Shiv Construction Company Limited v Mospa Limited & 6 others (Civil Suit 002 of 2022) [2023] KEHC 21551 (KLR) (2 August 2023) (Ruling)

Neutral citation: [2023] KEHC 21551 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL SUIT 002 OF 2022

RN NYAKUNDI, J

AUGUST 2, 2023

BETWEEN

SHIV CONSTRUCTION COMPANY LIMITED ..... PLAINTIFF

AND

MOSPA LIMITED ..... 1ST DEFENDANT

TIMOTHY KIPSIMNYAN CHESIRE ..... 2ND DEFENDANT

ISAIAH TOROITICH CHESIRE ..... 3RD DEFENDANT

HORNBILL DEVELOPMENT COMPANY ..... 4TH DEFENDANT

ESTATE OF THE LATE REUBEN KIPLANGAT CHESIRE ..... 5TH DEFENDANT

ALICE JEPCHUMBA CHESIRE ..... 6TH DEFENDANT

BARBARA JERONO CHESIRE ..... 7TH DEFENDANT

RULING

1. Before me is an application brought by way of notice of motion dated 9th March 2023, where the Plaintiff/Applicant seeks the following orders: -

    a. Spent

    b. That judgment on the negotiated settlement be entered in favor of the Plaintiff and against the defendant in the sum of Kenya Shillings Twenty-Five Million Four Hundred and Fifty-Eight Thousand six hundred and Ninety-Five and Thirty-Three Cents (Kshs. 25,458,695.33) plus interests and costs

    c. That the Defendant statement of defence dated 25th March 2022 be struck out with costs on the strength of the aforesaid negotiated settlement.

d. That the costs incented to this Application be awarded to the Plaintiff.

2. Given the contentious nature of the matter, I set out in extenso the grounds upon which the application is based, and these are that-

   i. The defendants contracted the Plaintiff to construct Highland malls for a contract sum of Kshs. 210,000,000.00.

   ii. A dispute arose later with regards to the outstanding sum subsequent to which the Plaintiff who also made a counter offer.

   iii. The defendants ultimately made an offer which was accepted by the Plaintiff. The offer and the acceptance by the defendants and the Plaintiff respectively created an enforceable and binding contract.

   iv. The defendants subsequently offered to settle the aforesaid judgment amount in Kind, which offer was rejected by the Plaintiff who insisted on a monetary payment.

   v. That the defendants have subsequently declined to execute the consent judgment because the parties did not agree on the mode of payment of the agreed amount in the sum of Kenya Shillings 25,458,695.33

   vi. The negotiated settlement is a different and distinct transaction from the mode of payment, and the failure by the defendant to sign the consent does not vitiate the binding nature of the negotiated settlement.

   vii. There is nothing pending for determination and the continued pendency of this suit will only serve to waste the court's time and cause the Plaintiff financial difficulties.

   viii. The defendants are already in occupation of the development of the subject of these proceedings and it is clearly very obvious that the defendant has nothing to lose if their proceedings remain undetermined.

3. In response to the application, the defendants filed a replying affidavit dated 5th May 2023 acknowledging that a dispute had arisen between the Plaintiff and the defendant regarding the actual completion date and the payment of the balance of the construction sum.

4. The respondents admitted that indeed an offer/proposal of the consideration of Kshs. 25,458,695/= was made by the respondents vide the 1st defendant's email dated the 17th August 2022 and a letter the 27th September 2022 with a view of bringing the suit to an amicable finding based on the final tabulations that had been exchanged between the parties. It was further the case of the respondents that contrary to the Plaintiff/Applicant assertions, the proposal on the mode of payment is part of the negotiations and forms part of the alleged negotiated settlement. That to give effect to the terms of the negotiated settlement, the whole contractual obligations subsisting between the parties must be read and interpreted wholesomely and the Plaintiff cannot be allowed to cherry-pick what suits it.

5. The defendants further filed an application dated 13th March 2023 seeking to amend their defence and include a counter-claim.

