**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KIAMBU**

**CIVIL APPEAL NO. 72 OF 2016**

**HOPETOUN EPZ (K) LTD.....APPELLANTS**

**VERSUS**

**JOB MWANGI T/A AFRICOST KENYA.....RESPONDENT**

***(Being an appeal from the Judgment of. J. Bartoo (RM) in Thika CMCC No. 107 of 2013 delivered on 4th February, 2016)***

**J U D G M E N T**

1. The suit in the lower court was commenced by way of a plaint filed on 14/2/2013.The Plaintiff in the lower court and now the Respondent herein, sued the Defendant now the Appellants, claiming a sum of **Kshs. 1,481,460/=** in respect of a contract by which the Appellants appointed the Respondent as the project manager to oversee the construction of the Appellants' factory in Sagana in 2011.

2. The Plaintiff averred that the construction project was to be completed in April 2011 but due to increase in the scope of work, the project was extended to August 2011. That under the contract, the Respondent was entitled to a sum of Sh.250,000/- for the preparation of the bill of quantities (BQs), refund of disbursements, and in addition to be paid Shs. 225,000/- on a monthly basis. He averred that the Appellants stopped payments after April 2011, having only paid Kshs. 905,000/= out of Kshs. 2,386,460/= owed to the Respondent.

3. The Appellants filed its Defence on 21st March, 2013, denying owing the amount claimed by the Respondent and in pleaded that the Respondent was in breach of contract; that in the execution of his duties as the project manager he had acted negligently, thereby occasioning the Appellants undue losses.

4. The matter proceeded to a full hearing, at the conclusion of which the trial Magistrate entered judgment for the Respondent against the Appellants as follows:

| | | |
|---|---|---|
| a. Preparation for BQS | Kshs. | 250,000/ = |
| b. 4 months pay @ Kshs. 225,000/= | Kshs. | 900,000/= |
| c. Disbursements | Kshs. | 316,460/= |
| d. Correspondences | Kshs. | 20,000/= |
| TOTAL | Kshs. | 1,481,460/= |

5. The Appellants, dissatisfied with this outcome, preferred the present appeal based on the following grounds:-

> **''a. The learned magistrate erred in law and fact in finding that there was a contract to pay supervision fees beyond the period agreed by the parties and without a written agreement between the parties.**
>
> **b.That the Learned Magistrate erred in law and in fact in finding that the Respondent was entitled to a higher amount than the amount set out in the agreement of the parties.**
>
> **c. The Learned Magistrate erred in law and in fact in failing to consider and make a finding on whether the Respondent was negligent in performance in his duties as the Project Manager and the consequence of such negligence.**
>
> **d. The Learned Magistrate erred in law and in fact in failing to distinguish between Respondent's Project**

**supervision duties and the Respondent's duties as the quantity surveyor/Architect for the project.**

**e. The Learned Magistrate erred in law and in fact in finding that the Respondent was owed Kshs. 250,000/= being fees for preparing bills of quantities without evidence that this amount indeed was owing.**

**f. The Learned Magistrate erred in law and in fact in finding in favour of the Respondent against the weight of evidence.**

*g.* **The Learned Magistrate erred in law in failing to consider the authorities presented by the parties in reaching her finding"**.

6. The Court directed that parties file written submissions in respect of the appeal. The Appellants submitted that the parties herein entered into a contract with the intention of creating legal relations under clear and equivocal terms. Counsel relied on the case of ***Fidelity Commercial Bank Ltd vs Kenya Grange Vehicle Industries Ltd (2017) eKLR*** for the holding that the purpose of a formal contract is to preempt disputes between contracting parties. It was submitted that the Respondent failed to exercise the standard of care required of him in his capacity as project manager. Counsel contended that the trial court erred in awarding supervision fees in the disputed period, costs and disbursements there being no evidence adduced by the Respondent in support thereof .

**7.** It was submitted further that the Respondent was only owed Kshs.

245,000/= in respect of fees for the preparation of BQs. Citing the case of **Fidelity Commercial Bank Ltd vs Kenya Grange Vehicle Industries Ltd (2017) eKLR the Appellants urged the** court to review the evidence from a fresh perspective .

8. In his written submissions, the Respondent relying on the case of ***National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd & Ano (2001) eKLR*** argued that a court of law cannot re-write a contract between the parties and as such the court should uphold the initial agreement herein. Counsel submitted that the obligations of the Respondent and the period of the contract and remuneration payable were stipulated in the contract; that due to increase in the scope of work the period was extended by four months and therefore the Respondent is entitled to be paid for the extended period. Moreover that, if the Respondent did not perform his obligations as alleged by the Appellants, the Appellants should have terminated his contract.

