Bishop Likavo t/a IVC Church Eldoret v Jawabu Interiors Ltd & 2 others (Civil Appeal E95 of 2022) [2023] KEHC 23646 (KLR) (17 October 2023) (Judgment)

Neutral citation: [2023] KEHC 23646 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL E95 OF 2022

RN NYAKUNDI, J

OCTOBER 17, 2023

BETWEEN

BISHOP LIKAVO T/A IVC CHURCH ELDORET ..... APPELLANT

AND

JAWABU INTERIORS LTD ..... 1ST RESPONDENT

INTEGRATED VISION CENTRE ..... 2ND RESPONDENT

INTEGRATED MEDICAL CENTRE ..... 3RD RESPONDENT

(Being an appeal from the Judgment/Decree of the Hon. Tabitha W. Mbugua (RM) delivered on 6th July, 2022 in Eldoret Small Claims Commercial Case No. E082 of 2022)

JUDGMENT

Coram: Before Justice R. Nyakundi

Mutai Oduor & Co Advocates

Munyaga Githaiga Advocates LLP

1. By an Amended Statement of Claim dated 28/5/2022, the 1st Respondent sued the Appellant seeking damages of Kshs.958,308.25/= plus interest thereon and cost of the suit.

2. The Appellant filed a Response to the Statement of Claim dated 16/5/2022, denying vehemently the Respondent's claim. The Appellant maintained that he was not and has never been a party in a contract with the Claimant and further that it does not own the premises and/ or the business on which work was supposedly conducted.

3. The case then proceeded for trial and in her Judgment delivered on 6/7/2022, the Adjudicator found that on a balance of probability the 1st Respondent had proved its case that there was

an implied contract between the parties and proceeded to enter judgment in 1st Respondent's favour in the sum of Kshs.958,308.25/= plus costs and interest.

4. Aggrieved by the said decision, the Appellant herein filed this appeal vide a Memorandum of appeal dated 13/7/2022 raising 11 grounds:

    1. That the learned Magistrate erred in law and in fact by finding that the pleadings, evidence and general conduct proved that there was a valid contract between the Appellant and the 1st Respondent herein when in fact that was not the case.

    2. That the learned Magistrate erred in law and fact by finding that the Appellant had made an offer handing over the site of construction when the evidence was to the contrary.

    3. That the learned Magistrate erred in law and fact by finding that variations connoted performance of a contract when no such variations were proven to have been done.

    4. That while finding that there was a contract between the Appellant and the 1st Respondent, The learned Magistrate erred in law and fact by failing to ascertain what terms of the alleged contract were.

    5. That the learned Magistrate erred in law and fact by failing to appreciate that retention fees in a construction contract is not payable unless parties have expressly agreed upon the same and provided the rate thereof and the period during which it should be paid. In the present case, no such express agreement was proven and the documents admitted in evidence made no such reference to retention fees.

    6. That the learned Magistrate erred in law and fact by failing to appreciate that it's a usage in construction contracts that variations must be expressly provided for and recorded. In the case at hand, there was no proof that such variations were provided for and agreed upon.

    7. That the learned Magistrate erred in law and fact by failing to appreciate that the 1st Respondent did not discharge the burden of proof that was bestowed on it under the law.

    8. That the learned Magistrate erred in law and fact by failing to appreciate that the 1st Respondent's pleadings were at a variance with the evidence in that the Statement of Claim sought to recover unpaid balances, the evidence led by CW 1 and shown in the exhibits sought retention fees and variations costs.

    9. That the learned Magistrate erred in law and fact by failing to appreciate that the amounts claimed as retention fees and variation costs were in the nature of special damages which should have been specifically pleaded and strictly proven.

    10. The learned Magistrate simply ignored the submissions made by the Appellant.

11. In all circumstances of the case, the decision of the learned Magistrate cannot be supported in law and ought to be set aside.

12. It was then directed that this Appeal be canvassed by way of written Submissions. Both parties filed their respective submissions.

