



**Secretary Board of Management Cardinal Otunga Girls Secondary School v Shana Builders & Contractors Ltd (Civil Appeal 49 of 2022)
[2024] KEHC 15616 (KLR) (6 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15616 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL 49 OF 2022
DK KEMEL, J
DECEMBER 6, 2024**

BETWEEN

**THE SECRETARY BOARD OF MANAGEMENT CARDINAL OTUNGA GIRLS
SECONDARY SCHOOL APPELLANT**

AND

SHANA BUILDERS & CONTRACTORS LTD RESPONDENT

(Being an Appeal against the Judgment and Order of the Chief Magistrate's Court of Kenya in Bungoma (Hon. A. Odawo-SRM) delivered on 16th May 2022 in Civil Suit No. 4 of 2020)

JUDGMENT

1. The Secretary Board of Management, Cardinal Otunga Girls Secondary School, the Appellant herein, sued Shana Builders and Contractors Limited, the Respondent herein in Bungoma Chief Magistrates Civil Suit No. No. 4 of 2020 (hereinafter 'The Lower Court Suit') for breach of contract vide a Plaint dated 10th January 2019. The Appellant claimed a contractual sum of Kshs. 700,000/-, interest thereon as well as costs of the suit.
2. The Respondent vide a Statement of Defence dated 22nd February 2022, denied the allegations as contained in the Plaint dated 10th January 2019. Subsequently the matter was set down for hearing.
3. At the close of the hearing, the trial magistrate rendered his judgment on 23/10/2019. The trial Court found that the Appellant failed to prove its case as against the Respondent and the same was dismissed with costs to the Respondent.
4. The Appellant was aggrieved by the said decision hence the instant appeal. It filed The Record of Appeal dated 30th January 2024. It founded its Memorandum of Appeal on seven (7) grounds which can be summarized into the following;



- a. The trial magistrate erred in law and fact by dismissing the Appellant's suit despite evidence by the Respondent admitting to be in receipt of the Kshs. 700,000/- from the Appellant and failing to conclude the drilling of a borehole project she had been assigned.
 - b. The trial magistrate erred in law and fact by dismissing the Appellant's suit despite availability of evidence on record indicating that there existed a valid contract between the Appellant and Respondent which was to be enforced and/or obeyed.
 - c. The trial magistrate erred in law and fact by only accepting the Respondent's case on defence at its face value without considering the fact that the Appellant had suffered great loss and damage at the instance of the Respondent who failed to honour the terms of their contract.
5. The Appellant prayed for this Court to: allow its appeal; set aside the judgement as delivered by the trial Court; re-evaluate and re-view the evidence of record and make its own impartial decision and render judgement in favour of the Appellant and condemn the Respondent herein to pay costs of this appeal as well as that in the lower Court.
 6. Directions were taken on 21st August 2024, and it was ordered that the appeal be canvassed by way of written submissions. Neither party wished to exercise their right to highlight.
 7. Vide written submissions are dated 3rd June 2024, the Appellant herein submits that the Respondent was contracted by the Appellant to drill a borehole at the Appellant's school. It was argued that the Respondent was showed the site of the supposed borehole and at the payment of Kshs. 700,000/- was paid upfront with the balance to be offset at the completion of the said project. On 7th February 2017, the Respondent began work at the site but on 9th February 2017, without substantive reasons the Respondent abandoned work at the site.
 8. The Appellant argues that at the time of instituting the lower Court suit the 30% balance was not transferred to the Respondent as it was yet to deliver the complete working borehole as agreed and that the Respondent was in breach of their contract.
 9. It was argued that the Respondent issued the Appellant herein the requisite progress report indicating that the borehole at the allocated site was collapsing due to loose formation on top of the silt and alleged that difficulties were experienced at the 12 meters mark and on getting to the 18 meters mark the said borehole collapsed. Counsel of the Appellant further argued that, the Respondent in the progress report indicated that due to the said challenges, they moved the said drilling to another site 4 meters from the initial site and a similar problem was encountered as the borehole as drill collapsed.
 10. The Appellant argues that the Respondent encountered challenges with its machinery and requested time to replace the same and that the Respondent further requested for time off to work on another project that will raise funds it could use to complete the Appellant's project. Counsel submits that despite payment of Kshs. 700,000/- to the Respondent no fully functional water borehole was delivered as agreed.
 11. The Appellant argued that the allegations by the Respondent that the project was frustrated by the fact that the Appellant availed geographical position which was inspired by a wrong geological survey report was a sham as the Respondent failed to availed any expert witnesses to attest to that.
 12. It was argued that the Respondent failed to fulfill his own part of the deal as his progress report indicated at 32 meters deep it was able to find some water and that the main reason for abandoning the said project was that it could not drill anymore due to its worn-out machinery and failure to do proper casing of the said borehole to prevent collapse.