9. The court has considered the evidence adduced at the trial and submissions made on this appeal by the respective parties. The duty of this court as a first appellate court is to re-evaluate the evidence and draw its own conclusions, but always bearing in mind that it did not have the opportunity to see or hear the witnesses testify see **Peters v Sunday Post Limited (1958) EA 424; Sele and Another v Associated Motor Boat Co. Limited and Others (1968) EA 123; Williams Diamonds Limited v Brown (1970) EAI I.**

10. The Court of Appeal in **Ephantus Mwangi and Another v Duncan Mwangi Wambugu (1982) – 88) IKAR** 278 stated that:

> **"A court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have alter on wrong principles in reaching the findings he did"**

11. The basic facts of the case were not in dispute and are as follows.

In 2010, the Appellants decided to put up a factory in Murang'a County for the production of avocado oil by a sister company. Thus in late 2010, the Appellants began the process of procuring a quantity surveyor. Following discussions, the Appellants engaged **Job Mwangi t/a Africost Kenya**, a registered quantity surveyor (QS) (the Respondent) to prepare the bill of quantities and to supervise the building project by a company known as **Sadasa Construction Ltd**.

12. On 18th January 2011 the Appellants's directors resolved to appoint the Respondent as the project manager and **Sadasa Construction Ltd** (**Sadasa**) as the contractor. Thus, on 28th January 2011 a contract was executed by the Appellants and **Sadasa**. By an addendum thereto, the Respondent was designated the project manager responsible for oversight in respect of the construction. The projected duration of the work was four months from January 2011. However, the work was not completed in that period and for disputed reasons, a fresh contract was entered into between the contractor, **Sadasa** and the Appellants on 1st April 2011.

13. The Respondent was therein designated the architect and quantity surveyor. The practical completion date was stated to be 30th September, 2011. Regarding the first contract, there is no dispute that the Respondent's total remuneration for management of the project for the four months was agreed at KShs.900,000. The Respondent was to be paid KShs.250,000/= for preparing the bill of quantities and to be refunded any disbursements made in respect of the project. He was paid a sum of KShs.905,000/= by the lapsing date of the first contract.

14. The issues in dispute were whether the sum of KShs.900,000/- was the full (one-off) payment agreed for the Respondent's services as project manager and whether the said term was subsequently varied; whether disbursements due to the Respondent were to be proved by receipts and whether the Respondent was entitled to payments in respect of correspondence. Other issues in dispute relate to the quality of services rendered by the Respondent and ultimately whether he was deserving of the payments claimed in his plaint.

15. A major difficulty in this matter arises from the fact that although the Respondent was undoubtedly the project manager responsible for the supervision of the construction under the two written contracts, the actual terms of his engagement with the Appellants were not formalized in these written contracts or through a separate written contract.

16. The court therefore has to review the correspondence and conduct of the parties to determine the intentions of the parties so far as the terms of the engagement are concerned. On this score, correspondence exchanged *via* email in November/December 2010 is significant. In support of their position in this matter the Appellants have placed much emphasis on the emails dated 23rd and 24th November 2010.

17. However in my view, it is necessary to look at the entire correspondence thread in that period to determine the parties' agreement on the actual terms. The earliest email on record**, DExh. 30** (page 280 of the record of appeal) is dated 23/11/10 and was sent at 10.50 a.m. by the Respondent to the Appellants director **Hunter Hannam.** Evidently there had been previous discussion and the email above was a continuation of that discussion.

18. The email subject is stated as **"Fee Proposal"** and reads as follows:

> **"Dear Hunter,**
>
> **I propose the amount of KShs.250,000/= for the Bill of Quantities and KShs.1,250,000/= for Project Management. Total KShs.1,500,000/=.**
>
> **Please let me have your comments.**
>
> **Regards**
>
> **Job Mwangi."**

19. On the same date at 2.51 p.m. Hunter Hannam (the director) addressed above, wrote back to Job Mwangi as follows:

> **"Subject: Fee Proposal**
>
> **Thanks Job,**
>
> **On the face of it we do not see an issue with the QS fee.**
>
> **With regards to the project management we need to really sit down and outline what is and what is not included in this to ensure both parties know what they are getting.**
>
> **Also can you please send me your QS that you have done that you showed us today so I can look over it.**
>
> **Thanks**
>
> **Hunter Hannam**
>
> **Olivado Kenya (E PZ) Ltd."**

20. **Olivado Kenya** was the sister company of the Appellants company which was to run the factory under construction upon completion. Evidently, reference to QS refers to Bills of Quantities (BQs) in the latter email.