The Appellant's Submissions

5. With regards to whether there was a valid contract between the Claimant and the 1st Respondent, Counsel for the Appellant, Mr. Oduor, submitted that the lower Court record shows that and was admitted by the 1st Respondent that no contact was executed between the Appellant and the 1st Respondent herein. Counsel argued that the 1st Respondent alleged and the Adjudicator held that such a contract existed by dint of the conduct of the parties. However, it was clear from the get go that the 1st Respondent was not contracting with the Appellant. Counsel maintained that it was on this basis that indeed no contract was executed and that the 1st Respondent knew as much. Counsel argued that the persons who were responsible for the construction were third parties, Ken Miller, Shelly Court and Hearts Afire Foundation. Counsel maintained that the Appellant was merely the transacting hand for the donors and not the contractor.

6. Counsel further submitted that the Claimant's witness testified that she was brought to the 1st Respondent by the 1st Respondent's children and was not sourced by the 1st Respondent at all. Counsel further argued that the 1st Respondent herein communicated to the donors and even sent its invoices to Ken Miller and Shelly Crofut. Counsel argued that the bank statements tendered by the 1st Respondent also showed that the funds paid to it always came from Hearts Afire Foundation.

7. Counsel further submitted that in particular, the entries of 7/12/2015, 25/1/2016 and 10/3/2016 show large deposits from Heart Afire Foundation. That the entries of 8/1/2016, 26/1/2016, 28/1/2016, 26/2/2016. 10/3/2016 and 28/6/2016 are payments made to the 1st Respondent. Counsel argued that these payments were almost always made after deposits by Heart Afire which is not a mere coincidence. Counsel maintained that it is hardly a wonder that in the meeting held on 14/1/2017 it was made clear that the project had stalled in 2006 because the funders who were paying the Claimant, were no longer funding the project. Counsel argued that the Appellant herein has demonstrated that he was just a conduit for the transfer of the funds between the Claimant and donors. That for purposes of construction, the Appellant was the go- between and that the persons responsible for this contract were not him.

8. On the issue of want of privity, Counsel cited the case of *Securicor Guard (K) Limited v Mohammed Saleem Malik & Another* [2019] eKLR in which the Court held that in the absence of the privity, there will be no contract.

9. Counsel contended that the 1st respondent herein did not discharge the burden of proof with regard to establishing whether its dealing with the Appellant amounted to a contract. Counsel argued that each and every assertion made by the 1st Respondent was rebutted by the Appellant. For instance, the claim that because it was the Appellant who made the payments shows that he was a party to the contact was rebutted by plausible evidence that such payments only arose after funds were availed by Hearts Afire Foundation. Counsel further submitted that the Appellant demonstrated that the 1st Respondent was required to communicate any invoices to Ken Miller and Shelly Crofut who responsible for the works done.

10. Counsel argued that the relationship between the email dated 21/10/2015 and 25/10/2015 is clear. That the 1st Respondent sent the Appellant the emails above in response to the direction given in the 1st Respondent's latter email. Counsel maintained that it is for this reason that the invoice attached to the 1st Respondent Exhibit 1 dated 26/10/2015 is entitled "Mobilization stage" which means it referred to the early stages of initiation of the construction works. That the 1st Respondent's exhibit 3 cannot be taken as a promise by the Appellant to pay the invoice because the subject invoice was sent at the "Mobilization stage". Counsel argued that it is common that a construction contact is not paid in entirety at the mobilization stage. Counsel further argued that at this mobilization stage it was made clear that the Appellant's position was that of a go-between with reference to the 1st Respondent on the one hand and Ken Miller, Shelly Crofut and Hearts Afire on the other hand.

11. Counsel further submitted that for a contract to exist, even by conduct of the parties it must be demonstrated that an offer was made and accepted and that in such acceptance there was consensus as idem. Counsel submitted that the concept of consensus *ad idemm* was discussed in the case of *Vincent M. Kimwele v Diamond Shield International Limited* [2018] eKLR.

