Mistry Jadva Parbat & Co Limited v National Oil Corporation of Kenya (Civil Suit 214 of 2012) [2023] KEHC 21609 (KLR) (17 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21609 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT 214 OF 2012

DKN MAGARE, J

JULY 17, 2023

BETWEEN

MISTRY JADVA PARBAT & CO LIMITED ..... PLAINTIFF

AND

NATIONAL OIL CORPORATION OF KENYA ..... DEFENDANT

JUDGMENT

1. This case has been in our corridors for 11 good years. I came and started with the matter as if it was a new matter. The parties who testified were totally unhelpful in that they differed with pleadings in the court file.

2. The plaintiff called two witnesses while the defendant called one witness.

Pleadings

3. The plaintiff filed a claim for 19,840,912.20. The plaintiff acknowledged that they had been paid Kshs. 48,796,2999.12 from the contract amount therefore a sum of Kshs. 6,643,416.37 was to be due subject to evidence.

4. From the contract sum of 55,439,715.49 but they indicated the difference as 19,846,912.43. There is reflected in the statement of Paresh Shivji Varsani.

5. On the other hand, the defendant filed defence stating that it had adhered to the terms of contract. The plaintiff was alleging extension was granted but failed to produce the same. The defendants specifically pleaded that any extension required prior approving which has not been shown.

6. The Defendant further throughout stated negotiation period there was allegation of extension which were to prove. The rest of the Defence was a general denial. The linchpin of the Plaintiff's case was two fold: -

a. There were extensions

b. There total contract sum ought to have been 68,637,211.85

7. The linchpin of the defence case was three fold, that is: -

a. The contract sum was 55,439,715.49

b. There was a previous contractor entitled to Ksh13.763,334 out of the contract sum, for works already done.

c. There were no extensions, and as such the contract sum was sacrosanct.

Defence Evidence

8. DW I Abell Moya testified that he was an improvement Engineer from Moi University. He started working with defendant who has been working since 2017. He adopted his statement and produced documents. On cross examination he stated that the contract was for 55,541,719.49 less Nil retention and 14 Million to the previous contractor. He denied that the final certificate was for 19,840,912.

9. He agreed that there was to be approval by the Quantity Surveyor Architect and the defendant. Any extension without the trio-approval was not valid.

10. There were two aspects, approval of time and extension of quantities. The quantities are said to be subject to the contractor's change. He stated that instructions should be measured before the extension is granted. He did not write a report for the contract for a sum of Ksh 55,541,714.90.

11. PW2 testified stating that he is a quantity surveyor having qualified in 1989. He produced his statement. He did not have terms of his assignment. He concluded that he did visit the site nor carry out comparison with the Defendant. He wrote a statement. He did not visit the plot. He did not produce evidence of qualification and had no letter of instruction. Whereas experts write reports, he wrote a witness statement putting him in the same state as commoners.

12. The monies given to the previous contractor were taken into account he needed with the witness. On the next date he alleged fell sick. He was due for cross examination. He was not cross examined. His evidence became worthless. Though even in chief the evidence was worthless, without cross examination, it ceased being evidence. It was basically inadmissible secondary hearsay.

13. PW1 Paresh J. Varsani testified his statement as evidence in chief. He also produced the costs dated 4/12/12 and 22/10/2018.

14. On cross examination he stated that the works done were for 13,763,334. There were for 13,763,334. There were additional works due to site instruction. He referred instruction. He referred to page 99 and page of exhibit 1.

15. He contended that page 108, Exhibit 1 instruction No. 13 dated 12/2/2022. There appears to have been multiple issues making review and not the main hearing. By a consent dated 25/6/18 parties concluded a case conference. This because subject of a ruling on 5/5/2019. It is not till 8/7/2019, some seven years later that this simple matter started with an opening statement. Due to the lackluster manner in prosecution this matter, the best that commends itself is whichever way this matter is determined. I will not award costs. The matter was filed in 2012, that on 5/12/2012. On 16/5/2015, a preliminary objection was filed. It was deemed on 5/10/2018.

16. Though it was indicated to us that the matter was for re-examination, the plaintiff was yet to be cross examined. The next time the matter came up, the witness was asked only 1 question. He changed his mind and stated that the is the only instruction by the defendant.

