



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NYERI**

**CIVIL APPEAL NO.79 OF 2014**

**BLUE VALLEY ENTERPRISES LIMITED.....APPELLANT**

**~VERSUS~**

**THE BOARD OF GOVERNORS**

**RUTHAGATI SECONDARY SCHOOL.....RESPONDENT**

***(Being an appeal from the Judgment and Decree of Hon. C. Wekesa (SRM) dated 28<sup>th</sup> October 2014 in Nyeri CMCC No.80 of 2013)***

**JUDGMENT**

**1. Introduction**

On 14<sup>th</sup> March 2013 the Appellant instituted CMCC No.80 of 2013 against the Respondent for Kshs.992,878.80 being payment for a building contract in which the Respondent allegedly engaged the Appellant to construct a dormitory. According to the Plaintiff, the contract was entered into on 8<sup>th</sup> June 2010 and the terms dictated that the Appellant would deploy its workmen at a fee to be ascertained by the District Works Officer and upon presentation of certificates at certain levels of the building the Defendant would pay for the ascertained amount. The Appellant stated that the contract required the Ministry of Works through the District Works Officer of the relevant District who would certify all the works done and issue a certificate to enable the Respondent honour its payment obligations.

In a Defence dated 12<sup>th</sup> April 2013, the Respondent contested the Appellant's claim stating that the material contract was for a fixed figure of kshs. 2,910,210/- as stipulated in the Appellant's letter dated 15<sup>th</sup> June 2010. Further the Respondent stated that the District Works Officer had no business and could not have had any business in determining or proposing the consideration payable to the Appellant. The Respondent stated that the District Works Officer's role was supervisory and limited to the quality and conformity of the works as per architectural specifications.

In a Judgment delivered on 28<sup>th</sup> October 2014, the trial Court dismissed the Appellant's case with costs to the Respondents hence prompting the instant appeal. Dissatisfied by this decision the appellant filed a Memorandum of Appeal dated 26<sup>th</sup> November 2014 on the following grounds: -

1. The learned trial Magistrate erred in fact and law in failing to appreciate the issues for trial in this matter.
2. The learned trial Magistrate erred in fact and law in failing to appreciate and apply the principles of the law of contract involved in this matter before her.
3. The learned trial Magistrate erred in finding that the Appellant's undertaking was for a specific task which it had performed but had gone beyond the original scope of works.
4. The learned trial magistrate erred in failing to appreciate the evidence of the works officer which had placed in perspective the relationships of the parties vis a vis the work undertaken.
5. The learned trial Magistrate erred in failing to find that the Plaintiff had proved its case on a balance of probabilities.

The Appellant prayed that the Judgment of the Senior Resident Magistrate in CMCC No.80 of 2013 be set aside and substituted with an order allowing the Appellant's case. The Appellant also prayed for costs of this appeal. By consent parties agreed to canvass the appeal via written submissions. The abridged written submissions of each party are as set out hereunder: -

## **2. The Appellant's submissions**

The Appellant submitted that by a Plaint dated 14<sup>th</sup> March 2013 in the subordinate Court, it claimed Kshs. 992,878.80 against the Respondent being the amount due and owing on a labour contract for construction of a dormitory in the Respondent's school. The Respondent had invited for tenders for said project and the Appellant's bid of Kshs. 3,800,000/- was accepted by the Respondent. This amount was a reflection of the materials supplied by the Contractor of the building materials. The Respondent had appointed Joeju General Merchants as the contractor for the building materials.

Before the project took off, the Respondent fund itself short of. The funds relied upon from the government through the Economic Stimulus Program (E.S.P) was capped at Kshs. 10,000,000/-. This prompted the Respondent to seek to revise the scope of works for the project to align it with the available Kshs. 10,000,000/-. Being a government project the review of the contract had to involve the Public Works ministry. It is on this basis that the Appellant wrote the letter dated 15<sup>th</sup> June 2010 committing to work with Joeju General Merchants Ltd to deliver within the newly negotiated framework. The role of the of Public Works remained to be supervising as well as certify the standards of the works being undertaken at every point of the project and to request the release of the funds to the Appellant.