12. As to whether the amounts claimed and awarded by the Adjudicator were pleaded and specifically and strictly proved as per the required standards, Counsel submitted that the 1st Respondent did not discharge the burden cast on it to prove the terms of the alleged agreement. That at paragraph 4 of the Claim the 1st Respondent specified the contact amount as Kshs.19,094,175/= whereas at paragraph 7 of the Claim the 1st Respondent claims Kshs.958,308.25/= being the unpaid balance as at 4/1/2019.

13. According to Counsel, there is no allegation whatsoever that what is being claimed is retention fees and payment for variation. Counsel argued that Parties are bound by their pleadings and as far as the pleadings are concerned, there was no claim for retention fees and or variations. Counsel maintained that a party must plead succinctly and clearly so as to enable the opposing party to know the case that faces them and prepare an appropriate rebuttal. That a party cannot be allowed to panel beat their pleadings by way of evidence so that the claim presented was something that it was not. Counsel urged the Court to be guided by the case of *Daniel Otieno Migore v South Nyanza Sugar Company Ltd* [2018] eKLR on the rule that party are bound by their pleadings.

14. Counsel further argued that the damages which were pleaded were damages which are special in nature and which must be strictly pleaded and proved. Counsel submitted that for this instant Claim, the Court could not tell which part was retention fee and which part constituted payment for variation and as such there was no specificity in the Statement Claim. Counsel cited the case of *Capital Fish Kenya v The Kenya Power & Lighting Company Limited* [2006] eKLR to buttress his submissions on the issue that special damages must not only be specifically pleaded but they must also be strictly proved.

15. According to Counsel, the claim for payment was vague on exactly what was being claimed and Court should not have been presented with a situation where it has to guess which part of the global sum constituted what claim.

16. Counsel further submitted that the foregoing notwithstanding, the lower Court heard the 1st Respondent's witness clearly explaining what she understood to be retention fees which she said was a percentage of the contract sum that is retained by a Client upon completion of a contract and is to be paid after the expiry of the defect's liability period. Counsel submitted that

the question of what percentage was agreed was never answered because no written document was ever produced before Court. Further that the witness alluded to a draft contract that allegedly the Appellant failed to execute. Counsel argued the same was never produced before the Adjudicator and so there was simply no basis upon which the so-called retention fees. Counsel further argued that even the invoice produced by the 1st Respondent as exhibit 1 dated 26/10/2015 made no provision for a retention fee and the percentage thereof. Counsel further submitted that what the 1st Respondent wanted was the Court to do was to assume that such fee was provided for without having to prove that it indeed was.

17. Counsel contended that even if were to assume for the sake of argument that an understanding existed regarding the retention fee and the rate thereof was 5% of the alleged contract sum by the 1st Respondent witness, the math simply does not add up. The whole contract sum is Kshs.19,094, 175/= , 5% thereof amounts to Kshs.954,708.75/=. That the Claimant in its Exhibit 4 has specified that the unpaid retention fee is Kshs.593,853.41/=. Counsel argued that this is not 5% of the contract amount. Counsel further argued that from the Claimant's Exhibit 1 the Certificate of Completion, which in its part renders the contract amount as Kshs.15,979,662.50/= and if this Court were to calculate the retention fee then which value would it use as the basis. Counsel maintained that once again the 1st Respondent failed the test of proof.

18. Counsel further submitted that the 1st respondent still needed to have proved how the said retention fees arose. That the 1st Respondent stated that the retention fee was raised on certificates generated at various stages of works without giving an explanation what those stages consisted of. Further that the 1st Respondent's witness failed to produce the so -called certificates so that even on that amount set out in exhibit 4 (a) as retention fees and thus the Adjudicator had no basis upon which to hold that such an amount was payable. Counsel further argued that 1st Respondent's witness admitted that retention fees were generally chargeable on a complete project and at the time that the 1st respondent alleged that the retention fees were, the project was incomplete. Counsel submitted that on what basis then would such fees be claimed. On the issue of retention, Counsel cited Julian Bailey in his book, Construction Law, 2nd edition, Routledge, At page 1040, paragraph 12.04. Counsel argued in construction contracts retention fees cannot be implied but must be expressly provided for.

