



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CIVIL APPEAL NO. 83 OF 2019**

**MBOFOMA COMPANY LIMITED.....APPELLANT**

**VERSUS**

**NYANSIONGO TEA FACTORY LIMITED.....RESPONDENT**

(Being an appeal from the Judgment and Decree of Hon. S.K. Onjoro (S.R.M.) at the Chief Magistrates Court at Kisii in Civil Suit No. 220 of 2015 dated 14<sup>th</sup> June 2019)

**JUDGMENT**

1. The facts leading up to this appeal are that the appellant herein was awarded a tender for construction of an ablution block and withering building external walls by the respondent. The appellant claims that it completed the entire work as agreed but the respondent failed to pay it in full. The appellant also claimed that the respondent refused to grant it a certificate of completion, a certificate of defect made good and retention of 5% of every payment which prompted it to file the case before the trial court.

2. When the matter came up for hearing before the trial court, **Francis Nyakundi Oyagi (PW1)** a director of the appellant company, testified that after they got the tender to develop ablution blocks for the defendant, they entered into a fixed price contract and commenced construction on 7<sup>th</sup> May 2013. He stated that the work was completed within 16 weeks as agreed and they received a partial payment of Kshs. 4,409,269.71/=. PW1 complained that they were not paid the balance of Kshs. 2,511,762.51/= and a sum of Kshs. 220,463.52 being 5% of every payment which had been retained cater for defects.

3. During cross examination, PW1 admitted that the plaint did not state how much the appellant was paid and how much it was claiming from the respondent. He explained that the work was done in stages and once it was approved by the works clerk, an invoice was issued. He however conceded that he did not have the invoice he issued on completing the project. He also stated that he installed electricity but was not given a certificate for the work. He stated that the bill of quantities indicated the materials that he was to use and there had been no claim that he had used sub-standard material.

4. **Samuel Onderi Miroga (PW2)** stated that he had been nominated by the appellant company to do electrical works at Nyansiongo Tea Factory, Ablution block. He started the work on 16<sup>th</sup> October 2013 and completed it on 20<sup>th</sup> October 2013. In cross examination, PW2 stated that he did not have any document to show that his works had been approved. He also stated that he was not given the bill of quantities by the plaintiff and admitted that he was oblivious of the terms of the contract between the appellant and the respondent.

5. The respondent's witness **Julius Oroko (DW1)** adopted his statement dated 11<sup>th</sup> September 2018 as his evidence in chief. On being cross examined he stated that the contract was a fixed price contract for a sum of around Kshs. 6,700,000/=. He testified that he was one of the people who were supposed to confirm the works had been done well and added that the ablution block was working and had electricity and water. DW1 also testified that according to the records he had extracted, they had paid the appellant a sum of Kshs. 4,110,529.65 excluding 5% retention. He insisted that there was no balance owing to the appellant and was of the view that if certificates were not issued, it meant that the work had not been completed.

6. Having considered the evidence before it, the trial court found that there was no evidence that the appellant had submitted its invoice for electrical and plumbing works and the respondent had failed to settle it. The trial court also observed that the plaintiff had failed to specify what he was seeking in his pleadings and thus dismissed the suit.

7. The appellant has now appealed against that decision of the trial court. I agree with the respondent's complaint that the appellant's memorandum of appeal was needlessly wordy. The grounds of appeal in the memorandum of appeal can be summarized as follows;

- a. The trial magistrate erred by failing to note that the contract was one contract and not one with sub contracts for electrical and

plumbing works.

b. The trial magistrate erred in finding that the plaintiff did not submit invoices for electrical and plumbing works done.

c. The trial magistrate erred by failing to note that the plaintiff was also claiming issuance of various certificates apart from the balance of the work done and the retention monies.

d. The trial magistrate failed to note that it was the defendant to issue certificates for work done and the plaintiff to thereafter issue invoices accordingly.

e. The trial magistrate failed to note that the certificates in relation to electrical and plumbing work were never issued despite work having been completed and the ablution block being in use.

f. The trial magistrate erred in making a finding that the plaintiff's pleadings were vague and gave undue regard to procedural technicalities.

g. The trial magistrate disregarded the evidence and only based his judgment on pleadings.

h. The trial court failed to appreciate that the bone of contention was the defendant's failure to pay the entire amount in terms of the fixed contract.