Applicant's submissions

6. The Applicant in his submissions raised five issues for determination, which are: -

   i. Whether or not the amount owed to the Plaintiff by the Defendants is contested

ii. Whether a valid binding and enforceable contract/Agreement for the amount owed to the Plaintiff was made by an exchange of correspondences between the Plaintiff and the defendants

iii. Whether this court should enter judgment on admission

iv. Whether Mode/manner of payment can vitiate existence of a valid contract

v. Whether there are any triable issues before court to allow the defendants application for amendment of its defence dated the 13th March, 2023

7. As to the first issue, it was the applicant's submission that the respondent made a proposal of the consideration of Kshs. 25,458,695/= *vide* the 1st defendant's email dated 17th August 2022 and a letter dated 27th September 2022 and the proposal was accepted by the Plaintiff/Applicant *vide* its letter dated 4th October, 2022. The applicant therefore submitted that the amount is not contested.

8. The applicant submitted that during the pendency of the suit, parties commenced discussions and negotiations with a view of having an amicable out of court agreement. The Defendants proceeded to propose a first offer which was declined by the Plaintiff. The defendants then made a subsequent offer which was accepted by the Plaintiff. The Plaintiff to this end submitted that the three elements of a contract were met and relied on the case of *Charles Mwirigi Miriti vs Thananga Tea Growers Sacco Ltd & Another* (2014) eKLR.

9. As to whether the mode of payment can vitiate the existence of a valid contract, it was the Plaintiff's submission that a party cannot be compelled to accept a certain mode of payment proposed by another party. The position is that there exists a valid contract that meets all the requirements in contract law. The Plaintiff relied on the case of *William Muthee Muthami versus Bank of Baroda* (2014) eKLR.

10. The Plaintiff submitted that acceptance does not extend to the mode of payment and therefore the defendants cannot deny existence of a valid contract on the basis of a non-agreement on the mode of payment. That the only factors that can vitiate a contract are misrepresentation, mistake, duress, undue influence and illegality. On this, he relied on the case of *Eldo city Limited versus Corn Products Kenya Ltd & another* (2013) eKLR.

11. The Plaintiff further submitted that the court should enter judgment on admission. He submitted that the disagreement on the mode or manner of payment cannot vitiate the existing contract as between the parties.

12. On the issue of whether the defendant's application to amend should be allowed, the Plaintiff submitted in the negative stating that it is an abuse of the court process and a demonstration of bad faith. The Plaintiff submitted that the issue of a snag list was long settled as between the parties which repairs amount was factored in the final amount reached as between the parties in the said settlement agreement.

Respondent's submissions

13. The respondent identified two issues for determination.

i. Whether there was a separate negotiated settlement agreement which can be a valid contract capable of enforcement; and

ii. Whether the defendants' Notice of Motion Application dated 13th March 2023 should be allowed.

14. On the first issue, the defendants were of the position that a validly executed contract is the source of primary legal obligations and it is upon each party to it to ensure that which the parties promised will be done, is actually done. They relied on the case of *Hydro Water Well (k) Limited v Sechere & 2 others*.

15. The Defendants further submitted that the rejection of the proposed mode of payment by the Plaintiff is a clear indication that there was an offer, and a consideration, but there was no acceptance. Neither was there a meeting of the minds by the parties. Counsel made reference to Chitty on Contracts Volume 1 general Principles Pg.100 which conceptualizes acceptance, as a condition precedent for a valid contract as, "a final and unqualified expression of assent to the terms of an offer." Consequently, the objective test of an agreement applies to an acceptance no less than to an offer.

16. It was the submission of the defendants that there was no valid agreement capable of enforcement, for the simple reason that the parties could not agree on the mode of payment of the proposed amount, for which the defendants construe as a fundamental term of the negotiated settlement agreement. The defendants therefore submitted that the mode of payment is part of the negotiations and forms part of the alleged negotiated agreement.

17. To give effect to the terms of the alleged negotiated settlement, the defendants submitted that the whole contractual obligations subsisting between the parties must be read and interpreted holistically and the Plaintiff should not be allowed to cherry-pick what suits it and discard that which does not.

