REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL APPEAL NO. E011 OF 2019

POWERWARE SYSTEMS LIMITED...APPELLANT

VERSUS

SOCABELEC (EA) LIMITED..RESPONDENT

JUDGMENT

1. This is an appeal arising from the Judgment of Hon. K.I. Orenge SRM delivered on the 17th August, 2018 in Milimani Commercial Court Civil Case No.4019 of 2010; the cause of action arose out of a Plaint filed by the respondent against the appellant in the lower court; the respondent claimed that the appellant had subcontracted it to develop an early warning system for the United Nations Office at Nairobi **(‘UNON’**); the respondent stated that it had completed the work and handed over the project to the appellant; and despite having completed the work the appellant failed to pay the respondent an outstanding balance in the sum of KShs.2,006,966/52;

2. The appellant refuted the claim and filed a counterclaim that due to the respondent’s failure to complete the project it occasioned a loss of KShs.2,625,000/-; the trial court found the appellant liable for breach of contract and entered judgment in favour of the respondent; the appellant being aggrieved by the judgment filed this instant Memorandum of Appeal and listed eight (8) Grounds of Appeal summarised as follows:-

(i) The trial court erred in entering judgment in the respondents favour in the sum of Kshs.2,265,000/- which was not the sum claimed in the Plaint;

(ii) The trial court failed to consider that the contract between the appellant and the respondent was contained in a letter dated the 11/07/2008; and that the appellant made payments to the respondent proportionate to the work done; and the sum was paid in Euros 64,804 to the respondent’s subsidiary in Belgium;

(iii) The trial court erred in failing to consider the appellant’s counterclaim; if it had it would have found that the respondent had breached the contract by failing to complete the contract; a fact admitted by the respondent in its pleadings.

3. At the hearing hereof the appellant was represented by learned counsel Mr. Chege whereas the respondent was represented by learned counsel Mr.Khaseke; as directed the parties disposed of the Appeal by filing and exchanging written submissions; which were highlighted by the respective counsel; hereunder are the rival submissions;

APPELLANT’s SUBMISSIONS

4. Counsel submitted that the appellant was contracted by the UNON to supply and install an Early Warning System for the whole UN complex; the appellant sub-contracted the project and invited bidders and received quotations; the respondent submitted a successful quotation contained in its letter dated 11/07/2008 (marked as Exhibit **‘D2’**); the appellant accepted the quotation and this letter marked as Exhibit **‘D2’** formed the basis of the contract between the two parties; and the respondent committed to completing the entire project for the sums payable in the following manner;

30% advance payment upon issuance of the LPO

40% at end of completion of cabling

20% upon installation of all equipment

10% upon commissioning

5. The appellant's contention was that in accordance with the respondent's quotation there was an overpayment of Euros 985.28 (equivalent to Kshs.101582) in the first payment of Euros 64804.04; it later paid the sum of Kshs700,105/- on the 18/07/2008 vide a cheque; the appellant made a further payment of Kshs.92,713/55 by cheque in June, 2009 which is supported by Exhibit '**D6'**; the last payment made was to International Energy Technik Ltd for materials related to the contract which was in the sum of Kshs.153,421/30 (refer to Exhibit **'D8')**; after all these payments any balance was to be paid upon completion of the contract as set out in the agreement;

6. When the overpayment of Euros 985.28 is added to the local component the total sum amounts to Kshs.1,047,821/85; the appellant was able to demonstrate by documentary evidence that it had directly paid the respondent the aforesaid sum;

7. The trial court in making the crucial conclusion misdirected itself when it arrived at the finding that no money was paid to the respondent and that for this reason the appellant was the one in breach of contract;

8. The trial court ought to have considered the contract terms, the fact that there was overpayment and ought to have considered whether there was a balance, if any, and the reasons for none payment; there was also an admission of failure to complete the project by the respondent and the Handover Report had listed the incomplete works; that handover is not synonymous with completion;

