REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 137 OF 2015

ELDORET POLYTECHNIC.....APPELLANT

VS.

JOHN ERICK OKACH T/A EKATCHWARE

SOFTWARE SOLUTIONS.....RESPONDENT

(Being an Appeal from the Judgment of the Chief Magistrate Honourable T.W Cherere in Eldoret Civil Case No. 362 of 2013, dated 30th November, 2015)

JUDGMENT

1. The appellant is a college polytechnic whereas the plaintiff carries on a software solutions and software maintenance services business in Eldoret. It was the respondent's case that by an agreement called Software Maintenance Contract and local purchase order dated 24th June 2010 he had agreed to supply, install and commission the college management information system at an agreed amount of Ksh 9,970,000/=. He installed the system, was paid Ksh 6,010,000/= and the balance of Ksh 3,960,000/= was never paid.

2. The respondent sued the appellant over the said amount of money. Judgment was entered in favor of the respondent as against the appellant for a sum of Ksh 3,960,000/= plus costs of the suit. The appellant was aggrieved by the same and lodged an appeal raising the following issues:

a. That the learned trial magistrate erred in law and on fact, by failing to appreciate the fact that, the plaintiff/respondent had not proved to the required standards that, he had rendered the services of installing and commissioning of the college management systems.

b. That the learned trial magistrate erred in law and on fact, by failing to appreciate that the respondent failed to prove that he had trained the appellant's staff as alleged.

c. The learned trial magistrate erred in law and on fact, by failing to appreciate that, the appellant had in his defence filed in the lower court, addressed the issue of pursuing the deposit made of Ksh 6,010,000/= once a determination of the suit had been made.

d. That the learned trial magistrate erred in law and on fact, by failing to take into account the evidence of DW1 Simeon Lelei and specifically to the effect that the appellant was still using manual systems and not the ones alleged to have been installed by the respondent.

e. That the learned trial magistrate erred in law and on fact by not seriously addressing the issue of collusion between the respondent and some of the appellant's staff, with a view of fleecing the appellant's public funds , hence ending up by sanitizing an illegality.

f. That the learned trial magistrate erred in law and fact by failing to appreciate the fact that failure to follow the right procurement procedures was sufficient to invalidate the purported contract between the appellant and the respondent.

g. That, the learned trail magistrate erred in law and fact by disregarding the report of the auditor general with reference to services rendered by the respondent.

h That the learned trial magistrate erred in law and on fact by not taking into account the submissions filed on behalf of the appellant in the lower court.

Reasons wherefore the appellant herein prays that:

i. The honorable court allows the appeal with costs to the appellant, and set aside the decision of the trial magistrate in total, and do replace the same with an order dismissing the respondent's case in the lower court.

ii. Costs of this appeal as well as costs of the lower *court be awarded to the appellant.*

iii. Any other remedy this honorable court may deem fit to grant.

3. The parties agreed to have the appeal canvassed by way of written submissions.

Appellant's submissions

4. The court was urged to refer to lower court submissions. The respondent did not avail the people he worked with as witnesses, the staff he trained after installing the system. Further the court had failed to note that the appellant would pursue a separate claim for refund since a claim under contract has limitation of 6 years. The court failed to consider the crucial evidence of Simeon Lelei who testified that the installed system had failed to work. The documents produced by the respondent were fake and he had not followed the right procedure to get the tender.

5. Section 68(1), (2) and *(3)* of the *Public Procurement and Disposal Act 2005,* required a party to have a written contract. The said provisions provide;

a. Section 68(1). The person submitting the successful tender and the procuring entity shall enter into a written contract based on the tender documents, the successful tender, any clarification under section 62 and any corrections under section 63

b. Section 68(2) the written contract shall be entered into within the period specified in the notification under section 67(1) but not until at least fourteen days have elapsed following the giving of that notification.

c. Section 68(3), no contract is formed between the person submitting the successful tender and the procuring entity until the written contract is entered into.

6. They relied on ***EPCO Builders Ltd v. County Government of Kilifi [2017] eKLR*** where the court opined that tender documents could not be equated to a contract, and what the statutes obligate one to do cannot be overridden by other evidence like a tender document. And in ***Hezekiah Adala t/a Hezekiah Engineering Services v. Tana Teachers Sacco Society Limited [2018] eKLR*** the court opined that a formal contract had to be signed by the parties.

Respondent's submissions

7. They urged that the court should disregard the appellant's arguments that the court disregarded their witnesses' evidence. He won the tender through an open advertisement. The appellant did not point out which procedure was not followed. Section 88 and 89 of the Public Procurement and Disposal Act 2005 also gives an alternative procurement procedure. The audit report in question was outside the contract period. The appellant's reliance on ***EPCO Builders Ltd v. County Government of Kilifi HCC No. 29 of 2016*** was misguided since the procedure was different from what is envisaged under section 68 of the 2005 Act. Also in ***Hezekiah Adala v. Tana Teachers Sacco Society Ltd C.A no. 12/2017*** is inapplicable as it deals with variations of concluded contracts. Finally, he urged that the appeal be dismissed with costs.

