



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. 153 OF 2019

SANTOKHSINGH T/A TRILOK CONSTRUCTION.....APPELLANT

-VERSUS-

SUCHAMINVESTMENTS LIMITED.....RESPONDENT

[BEING AN APPEAL AGAINST THE JUDGMENT AND DECISION

OF HON. E.K MAKORI ON THE 27TH JUNE 2019 IN THE CHIEF

MAGISTRATE'S COURT AT MOMBASA IN CIVIL CASE NO. 1524 OF 2017]

JUDGMENT

1. This is an appeal against the Judgment of Mombasa Chief Magistrate in CMCC No. 1524 of 2017. The Appellant sued the Respondent for breach of agreement entered between the Parties partly in writing and partly in oral. The Appellant's case before the trial court was that the Respondent engaged the Appellant to undertake building work at the Defendant's proposed reconstruction and refurbishment of a hotel known as Amani Tiwi Beach Resort situated on L.R. 13442 in Tiwi, Kwale County, within the Republic of Kenya.

2. The Appellant averred that it was an agreed term that it would at various intervals submit to the Project Quantity Surveyor an application for payment giving details of the work done and the materials on the site. Consequently, an interim valuation of the work done and of the materials used on the site would be prepared by the consulting quantity surveyors and the project manager; Messrs. Precise Cost Engineering International Company Ltd. The report would then be forwarded to the architect who would in turn issue an interim payment certificate in favour of the Appellant and payment would be effected to thereof within 14 days of presentation of the Certificates to the Respondent.

3. As at 30th September, 2013 the Appellant averred that it had undertaken the construction and Refurbishment work at the Respondent's above stated premises at a cost of Kshs.81, 236,406.61 but the Respondent only paid to a tune of Kshs.64,721,598.50 leaving a balance of Kshs.16,514,808.11 which was the basis of the Plaintiff's claim at the lower court.

4. In response thereof, the Respondent filed its statement of defence on 24th October, 2017. It denied the claim and counterclaimed against the Respondent for Kshs.24,932,857/=. It averred therein that the final certificate by the consulting Quantity surveyor is dated 3rd July, 2013 and only recommended that the Appellant be paid the sum of Kshs.7,947,089.07 and not for Kshs.16,514,808.11 as the Appellant alleges.

5. The Defendant's counter claim for Kshs.24,932,857/= is on the basis of substandard work done by the Appellant including Kshs.12,170,000/= which is an outstanding cost for accommodation and meals for the Plaintiff's labour force. According to the Respondent, the amount owing to the Appellant for Kshs.7,947,089.07 should be set off to leave a balance of Kshs.16,985,768/= and that Judgment be entered against the Appellant in that sum.

6. At trial, the Appellant testified on his own behalf. He adopted his statement dated 4/8/2018 as evidence in chief. He further stated that he was never invoiced for the claims raised by the Respondent. On cross-examination he denied being aware of the document dated 3/7/2013 which showed the amount due to him was Kshs.7,000,000/=. He confirmed that it was prepared by the surveyor who prepared his final report. The Appellant conceded that a room had been reserved for him at the hotel for his stay but the same was part of the agreement and ought not to have been charged. The agreement as presented was only signed by the Appellant and the Respondent never signed it.

7. For the Respondent, Amurit Singh, its Chief Engineer testified. He adopted his statement dated 15th January, 2019 as evidence in chief. He conceded that the Defendant contracted the Plaintiff to undertake some construction and refurbishment works at its hotel known as Amani Tiwi Beach Resort which is located in Kwale County.

8. On terms of payment, DW1 stated that the Plaintiff ought to submit to the project Quantity Surveyor an application for payment containing

details of the work done and the materials on the site. The Quantity Surveyors together with the project managers would then prepare an interim valuation of the work done and the materials on site and then forward the valuation to the architect who in turn would issue an interim payment certificate in favour of the Plaintiff. The Defendant at this point would then be obliged to make the payments. However, Mr. Amurit added that the certificate of payment would be subject to the Defendant's satisfaction that the work was carried out as agreed and further recoup costs of materials that might have been supplied to the Plaintiff and recovery of any payments that might have been done.