19. On the issue of variation/alterations, Counsel submitted that the Claim as well as the evidence was similarly deficient to prove the varied works but also the formula used for calculating the amount claimed a there was no written agreement and no such terms had been shown to have been expressly discussed and agreed on. That the lower Court was deprived of the benefit of any material that it could use to determine that issue in favour of the 1st Respondent. Counsel argued there was therefore no basis upon which the Adjudicator could support a finding that retention fees were due and payable. Counsel maintained that the claim for variation was a claim in special damages and therefore needed to be have been pleaded specifically and proven strictly. Counsel relied on the definition of a variation as cited by Julian Bailey in his book, Construction Law, at page 646,paragraph 7.01.

20. Counsel argued for works to amount to variation, there must be express instruction to do them. Second, it must be shown that what was done was different from what was originally contemplated under the works. The 1st Respondent in the Claim did not produce any formal express instructions to confirm that such works was agreed upon. Further the 1st Respondent did not produce drawings or bills of quantities to help the Court measure variations and how

they were costed. What the 1st Respondent wanted and the lower Court granted was to use figures plucked form thin air to attach liability on the Appellant.

21. Counsel argued that in terms of proof, the totality of the 1st respondent's case was set around documents that were self-generated after the facts. Counsel argued that apart from the then Claimant's exhibit No.2, exhibit No.1 and exhibit no.7, the rest of the documents exhibit 6, 5,4 (a) and (b) were self-generated documents, deliberately crafted to fit within the narrative that the 1strespondnet was owed monies for retention and variation. That the invoice dated 26/10/2015 contained in the Appellant's exhibit issued at mobilization stage makes no reference whatsoever to retention fees. Counsel maintained that the said document was drafted by the 1st respondent and so by the reason of the contra proferentum rule must be interpreted strictly as against the 1st Respondent. These documents formed the essence of the claim therein and needed to be strictly proved. Counsel contended that the 1st Respondent made allegations and instead of proving them, it was the Appellant's burden to prove them. Counsel cited section 107 (1) of the *evidence Act* and also urged the Court to be guided by case of *Direct Line Assurance Co. Ltd. v Peter Micheni Muguo* [2018] eKLR on the issue of contra proferentum rule.

22. In the end, Counsel submitted that the learned Adjudicator erred in law in allowing the Claim when the same was not proved on a balance of probabilities.

The 1st Respondent's Submissions

23. On whether there was a valid contract between the Appellant and the 1st Respondent, Counsel for the Respondent, Mr. Githaiga, submitted that the 1st Respondent and the Appellant entered into a contract for works with the Appellant acting on behalf of the 2nd and 3rd Respondents for the construction works of IVC medical centre. The 1st Respondent's witness testified at the lower Court that the total value as per the contract was Kshs.19,094,175/=. The witness gave evidence that the agreement was oral at the first instance and work commenced. Thereafter, the witness on behalf of the 1st Respondent forwarded a draft contact for signature by the Appellant but latter declined to sign the same. On cross-examination, the Appellant's witness did not dispute having received the said contract only that he indicated that he could not sign without the authority of the other third parties. Counsel cited the book of Keating On Construction of Contracts Tenth Edition at page 23 and 24 on the useful approach where it is difficult to determine whether a concluded contract has come into existence where there has been negotiations between the parties but no formal contract has ever been signed. Counsel submitted that if the foregoing approach is adopted by the Court then it will be evident that indeed there existed a valid contact between the parties.

24. Counsel further submitted that the 1st Respondent witness testified that the requisite approvals were obtained prior to the commencement of the works including a Certificate of Compliance by the National Construction Authority which was produced as exhibit 1. That the same was obtained by the 1st Respondent and the Appellant. Further, the 1st Respondent testified that invoices were raised in in intervals as the works commenced. Payments were equally made by the Appellant in the year 2015 and 2016 as can be gleaned from the bank statements exhibits.