8. The issue that arise for determination is:-

i. Whether the appellant fulfilled his part of the agreement

9. This is an appellant court and it has a duty to re-analyse and re-evaluate the evidence on record keeping in mind that it did not have the opportunity to hear and see witnesses testify. See ***Selle & Anor v. Associated Motor Boat Co. Ltd & Ors (1968) EA 123.***

10. The appellant witness, *Simeon Keter*, testified that he was an internal Auditor, the full process of public procurement Act was not followed, though the respondent was paid Ksh 6,000,000/= to facilitate the work, he did not complete the work; the system he implemented is not in use, no certificate of completion and commissioning was issued. The local purchase order issued to the respondent was not a contract. On cross-examination however he did not avail audit reports for the year 2012-2013. He denied the respondent ever installed the system and trained the staff. Further that the Respondent should have availed the people he worked with to install the system.

11. The respondent on the other hand claimed he installed the system and that he showed the appellant's employee's how to use it; they signed as a confirmation of the same. The said document was not produced as evidence in court. The respondent produced a local purchase order (pex no.1) from the appellant herein, addressed to him. He was required to supply, install and commission the college management system at a cost of Ksh 9,970,000/=. The same was signed by the finance officer Mr. K.S Bitok and the Principal Mr. C.K Lagat, it was signed on 24.6.2010. The respondent quotation for the supply of the same dated 3.12.2009 shows 45% payment was to be made on order, 55% upon delivery.

12. It is not in dispute that the respondent was paid Ksh 6,010,000/=, this was confirmed by *Simeon Keter* (DW1) who stated a sum of ksh 6,000,000 was paid to the respondent. The balance of ksh 3,960,000/= was being claimed by the respondent. This court's understanding is

that by virtue of the local purchase price the parties had entered into a contract after considering the respondent's quotation. In *Eldocity Limited v. Corn Products Kenya Limited & Anor* [2013] Eklr the court held as follows:

> "…preliminary agreements are referred to by a number of descriptions including letters of intent, heads of agreement, memorandum of understanding or commitment letters. A preliminary agreement is utilized where for one reason or another it is desirable to enter into an interim or initial agreement or understanding pending the parties mutual rights and obligations being set out in a formal contract. It is thus a useful tool in commercial transactions. As to the question as to whether MOU'S are legally binding, I would state that the same is partly a matter of construction of the particular document and partly a question of legal analysis.. It is trite law that in deciding disputes it is the courts duty to give effect to the intention of the parties. The parties intention is discernible from the documents and conduct of the parties. However onerous a document or contract maybe, the court's duty is to give effect to it."

The above gives a presumption that when parties entered into the agreement, the appellant knew the purpose and intent of the local purchase order which gave a presumption of a contract. In this case there is no formal contract that was produced by the parties which this court can refer to. The appellant argued that the procedure was not followed, which I think does not arise at this point, since a look at the local purchase order shows the finance officer and the principal signed the document.

13. The appellant relied on the report by the Auditor General who cited many flaws, such as the tender evaluation minutes and contract agreement were not provided to him for audit review, thus it was not possible to establish how the consultant was identified and awarded the contract, which was contrary to section 29 of the Public Procurement and Disposal Act 2005. In addition to this the payment voucher was not also provided for audit. There was no certificate of work done which was issued and the commissioning of the system. The appellant then relied on this report in court to testify that the respondent did not follow the right procedure and therefore he could not be paid the balance. It is unfortunate on the part of the appellant that they are raising issues only because the same was cited by the audit report.

14. The case in ***Epco Builders Ltd v. County Government of Kilifi [2017] eKLR*** the defendant had advertised for a tender for construction of a hospital complex, the plaintiff won the tender and before the same was put in writing the defendant cancelled the tender, the court found there was no binding contract. This case differs with the instant case, first because the issue on procedure on tendering did not arise from the beginning, such tendering documents could have been availed by the appellant, the appellant only brought the issue on tendering when they failed to pay the respondent because of what the audit report had disclosed. Infact the report indicates that the appellant did not include the provision for the liability incase the court made a finding in favor of the consultant (the respondent).

15. The intent of the contract has to be effected by both parties. The respondent had a burden to discharge by proving. *Section 107* of the *Evidence Act* provides as follows:

> (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.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person

16. The respondent had proved his case in the lower court on a balance of probability and it is for that reason the court entered judgment in his favor. This court will not normally interfere with a judgment of the trial court unless it was founded on wrong principles and or misapprehension of the law. In ***Selle & Anor v. Associated Motor Boat co. Ltd & Anor (1968) EA 123*** it was held as follows,

> "A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion." (See Also Law Ja, Kneller & Hannox Ag Jja In Mkube Vs Nyamuro [1983] Klr, 403-415, At 403)

17. The evidence tendered by the appellant shows that they did not honor part of the agreement as per the Local Purchase Order. They failed to adequately challenge the respondent's evidence. The appeal lacks merit and is dismissed with costs to the Respondent.

S. M GITHINJI

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this **20th** day of **May, 2019**

In the absence of:

Mr. Andambi for the appellant

Mr. Ondiek for the Respondent

Ms Sarah – Court assistant