9. On that regard, according to DW1, the last payment certificate was made on 3RD July, 2013. The work done was quantified to be Kshs.72,668,687.57 out of which the Defendant paid the Plaintiff Kshs.64,721,598.50 leaving a balance of Kshs.7,947,089.07/=. Upon examining the work done it is averred that the Defendant was not satisfied with the work done by the Plaintiff and had to carry out repairs for the substandard works. The Defendant further alleged to have supplied bags of cement which were not accounted for and finally it is averred that there are outstanding expenses for accommodation and meals for the Plaintiff's labour force. All these were raised in the counter claim of which in total the Defendant claimed against the Plaintiff Kshs.24,932,857/=-.

10. After considering the evidence and the submissions made on behalf of the parties, the learned trial Magistrate delivered the impugned judgment on 27th June, 2019 and dismissed both the Plaintiff's claim and the Defendant's counter claim on ground that the terms of the contract were not clear for the court to ascertain on liability.

11. The Appellant was aggrieved by the said Judgment and now challenges it on four (4) grounds as set out in the memorandum of appeal dated 29th July, 2019, as follows:

a. The trial magistrate erred in law in holding that he was not able to ascertain the terms of the contract between the Plaintiff and the Defendant.

b. The Honourable Magistrate erred in law and in fact in failing to evaluate the evidence on record before arriving at the decision to dismiss the Plaintiff's suit.

c. The learned magistrate totally failed to take into consideration the submissions by the Plaintiff and to critically evaluate the evidence on record or background of the claim and in so doing arrived at a wrong decision.

d. The decision by the Magistrate is contrary to law for having failed to determine whether there was indeed a contract between the Plaintiff and the Defendant the terms thereof and alleged breaches.

12. When this appeal first came before this court on 11/10/2019, the court by the consent of the parties directed that the appeal be heard by way of written submissions. At the time of writing this Judgment only the Appellant had filed his submissions which I now proceed to consider.

The Appellant's Submissions

13. The Appellant submits that the Respondent did not dispute having entered into a contract with the Appellant with regard to construction and refurbishment of its hotel known as Tiwi Hotel in Kwale County. The Respondent did not dispute owing to the Appellant and as such the trial magistrate is said to have erred in law. The Appellant executed its part by undertaking the construction work and the trial court ought to have considered the terms and apply the same to the oral agreement between the parties. In support of this line of argument, the Appellant relied on the case of *Trishcon Construction Co. Ltd –vs- Avtra Singh Bahra [2017]eKLR*.

14. On the second ground of appeal, the Plaintiff submitted that the trial magistrate erred by failing to evaluate the evidence presented before him by the parties. In that regard it is submitted that PW1 testified to the affirmative that there was a contract between the parties and further that the interim payment certificates produced as P. Exb1 were enough proof that the Appellant indeed performed their contractual obligations. According to the Plaintiff, DW1 conceded that all the interim payment certificates were prepared by the Defendant's architect upon satisfaction of work done and no complaints were ever raised thereof.

15. In response to the Respondent's counter claim, the Appellant submits that there was no evidence adduced to show that either the Respondent supplied any cement to the Appellant or that the Respondent offered any accommodation and meals for the Appellant's workers. It is averred that the agreement was that the Respondent could offer accommodation for senior workers to occupy upto three (3) rooms without being charged. As such the Appellant is of the view that the counter claim is an afterthought and this court should revisit the evidence afresh. To buttress its argument, the Appellant relies on the case of *Abok James Odera & Associates-vs-John Patrick Macharia t/a Macharial & co. advocates [2013] eKLR*.

16. Turning on the fourth ground of appeal on whether the trial magistrate erred in law by failing to determine whether there was contract between the parties, it is the Appellant's submission that it has proved that it had satisfactorily completed the project. That during the contract period, the Appellant was issued with payment certificates totaling to Kshs.81,236,406.61 but the Respondent only honored payment certificates totaling to Kshs.64,721,598/=-, leaving a final certificate of Kshs.16,513,808.11 dated 17th May, 2013 unpaid. The unpaid certificate is said to have been prepared by the Respondent's architect upon satisfaction of the work done having been executed by the Respondent's quantity surveyor. Finally the Appellant submitted that there were no complaints raised with regard to defects within clause 41.5 of the agreement. The Appellant seeks this court to quash the trial court judgment and replace it with judgment as sought in the Plaintiff.

