Sompiroi v Arntz (Civil Suit 140 of 2017)
[2023] KEHC 3173 (KLR) (Civ) (6 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3173 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT 140 OF 2017

CW MEOLI, J

APRIL 6, 2023

BETWEEN

JOSEPH OSOI SOMPIROI ..... PLAINTIFF

AND

WILLI ARNTZ ..... DEFENDANT

(Formerly Machakos High Court Civil Suit No. 21 of 2009)

JUDGMENT

1. Joseph Osoi Sompiroi, (hereafter the Plaintiff) sued Willi Arntz (hereafter the Defendant) alleging breach of contract for which he seeks special damages in the sum of Kshs. 19,124,026/-; interest on the special damages at the rate of 17% p.a. from 31st December, 2007 until payment in full; and costs of the suit.

2. The Plaintiff averred that through an oral agreement of the parties made sometime in or about August 2005, the Plaintiff was to construct a Ranch house on the Defendant's land situated at Amboseli in accordance with agreed specifications and drawings. The Plaintiff further pleaded that pursuant to the agreement, he undertook the agreed construction works together with additional works in a professional and satisfactory manner.

3. He averred that in breach of the agreement, the Defendant neglected and/or failed to fulfil his obligation to pay the Plaintiff for the services rendered. According to the Plaintiff, the Defendant only made payments in the sum of Kshs. 35,507,280/- leaving an outstanding balance in the sum of Kshs. 19,124,026/- which sum continues to accrue interest at the commercial rate of 17% p.a.

4. The Defendant entered appearance and filed the statement of defence dated 19.02.2009 in which he denied the averments in the plaint. More specifically, the Defendant denied owing the Plaintiff the

sums pleaded in the plaint and further averred that the alleged works undertaken by the Plaintiff were unsatisfactory and his claim excessive.

5. During the trial, the Plaintiff testified as PW1. He adopted his witness statement filed on 17.12.2012 and produced the bundle of documents in the list of documents dated 14.12.2012 as PExh.1-5 (being the Certificate of Registration No. 515766, Approved plan in respect of the Ranch house drawn by Aspan Design Consultancy, Swift Credit Advice documents from bank showing payments done by the Defendant pursuant to the contract, Letter dated 21.01.2008 from Plaintiff's advocate to the Defendant and Letter dated 24.01.208 from Defendant's advocate to the Plaintiff's advocate, respectively).

6. The gist of his evidence was that he met the Defendant through a mutual friend by the name Paul Dokolo Kiomerek, (PW2) following which the parties herein orally agreed as friends without any formal contract to construct a ranch house (hereafter the project) in Amboseli at a cost of Kshs. 7,500,000/- and based on a sketch which was drawn up by the Defendant and witnessed by Paul. He stated that the Defendant asked him to take and send him photographs at every stage of the project, and in turn he would send funds for the project as it progressed. That however, the preparation of the ground alone consumed the contract sum and at completion of the project he had expended an estimated sum of Kshs 31,000,000/- to 32,000,000/- well above the sum initially agreed.

7. He testified further that upon invoicing the Defendant in respect of the said sums, he disputed the sums as a result of which each party commissioned a quantity surveyor to carry out assessment of works done. That while he did not know the outcome of the quantification done by the Defendant's quantity surveyor, his own surveyor costed the completed works at a gross value of Kes.54,672,550/- out of which the balance of Kes. 19,124,026/- claimed in the plaint remained outstanding. He stated that on completion of the construction, the Defendant took possession.

8. During cross-examination he asserted that the parties had initially agreed that any expenditure above the contract sum of Kshs. 7,500,000/- would have to be approved by the Defendant. While reiterating that he completed the project, he admitted that he did not tender photographs evidencing the same. Nor copies of invoices he allegedly sent to the Defendant which he claimed to be in the latter's possession, explaining that the quantity surveyor's estimates were based on the completed project. He denied being paid any money in December 2007 hence his refusal to proceed with the project. He stated during re-examination that his quantity surveyor had visited the site and quantified his work.

9. Paul Dokolo Kiomerek (PW2) equally adopting his witness statement dated 14.12.201 testified that he introduced the Plaintiff to the Defendant for the purpose of the project in question. He asserted during cross-examination that the project was completed by the Plaintiff save for the internal fittings.

10. Paul Mutie testifying as PW3 identified himself as a practicing quantity surveyor holding a degree in Building Economics and duly registered by the board of architects and quantity surveyor. The kernel of his evidence was that he was instructed by the Plaintiff to conduct a valuation of the entire work done in respect of the project by the Plaintiff and prepared his report showing a gross value of Kshs. 54,672,550/-. That he had in compiling his report visited the site where he noted the main house, a swimming pool, guest house and other extra work in respect of the project which he measured and valued. He produced his report dated 20.11.2007 as PExh.6.