13. The Appellant argued that the Respondent herein abandoned work and he ought to pay the money he was paid upfront as there exists no functional borehole in the school. Counsel urged this Court to find that the Appellant proved its case on a balance of probability as it is clear the Respondent failed to fulfill its duties as per the contract.
14. Vide submissions dated 4th September 2024, the Respondent submitted that there existed no valid contract between the parties for the Court to enforce any obligations as the Appellant failed to avail any contract in Court. Counsel relied on the cases of South Nyanza Sugar Co. Ltd vs Leonard O. Arera (2020) eKLR and Tnanathi Water Services Board vs Qaza Agencies Ltd (2019) eKLR arguing that the Appellant cannot invite the Court to rewrite the contract by compelling the Respondent to pay the received upfront payment of Kshs. 700,000/-.
15. The Respondent argued that the Appellant misled it with the hydrological survey report it shared with it as it established the school lacked water catchment ground despite the Respondent's drilling the ground up to 130 meters but no water was discovered.
16. The Respondent submits that it should not be blamed as it only relied on the availed geological survey report as availed by the Appellant. It argued that the Appellant is the author of its own misfortune and should be bound by its own mistakes. Counsel relied on the case of Hydro Water Well (K) Ltd vs National Water Conservation & Pipeline Corporation (2017) eKLR. Further, the Respondent urged this Court to find that the dints of Section 120 of the Evidence Act are in favour of the Respondent herein.
17. In conclusion, the Respondent argued that the lower Court visited the site and established that the Respondent carried out its part of bargain as there was a hole existing on the Appellant's school premises though dry. It was also argued that the Appellant's witnesses on cross examination by the Court established that the borehole currently supplying the school with the water was drilled about 2km away from the school premises thus confirming that there was no water catchment of the school ground.
18. In closing, the Respondent asserted that the appeal before this Court must fail and urged this Court to dismiss the same with costs to the Respondent.
19. From the foregone discourse, the issue that emerges for determination is whether the Respondent was in breach of contract as alluded to by the Appellant herein.
20. This Court's role on appeal was settled in case of *Selle & Anor. -vs- Associated Motor Boat Co. Ltd* (1968) EA 123; It is duty bound to revisit the evidence on record, evaluate it and reach its own conclusions. It must not, nevertheless, interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of the law or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was also the holding in *Mwanasokoni – vs- Kenya Bus Service Ltd.* (1982-88) 1 KAR 278 and *Kiruga –vs- Kiruga& Another* (1988) KLR 348).
21. Imelda Odhiambo (PW1) testified that she is the Principal at Cardinal Otunga Girls High School and that at her request this Court adopted her witness statement dated 10th January 2019 as her evidence in chief and further relied on the documents as filed in list of documents on 13th January 2020, which she produced in Court as PEXH.1-15. According to her the Respondent herein, was contracted and paid Kshs. 700,000/- for work that it failed to deliver. She told the Court that there is no borehole in the school yet as per the tender agreement the Respondent was paid 70% of the fees upfront with the balance to be remitted once the project was completed. It was her evidence that if there was any survey to be conducted the Respondent was the one to handle the same as a done was fronted, he applied