25. Counsel submitted that it is not in doubt that a contact existed between the parties herein in as much as it was not in writing. That the payments made by the Appellant to the 1st Respondent

were in respect of works done as no other relationship between the parties was established at the trial save for the contract for works in question.

26. Counsel further submitted that a contract for works need not to be in writing, it may be oral or inferred from the circumstances as set out above. Counsel relied on the case of *Pasacon General Construction & Electrical Services Limited v Total Kenya Limited* [2018]eKLR.

27. Counsel argued that the evidence led by the 1st respondent at the trial Court, even in the absence of a written contract is sufficient to prove that the terms of the contact in this case were agreed upon and that the 1st Respondent proved its case to the required standard. Counsel cited the case of *Central Microfilm Operators Limited v Teachers Service Commission*.

28. Counsel further submitted that at the close of the Claimant's case, the 1st Respondent was re-examined and she testified that she had never received any payment from Shell Croffat or Ken Miller. That the name of the client was IVC Prayer Mountain Medical Centre. She confirmed that that she had applied for the certification by the National Construction Authority together with the Appellant and that the Appellant paid for it. She further testified that retention was agreed upon and is standard in construction projects.

29. Counsel further submitted that from the pleadings, evidence and general conduct of the parties, it indicates that the existed a valid contract. It was evident at the trial Court that the 1st Respondent held a hand over meeting at the site with the Appellant. That the site hand over was done by the Appellant. Further that the hand over connoted an offer. That the 1st Respondent testified at the trial Court that she took over from a previous contract. That the Appellant during cross-examination confirmed the position and verified that the 1st Respondent together with the architect conducted variations on the site. That these variations connote performance and the consideration was the money paid by the Appellant for the works done.

30. Counsel maintained that indeed the three essential elements of contract were met and hence there existed a valid implied contract.

31. According to Counsel, the Appellants have introduced a very interesting twist in this matter that the introduction of third parties purportedly the actual owners of the actual owners of the project namely; Ken Miller, Shelly Crofut and Hearts Afire Foundation. Counsel submitted that this line of argument cannot hold for reasons that; no third-party proceedings were instituted by the Appellant at the trial Court if indeed he had reason to believe that the 1st Respondent could have sustained a civil claim against them. Secondly, they were never called as witnesses by the Appellant.

32. Counsel further submitted that on cross-examination of the Appellant's witnesses it also emerged that none of the third parties owned the 2nd and 3rd facilities. Counsel further argued that the alleged third parties were nowhere in the initial engagements and their role in the course of the construction works remain unclear. Counsel cited the case of *Julius Kigen Kibiego v Angeline Korir and Another* [2012] eKLR.

33. That vide an email dated 21/10/2015, the Appellant promised to act on the invoice sent to him by the Claimant. Counsel submitted that this meant payment and that no other meaning can be attached to it.

34. With regard to whether the amounts claimed and awarded were pleaded and strictly proved as per the required standards, Counsel submitted that the 1st Respondent having established that

a contract for works existed as between the parties herein, the Appellant breached a cardinal term of the contract, that of failure to pay the Claimant for the whole works done as agreed.

35. As to the amounts payable and owing, Counsel submitted that the same were specifically pleaded and clarified by exhibit 5, a statement of account which was sent to the Appellant. The amounts were also proved since all payments made by the Appellant and the 2nd and 3rd Respondents were document and the balance thereof ascertained through the statement of account. Counsel contends that further invoices were raised and sent to the Appellant for payment but the Appellant failed to dos so. Counsel further argued that the Appellant did not any of his documents filed in Court dispute the existence of the debt as pleaded. He also confirmed during cross-examination that he does not dispute the invoice sent to him. According to Counsel, the only inference that can be drawn here is that the Appellant admitted the existence of the debt but the only challenge was payment due to problems he encountered with the cashflow. Counsel further argued that the Appellant did not dispute the statement of account and retention fees as billed. Counsel submitted that the Appellant indicated that he disputes the item on retention fees but again, on cross-examination, he confirms that he never document such dispute. That it can then be inferred that the assertion to dispute that item is an afterthought meant to defeat the 1st Respondent right to be paid for the work done. Counsel further submitted that CW 1 confirmed that the retention fees had been agreed upon and is standard in construction works. Counsel maintained that the same ought to paid.