18. On the second issue, the respondent submitted that in order for the court to effectively determine whether the defendants' application has merit, the defendants submitted that the issue for determination is whether the amendment is necessary for determining the real questions in controversy between the parties. The defendants further submitted that the amendments will not cause any injustice whatsoever to the Plaintiff.

Analysis and determination

19. From the onset, without a doubt, there was a negotiated settlement agreement and the parties agreed on the total sum to be paid by the defendants. The defendants have equally alluded to the said negotiated settlement in their response. The only contention therefore between the parties is the mode of payment.

20. From the pleadings, evidence and submissions of parties, I was able to isolate the following two issues:

    1. Whether there existed a valid binding and enforceable contract between the parties.

    2. Whether the mode of payment can vitiate the existence of a valid contract

    3. Whether the defendant's application dated 13.03.2023 should be allowed?

Whether there existed a valid binding and enforceable contract between the parties.

21. *Chitty on Contracts* Volume 1 general Principles 32nd Ed. Pg 101 states as follows:

> Businessmen do not, any more than the courts, find it easy to say precisely when they have reached agreement, and may continue to negotiate after they appear to have agreed to the same terms. The court will then look at the entire course of negotiations to decide whether an apparently unqualified acceptance did in fact conclude the agreement. If it did, the fact that the parties continued negotiations after this point does not affect the existence of the contract between them: for example, in one such case the subsequent negotiations showed "_only that the parties wished to discuss the implementation of the agreement and that [one

> of them] wished to improve the terms that had been agreed". The position would, of course, be different if the continued negotiations could be construed as an agreement to rescind the contract. A fortiori, the binding force of an oral contract is not affected or altered merely by the fact that, after its conclusion, one party sends to the other a document containing terms significantly different from those which had been orally agreed.

22. It is the Plaintiff's submission that during the pendency of the suit, there were discussions and negotiations on the possibility of exploring amicable out of court agreement on the balance of construction costs due to the Plaintiff from the defendants. The Plaintiff submitted that a contract was created when an offer was made by the defendants through an email dated the 17th August 2022 and letter dated the 27th September 2022, which proposal was accompanied by a revised payment certificate valued at Kshs. 25,458,695/= which subsequent offer was accepted by the Plaintiff vide its letter dated 4th October 2022.

23. In support of the contention that there was a valid agreement, the Plaintiff's counsel, submitted that all the three essential requirements of a valid contract had been met. Counsel relied on the case of *G. Percy Trentham Ltd v Archital Luxfer Ltd* (1993) and the case of *Charles Mwirigi Miriti -vs- Thananga Tea Growers Sacco Ltd & Another* (2014) eKLR.

24. The defendant on the other hand submitted that there was no valid agreement capable of enforcement, for the simple reason that the parties could not agree on the mode of payment of the proposed amount, for which the defendants construe as a fundamental term of the negotiated settlement agreement.

25. The Defendants further opined that contrary to the Plaintiff's assertions, the proposal on the mode of payment is part of the negotiations and forms part of the alleged negotiated agreement. Counsel relied on the case of *RTS Flexible Systems Ltd -vs- Milkorei Alis Muller GmbH & Co KG*

26. I have reviewed and analysed the correspondence and documents exchanged between the parties.

27. I start by quoting the very relevant words of Steyn LJ in *G. Percy Trentham Ltd v Archital Luxfer Ltd* [1993] 1 Lloyds Rep 25. Lord Steyn said:

> ...It is important to consider briefly the approach to be adopted to the issue of contract formation ... It seems to me that four matters are of importance. The first is that... law generally adopts an objective theory of contract formation. That means that in practice our law generally ignores the subjective expectations and the unexpressed reservations of the parties. Instead, the governing criterion is the reasonable expectations of honest men. ... that means that the yardstick is the reasonable expectations of sensible businessmen. Secondly it is true that the coincidence of offer and acceptance will in the vast majority of cases represent the mechanism of contract formation. It is so in the case of a contract alleged to have been made by an exchange of correspondence. But it is not necessarily so in the case of a contract alleged to have come into existence during and as a result of performance.
>
> The third matter is the impact of the fact that the transaction is executed rather than executory. It is a consideration of the first importance on a number of levels. The fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations. It will often make it difficult to submit that the contract is void for vagueness or uncertainty. Specifically, the fact that the transaction is executed makes it easier to imply a term resolving any uncertainty, or, alternatively, it may make it possible to treat a matter not finalised in negotiations as inessential. In this case fully executed transactions are under consideration. Clearly, similar considerations may sometimes be relevant in partly executed transactions. Fourthly, if a contract only comes