21. It appears that the *sit-down* proposed in the latter email did not happen until a date in December 2010, as can be discerned from the next email in this series. The first is the email dated 15th December 2010. It was sent by **Hunter Hannam** to the Respondent at 10.02 a.m. The email is marked **D Exh 1** and is at page 1 of the Record of Appeal. The email reads *inter alia*;

> **"Subject: Progress**
>
> **Good morning Job,**
>
> **As per our phone conversation and the meeting we had on Monday.**
>
> **We would like to use you as our Project Manager at the rate of KShs225,000/= per month for 4 months. The money will be paid retrospectively each month as the building progresses.**
>
> **Please also send me your bank details so we can pay you for the QS work you have already done.**
>
> **The project manager job will comprise of the following areas:**
>
> - **Getting consent from Murang'a Council for the construction**
> - **Organizing and coordinating all the individual construction**

- **Ensuring the correct materials are used to ensure quality.**

**It is important to us that you are able to give us regular updates and timelines for this work as time is against us in this endeavor.**

**Initially I think the four areas are as follows:**

**….**

**….**

- **Review the BQS as we had discussed in your office. The new architects plans should be ready today around 3 p.m. Once the BQS is reviewed , I would like you to talk with Mr. Virgi (contractor) again and confirm he is happy with the adjustment of his price with regards to quantities …**

**If you have a look at the attached time line, our work is to be finished by end of April so that I can start processing in May.**

**…..**

**Regards,**

**Hunter Hannam**

**Olivado Kenya (EPZ) Ltd."**

22. On 16/12/16 at 8.39 p.m. the Respondent responded to the above email as follows:

**"Subject: Africost Banking Details**

**Dear Hunter,**

**Below find our banking details**

**…….**

**……**

**……**

**We will require your tax exception letter so that we can file it together with our returns."**

**Kind regards,**

**Job Mwangi."**

23. The email then delves into details of the project and does not dispute the amounts stated in the email by Hunter. What emerges from the Appellants' own proposal which the Respondent evidently accepted is that:

a) The services of the Respondents were required for a period of 4 months

b) The rate was KShs.225,000/= per month paid in arrears as the building progressed.

24. Although there is no reference to a one-off payment in the Appellants' email , it seems that the Respondent had adjusted the Respondent's offer of a lumpsum payment to a lesser sum as contained in the Respondent's email 23rd November 2010 but nonetheless limited the payment period to 4 months, bringing the total sum payable to KShs.900,000.

25. The Respondent did not tender any evidence to support his claim that the Appellants increased the scope of work and were responsible for the project going beyond the agreed 4 months. Equally, the Appellants' witness **Gary Keith Hannam (DW 1)** appeared to blame the inaccuracies in the Respondent's BQs for the dispute with the contractor who downed his tools midway through the project, demanding certain payments. He stated *inter alia* in his evidence in chief:

**"…. We had a meeting with Sadasa at Mr. (Job's) office as the contractor had refused to complete the work unless he was paid. We agreed to have a new contract that began in May. It could then relieve the contractor of penalties of late**

**completion."**

26. Referred to **D Exh. 1** (email of 16.12.10) the witness stated of the contents that :

> **"Hunter is negotiating with (Job). There is no ….. by Mr. Job. He gives us a bank account and there was no other agreed requirement (for) us to pay more. There is no document showing any such agreement by ourselves and Mr. Job."**

27. Under cross-examination the witness was to state:

> **"Job was to be paid 225,000/= per month …. Production begun in June 2011. The major work took about five months. The total amount (due to Respondent) was 900,000/= to be paid in 4 months ….."**

28. Taking issue with the competence and diligence demonstrated by the Respondent in the work **DW1** stated that:

> **"Job was still incompetent. There was an over valuation (of works). The report came out and we (asked) questions. We kept on reminding him. We did not employ someone else. The factory is working. There are consequences of non-supervision. If he had worked seriously we should have been paid KShs.905,000/= all what was paid plus disbursements which are proved. The project went up to June 29th 2011. If he had done his job well he could have been paid for May and June."**

