NYeri/municipality Block 1/688 (hereinafter ‘the Suit land’) into a quarter acre plots. The consideration to be paid upon completion of the works was Kshs. 7,000,000/=.
4. The Appellant stated that he commenced the required works as agreed but states that on 9th April 2020 whilst still undertaking the works, the Respondent unilaterally terminated the contract on grounds



- that the challenges arising from the onset of the COVID-19 pandemic made it impossible for the Defendant to continue with the works.
5. Thereafter the Defendant by a letter dated 23rd April 2020 requested the plaintiff to furnish him with an itemized invoice accompanied by documentary evidence to enable the Defendant pay for the works already undertaken prior to the termination of the contract.
 6. The plaintiff put in a claim for professional fees of Kshs. 4,367,812 which amount was broken down as follows:-
 - i. Works undertaken - Kshs. 4,200,000
 - ii. Expenses Incurred - Kshs. 167,812
 - iii. Vat at 16%
 7. The plaintiff complained that despite demand being made and numerous reminders the plaintiffs have failed to settle this amount. The plaintiff then filed a plaint dated 27th May 2021 seeking judgment against the Defendant for
 - “(a) Kshs. 5,039,812
 - (b) Costs of the suit and interest at court rates”
 8. The Defendant filed a statement of Defence dated 28th July 2021 in which it admitted to having entered into a service contract with the plaintiff. The Defendant further admits that it did terminate the contract as alleged by the plaintiff.
 9. However the Defendant claimed that contrary to the express terms of the contract, the plaintiff refused to use the Map Survey Topography Report commissioned by the plaintiff and that instead the Defendant proceeded to commission his own report to the detriment and expense of the Defendant.
 10. Further that the terms of the contract provided that the plaintiff provide the Defendant with an efficient plot layout and road access for approval which the plaintiff failed to provide.
 11. The Defendants denied the expenses claimed by the plaintiff and claims that no documentary evidence was availed by the plaintiff to support the amounts claimed in their invoice. The Defendant denied owing the plaintiff any amount whatsoever and urged the court to dismiss the suit.
 12. The matter was heard interpartes in the lower court and vide a judgment delivered on 18th August 2022, Hon Nelly Kariuki, Principal Magistrate dismissed the plaintiffs claim in its entirety and awarded costs to the Defendant.
 13. Being aggrieved by the decision of the trial court the Appellant filed the present appeal which appeal was premised upon the following grounds:-
 1. The learned Magistrate of the trial court erred in fact and in law in failing to apprehend the case set out before her thereby missing out on the issues for determination.
 2. The learned magistrate of the trial court erred in law and fact in failing to appreciate that the dispute between the parties was not one on liability but one of quantum totally substantiated by the evidence adduced before the court.



3. The learned magistrate of the trial court erred in fact and in law in taking into account irrelevant matter and failing to take into account relevant matter thereby arriving at a conclusion that was not supportable by law or fact.
4. The learned Magistrate of the trial court erred in law and in fact in arriving at the conclusion that the appellant as a professional could not adduce evidence regarding professional work rendered by him in the contract under reference thereby arriving at the wrong conclusion in the matter before her.
5. The learned magistrate of the trial court erred in fact and in law in shifting the burden of proof in the matter when the appellant had already discharged his evidential burden for which the Defendant was required to discharge.”

Analysis And Determination

14. I have carefully considered the record of Appeal herein as well as the written submissions filed by both parties.
15. This is a first appeal thus it is the duty of this court to re-evaluate and review the evidence adduced in the lower court and draw its own conclusions.
16. In *Selle & Anotehr-VS- Associated Motor Boat Company Limited Others*[1968] E.A 123, the court of Appeal held that;-

“An appeal to this court from 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 they are that this court must reconsider the evidence, evaluate it and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings or fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.....”
17. Similarly the same court in the case of *Kiruga-VS- Kiruga & Another*[1958] KLR eKLR the court observed that

“An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong.”
18. The only issue for determination is whether the learned trial magistrate erred in dismissing the Appellants claim for Kshs. 5,039,812 plus costs and interest thereon.
19. The fact that the parties in this matter had entered into a service contract is not in any dispute. A copy of the contract No 192002 dated 28th February 2020 duly signed on behalf of both parties is contained in the plaintiffs list of Documents filed on 11th June 2021.
20. The contract was a term contract which was to run from 27th February 2020 to 31st December 2020. However as stated earlier the Defendant on 9th April, 2020 invoked clause 8 of the contract and terminated the contract citing hardship arising from the Covid-19 Pandemic. A copy of the letter terminating the contract is also contained in the Plaintiff’s list of Documents.