- and got accepted. She told the Court that she seeks a refund of the paid upfront fees and damages for breach of contract plus costs.
22. On cross-examination, she told the Court that the tendered was duly advertised and the Respondent was the lowest bidder. According to her, a contract was executed in February 2017 with terms and conditions duly stipulated. She told the Court that the school drilled a new borehole and the same was the source of its water. Referring to PEXH.2 she told the Court that the Respondent abandoned the work at site. She told the Court that there is a Ministry that conducts surveys as they are not allowed to do private surveys, and that the Respondent did request to be allowed to conduct its own survey as per PEXH4. She insisted that the school was not misled by any survey and that the Respondent did not drill any borehole. Referring to PEX.7 she told the Court that the borehole drilling by the Respondent was to end on 17th February 2017.
 23. Enock Sabuni Wanyonyi (PW2) testified that he is a hydro-geologist by profession and was the chairman of the Board of Management at Cardinal Otunga Secondary School between the year 2016-2017. At his request this Court adopted his recorded witness statement dated 27th November 2020 as his evidence in chief. According to him, the Respondent won the contract for the borehole drilling project at the Appellant's school and he was given the site to do the job, but the Respondent is yet to deliver on the same. He told the Court that the school wants a refund of the money paid upfront to the Respondent with interest plus costs.
 24. On cross-examination, he told the Court that the Appellant's school currently gets water from a borehole that is about 1km from the school. He told the Court that the tender for the borehole drilling was advertised via a tender and the Respondent was successful and that agreement between the parties was duly written with precise terms and conditions. He told the Court that the Respondent was supplied with the geologist survey report and it was dig 100 meters deep, but he is not aware if the drilling was ever done. He concurred that the Respondent request to conduct its own survey but he was not aware of the reasons for the same request and that he never asked for the reason behind the request. He told the Court that the 2nd borehole was drilled with a different report and that they never drilled water on the same site as was shown to the Respondent. He insisted that he never saw the Respondent commence drilling of the borehole.
 25. On re-examination, he told the Court that the Ministry of Water guides stakeholders on the aspect of location of water as a report is done indicating its location on the ground, and how far the same should be drilled for. According to him evidence of drilling is that one drills 1 meter, takes the soil and sets it somewhere and keeps repeating the process until they reach the required meters. However, he did not see the Respondent doing the same.
 26. Nazib Khan Kachulala (DW1) told the Court that he is a contractor by profession and the Director of the Respondent herein. At his request this Court adopted his recorded witness statement dated 22nd October 2021 as his evidence in chief. Further, he relied on his list of documents dated 22nd October 2021 which he produced in Court as DEXH.1 -4 respectively. According to him, he never applied for any tender and that vide communications with the former principal at the Appellant's school he took up the project of drilling a borehole for the Appellant's School. He told the Court that there was no formal agreement between the parties. It was his evidence that when he commenced the drilling, he drilled the first 100 meters and established that there was no water prompting him to dig further into the ground as per the instructions of PW2. He told the Court that he dug 30 meters further and dug two more boreholes in search of water. He insisted that the evidence is on ground at the site and that he based his drilling on a geologist report by one Mr. Kihika dated January 2017. Referring to DEXH.4 he told the Court that the Appellant's school was misled by the report dated January 2017 as they dug