8. The parties agreed to canvass the appeal by way of written submissions which I have duly considered. For the appellant, it has been argued that there was no dispute on the nature of the contract herein. The appellant was to complete construction of ablution blocks and install electricity and water whereas the respondent was to pay an agreed fixed price for the work. The appellant's counsel submits that the appellant performed its part of the contract and the ablution block is fully functional and in use. He submits that in contrast, the respondent only paid a sum of Kshs. 4,110,529.95 out of an agreed sum of Kshs. 6,700,568.70/=. The appellant also complains that the respondent withheld payment of 5% retention money and failed to issue the appellant with a certificate of completion of work and a certificate of defect made good.

9. The appellant's counsel contends that although the appellant failed to mention the amount due to it in the plaint, the contract was clear and specific and the respondent is obliged to perform its part of the contract. Counsel argues that it is the duty of the court to see to it that each party has fulfilled its obligations under a contract. He argues that there is clear evidence that the respondent has not paid the balance due to the appellant in breach of the contract. He therefore urges the court to compel the respondent to honour its part of the obligation being payment of the fixed price for the work done and completed. He also argues that the court ought to do substantive justice without undue regard to technicalities.

10. The respondent's counsel contests the manner in which the memorandum of appeal has been drawn. He argues that contrary to Order 42 Rule 1(2) of the Civil Procedure Rules, the memorandum of appeal contains arguments and narratives which make it difficult to understand the grounds upon which the appeal is based. The respondent also supports the trial court's decision to dismiss the appellant's case on the ground that the appellant had not pleaded the prayers sought.

11. I have analyzed the evidence afresh and drawn my conclusion as is expected of a first appellate court(see. **Selle & Another v. Associated Motor Boat Co. Ltd & Others [1968] EA 123**). I have also analyzed the memorandum of appeal and the parties' submissions. In my view the issues that are for the determination are;

a. Whether the trial court erred in finding that the appellant had failed to prove its case; and

b. Whether the trial court erred in dismissing the appellant's case for failure to plead the orders sought.

12. It is not in dispute that the parties herein entered into a contract for construction of an ablution block and withering building external walls by the appellant for the respondent. PW1 testified that the work commenced on 7<sup>th</sup> May 2013 and was completed within 16 weeks as agreed in the contract. PW2 confirmed that he had been instructed by the appellant to install electricity at the site and he had completed the work and was duly paid for his services.

13. PW1 further testified that the contract was a fixed price contract. The respondent's witness DW1 agreed that the contract was a fixed price contract without variations. He added that it was an express term of the contract that the appellant would obtain a one priced bill of quantities which contained the materials to be used and the prices of the materials for various stages of the work. He stated that the contract involved two stages the first being the civil work which involved the building of the ablution block and plumbing and the second being the electrical works. In his written statement, DW1 claimed that the appellant only obtained the bill of quantities and drawings for the civil work but did not obtain one for the plumbing and the electrical works. Consequently, the payment for the appellant was only restricted to the civil works and did not include plumbing and electrical works.

14. DW1 explained that for payments to be made an invoice had to be accompanied by a certificate of the works done and duly approved by the clerk of works. He claimed that the plaintiff did not submit any invoice or certificate for plumbing and electrical works as he never undertook the work. He insisted that the defendant had fully performed its contractual obligations and did not owe the plaintiff any monies in respect of the contract.