Respondent's Submissions

17. The Respondent's submissions are dated 5th March, 2020 and were filed on 26th May, 2020, The Respondent's submissions are based on evidential facts as considered above, It is sought that the court do uphold the lower court decision.

Analysis and Determination

18. I have considered the grounds of appeal by going through the evidence adduced at the trial court, the submissions by both parties and the cited law. In my view, there are three issues for determination. These are;

- a. *Whether there was a contract capable of enforcement between the Appellant and the Respondent, and if so;*
- b. *Whether the Appellant had proved his case on a balance of probability;*
- c. *Whether the prayers sought by the Appellant can issue.*

19. In addressing those issues, this court is cognisant of its duty on a first appeal such as this. This court is at liberty to depart from the conclusions reached by the trial Magistrate should its review, evaluation and analysis of the evidence lead it to different conclusions. ***[See the case of Selle vs. Associated Motor Boat Co Ltd [1968] EA 123].***

20. The factual basis of the reliefs sought is not hard to discern. The Appellant and the Respondent entered into a reconstruction agreement the terms of which the Appellant was to reconstruct and refurbish the Respondent's hotel known as Amani Tiwi Beach resort in Kwale County. The Respondent engaged the services of an architect; Messrs. T. Gaal & Associates and a consulting Quantity Surveyor; ***Precise Cost Engineering International Co. Ltd*** to examine the quality of works done by the Appellant.

21. It was agreed that payments would be made to the Appellant at various intervals. The Appellant would submit an application for payment detailing the work done and materials on the site to the Quantity Surveyor. The Quantity surveyor would then prepare an interim valuation of the work done and materials used and forward the same to the architect who would in turn issue an interim payment certificate. At this point the Respondent would then make the payment. These issues are not disputed. They have been confirmed by both the Appellant's and Respondent's witnesses. This court finds that parties had intended to be bound by those terms to give rise to a legal relation.

22. The Appellant argued that both parties were in agreement to be bound by the standard terms of a building contract as outlined in the Agreement and Conditions of Contract Works (Joint Building Council of Kenya 1999 Edition) ("the JBC Agreement") but the agreement presented in this court was not signed by the Respondent. This court is unable to accede to the Plaintiff's contention that the contract was partly in writing. A written agreement or contract not signed by both parties may not be deemed to constitute the contract between the two parties. The parties were left to adhere to an oral agreement and by their conduct, implied the intention to give rise to a legal relationship. This court finds that there was an oral contract between the parties the terms which are outlined in the preceding paragraphs.

23. What is in dispute as I grasp the Appellant's case is that the payment certificates were delivered to the Respondent for payment and were partially paid. The Appellant argued that the Respondent has refused to settle the last valuation certificate dated 17th May, 2013 for Kshs.16,514,808.11 prepared by the Quantity Surveyor Messrs. Precise Cost Engineering Ltd. On the other hand, the Respondent averred that the said valuation certificate is unknown to it and in its consideration the last/final valuation Certificate is dated 3rd July, 2013 for Kshs.7,947,089.08. The Respondent sought the that amount be set off to its counter claim against the Appellant for Kshs.24,932,857/=. The Respondent's counter claim is based on the allegations that there was breach on part of the Appellant through defective works and failure to account for certain bags of cement delivered to the Appellant. The claim further extends accommodation and meals offered to the Appellant's workers.

24. The law as it stands, is that he who alleges must also prove. To begin with the Respondent's position, no sufficient evidence was tendered to prove the specific defective works which necessitated any remedial or rectification work. If any rectification was done as alleged then no evidence has been tendered to that effect. There is also no evidence to buttress the claim for meals and accommodation alleged to have been offered to the Appellant's workers which was denied. For the unaccounted bags of cement, I agree with the Appellant's argument that no proof has been tendered to show that the bags of cement were indeed supplied to the Appellant. Section 107 of the Evidence Act (Cap 80) demands that the Defendant ought to have tendered such evidence to succeed. The Respondent did not, and as such the counter claim ought to fail.