> into existence during and as a result of performance of the transaction it will frequently be possible to hold that the contract impliedly and retrospectively covers pre-contractual performance.

28. The Supreme Court of the United Kingdom later stated as follows in the case of *R TS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)* [2010] UKSC14,[45] :

> The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement."

29. The precedents cited may only be of persuasive value but they set out sound and the correct legal principles applicable to common law jurisdictions on contract law. My task is clearly to review what the parties said and did and from the material before me to infer whether there existed an objective intention as expressed to each other to have a mutually binding contract. I may not impose the subjective thoughts of the parties.

30. Where therefore parties reach an agreement on all the terms of contract they regard (or the law requires) as essential, a contract is deemed to have been formed. What is essential is the legal minimum to create a contract. These are the intention to create legal obligations and consideration. Other terms are secondary as far as formation of a contract is concerned. The reason is that the law does not require commercially sound terms or sensible terms. Parties may agree to any terms and the court will, once it is shown that the parties agreed and valid consideration exists, always hold the parties to their bargain. The court will not seek re-write the contract for the parties. It was the position in *National Bank of Kenya Ltd vPipe Plastic Samkolit (K) Ltd & Another* [2002] EA 503.

31. The Plaintiff/Applicant relied on the case of *Eldo city Limited Versus Corn Products Kenya Ltd & Another* (2013) eKLR. In the said decision, which I find relevant in addressing the issue in question, the court stated as follows:

> In my view, to uphold the position where a party can pull out of a transaction when the parties are already at consensus ad idem, will not be prudent in the world of commerce. To my mind, that freedom should be limited up to a point the parties are still negotiating. Once all terms have been agreed and settled, that freedom should dissipate. Otherwise, mischievious parties with no intention of selling their merchandise may engage serious purchasers in a wild goose chase knowing very well that they can pull out at any stage. I think that is not to be encouraged.

32. I find that the conduct of both parties pointed to one of completion rather than avoidance. It was only about the mode of payment to settle the amount owed to the Plaintiff. Therefore, I have reason to hold that the Plaintiff has shown to my satisfaction that there was a binding agreement between them. I hold so.

Whether the mode of payment can vitiate the existence of a valid contract

33. The *Black's law dictionary* Tenth Edition, defines a contract as an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable in law. That for a contract to be valid certain features have to be present. The elements that make a contract are:

    i. Offer- which is simply a proposal made by one party (the offeror) to another party (the offeree) indicating a willingness to enter a contract.

    ii. Acceptance is the agreement of the offeree to be bound by the terms of the offer.

    iii. Genuine Agreement-Offer and acceptance go together to create genuine agreement, or a meeting of the minds. Agreement can be destroyed by fraud, misrepresentation, mistake, duress, or undue influence.

    iv. Consideration- which describes the thing of value promised to the other party in a contract in exchange for something else of value promised by the other party. This mutual exchange binds the parties together.

    v. Capacity reminds us that the law presumes that anyone entering a contract has the legal capacity to do so. Minors are generally excused from contractual responsibility, as are mentally incompetent and drugged or drunk individuals;

    vi. Legality-parties are not allowed to enforce contracts that involve doing something that is illegal. Some illegal contracts involve agreements to commit a crime or a tort others involve activities made illegal by statutory law.

34. Vitiating factors in a contract are those factors the existence of (any of) which will cripple or invalidate the contract. Examples are; mistake, duress, misrepresentation, undue influence, illegality, unconscionable contracts, fraud, insanity, a party being a minor and void agreements.

35. According to the applicant, the mode of payment cannot amount to a vitiating factor. That acceptance does not extend to the mode of payment as is alleged by the Defendant.