15. When probed during cross examination, DW1 told the trial court that he was among the persons tasked with confirming that the work had been done properly. He stated that the ablution block was working well and had electricity and water. I found no proof on record to support

the respondent's claim that the bill of quantities obtained by the appellant did not include plumbing and electrical works as claimed by DW1. Similarly, no evidence was produced to show that it was a term of the contract that the appellant was to obtain a certificate for the works done. According to the appellant, the issuance of the certificate of completion and certificate of defect made good were supposed to be issued by the respondent after the construction was completed.

16. It is clear from the evidence of both PW1 and DW1 that the appellant completed the works as agreed. Despite admitting that the ablution block had electricity and water, it was established from the evidence of PW1 and confirmed by the evidence of DW1 that the appellant was only paid a sum of Kshs. 4,110,529.65/= for civil works and not the entire sum of Kshs. 6,700,568.70 as agreed. DW1 also admitted that the amount paid to the appellant did not include the 5% retained to cater for defects even when he had admitted that the ablution block was functioning and had electricity and plumbing. Based on this evidence, it is my finding that the respondent acted in breach of the contract by failing to pay the contractually agreed sum for work done.

17. That said, I am of the view that this appeal must fail for the reason that the appellant failed to properly plead its case. It is a trite principle of law that a party is bound by his own pleadings and cannot be allowed to raise an issue without amending his pleadings. In the case of *Caltex Oil (Kenya) Limited v Rono Limited Civil Appeal No 97 of 2008 [2016] eKLR* the court emphasized on the relevance of pleadings in the following terms;

[Pleadings] have the potential of informing each party what they expect in the trial before the court. If a party wishes the court to determine or grant a prayer it must be specifically pleaded and proved. The pleadings are a precursor for a party to lead evidence in satisfaction of the prayers he seeks to be granted in his favour. **Where no such prayer is pleaded in a specific and somewhat particularized manner, the party is not entitled to benefit and the court has no jurisdiction to whimsically grant those orders.** [Emphasis added]

18. The respondent also referred this court to the case of *Raila Amolo Odinga & Another vs IEBC & 2 Others [2017] eKLR* where the Supreme Court cited the approval the decision of the Supreme Court of India in the case of *Arikala Narasa Reddy v. Venkata Ram Reddy Reddygari & Anr*, Civil Appeal Nos. 5710-5711 of 2012; [2014] 2 S.C.R thus;

In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.

19. The appellant did not specify the amount of money it claimed from the respondent in its plaint. It is only during trial that PW1 stated that the amount claimed by the appellant from the respondent was a total of Kshs. 2,511,762.51. He testified that the figure included Kshs. 2,291,298.99 which was the balance of the agreed sum and Kshs. 220,463.52 which had been withheld to cater for defects upon the completion of works. These facts were not pleaded by the appellant in its plaint.

20. I dismiss the appellant's argument that the defect in the pleadings was a technicality which the court should disregard in favor of doing substantive justice. Firstly, it has been held that Article 159(2) (d) of the Constitution is not a cure-all for all procedural shortfalls. (See *Charles Wanjohi Wathuku V Githinji Ngure & Another Civil Application No. Nyr. 9 Of 2016 [2016] eKLR*, *Raila Odinga & 5 Others v. IEBC and 3 Others Petition No. 5 Of 2013 [2013] eKLR*, *Nicholas Kiptoo Arap Korir Salat V IEBC & 6 Others [2013] eKLR*) Secondly, pleadings must clearly state a party's case. Where a party to a suit fails to make a specific prayer in its pleadings, the court lacks the jurisdiction to grant those orders. The trial court's decision to dismiss the appellant's case was therefore well founded.

21. The upshot of the foregoing is that this appeal is found to be lacking in merit and is dismissed with costs to the respondent.

**Dated, signed and delivered at KISII this 9<sup>th</sup> day of July 2020.**

**R.E.OUGO**

**JUDGE**

**In the presence of:**

**Mr. Okenye For the Appellant**

**Mr. Nyachiro For the Respondent**

**M/s Rael Court Assistant**