17. He was shown the contract and confirmed that for extension, written instructions were mandatory as per as per page 96 of exhibit 1. The contract was to run from 24/8/2001 to 11/2/2002. He conceded that the contract was not for 55,431,714.00. The witness appeared unsure of what he was saying. He admitted the deduction for the previous contractual works. The witness was stood down on 25/7/2019 before end cross of examination.

Analysis

18. This case teaches us on two important aspects. The first one being the place of documents and secondly, the nature of experts. The contract herein was in writing. It terms incorporated documents and conventions in addition to the express provisions. This is where the rubber met the road. The plaintiff turned up with an expert, who purported to interpret the contractor and the workings.

19. Documents, like bullets always speak to their nature. They never require translation through experts. Whereas the court has to observe the demeanor and truthfulness of those witnesses, documents still speak for themselves. The observation of documents cannot change because some expert has turned up.

20. Though there are many experts in various fields, contracts are not engineering documents but legal documents. Parties cannot read into or out of documents matters extrinsic to them.

21. Where there is a written document parole evidence is very good music but to the goats. It is not admissible to explain self-explanatory documents. In *Fidelity & Commercial Bank Ltd v Kenya Grange Vehicle Industries Ltd* (2017) eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth; -

> " Courts adopt the objective theory of contract interpretation and profess to have overriding view sometimes called Four Corners of an Instrument, which insists that a documents meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed..."

22. The trial court and this court will construct documents in a similar manner as there are no witnesses required to know the content of a document.

23. Very easy questions stated having answers I could not fathom. For example, extensions of contract are alluded to but neither specifically pleaded nor proved. The Plaintiff indicated that they were paid Ksh. 48,840,299.12. I have no difficult with the total figure. However, what was being paid.

24. There were certifications for words done. However, these works were not pleaded whether the said amount included extensions or not. The easiest way to know whether extensions were approved, without the approval letter, is to plead all certificates and show which certificates were paid and whether such a payment included payment for extension.

25. The remaining payments needed evidence of what they contain. What part of the payment remaining is the principal sum and what is the extensions. What the plaintiff did was to throw figures to the court

and ask that they be paid. In the case of *David Bagine v 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 vs. Hyde Park Hotel Limited [1948] 64 TLR 177 thus:
>
> "Plaintiffs must understand that if they bring actions for damages it is for thm 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"

26. The other aspect is the kind of pleadings that were in court. The parties were in agreement that Ksh. 48,840,299.12. was paid. Unfortunately, there were no breakdown from either side.

27. The defence filed by National Oil Corporation met requirements set out in Raghbir Singh Chatte v NBK (1996) KL was met: *Raghbir Singh Chatte v National Bank of Kenya Limited* [1996] eKLR, where the Court of Appeal stated as doth: -

> " The main object of this rule and r.14 is to bring the parties by their pleadings to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing (per Jessel M. R. in Thorp v Holdworth (1876) 3 Ch. D. 637). This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him. Thus, in an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible", (underling supplied).
>
> I will also add that the crucial deficiency of a general denial which I have already described, also applies to the evasive, inconsistent and contradictory alternative general traverse in the appellant's defence. This was that if the respondent had extended any overdraft facilities without stating the amount involved, to the appellant which was moreover, denied, then the same and here again, without stating how and when, had been paid. Such a spurious pleading in the alternative cannot give any merit to the defence and so also makes it one which discloses no reasonable defence for all purposes including that of 0 6 r 13(1)(a)."

28. This is because the plaintiff already pleaded that they were paid 489,796,20999.13. The defendant does not need to specify how this was paid.

29. The plaintiff pleaded that the contract sum of 68,637,211.55 but in evidence stated that it 55,431,714.90. The plaintiff admitted that Kshs. 13,763,334 had been done by others. Ipso facto, they were only entitled to a sum of Ksh. 41,668,380.90 was the only amount payable from the contract sum. This is because the parties are in agreement that the former contractor needed to be paid that amount. The Plaintiff was paid Ksh. 7,127,918.22 in excess. From the pleadings, it is not possible to know which amount falls under what heading.