The Appellant argued that the supervisory agent agrees that the project was completed beyond the revised scope of works and that the Appellant incurred more costs than the revised scope as indicated in Local Purchase Orders made by the Respondent hence the claim for monies more than Kshs. 2,992,878 indicated in the Appellant's letter dated 15<sup>th</sup> June 2010. The extra amount is premised on the Supply Contract by Joeju General Merchants Ltd where the Respondents had issues LPO's for the building materials.

The Appellant relied on the case of **Joeju General Merchants Ltd ~v~ The Secretary Board of Governors Ruthagati Secondary School Civil Appeal No.4 of 2013** where it was held that every L.P.O issued to the material contractor was an independent contract that had the effect of supplementing the undertaking made on 15<sup>th</sup> June 2010. It is important to note that Joeju General Merchants Ltd is related to the Appellant herein and in **Civil Appeal No.4 of 2013** the former had sued the Respondent for an extra kshs. 2,853,099 for materials delivered despite the fact that in a letter dated 15<sup>th</sup> June 2010 there was a fixed amount for the contract. The appeal succeeded because each LPO was treated as a separate contract and the extra amount evidenced by an LPO was held to be due and payable.

## **3. The Respondent's submissions**

The Respondent filed written submissions dated 31<sup>st</sup> October 2018 attaching each and every ground of the appeal. On the first ground as set out above, the Respondent stated that the trial Magistrate fully appreciated the issues raised in the trial and reference was made to page 128 of the record. Countering the second ground of appeal, the Respondent stated that the same is amorphous as the trial Magistrate fully applied the law of contract and reference was made to pages 130-131 of the record. Attacking ground 3 of the Appeal, the Respondent argued that the Appellant was engaged to undertake a specific task for a fixed consideration. There was no evidence to show that the parties had negotiated and agreed for works other than the one contracted for.

The Respondent's response to ground 4 of the appeal was that the District Works Officer was a stranger to the contract between the parties. Any material by the said officer is extraneous to the relationship between the parties. The additional costs claimed by the Appellant are baseless.

The statement for payment on account contained monies that formed part of the agreed contract price of Kshs. 2,901,210/- which had been settled by the Respondent. In fact, the Respondent was not party to this statement and its author had no authority to determine whether there were extra works and the value of the said works.

In response to the fifth ground of appeal, the Respondent submitted that the trial Magistrate was fully seized of the evidence which it properly evaluated and reached a proper conclusion that the Appellant had failed to prove its case on a balance of probabilities. Reference was made to pages 74 and 75 of the record.

In additional written submissions filed on 5<sup>th</sup> November 2018, the Respondent contested the applicability of the above cited Civil Appeal No.4 of 2013 in the instant case for the following grounds: -

1. This Court is not bound by the said decision as it emanates from a Court of equal jurisdiction.
2. The subject of the instant claim, unlike the one in Civil No.4 of 2013, is the cost of labour. This labour cost was fixed by the Appellant's letter dated 15<sup>th</sup> June 2010 and hence there is no room for variation. The cost of labour does not escalate with the escalation of cost of building materials or on supply of extra materials. Even if there was such a rise of labour costs due to increased price of materials, such a rise would have to be quantified which was not done in this case.

## **3. The law**

This being a first appeal this Court is guided by the ration in ***Selle ~v~ Associated Motor Boat Company Ltd (1968) EA 23 at page 126*** where it was held: -

***“Briefly put they (the principles) are that the Court must reconsider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect.***

***In particular, this Court is not bound necessarily to follow the Trial Judge's finding of fact if it appears that he clearly failed on***

*some points to take account of particular circumstances or probabilities materially to estimate the evidence; of if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally”*

This duty of the first appellate Court was echoed most recently by the Court of appeal in *Peterson Ndung’u and 5 Others vs Kenya Power & Lighting Company Ltd (2018)eKLR* where the Court cited its earlier holding in *Abok James Odera & Associates vs. John Patrick Machira t/a Machira & Co. Advocates (2013)eKLR* thus:-

*“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kusthon (Kenya) Limited 2000 2EA 212 wherein the Court of Appeal held, inter alia, that: -*

*“On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”*

This Court is therefore guided by the above principles in evaluating the evidence adduced by the parties in the lower Court to determine this appeal based on the grounds advanced for and against the same.