36. The respondent on the other hand submits that the rejection of the proposed mode of payment by the Plaintiff is a clear indication that there was an offer, and a consideration, but there was no acceptance.

37. G.H. Treitel, in his book, *The Law of Contract*, 10th edition, p.16 defines Acceptance as a final and unqualified expression of assent to the terms of an offer. In my thinking, the issue of the mode of payment comes at the tail end of contract formation i.e., execution of the terms of the contract. Once all other elements are appreciated, executing the terms becomes a separate issue. It is evident that the parties were trying to get into a negotiated settlement with a view of settling the matter and as such, the respondents proposed various offers, which were declined by the applicant. The applicant accepted a subsequent offer from the respondent vide its letter dated the 4th October, 2022, which I think satisfies the element of acceptance.

38. I need to consider the Plaintiff's letter dated 4th October, 2022. It is a letter in which the plaintiff accepted the offer in principle. For avoidance of doubt, the contents of the Plaintiff's letter sent to the Defendants were as follows:

> We refer to the above matter, your email dated 17th August 2022 and your letter dated 27th September 2022.

> Our client has considered your clients offer and after extensive consultations has reluctantly agreed to accept your clients' final accounts.
>
> Our Instructions are that the said sum of Kshs. 25,458,695.33 being the final sum due to our client be paid in one lumpsum within thirty (30) days from the date of the signing of the settlement consent."

39. The defendants made an offer through the 1st defendant vide an email dated 17th August 2022 and letter dated the 27th September 2022 which proposal was accompanied by a revised payment certificate valued at Kshs. 25,458,695/=which subsequent offer was accepted by the Plaintiff vide its letter dated the 4th October 2022 as outlined herein above.

40. In my view, the correspondence from the Plaintiff is sufficient acceptance to the offer. It is after the acceptance that the defendants suggested ways of settling the amount but the Plaintiff was not amenable to that.

41. I therefore hold that the mode of payment cannot vitiate the valid contract formed between the parties. As it was stated in the case of *G. Percy Trentham Ltd v Archital Luxfer Ltd* [1993] 1 Lloyds Rep 25.

> law generally adopts an objective theory of contract formation. That means that in practice our law generally ignores the subjective expectations and the unexpressed reservations of the parties. Instead, the governing criterion is the reasonable expectations of honest men. ... that means that the yardstick is the reasonable expectations of sensible businessmen.

Whether the defendant's application dated 13.03.2023 should be allowed?

42. In the meantime, the defendant filed an application dated 13th March, 2023. The defendant seeks to amend the defence and introduce a counterclaim, which essentially disputes on the snags that were allegedly outstanding and compromised by way of subsequent consent.

43. The application is that of amendment and generally, courts are liberal when it comes to amendments, although they may be refused if there will be prejudice to the other party. The principle was well stated by O'Connor J, in the case of *Eastern Bakery vs Castelino* (1958) EA 461, where the judge stated as follows at P462 :-.

> It will be sufficient for purposes of the present case, to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs: *Tildesley v. Harper* (10 (1878), 10 Ch. D. 393; *Clarapede v. Commercial Union Association (2)* (1883), 32 W.R. 262. The court will not refuse to allow an amendment simply because it introduces a new case: *Budding v. Murdoch* (3) (1875), 1 Ch. D. 42. But there is no power to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject matter of the suit: *Ma Shwe Mya v Maung Po Hnaung* (4) (1921), 48 I.A. 214; 48 Cal. 832. The court will refuse leave to amend where the amendment would change the action into one of a substantially different character: *Raleigh v. Goschen* (5), [1898] 1 Ch. 73, 81; or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendments, e.g. by depriving him of a defence of limitation accrued since the issue of the writ: *Weldon v. Neal* (6) (1887), 19 Q.B.D. 394; *Hilton v. Sutton Steam Laundry* (7), [1946] K.B. 65. The main principle is that an amendment should not be allowed if it causes injustice to the other side".

44. The defendants in support of their application, stated that the purpose of the amendment is to facilitate the determination of the real question in controversy between the parties.