30. Therefore, adding the paid amount and the contract sum to the previous contractors the total sum comes to 62,559,633.13 out of the contract sums of 55,431,714.90 there was an overpayment of Kshs. 7,127,918. 23.

31. In the partial cross examination, the only instruction referring instructions by the defendant was at page 108.

32. The difficulty in this matter is the nature of the pleadings. The plaintiff simply threw figures to the court. I have lost Kshs. 19,840,912. Let the defendant pay. They do not specifically plead which money arose from which account of the 48,796,299.13 paid, this not pleaded now they arose. Which certificate were paid and their contract.

33. Before proceeding to prove, it is important that the extension be pleaded in the plaintiff specifically. None were pleaded.

34. The evidence of PW2 was totally useless. He is said to be a professional but has nothing to show. He did not go to the site and cannot vouch for the authenticity of the account. He has no letter of instruction. He did not prepare a report. He was a gun for hire. I disregard his evidence. Listening to him, I had my doubts about his qualification. In the case of *Kagina v Kagina & 2 others* (Civil Appeal 21 of 2017) [2021] KECA 242 (KLR) (3 December 2021) (Judgment), the court of Appeal sitting in Nyeri stated as doth: -

> " The Judge then summarized the appellant's complaints as laid in support of his application as already highlighted above albeit in summary form. On the issue of the expert witness, the Court adopted the position taken in a persuasive authority namely, Buham and Others [2005] EWCA CR. M. 1980, on the approach a court should take when addressing questions regarding admissibility, qualifications, relevance and competence of expert testimony which in law are left to the discretion of the trial court. Secondly, there is also need for the court to subject such expert testimony to vigorous in-depth analysis, weigh it along with all other evidence bearing in mind that the duty of an expert witness is to provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within their expertise with regard to issues in controversy before the Court."

35. The court continued as doth: -

> " We agree with the appellant's observation that no other expert evidence was called either by the court or the 1st respondent to controvert the testimony of the expert called to testify on his behalf. The record is also however explicit that the reason why the Judge discounted the said evidence was not only because the same had been controverted by any other evidence tendered through another expert witness opinion to the contrary but because the expert witness called by the appellant, although he gave evidence on the nature of trainings he had undergone and where he had under taken those trainings, he failed to tender any proof with regard thereto in the form of academic testimonials or his expertise. Our take on the above undisputed factual position is that without proof and submission of the witnesses' credentials to the court, there was nothing to demonstrate that the said witness was indeed a forensic expert.

36. The so called expert did not proof his own expertise. His testimony was more of the plaintiff's rumours and hyperbole than evidence. He did not produce any evidence of himself going past standard 7. He stated he was an engineer but had nothing to show for it. Engineers are given terms of reference. None was given. He is said to have been orally instructed.

37. The first thing Engineers show is there registration number with the Boraq. The evidence he gave was pure hearsay and worth less. He was simply summing 5 documents.

a. Letter of acceptance

b. Certificate of payment financial accounts

c. Contract agreement

d. Annotation to the final accounts. He even indicated that the works were examined by the defendant.

38. There were engineers involved in the approvals and who possibly asked for and justified the impugned extensions. The plaintiff was quiet on why they were not called. The person who came to court did not in his demeanor appear to know what he was talking about. He cannot be said to be an expert.

39. Further the payment for 48,796,2999.13 is equally not specifically pleaded. It is important to know which works were certified and paid. There the extension included. Consequently, the plaintiff's claim is tenuous. In David Bagime:-

> "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 Park Hotel Limited [1948] 64 TLR 177 thus:
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> 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" We also refer to the cases of Ouma vs. Nairobi City Council [1976] KLR 297 at page 304 and Kenya Bus Services vs. Mayende (1991) 2 KAR 232 at page 235."

40. Therefore, with specifics the court cannot give judgment for the plaintiff. The 68,637,211.60 is not shown how it arose and its relationship with 55,431,715.49.

41. Consequently, the plaintiff failed to prove their case. The same is dismissed with costs of Kshs. 440,000 /= to the defendant. 30 days stay.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 17TH DAY OF JULY, 2023. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Osoro for the plaintiff

Mr. Kerengure for the defendant

Court Assistant - Brian