36. In view of the contra proferetum rule, Counsel argued the documents generated by the 1st Respondent were shared with the Appellant once generated and that he did not dispute none of the contents.

37. With regard to the issue that the 1st Respondent was not entitled to retention fees and variation fees, Counsel submitted no such position was taken and included in the response to the claim. Counsel argued that the position taken in the statement of claim and the evidence led to that effect is therefore uncontroverted. Counsel cited the Supreme Court Case of *Raila Odinga & Another V IEBC & 2 others* [2017] eKLR on the issue of evidential burden of proof.

38. Counsel argued that in allowing the appeal as prayed would be equated to setting aside the entire contact in the absence of sufficient grounds and reasons to do so. Counsel submitted that this would be adverse since no vitiating factor has been pleaded by the Appellant as to cause the contract to be set aside. Counsel cited the case of *Lole v Butcher* (1949) A ER 1107.

39. In the end, Counsel urged the Court to leave the contract between the parties undisturbed.

Issues for determination

40. In my view the following issues arise for determination:

    a. Whether was a valid contract between the Appellant and the 1st Respondent

    b. Whether the amounts claimed and awarded were specifically pleaded and strictly proved to the required standards

Whether was a valid contract between the Appellant and the Respondent

41. The *Black's Law Dictionary* defines a contract as follows: -

> An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.

42. Atkin LJ in the case of *Rose and Frank Co v J R Crompton & Bros Ltd*, ([1923] 2 KB at 293, stated:

> To create a contract there must be a common intention of the parties to enter into legal obligations, mutually communicated expressly or impliedly".

43. In *R TS Flexible Systems Ltd v Molkerel Alois Muller GmbH & Co, KG (UK Production)* (2010) UKSC14, [45] the Supreme Court of the United Kingdom stated that: -

> ...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 finalized, 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."

44. On implied contracts, the Court of Appeal in *Ali Abid Mohammed v Kenya Shell & Company Limited* (2017) eKLR , stated that a contract between parties can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded. The court said;

> It therefore follows that a contract can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded. See Timoney and King v King 1920 AD 133 at 141. In the circumstances of the instant case, there existed an enforceable contract between the parties by reason of Conduct. Indeed, it was not disputed by the respondent that it supplied petroleum products to the appellant at a specific amount per liter and for a certain period of time."

45. Bingham LJ in The Aramis [1989] 1 Lloyd's Rep 213 made some general observations about the circumstances in which a contract might be implied. At p.224 col. 1, he said:

> As the question whether or not any such contract is to be implied is one of fact, its answer must depend upon the circumstances of each particular case – and the different sets of facts which arise for consideration in these cases are legion. However, I also agree that no such contract should be implied on the facts of any given case unless it is necessary to do so; necessary that is to say, in order to give business reality to a transaction and to create enforceable obligations between parties who are dealing with one another in circumstances in which one would expect that business reality and those enforceable obligations to exist".
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> Further:
>
> I do not think it is enough for the party seeking the implication of a contract to obtain "It might" as the answer to these questions for it would, in my view, be contrary to principle to countenance the implication of a contract from conduct if the conduct relied on is no more than consistent with an intention to contract than

> with an intention not to contract. It must surely be necessary to identify conduct referable to the contract contended for or at the very least, conduct inconsistent with there being no contract made between the parties to the effect contended for. Put another way, I think it must be fatal to the implication of a contract if the parties would or might have acted exactly as they did in the absence of a contract".

46. It therefore follows that a contract need not be in writing but can be inferred from the conduct of the parties. It must be noted that The elements of offer, acceptance and consideration must be proved, in implying a contract the conduct of the parties remain paramount.