45. The Plaintiff on the other hand opposed the application stating that the issue that the defendants seek to introduce was long dealt with and that the application is an afterthought and abuse of the court process.

46. Let me briefly outline the background giving rise to this suit.

47. On 24th January 2022, the Plaintiff instituted the present suit against the defendants on allegations of breach of the terms of the settlement agreement. The Plaintiff alleges that despite several demands to the defendants to comply as per the Settlement Agreement by perfecting the security, the defendant instead provided title documents of a purported security in the name of a 3rd party called Hornbill Development company limited (the 4th defendant) which is a stranger to the Plaintiff and as a result, the Plaintiff alleged that the 1st defendant is in blatant breach of the settlement agreement.

48. The parties attempted to negotiate the dispute giving rise to this suit, to amicably settle it out of court. The settlement has been challenged hence the present application.

49. In my thinking, if the application is allowed, the Plaintiff will be greatly prejudiced. The proposed amendment appears to be an afterthought and an abuse of the court process. My duty here is to examine the intentions of the parties and I find that the parties intended to get into a settlement agreement and that there existed a valid contract between the parties. I believe that once the issue of whether there existed a valid contract is settled, the question on the snag list will be equally addressed since the issue was factored in the final amount agreed by the parties. Perhaps before penning off the question to ask is exactly whether the defendant in seeking leave to defend a claim at this stage of the proceedings the respondents they can be said to act in good faith. In reference to this contract obligation by the parties to observe reasonable commercial standards of fair dealings in accordance with the terms of the contract purposes consistency in line with the justified expectation of the plaintiff. My reading and interpretation of the negotiated terms emphasize the duty to perform by each party dependent on the condition precedent of Kshs 25,458,695/=. There are two aspects in my view which can be drawn out of the trajectory being pursued by the respondent. The first is the canon of not acting honestly and the second is fidelity to the parties bargain as expressly stated in the negotiated contract created in good faith. The perception being created by the respondent is that the particular negotiated settlement being agitated by the plaintiff is improper in the particular context and should be regarded as commercially an acceptable by reasonable and honest people. The concept of a duty to negotiate in good faith and to carry out the negotiations to finality is inherent and implied being in force without any repudiation by either party.

Conclusion

50. The Plaintiff has in my view proven its case on a balance of probabilities. On the totality of the evidence and the circumstances of this case, it would be unrealistic to conclude that the parties never intended to form and complete the negotiated contract. I have from the totality of the evidence concluded that the parties intended to be bound. Their intention never ultimately took any other turn but to ultimately complete the settlement terms of the contract. In considering the factors highlighted in this case by the respondent I hold the view that the following principles were non responsive.Whether the proposed amendment is necessary to determine the disputeThe need to avoid prejudice to other party as well as the need for the efficient administration of justiceGeneral case management principles such as intolerance to late amendmentsThe overriding objectiveHeavy onus on the party seeking the late

amendment to justify itThe application is fact sensitive andWhether the amendment has a reasonable prospect of success.

51. What is more pronounced as reflected in the affidavits in respect of the cause of action that if this court takes the approach articulated by the respondents its founded upon the same or substantially the same facts upon which the suit was originally filed. Thereafter, it was concluded within the negotiated terms of settlement.

52. Business sense would dictate that completion be met by both parties forthwith. I would consequently make the following orders in favour of the successful Plaintiff:

    i. That the Defendant statement of defence dated 25th March 2022 be struck out with costs on the strength of the aforesaid negotiated settlement.

    ii. That judgment on the negotiated settlement be entered in favor of the Plaintiff and against the defendants in the sum of Kenya Shillings Twenty-Five Million Four Hundred and Fifty-Eight Thousand six hundred and Ninety-Five and Thirty-Three Cents (Kshs. 25,458,695.33) plus interests and costs Fifteen days interim stay granted to enable parties internalize the decision.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 2ND DAY OF AUGUST 2023

In the Presence of

Mr. Kigen for the Petitioner

M/s Kaunda for the Respondent

R. NYAKUNDI

JUDGE