9. Even if the works had been commissioned it was admitted that the work had not been completed; and because of the incomplete work the UNON had refused to pay the sum of KShs.2,625,000/- under the main contract with the appellant; which the respondent is liable to pay as pleaded in the counter-claim for having breached the contract;

10. The trial court displayed its misunderstanding of the case by indicating that the amount claimed in the Plaint as KShs.2,625,000/- instead of KShs.2,006,966/52 and also awarding the respondent general damages yet there was no such prayer in the Plaint;

11. The appellant urged this court to allow the appeal with cost both in the lower court and on appeal.

RESPONDENT'S SUBMISSIONS

12. In response the respondent's counsel confirmed that indeed the respondent's claim in the lower court was KShs.2,006,966/52 and not KShs.2,625,000/-; that indeed it was clear that the trial court erred in confusing the two figures set out in the Plaint and the Counterclaim; and ended up awarding the respondent with the latter amount instead of the former; that this court has the power to re-evaluate the evidence and arrive at its own conclusion;

13. The respondent had proved its case whereas the appellant's counterclaim was devoid of any evidence; the basis of the parties' contractual relationship being based on the letter of 11/07/2008 is not contested; neither is the contractual amount set out therein;

14. In accordance with the letter the contract payments had two (2) components; the first was the payment of the sum of Euros 63818.76 and the second was the sum of Kshs.2,333,682/=; the first component was payable to the partner company Socabelec S.A in Belgium for shipment of equipment and material; that at the trial in the lower court this component was not contested nor was it also in dispute; the appellant made the first payment in the sum of Euros 64,804/04 instead of the agreed Euros 63,818.78 which translated to an over payment of Euros 985.28 and at the presiding exchange rate this amounted to Kshs.101,582/- ; this evidence is supported by Exhibit **'D4';**

15. The second component was the amount of Kshs.2,333,682/- inclusive of VAT that was to be paid to the respondent as the local supplier for materials sourced locally; the appellant issued the respondent with a Purchase Order in the sum of Kshs.2,707,071/12 inclusive of VAT and made part payment of Kshs.700,105/- which was 30% in accordance with the contract letter; the mode of payment of the money was to be made as work progressed and in the following manner;

30% upon issuance of the LPO

40% upon completion of cabling

20% upon installation of all equipment

10% upon commissioning

16. The respondent's contention was that the 40% at cabling stage and 20% at installation stage was not honoured by the appellant; that the invoice for Kshs.92,713/59was for a different commodity and was not related to the sum claimed; whereas the sum of Kshs.153,421.30 was not paid to the respondent but to a third party on 14th May, 2008 before the parties entered into the contract on the 11/07/2008;

ISSUES FOR DETERMINATION

17. After hearing the parties rival submissions this court framed the following issues for determination;

(i) Whether or not the respondent proved its case on a balance of probabilities that the appellant breached the contract;

(ii) Whether the appellant proved its counterclaim on a balance of probabilities;

(iii) Whether the judgment dated the 18th July 2018 had errors on the sums claimed;

ANALYSIS

18. This being a first appeal, this Court has a duty to review the evidence submitted at trial to establish if the resulting judgment was justified; this court is guided by the Court of Appeal's renowned case of **Selle& Another vs Associated Motor Boat Co. Ltd &Another (1968) EA 123**; where it was held that the duty of an appellate Court is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that the Court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect; in addition, the Court will as an appellate court, not normally interfere with a lower court's judgment on a finding of fact unless the same is founded on wrong principles of fact and or law;

Whether or not the respondent proved its case on a balance of probabilities that the appellant breached the contract;

19. The standard of proof in a civil action is the usual one of ***'on a balance of probabilities'***; and evidence as to breach of contract by either parties thereto must be proved to that standard; in this instance the respondent in its Plaint claimed that the appellant breached the terms of the contract; whereas the appellant in its counterclaim made the same allegations;

20. It is not in dispute that the terms of the contract are as set out in the engagement letter dated the 11/07/2008 and that it sets out the mode of payment to be made to the respondent and the works to be carried out; the letter indicates that the payment for supplies was to be made in two categories one being a foreign component in the sum of Euros 63,818.76 and the other category being a local component in the sum of Kshs.2,333,682/-;