11. Under cross-examination it was his evidence that the project was at an advanced stage of completion and that he only took site notes but no photographs of the site. He confirmed that electrical and plumbing works were yet to be done although construction of the project was complete. It was his evidence further that his quantification of work done was based on the market rate. Upon re-examination he stated that to carry out assessment as a quantity surveyor it was not necessary to peruse

invoices and his report was based on a valuation of materials and work done. He went on to state at the time of the site visit the Defendant had taken residence on the project. Finally, that costing is ordinarily based on market rates that are regularly updated by the institute of quantity surveyors.

12. The Defendant testified as DW1. He adopted his witness statement dated 26.06.2013 and supplementary witness statement dated 29.01.2019 and produced the bundle of documents in the list of documents dated 29.01.2018 as DExh.1 -22. He proceeded to confirm having engaged the Plaintiff's services by way of an agreement executed before a witness. His contention was that the parties had agreed that the project would cost Kshs. 5,000,000/- and the Plaintiff was required to raise duly supported invoices for payment. That the Plaintiff failed to do so and eventually sent a statement of accounts totaling Kshs. 60,000,000/-.

13. He stated that he made payments in installments totaling Kshs. 36,000,000/- to the Plaintiff and upon the disagreement arising concerning the total expended costs, he engaged a quantity surveyor who advised him that he had been overcharged to the tune of Kshs. 6,800,000/-. That in the circumstances, he did not owe the Plaintiff any money but rather the Plaintiff owed him Kshs. 10,000,000/- that was paid in excess of the contract price.

14. It was his evidence further that he had terminated the Plaintiff's services and taken possession of the project at 70% completion. He asserted that he expended a further Kshs. 7,300,000/- to complete the project, asserting that the maximum amount he ought to have paid for the entire project was Kshs. 23,000,000/- but he paid Kshs. 36,000,000/- even though the Plaintiff has never furnished him with any invoices.

15. During cross-examination he reiterated that the parties' agreement was for construction of a house and that in December 2007 he paid Kshs. 420,000/- to the Plaintiff's workers who complained of not having been paid by the Plaintiff, contrary to the parties' agreement. Upon re-examination he asserted that the Plaintiff failed to complete the project which he was compelled to complete in 2008 at a cost of Kshs. 7,300,000/.

16. Joseph Gitogo Wangechi testified as DW2. He identified himself as a "fundi" (artisan) and currently working as a contractor. He proceeded to adopt his witness statement dated 16.10.2019. The gist of his evidence was that he was engaged by the Plaintiff to carry out the project which was 70% complete when the parties herein fell out about December 2007. That the project earlier scheduled for completion in 2006 was delayed due to the Plaintiff's failure to procure materials and to make prompt payments to workers. He confirmed that the project at some point had stalled due to non-payment of workers that prompted DW1 to step in and settle unpaid dues owed by the Plaintiff. He testified that after the Plaintiff and Defendant fell out, the Defendant had engaged him to complete the project and was paid by the Defendant for his services.

17. During cross-examination he stated that he had been initially engaged by the Plaintiff as a foreman at the beginning of the project, but he stopped working for the Plaintiff in December 2007 when parties herein disagreed and because the Plaintiff failed to promptly pay his foreman wages, and which the Defendant settled. He stated that he did not execute any contract to complete the project but asserted that the Defendant had expended money in that regard. The witness also maintained that the Plaintiff did not complete the works agreed upon.

18. In re-examination, DW2 testified that following a formal meeting it was resolved that he would take over from the Plaintiff to complete the project.

19. That marked the close of the trial, whereupon the Court directed the parties to file written submissions.

20. On his part, the Plaintiff asserted that he had tendered sufficient evidence to show that he had carried out the requisite works in accordance with the oral agreement between the parties and which works were valued at the total cost of Kshs.54,672,550/-.The Plaintiff argued that the burden had therefore shifted to the Defendant to demonstrate that the works in question were carried out in an unsatisfactory manner. In supporting this submission, counsel cited the case of Project Innovations Limited v Aziza Residential Suites Limited & another [2015] eKLR.

21. It was the Plaintiff's position that out of the sum of Kshs.54,672,550/- the Defendant had paid the sum of Kshs.35,507,280/- and the Plaintiff was therefore entitled to the balance sum of Kshs.19,124,026/- from the Defendant.