47. In *Charles Mwirigi Miriti versus Thananga Tea Growers Sacco Limited and Another* (2014) eKLR the court of appeal stated that it is trite that there are three essential elements for a valid contract. That is an offer, acceptance and consideration.

48. In this case there was no written contract. The Court has therefore been called to ascertain whether the pleadings, the evidence and the general conduct of the parties reveal any contract.

49. In the present case, it is not disputed that the 1st Respondent was contracted to work on the IVC medical centre. That was an offer. The consideration for that matter was Kshs.19,000,000/= as evidenced by the bank statements. The Appellant on cross-examination told the Court that he handed over the construction to the 1st Respondent for the work to begin on behalf of Ken and Shelly. This to me was performance and connoted acceptance. Although the Appellant testified that he did not contract the 1st Respondent, he in fact admitted that he had a meeting with the 1st Respondent's Director at the site. He also admitted that that the emails in question were between him and the 1st Respondent's Director. He also conceded that there were no emails between 1st Respondent's Director and the said Ken and Shelly. He also told the Court that he is the chair of IVC Church and that Ken and Shelly do not own the IVC Church and the IVC medical centre. Further although the Appellant seems to suggest that he was only a middle in the contract herein the evidence on record seems to suggest otherwise from his own testimony it is evident that from outset the idea to build a medical facility for that matter was his, the issue of funding notwithstanding. Be as it may there was nothing stopping the Appellant herein from instituting third party proceedings against the said Ken Miller, Shelly Craffat and Scott Craffat for that matter.

50. From the evidence adduced it is clear that there existed an enforceable contract between the Appellant and the 1st Respondent herein by reason of conduct. The three essential elements for a valid contract that is an offer, acceptance and consideration were duly fulfilled.

Whether the amounts claimed and awarded were specifically pleaded and strictly proved to the required standards

51. It is trite that special damages must be strictly proved. The question here is whether the sum of Kshs.958,308.25/= claimed as special damages, although specifically pleaded, was strictly proved.

52. To prove that the Appellant owed him Kshs.958,308.25/= , the 1st Respondent produced a statement of account annexed as exhibit 5. The 1st Respondent also produced copies of invoices annexed as exhibit 4(a) and 4(b) that were sent to the Appellant herein.

53. During the hearing of the dispute herein it is evident that the Appellant did not deny receiving the aforementioned invoices. The Appellant in fact during cross- examination confirmed that

in an email sent to the 1st Respondent's Director he indicated that he would work on the said invoices.

54. Counsel for the Appellant, Mr. Oduor has also urged the Court to be guided by the contra proferentum rule in deciding this instant appeal as the 1st Respondent's case was set around documents that were self-generated. Counsel also submitted that the invoice dated 26/10/2015 was generated at the mobilization stage and makes no reference whatsoever to retention fees and thus by reason of the contra proferentum rule must be interpreted strictly as against the 1st Respondent. The contra proferentem rule is a legal doctrine in contract law which states that any clause considered to be ambiguous should be interpreted against the interests of the party that created, introduced, or requested that a clause be included. In this case although the said documents were self-generated the same were said by the 1st Respondent the same were sent to the Appellant who acknowledged receipt of the same and such cannot be said to have not been aware of their contents. The Appellant also during cross-examination conceded that there was no email from himself to the 1st Respondent disputing the said statement of account on retention fees.

55. I also note from the evidenced adduced at the at trial that said evidence was uncontroverted by the Appellant and thus are prima facie evidence that the Appellant owes the 1st Respondent Kshs.958,308.25/=. After going through pleadings, evidence and parties submissions on record, it is my finding that the 1st Respondent successfully discharged its evidentiary burden of proof in proving its case against the Appellant on a balance of probabilities. I accordingly find that the Appellant is liable to pay the Respondent Kshs.958,308.25/= being the amount owed.

56. From the totality of evidence, pleadings and legal arguments advanced by the parties, it is safe to conclude that the appeal herein lacks merit and is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 17TH DAY OF OCTOBER 2023

In the presence of

Mr. Munyaga Githaiga for the Appellant

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R. NYAKUNDI

JUDGE