21. The first part of this issue is whether the respondent failed to complete the work and was therefore in breach of the contract; the second part relates to issue of non-payment of the balance and whether it was the appellant who was in breach of the contract;

22. Starting with the first part; the appellant's contention is that payment was withheld due to the respondent's failure to complete the works; the question that arises is whether or not the respondent completed its work;

23. In addressing this question this court has re-evaluated the evidence of the appellant and the respondent; Patrick Kiiru Kamau (**DW1**) who was the appellant's Managing Director; his evidence at the trial was an admission that the work done was major and that the project was commissioned and was operational; but it was nevertheless incomplete and that even upon issuing a demand to the respondent to complete the work the respondent declined;

24. The respondent's witness **PW1** stated that the scope of the work was as per Appendix A and that the respondent had completed the same; according to Appendix A the project was for the supply and installation of an electrical monitoring system for the whole of the UN Gigiri Complex; the locations for monitoring were marked as Block A,B,C,D,E,F,G,H,I, the Central Area, the Conference Halls, Blocks M,N,P,Q,R,S,T,U,V,W and X; the UPS units output in all the blocks, air conditioners and room temperature thresholds in the CTS server centre;

25. The respondent's witness also stated that the Project Hand Over Report was signed by **DW1** for the appellant, a representative of the respondent and a representative of the UNON; and that the report indicated that the system was indeed installed in accordance with the terms of reference in Appendix A; the report also identified three (3) pending works but there was a clarification that reads as follows;

> ***"The project so far, operates as required with a database set up to store the data to the alarms and the power parameters from the blocks mentioned."***

26. The record reflects that the appellant did not contest the Project Handing Over Report nor did it call any witnesses to adduce any evidence at the trial to demonstrate how these pending works had substantially tainted the respondent's performance;

27. With no evidence to controvert the Project Handing Over Report this court is satisfied that the report suffices as proof that the respondent completed the works; this then leads to the second part;

28. The second part relates to the monies due to the respondent; the appellant's contention is that final payment was to be made upon the completion of works; as pointed out by the respondent the documentary evidence produced in the form of the letter of 11/07/2008 does not support or contain any term to the effect that the final payment was to be made upon the completion of works; the letter was clear that the amount was in the sum of Kshs.2,333,682/- exclusive of VAT; it was to be paid in four (4) installments as set out hereunder;

30% upon issuance of the LPO

40% upon completion of cabling

20% upon installation of all equipment

10% upon commissioning

29. It is trite law that provided the contract is valid the parties are bound by its terms and conditions; again reiterating the trial court's observations in its judgment;

> ***'…no evidence can be adduced to vary the terms of the contract, if the language is plain and unambiguous'***

30. Reference is also made to the case of **National Bank of Kenya vs Pipe plastic Samkolit (K) Ltd &Anor [2001] eKLR** where it was held that a court of law cannot purport to rewrite a contract between the parties, the parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded.

31. It is not disputed that the agreement had two components a foreign supplier and the local supplier; the appellant's evidence was that it made an overpayment to the foreign supplier and paid the sum of Euros 64,804.04 instead of Euros 63,818.76; it is not disputed that this sum was paid directly to the foreign company for the intended purpose and that the goods were delivered; the appellant's contention was that the overpayment was to be deducted from the amounts due to the local supplier; but from the evidence adduced it is apparent that this decision was made unilaterally by the appellant as it failed to provide any evidence that such a decision was communicated to the foreign component and the local supplier and that it had been accepted; nor was there any evidence of a demand letter made to the foreign company for a refund of the overpayment; and a response to that effect;

32. The evidence on record demonstrates that the foreign supplier was based in Belgium and the engagement letter clearly states that;

> ***"The goods are quoted CIF Jomo Kenyatta Airport (Incoterms 2000), IDF; Duties VAT will be on Powerware Ltd's account"***