22. The Defendant on the other hand contended that contrary to the averments made by the Plaintiff, the contract entered into between the parties herein was in writing being the document titled"Letter of Understanding" dated 2.05.2005 produced as an exhibit. The Defendant set out in his submissions the terms of the agreement which he contended were clear and never vitiated or set aside. Hence he urged the court not to rewrite the terms thereof, relying the case of National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR.

23. The Defendant contended that the Plaintiff breached the terms of the agreement by raising excessive charges in respect of the costs of the project; by delayed payments to workers; and by failing to complete the project. According to the Defendant, only about 75% of the project work was done by the Plaintiff thereby justifying the sums paid by the Defendant and which sums constituted full payment for work done.

24. The Defendant further contended that the Plaintiff's evidence does not meet the required threshold in proving a claim based on breach of contract, adding that in the absence of evidence to support the claimed sum of Kshs.19,124,026/- the court ought to dismiss the Plaintiff's suit with costs. In the alternative, the Defendant urged this court to apply interest at court rates as opposed to the rate of 17% p.a. sought in the plaint.

25. The court has considered the pleadings, the rival evidence, and the submissions by the parties. The key issue for determination is whether on a balance of probabilities the Plaintiff has made a case for breach of contract against the Defendant, which would entitle him to the reliefs sought in the plaint. The applicable law relating to the burden of proof is found in Sections 107, 108 and 109 of the *Evidence Act* which state 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."

26. The Court of Appeal in Mumbi M'Nabea v David M.Wachira [2016] eKLR in discussing the above provisions and the standard of proof in civil liability claims stated inter alia that:-

> " In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:
>
> "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 exists." The above provision provides for the legal burden of proof.
>
> However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:
>
> "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."
>
> The position was re-affirmed by the Court of Appeal in Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:
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> "Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence."
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> See also Karugi & Another v Kabiya & 3 Others (1987) KLR 347.

27. Certain basic facts are not disputed. There is no dispute that the parties herein entered into an agreement pertaining to the construction of a Ranch house (the project) on the Defendant's property situated in Amboseli. However, my examination of the pleadings and evidence on record reveals that contrary to the Plaintiff's assertions, the agreement was reduced into writing and described as a "Letter of Understanding" dated 2.05.2005. A copy thereof was tendered by the Defendant as D.Exh.18.

28. The above document read inter alia as follows: -

> " LETTER OF UNDERSTANDING
>
> SUBJECT CONSTRUCTION OF HOUSE IN AMBOSELI
>
> Will Arntz and Joseph Sompriroi, with the help if Paul D. Koimerek, had deed discussion regarding subject project, based on drawing done in Germany (status Febr 21, 2005)
>
> In deep trust to each other, Joseph and Will agree to realize this project as follows
>
> 1. Joseph will act as general contractor being responsible for building the house to full functioning (Key Turn Project) except for furniture's, but incl. all even staff houses, parking, fences, etc ....."

29. The Court of Appeal in Musimba Investments Limited v Nokia Corporation [2019] eKLR stated that:-

> "One of the principles of contractual interpretation is that parties have the freedom to contract; to contract even to resolve their disputes away from the courts; and that courts should not re-write terms of a contract for them.
>
> We restate the words of Lord Neuberger, the former President of the Supreme Court of the United Kingdom, in Arnold v Britton [2015] UKSC 36 that:-
>
> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean', to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focusing on the meaning of the relevant words".

30. The key terms of the agreement were that the Plaintiff was to act as the general contractor of the project described as a turn-key project; that the project would entail construction of a terrace including a swimming pool, a house and a staff house; that the total cost of the project would be between the sums of Kshs.7,500,000/- and Kshs.8,500,000/- subject to discussions in the event of increase in cost. The terms of payment were also set out in the agreement.

31. There is no dispute that the cost of construction increased beyond the amount stated in the agreement, although it remains unclear what the eventual total sums agreed amounted to. Be that as it may, it is not disputed that the Plaintiff undertook construction of the project and subsequently received payments totaling Kshs. 35,507,280/- from the Defendant.

32. On the key issue for determination the court's view upon reviewing the entire record, was that the material placed before the Court comprised rival oral and documentary pieces of evidence, none faring better than the other. The Plaintiff placed reliance on his oral and documentary evidence and more specifically the report of the quantity surveyor (P.Exh. 6) in support of his claims to have completed the project as agreed. Beyond this document indicating the gross value of work done to be Kshs.54,672,450/-, the Plaintiff did not tender any other credible evidence to ascertain the completion of the project in line with the terms of the agreement, such as approvals by the Defendant of enhanced expenses and corresponding expenditure and duly supported invoices or statements, correspondence, or other paper trail. This, despite the Plaintiff asserting during cross-examination that he raised several invoices against the Defendant.