#### **4. The issues**

A review of the evidence and the pleadings indicate that this appeal raises the following issues:-

- a) Whether the learned trial Magistrate erred in fact and law in failing to appreciate the issues for trial in this matter;
- b) Whether the learned trial Magistrate erred in fact and law in failing to appreciate and apply the principles of the law of contract involved in this matter before her;
- c) Whether the learned trial Magistrate erred in finding that the Appellant’s undertaking was for a specific task which it had performed but had gone beyond the original scope of works;
- d) Whether the learned trial magistrate erred in failing to appreciate the evidence of the works officer which had placed in perspective the relationships of the parties’ vis a vis the work undertaken; and
- e) Whether the decision in *Joeju General Merchany Ltd vs The Secretary Board of Governors Ruthagati Secondary School Civil Appeal No.4 of 2013* decided against the Respondent herein has the same effect in favour of the Appellant in the instant appeal.

#### **5. Determination**

##### **a) Whether the learned trial Magistrate erred in fact and law in failing to appreciate the issues for trial in this matter**

At the close of each parties’ case the trial magistrate identified the following as the main issues at page 130 of the record: -

- a) Whether there exists a contract of labour to erect a one storey building between the Appellant and the Respondent;
- b) Whether there exist terms and or any conditions in the said contract;
- c) Due performance of the above contract by the Appellant;
- d) Whether there is still an amount owed by the Respondent to the Appellant to justify the claim herein; and
- e) Whether the Appellant had proved its claim on a balance of probabilities.

The Appellant’s submissions dated 25<sup>th</sup> October 2018 do not address this issue although it was its first ground of appeal in the Memorandum of Appeal dated 29<sup>th</sup> November 2014. The Respondent on the other hand submitted that the issues were well appreciated and referred to page 128 of the record of appeal. A review of the pleadings at the lower court indicates that the issues as identified above were the most pertinent in determination of the Appellant’s case. Consequently, the trial Magistrate correctly appreciated the issues in the case. .

##### **b) Whether the learned trial Magistrate erred in fact and law in failing to appreciate and apply the principles of the law of contract involved in the matter before her**

The Appellant did not identify any particular principle of contract that the trial magistrate allegedly failed to appreciate. A scrutiny of the trial Magistrate’s Judgment dated 28<sup>th</sup> October 2014 indicates that the Magistrate was guided by the principles of the law of contract. The Magistrate correctly noted that the case involved a labour contract the terms of which were not written although the case hinges on the commitment later by the Appellant dated 15<sup>th</sup> June 2010. The trial Magistrate noted that at first tenders were floated and the Appellant won.

When it was realized that the amount quoted was way above the available funds, the parties agreed to carry out the labour at a fixed amount as evidenced in the Appellant's letter dated 15<sup>th</sup> June 2010. She concluded that there was a labour contract which was duly performed by the Appellant at a fixed consideration which was paid. The trial magistrate aptly referred to Chitty on Contracts at page 51 of Chitty on Contracts was cited thus:-

*“The task of the Court is to extract the intention of the parties both from the terms of their correspondence and from the circumstances which surrounds and follow it and the question of interpretation may be thus stated”*

This was in reference to the effect of the Appellant's commitment letter dated 15<sup>th</sup> June 2010 where the Appellant undertook to carry out the labour at a fixed amount of kshs.2,910,210/-.

**c) Whether the learned trial Magistrate erred in finding that the Appellant's undertaking was for a specific task which it had performed but had gone beyond the original scope of works**

The trial magistrate held that according to the evidence and the circumstances of the case, the Appellant was contracted to provide labour for a fixed amount of kshs. 2,910,210/- and that the Respondent acted on the belief that the same would be the ultimate cost. There was no contract to the contrary, neither was there proof of another agreement apart from the demand for the extra Kshs.992,878.80 which was made after the work had been completed and paid for. The trial magistrate held that the Plaintiff's witness, the District Works officer was not a party to the said commitment and he had admitted that he worked at the request that was presented by the Appellant to the exclusion of the Defendant when he in fact knew that the estimated budget was limited. When cross-examined, this witness stated the following at page 98 of the record:-