- as per the same by could not locate any water at the site. He told the Court that another client of his one, Mr. Fugo Chenge, shared with him a report wanting a borehole dug for him and on inspection he established that the same was prepared by Mr. Kihika and the contents were a duplicate of what the Appellant had shared with him but the places were different. He told the Court that he did not do the geological survey.
27. On cross-examination, he told the Court that the Respondent herein has 2 Directors and that he was instructed to take lead on the drilling at the Appellant's School. Referring to PEXH.2 he told the Court that he did not receive such a letter and that he was the author of PEXH.3 which was response to PEXH.2. Also, he told the Court that he was the one who wrote PEXH.4. It was his evidence that despite drilling, the borehole kept on collapsing, and they rectified the same and kept on drilling. According to him, he left the site of drilling as the school was not paying him. He was paid Kshs. 700,000/- and that the 30% balance was to be remitted once the borehole drilling was completed. He denied the allegations that he never delivered.
 28. On re-examination, he told the Court that as per PEXH.2 the Appellant's school admitted that he had commenced worked and that he requested more funds due to the variations on the 30 meters. According to him, he suggested that they conduct their own survey and then they would have re-drilled the water. He told the Court that the distance between the initial site and the new site was 6 meters.
 29. At the request of the Counsel for the Respondent, on 21st February, 2022 the Court and the parties to this appeal visited the site, Cardinal Otunga Girls High School, wherein the Court established that the scene ground was not levelled up and appeared to have been dug. The Court observed an elevated round casing, that was grey in colour appeared plastic in material and the Respondent noted that he placed the same while digging the borehole.
 30. On cross-examination of the Respondent at the scene, he told the Court that he drilled up to 130 meters as agreed and drilled an additional 30 meters on the instructions of the principal and that he has samples of all that was dug in his office.
 31. On cross-examination of PW1 at the scene, she told the Court that the drilling was not 130 meters deep and no independent report states the same. She insisted that the Respondent won the tender but another person dug the borehole that currently supplies the Appellant's school water. According to her they chose not to dig at the same site as shown to the Respondent as the matter was already in Court, and that she was never served with any Court order stopping her from doing the same. She told the Court that the current borehole supplying them with water is not a property of Cardinal Otunga.
 32. On re-examination of PW1 at the scene, she told the Court that she could not instruct the contractor to dig at the site to avoid conflicts
 33. To establish the depth of the dug borehole on site, the Court ordered that a string and stone be availed to ascertain the same. Counsel for the Respondent objected as the borehole was dug one year ago and the same could have been interfered with by that point. The Court duly noted his concerns but proceeded to conduct the measurement of the depth of the drilled hole. The Court established that the same was not 130 meters.
 34. Chitty on Contracts, 32nd Edn, Vol.1, pg 13, defines a contract as an agreement giving rise to obligations which are enforced or recognized by law.
 35. Section 3(1) of the [Law of Contract Act](#), Cap 23 states as follows;

“No suit shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person unless the agreement upon



which such suit is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized”.

36. It is not disputed that vide a tender process the Respondent herein was contracted by that Appellant herein to drill a borehole at its premises. It is not disputed that pursuant to the said contract, the Respondent was paid an upfront fee of Kshs. 700,000/- and the 30% balance was to be remitted upon completion of the said borehole drilling project. According to PEXH.2 it is clear that the Respondent embarked on the drilling exercise on 7th February 2017 and it was agreed that the Respondent was to complete the same by 17th February 2017. Further, it is also not disputed that the aim of the said borehole drilling project was not attained as there was no water located from the drilled borehole.
37. In its submissions before this Court that Respondent alleges that there was no contract between the parties. The law of contract gives effect to consensual agreements entered into by particular individuals in their own interests. Subject to the PEXH.2 it is clear that there existed a written contract between the parties as the Respondent was duly awarded a tender wherein it was paid 70% upfront fees and the 30% balance was to be offset once the borehole drilling project was completed. Also, it is imperative to note that the said project was to be concluded by 17th February 2017, which the was not the case as of 9th March 2017.
38. From the foregoing it is clear that there existed an advertised tendering process that the Respondent herein in participated in by bidding, the same was accepted and the Respondent won the contract for the drilling of a borehole at the Appellant’s school. I believe that this clearly indicates that there existed a written contract with terms and conditions between the parties herein. This Court referred to the availed a letter marked as PEXH.2 which clearly indicated that the Respondent won the tender, committed to the same by commencing work on 7th February 2017 and orally committed to conclude the said borehole drilling by 17th February 2017. Therefore, the trial Court’s reference to the existence of an oral contract was an error as there clearly exists a written contract that was simply not availed before this Court. We all understand that most of government business is duly recorded for purposes of accountability and it will be farfetched for this Court to assume that the Respondent was orally contracted to drill a borehole in the Appellant’s school and a payment of Kshs. 700,000/= was released to the Respondent herein subject to an oral contract.
39. It is my humble view that the arguments as raised by the Respondent in its submissions before this Court must fail as per PEXH.2. Also, I find that there exists a valid and enforceable written contract between the parties herein and this Court shall proceed to discern the intentions of the parties vide PEXH.2, PEXH.3 and PEXH.4.
40. The Appellant submitted that the Respondent breached the contract between them. According to the Black’s Law Dictionary 9th Edition, Page 213. Breach of Contract is defined as