25. Turning to the Appellant's claim the main relief sought is to compel the Respondent to make payment on the last valuation certificate dated 17th May, 2013 for Kshs.16,514,808.11 and a declaration that the Respondent was in breach thereof. However, for those orders to issue, this court has to satisfy itself that the correct procedure for payment as agreed to by the parties was followed. To wit, this court has to be satisfied that an interim valuation had been done by Messrs. Precise Cost Engineering Co. Ltd, the Quantity Surveyor then the valuation forwarded to the architect; T. Gaal & Associates and indeed a payment certificate issued. At this point then this court could have only option of compelling for the payment thereof.

26. However, there are two valuation reports by prepared by the Quantity Surveyor (Precise Cost Engineering Co. Ltd). One, it is alleged that it was the last an unpaid valuation certificate. On cross examination, the Appellant conceded that the said valuation certificate was unsigned. The Respondent, on its side produced a valuation report dated 3rd July, 2013 as the final valuation prepared by the same Quantity Surveyor. The final valuation is captured therein as Kshs.7,947,089.07 and the Respondent averred that it was the only valuation pending payment.

27. The two valuation reports which are alleged to be the final depending on who is saying it, make it difficult for the court to ascertain the truth. Nothing would have been better for the Appellant than to call the Quantity Surveyor's Executive Manager who has been preparing the valuation report as a witness before this court so he could shed light on the issue. The genuineness of the valuation certificates could be ascertained if the maker of the documents was called as a witness and examined on their contents.

28. In the circumstances, it is difficult for the court to ascertain the truth on the valuation 9 dated 17th May, 2013. This is because unlike the other valuations presented as evidence this one has not been signed by the Surveyor. Secondly, the Respondent produced an alternative

Valuation report dated 3rd July, 2013 which it referred to as the last valuation. It is therefore, this court's view that the Appellant ought to have called Mr. Erastus Mwanjama Katani who prepared the valuation to prove its preponderance.

29. That being this court's view of the matter, I am not persuaded that the Appellant established, to the required standard on balance of probabilities, the sum of Kshs.16,514,808.11 claimed to be due as per the valuation report dated 17th May, 2013.

30. However, in the interest of Justice this court has noted that the Respondent admitted owing the Appellant Kshs.7,947,089.08 vide the valuation Certificate dated 3rd July, 2013. The Respondent sought the said claim to be set off from the amount counter claimed. Having dismissed the counter claim for want of proof, this court is inclined to enter judgment in favor of the Appellant for the amount admitted by the Respondent being Kshs.7,947,089.08. There is no defense to this amount. The totality of the circumstances and facts dictate so. This court therefore exercises its discretion to grant judgment on admission as provided for under Order 13 Rule 2 of the Civil Procedure Rules, 2010 for Kshs.7,947,089.08 in favour of the Appellant.

Disposition

31. As I finish I want to re-emphasize that the Plaintiff deserves to be compensated for the work and services rendered to the Defendant and which the Defendant took over and benefited from. The result of the foregoing is that, the appeal partially succeeds. I set aside the lower court decision dismissing the Plaintiff's claim and substitute it with Judgment against the Respondent for the amount admitted being Kshs. 7,947,089.08.

32. Although the Appellant has partially succeeded in his appeal, I believe, in the circumstances of this case, each party should bear its own costs of the appeal.

Orders accordingly.

Dated, Delivered and Signed at Nairobi this 2nd day of JUNE, 2020.

D.O CHEPKWONY

JUDGE

In view of the declaration of measures restricting court operations due to the COVID-19 pandemics, and in light of the directions issued by His Lordship, the Chief Justice, on 15th March 2020. This ruling/judgment has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159 (2) (d) of the Constitution which requires the court to eschew technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 18 of the Civil Procedure Act, Cap 21, Laws of Kenya, which impose on this court the duty to use, inter alia, suitable technology to enhance the overriding objective, which is to facilitate just, expeditious proportionate and affordable resolution of civil disputes