21. The Appellant claims that at the point of termination they had completed 60% of the works and demand payment for the completed works.
22. However the Respondent insists that the Appellant have failed to provide documents in support of their claim in the form of invoices, receipts etc. That without such documentation the Appellant's claim cannot be honoured.
23. It is trite law that he who alleges must prove. The Evidence Act Cap 80 Laws of Kenya places the burden of proof of any fact upon the person who wishes to rely on the existence of said fact. Section 107 of the Evidence Act provides:-

“Burden of Proof

1. Whoever desires any court to give judgment as to any legal 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”
24. In the case of Anne Wambui Ndiritu-VS- Josphe Kiprono Ropkoi& another[2005] E.A 334, the court of Appeal stated as follows:-

“As general proposition under Section 107 (1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”

25. The Respondents relied on their detailed report dated 23rd April 2020 which provided a breakdown of the works they had undertaken since the commencement of the contract. The report ends with the following paragraph

“Costs of Work Done

Our evaluation of work done so far is to 60% (sixty percent) of the contract. This means our fee is 60% of Kshs. 7,000,000/= = Kshs. 4,200,000/= (Kshs. Four million two hundred thousand only)

26. However the Appellant did not annex any proof of expenses incurred. There was no proof of invoices or receipts to support payments made to third parties e.g government offices. To merely avail a report without supporting documents is not sufficient.
27. The Respondents have challenged some of the works allegedly undertaken by the Appellant on the basis that the same were not provided for in the contract.
28. The Appellant stated that they conducted a topographical survey and scheme planning using their own consultant Clarent Co. Ltd. This forms part of the Appellants claim.
29. However Clause 1 of the contract clearly provided that Aberdare Safari Hotels Ltd (the Respondent) were to supply all documentation including Title Deeds Topography etc’



30. Parties are bound by the four corners of their contracts. The duty of the court is to enforce and give effect to the contract as it is not as the Appellant wished it to be. The Appellants cannot proceed to carry out works which are not assigned to them under the contract and then claim for said works. Courts will only enforce what is provided for in the contract.
31. The Appellants argument that the Respondent did not commission a topographical survey is neither here nor there.
32. In National Bank Of Kenya Limited -VS- Pipe Plastic Samkolit (k) Ltd[2011] eKLR it was stated that
“ A court of law cannot rewrite a contract between parties. The parties are bound by the terms of their contract. Unless coercion, fraud or undue influence are pleaded or proved.”
33. See also Pius Kimaiyo Langat-Vs- Co-operative Bank Of Kenya Limited[2017] eKLR.”
34. Therefore if the Appellant wished to have the terms of the contract amended then they ought to have engaged the Respondents on that point. The Appellant cannot proceed to conduct the topographical works outside the terms of the contract and then expense the Respondent for the same.
35. As stated earlier there is no evidence of fees paid by the Appellant to the County Government of Nyeri for development permission thus this claim remains unproven.
36. The standard or proof required in a Civil case is on a balance of probabilities. The Appellants failed to prove on a balance of probability that they had completed 60% of the works required to be done.
37. The Report dated 23rd April 2020 submitted by the Appellants was merely a narration of the works alleged to have been done. The question of whether or not the Appellants could give expert evidence regarding the nature of the works done is not in my view a critical issue. All the Appellant was required to do was to prove by way of documentary and/or other tangible evidence that the works they claim to have done were in fact completed. There was however no proof of the costs of such works to support the Appellants claim for Kshs. 4,200,000. I do agree with the learned trial magistrate that the Appellants claim remained unsubstantiated and accordingly that claim had to fail.
38. Finally I find no merit in this appeal. The same is dismissed in its entirety. Costs of the appeal are awarded to the Appellant.

DATED IN NYERI THIS 19TH DAY OF JULY 2024

MAUREEN A. ODERO

JUDGE