“a violation of a contractual obligation by failing to perform one’s own promise, by repudiating it, or by interfering with another party’s performance. A breach may be one by non-performance or by repudiation or by both. Every breach gives rise to a claim for damages and may give rise to other remedies. Even if the injured party sustains no pecuniary loss, or is unable to show such loss, with sufficient certainty, he has at least a claim for nominal damages.”
41. The Plaintiff, is not required to establish the causal link (between breaches of an agreement and damages) with certainty, but only to establish that the wrongful conduct was probably a cause of the



loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence. The adequate test to be applied is whether there is evidence upon which a Court of law, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the Plaintiff. This implies that the Plaintiff is to make out a prima facie case, in the sense that there is evidence relating to all the elements of the claim. The Court must consider whether there is evidence upon which a reasonable man might find for the Plaintiff. (Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA) 449.)

42. According to PEXH.2, it is clear that the Respondent commenced work on 7th February 2017, and in the presence of the Appellant, they noted that the said work will be completed by 17th February 2017, but the same was still pending by 9th March 2017. In response, the Appellant vide PEXH.3 committed to have the said borehole drilling project completed by 22nd March 2017, while alluding to the stalling of the project to be as a result of non-availability of a machine to attain the required depth. Based on PEXH.4 it is clear from the borehole progress report dated 5th April 2017, that that Respondents drilled a total depth of 130 meters against the recommended 100 meters, and that the Respondent was still unable to strike the water levels required and that the same borehole kept on collapsing. Subject to the same report the Respondent requested to be allowed to conduct a geological survey at its own cost and re-drill based on the said report, but vide PEXH.7 dated 19th June 2017, the Appellant's school declined the Respondent's request but when the Respondent received the said correspondence it has already re-done the geological survey, and the Appellant's school request to have the report of the said survey shared with the Appellant
43. From the foregoing, at no point did the Appellant's school in its correspondences with the Respondent, as availed in Court, indicate that they did they allow the Respondent to conduct its own geological survey. The Appellant, even after the Respondent proceeded to conduct its own geological survey simply sought for the contentious report and failed to render any response on the same. The Appellant did not issue any orders allowing the Respondent to re-drill even after the Respondent shared with the Appellant its re-geological survey instead they received a demand letter seek a refund of the upfront paid fees.
44. From the foregoing, it is evident that only even with a well done hydro-geological survey, striking of water remains a probability. The Respondent herein been guided by the hydro-geological survey as availed by the Appellant failed to strike any water this prompted him to prepare PEXH.4, a borehole progress report dated 5th April 2017, wherein he suggested amongst other things to be allowed to conduct his own geological survey at his own cost. Been committed to its work, the Respondent eventually did its own hydro-geological survey and established better site for the borehole at only a depth of 80 meters.
45. It is evident that one of the essential roles a contractor handling the borehole drilling exercise has to conduct is the hydro-geological survey. This survey leads the contractor in establishing the depth of the borehole. In this instant appeal, it is certain that the did not breach the contract between it and the Appellant. The Respondent utilized the share hydro-geological survey which was conducted by another person and act each point of drilling he was not striking any water levels. This prompted him to decide to proceed and conduct another hydro-geological survey at his own cost whereby he established another potential site that will have them drilling to a depth of 80 meters. Without venturing further into the substance of the two reports, this Court opines that even if a contractor spearheading the drilling project strikes no water levels they are still entitled to their pay. In most cases when contractors drilling a hole find it to be dry, at that point it is within their right to down their tools which was not the case in this appeal.



46. A visit to the site by the trial Court proved that the Respondent did drill the holes with the Court also noticing the presence of casing. This clearly shows that he did fulfill his part of the contract but in this case, he only hit dry ground. I believe that the Respondent was entitled to the upfront payment for the work done and the drilling of another how outside the identified site area as it sought to strike the water levels.
47. I find and hold that the Appellant has not proved its case on a balance of probability. Accordingly, I enter judgment in favour of the Respondent by upholding the lower Court's decision. Having said as much, the appeal is dismissed with costs to the Respondent.

Order accordingly.

DATED AND DELIVERED AT SIAYA THIS 6TH DAY OF DECEMBER, 2024.

D. KEMEI

JUDGE

In the presence of:

N/A for M/s Chunge for Appellant

Wamalwa Rfor Respondent

Kizito/Ogendo.....Court Assistant