33. The report P. Exh.6 was premised on the proposed project and there is no other credible evidence to confirm the value of the project at the date of alleged completion by the Plaintiff. Not even photographs of the alleged site. PW3 himself admitted that plumbing and electrical works were incomplete at the time he visited the project site. Against the Plaintiff's evidence is testimony by the Defendant himself and through DW2 that the project had been delayed and was only 70 or 75% complete by December 2007 when the parties herein disagreed.

34. Indeed, the Plaintiff during cross-examination and re-examination admitted that he refused to proceed further with the project in December 2007 because he had not been paid. This suggests that as of that date, the work was incomplete, as stated by the Plaintiff's foreman at the time, and now turned defence witness, DW2. And by PW2 who confirmed during cross-examination that some internal work was completed by the Defendant upon taking possession of the project.

35. Besides, the Defendant produced documentary evidence of expenditure in the sum of over Kes. 7,000,000/- that he claims to have expended in completing the project. He also claimed that the Plaintiff had raised exaggerated charges on materials to the tune of about Kes.6-10 million which had already been paid to him. I hasten to add that the documents relied on by the Defendant in the latter regard, that is DExh.1, 20 and 21 suffer the same weakness as the Plaintiff's key exhibit as they appear unsupported. Additionally, the former and latter documents are unsigned. The authors, like the author of D.Exh 20 were not called as witnesses. Reading the contents of D. Exh.20 it is unclear whether it relates to the material project herein. Similarly, the connection between it and D.Exh. 21 is unclear.

36. On the evidence before the court, it is difficult to make the finding that the Plaintiff fully performed his obligations under the contract even though he had indeed admittedly completed 75% of the project. What was the equivalent value of the 75% of work done by December 2007? That is a difficult matter as well because the project cost, having been agreed initially at between Shillings 7.5 million to 8.5 million grew exponentially during execution to the minimum undisputed sum of over Kes.36 million. And although there is a dearth of evidence as to how this happened, it seems from the conduct of the parties that there was ongoing consensus thereon, but the consensus on the maximum cost of the expanded project remains unclear.

37. Evidently, the parties herein proceeded with the project and transacted in a rather non-conventional manner that makes it difficult to decipher the scope of what exactly was initially conceived and evolved and was agreed between them as the finished so-called "turnkey" project and the cost thereof. It is little wonder therefore that a dispute eventually broke out. This notwithstanding, the burden of proof ultimately lay with the Plaintiff, and as observed earlier in this judgment, the total sum of his evidence fell below the required standard of proof.

38. In the present instance, the completion and cost of the project work done by the Plaintiff was disputed by the Defendant and the burden fell upon the Plaintiff to prove through credible evidence that he had carried out the requisite works to completion. Failing that, to demonstrate that he had carried out works whose unpaid value amounted to the sums sought in the plaint. The sum of Kshs. 19,124,026/- sought by the Plaintiff was a special damage claim. Special damages must be specifically pleaded and strictly proved.

39. The Court of Appeal in David Bagine vs. Martin Bundi [1997] eKLR stated:-

> "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 Part 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."

40. Chesoni, J (as he then was) stated in the case of Ouma v Nairobi City Council (1976) KLR 304 that:-

> " Thus, for a plaintiff to succeed on a claim for special damages he must plead it with sufficient particularity and must also prove it by evidence. As to the particularity necessary for pleading and the evidence in proof of special damage the court's view is as laid down in the English leading case on pleading and proof of damages, Ratcliffe v Evans (1892) 2 QB 524 where Bowen L J said at pages 532, 533;-
>
> The character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

See also; Hahn -v- Singh [1985] KLR 716

41. The Plaintiff having failed to discharge his burden of proof, he cannot find succor in the weakness of the defence case. In Karugi & Another V. Kabiya & 3 Others [1987] KLR 347 the Court of Appeal stated that:

> " [T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendants' failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...--. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim." (Emphasis added).

See also Wareham t/a A.F. Wareham & 2 Others Kenya Post Office Savings Bank [2004] 2 KLR 91

42. In the result, the Plaintiff's claim must fail, and his suit is hereby dismissed with costs to the Defendant.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 6TH DAY OF APRIL 2023.

C.MEOLI

JUDGE

In the presence of:

N/A for the Plaintiff

Ms. Jan Mohamed SC for the Defendant

C/A: Carol