33. This court reiterates that there is no dispute that the goods were delivered and the monies paid to the respondent's subsidiary in Belgium; and the record reflects that there was no evidence adduced of any demand made for refund from the foreign subsidiary; there was also no evidence that there was any consensus reached with the local supplier or the foreign supplier on the issue of off-setting; without such evidence the appellant cannot purport to unilaterally deduct the sum from the local supplier; the amount stated as an overpayment may have been calculated so as to cushion the charges/fees as cited above;

34. Upon perusal of the agreement of 11/07/2008 this court finds no mention of any term that provides for such off-setting of any of the supplier's payments; and as stated by the trial court in its judgment;

> ***'…no evidence can be adduced to vary the terms of the contract, if the language is plain and unambiguous.'***

35. From the evidence adduced it is apparent that the only monies in contention is that of the local supplier; the letter of 11/07/2008 was clear that the amount was in the sum of Kshs.2,333,682/- exclusive of VAT; it was to be paid in four (4) installments as set out hereunder;

30% upon issuance of the LPO

40% upon completion of cabling

20% upon installation of all equipment

10% upon commissioning

36. The appellant and the respondent do not dispute that the initial 30% of KShs.700,000/- was paid; and there is documentary evidence to that effect produced by the appellant that this payment was made on the 18/07/2008 vide a cheque; the appellant claimed to have made a further payment of Kshs.92,713/55; there is also documentary evidence produced in support of this payment which was made by cheque in June, 2009 ('Exhibit '**D6');**

37. Even though the respondent disputes this payment and contends that it was made for a different purpose; this contention was not controverted by any substantive evidence from the respondent and therefore this amount is found to have been paid; and the same is deductible from the main sum;

38. The appellant also claims to have made payment of Kshs.153,421/30 and produced documentary evidence(Exhibit **'D8')**in support; but this court upon perusal of the same concurs with the respondent's submission that this last payment was made by the appellant to International Energy Technik Ltd; whether it was for materials related to the contract the document produced demonstrates that this payment was made to a third party; another notable factor is that the **'Exhibit D8'** is dated the14th May, 2008 which is a date prior to the date 11/07/2008 when the parties herein entered into the contract; therefore it is quite evident that this payment has no bearing to the contract herein and therefore these sums cannot be deducted from any sum that is due and payable to the respondent;

39. The overpayment to the foreign supplier as stated earlier also has no bearing to the contract with the local supplier; and this sum is thereforenot deductible from the amount due as setting off is found not to have been a term of the agreement; the appellant therefore is found to have produced evidence to support only two payments that is Kshs.700,105/- and Kshs.92,713/59 and if these sums are deducted from the contractual sum of Kshs.2,333,682/- the balance due will be in the sum of Kshs.1,540,863/41;

40. Having satisfied itself that the Project Handing Over Report suffices as proof that the respondent completed the works this court finds that pursuant to the terms of the contract the balance was payable upon the commissioning of the project and not upon completion; the terms of the contract are clear and unambiguous and the appellant is bound by the terms and the fact is that handover/commissioning is not synonymous with completion;

41. This court finds no good reason to interfere with the trial court's finding in favour of the respondent that there was clear breach of contract on the part of the appellant as it failed to pay the respondent the balance due as per the agreement; but finds that there is need to interfere with the judgment amount as the sum due to the respondent was not in the sum of Kshs.2,265,000/- as set out in the judgment; nor is the respondent entitled to the sum set out in the Plaint; from the evidence adduced this court is satisfied that the respondent is entitled to the

sum of Kshs.1,540,863/41;

42. This court is satisfied that the trial court considered the contract terms and made a correct finding that there was clear breach of contract on the part of the appellant as it had failed to pay the respondent the balance due as per the agreement;

43. This ground of appeal is found lacking in merit and is hereby disallowed.

Whether the appellant proved its counterclaim on a balance of probabilities;