*“No additional works given as it (The excess materials supplied by Joeju General Merchants Ltd) was for the same dormitory. I know about the contract price for the building of the dormitory. It is in the contract agreement. Refer to letter dated 15<sup>th</sup> June 2010...”*

At page 100 of the record, this witness stated that the payment vouchers he made (Which form the basis for the claim of extra payment by the Appellant) were not audited when it is supposed to. In fact he stated that the project was not to exceed kshs.10,000,000 and that labour works was to cost only 2 million. He stated that he was not aware about the more materials supplied by the Appellant. He agreed that he represented the Ministry of Works whose only duty was standards and could not dictate on payments.

Based on the above the trial magistrate was right in holding that the claim by the appellant that it performed beyond the agreed scope of labour works in seeking for extra payment is not substantiated.

**d) Whether the learned trial magistrate erred in failing to appreciate the evidence of the works officer which had placed in perspective the relationships of the parties vis a vis the work undertaken**

The evidence of the works officers was properly appreciated by the trial Magistrate. She properly discredited this evidence as the witness agreed that he worked on the request presented by the Appellant to the exclusion of the Defendant. At page 97 of the record the witness stated that he was involved in supervision and that **the contract for labour was distinct from the contract for materials.** (emphasis mine) The contract for materials was carried out by Joeju whereas the Appellant carried out the works/labour. He agreed that the consideration for the works was fixed by the letter dated 15<sup>th</sup> June 2010. The trial magistrate therefore correctly appreciated the evidence of this witness.

**e) Whether the decision in *Joeju General Merchany Ltd ~v~ The Secretary Board of Governors Ruthagati Secondary School Civil Appeal No.4 of 2013* decided against the Respondent herein has the same effect in favour of the Appellant in the instant appeal.**

It is important to note that whereas the Appellant in Civil Appeal No. 4 of 2013 sought for extra payment based on LPO's issued, the Appellant in the instant appeal seeks for extra payment for labour works based on payment vouchers by the District Works Officer. Civil Appeal No. 4 of 2013 determined the effect of duly issued and executed LPO's in a transaction between the parties. The Court in that case correctly held that an LPO is a legally binding document between a supplier and a buyer. That case does not apply in the instant appeal as the same is distinguishable. The Appellant in the instant case seeks for payment beyond the amount it committed to undertake labour works yet in Civil Appeal No.4 of 2013 the Appellant sought for extra payment based on LPOs issued by the client itself. For labour works, it is important to note that the scope of work was agreed by all the parties based on the limited finances available to the Respondent for the construction of the dormitory. Fr variation there ought to have been Local Service Orders to indicate an acknowledgment of variation from the agreed scope of work.

## **6. Conclusion**

The Appellant submitted in its written submissions dated 25<sup>th</sup> October 2018 that indeed the Respondent had limited funds for building of a dormitory in its school. The money given by the government to the Respondent school through the Economic Stimulus Program (ESP) was limited to Kshs. 10,000, 000/- .Parties agreed to revise their contract to align the Respondent's expenditure to the available funds. Through a letter dated 15<sup>th</sup> June 2010, the Appellant committed to provide labour works at a fixed Kshs. 2,999,878.80. The claim for payment beyond this agreed sum is unsubstantiated. The Appellant links the rise on the supply contract given to Joeju General Merchants Ltd where the Respondent gave LPOs allegedly above the stated amount in the contract for materials. From the evidence on record, although both the materials and labour contracts were given to related entities the said contracts are distinct and the parties are also different. The contract for supply of materials was found to have been varied by LPOs but the same cannot be said for a contract for services where parties had fixed the consideration and no equivalent variation was made. From the foregoing, the appeal must fail. It is dismissed with costs to the respondent.

**Dated, delivered, and signed at Nyeri this 18<sup>th</sup> day of January 2019.**

**Mumbua T. Matheka**

**Judge**

In the presence of:

Court Assistant- Emmanuel

Mr. Mahan holding brief for Mr. Mwangi Kariuki for respondent

Ms. Wangeci holding brief for Mr. Nderi for appellant

**Mumbua T. Matheka**

**Judge**

**18/1/19**