44. The legal burden of proof lies on the party who invokes the assistance of the law;and this court reiterates that the standard of proof is ***'on a balance of probabilities'***; the applicable law is found in the following sections of the Evidence Act **('Act')**

45. Section 107 (1) of the Act supports this position and reads as follows;

> ***"107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist…"***

46. Section 108 of the Act provides that;

> ***"The burden of proof in a suit or proceedings lies on that person***
>
> ***Who would fail if no evidence at all were not given on either side."***

47. Section 109 of the Act reads as follows;

> ***"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence unless it is provided by any law the proof of that fact shall lie on any particular person."***

48. The appellant's only witness confirmed that the work done was major and that the project was in operation; but because of the incomplete work the UNON had refused to pay the sum of KShs.2,625,000/- under the main contract with the appellant; this witness produced no communication or witness evidence from the UNON to show that the project was incomplete; or that the UN had refused to pay the appellant company the said sums due to the respondent's unfinished works; and therefore produced no evidence to establish that the appellant too was in breach due to the sub-contractor's (read respondent's) breach of contract;

49. The facts that qualified the breach of contract as set out in the counterclaim were specifically within the appellant's knowledge and so the burden of proving these facts upon a balance of probabilities was upon the appellant; and the appellant was the party who would fail in the counterclaim if no evidence was given by either side so the burden was upon the appellant to prove that by failing to complete the terms of the contract the respondent had breached the contract and was therefore liable to compensate the appellant;

50. As pointed out by the trial court in its judgment that the appellant adduced no evidence that after the project was handed over the UN did not pay the appellant; the court also noted that the appellant had not sued the UN in a bid to seek to recover any outstanding monies claimed;

51. There was no witness called from the UNON to support the contention of incomplete works; neither was there any documentary evidence produced or any communication from the UNON withholding payment for the incomplete works and breach of the main contract;

52. The upshot is that the trial court's failure to consider and address the appellant's counterclaim in its judgment is due to fact that it was devoid of any evidence; and this court finds the appellant failed to lead any evidence to substantiate its claim that it had lost the sum of Kshs.2,625,000/- due to the respondent's alleged breach of contract; in the circumstances this court finds that the appellant's claim must fail;

53. The ground of appeal is found lacking in merit and it is hereby disallowed;

Whether the judgment had errors on the sums claimed; ***and the consequences of the errors;***

54. This court has perused the court record and notes that indeed the respondent's claim in the lower court was in the sum of KShs.2,006,966/52 and not KShs.2,625,000/-;which was actually the sum pleaded in the counterclaim; as regards errors and mistakes in judgments this court has the power to re-evaluate the evidence which may then help cure any anomaly;

55. This court in re-evaluating the evidence adduced finds that the judgment had errors in the sums claimed; and it is indeed very clear that the trial court erred in confusing the figures set out in the Plaint and the Counterclaim; and ended up awarding the respondent the amount set out in the Counterclaim as opposed to the amount pleaded in the Plaint;

56. Nonetheless after re-analysing the evidence this court reiterates its findings that the sum due to the respondent is not in the sum of Kshs.2,006,966/- as set out in the Plaint and that the respondent is entitled to the sum of Kshs.1,540,863/41.

FINDINGS AND DETERMINATION

57. For the forgoing reasons this court makes the following findings and determinations;

(i) This court finds that the trial court confused the amounts in the Plaint with the amounts set out in the Counterclaim; the judgment dated the 17/08/2018 awarding the sum of Kshs.2,625,000/- is hereby set aside and substituted with a judgment in the sum of Kshs.1,540.843/41 in the respondent's favour plus interest thereon at court rates;

(ii) This court finds the appellant's counterclaim was devoid of any evidence and it is hereby dismissed;

58. The costs are in the discretion of the court; and in this instance the appellant shall bear the costs in the lower court and in this appeal;

It is so Ordered.

Dated and Signed at Nyeri this 5th day of February, 2020.

HON.A.MSHILA

JUDGE

Dated, Signed and Delivered at Nairobi this 5th day of February 2020.

HON.A.MSHILA

JUDGE