29. Right from the start, the question of payment in respect of project management was a fundamental one and the parties held several discussions. The correspondence later exchanged by the parties in 2011 subsequent to the completion of the works regarding the Respondents payment does not include a direct admission by the Appellants of the Respondent's invoice as the Respondent suggests regarding the Appellants emails dated 15th July 2011 and 17th June 20177; these relate to payments to claims in respect of an Engineer **Wangai Ndirangu**. This is clear from a perusal of the entire thread of related emails at pages 65 to 71 of the record of appeal [**DExh. 15].**

30. From the parties' respective exhibits at the trial, the issue of the payment due to the Respondent in respect of the extra months taken by the project is first recorded in the invoice dated 25th July 2011 from Respondent to the Appellants seeking payment in respect of the four months between May and August at the rate of KShs.225,000/= per month. Despite the date of the invoice, it was evidently sent on 6/12/11 via email by the Respondent. The email states that the "workings" attached were for "review and comments" by the Appellants – see page 11 of the Record of Appeal.

31. The response by the Appellants came on 8/12/13 (page 10) and is in terms *inter alia* that:

> **"As I have already told you the agreement was for a set amount. KShs.250,000/= for BQS work which we agreed on. Then KShs.1,250,000/=for project management, however I suggested that we should not pay that much, a total of KShs.900,000/= for the project paid in 4 installments of 225,000/= per month for 4 months.**
>
> **We also agreed that we would meet the disbursement costs.**
>
> **Therefore I believe that the bill is KShs.1,466,460 (KShs.250,000/= + KShs.900,000/= + KShs.316,460/=) less payment of KShs.905,000 (KShs.450,000 + 250,000 + KShs.205,000/=). Outstanding bill of KShs.561,460/=".(**sic**)**

32. On 10th December 2011 the Respondent replied by email to the above response. He stated *inter alia*:

> **"Something else.**
>
> **We had estimated that the project would last 5 months thus my figure of KShs.250,000/= per month x 5 months = KShs.1,250,000/=.**
>
> **You asked that we reduce to KShs.225,000/= per month then you would add the difference if all went well. KShs.225,000/= x 5 = KShs.1,1235,000/=. This should be the beginning not the …….. I hope you can recall that conversation. There was an email to that effect. Please check your sent items. I can't trace it here."**

33. To which the Appellants replied *inter alia* that:

> **"Yes I recall that I asked that the amount be reduced and we agreed on it, I do also recall a discussion where if the project went well would look at paying the difference.**
>
> **However, do you think it has gone well. I personally think some aspects have been ok, but many of them have not gone well at all."**

34. Although there is evidence that the Respondent, despite the Appellants allegations of incompetence, remained on the project as manager until the issuance of the completion certificate, it is evident from the correspondence between the parties that no discussion was held at the time of the extension of the building contract in April 2011 concerning the rate or fact of further payments to the Respondent. Indeed, there

is no evidence that the invoice dated 25th July 2011 was prior to December 2011 served upon the Appellants.

35. Secondly, it seems from the tone and contents of the forwarding email by the Respondent that the attached invoice was being presented as a basis for further discussion with the Appellants, and his subsequent emails appear to be an attempt to negotiate further payments, predicated upon on negotiations conducted *prior* to the first contract. These were therefore negotiations after the fact.

36. Before the trial court, the Respondent asserted as a matter of right that he was entitled to payment in respect of the extended period at the rate of KShs.225,000/= per month. With respect, there is no basis for such a bold claim; all that the Respondent was asking the trial court is to imply this term into the relationship of the parties after April 2011, based on the Respondent's continued supervision of the project. There is no evidence that the scope of the project itself had been extended beyond the initial project, even if the period of implementation had been extended.

37. Both parties are agreed that as at April 2011, work was incomplete, and was not completed until several months later. Beyond the mere extension of time to perform the work, what is the basis for the Respondent's demand further payment?

38. In the case of **Kenya Breweries Ltd.v Kiambu General Transport Agency Ltd [2000] EA 398** the Court of Appeal observed that:

> **"A variation of an existing contract involves an alteration as a matter of a contract, of contractual relations between the parties; hence the agreement for variation must itself possess the characteristics of a valid contract. To effect a variation therefore, the parties must be *ad idem* in the same sense as the formation of a contract and the agreement for variation must be supported by consideration …. If the agreement is mere *nudum pactum* it will not cause action for breach particularly if its effect was to give voluntary indulgence to the other party to the agreement. A written contract cannot be amended by an implied stipulation unless it can be said to be mutually intended and necessary to give efficacy to the contract."**

39. Courts, it has been said, cannot rewrite contracts between parties. If it was the intention of the parties herein that the initial term regarding payment was to be applied in the period of extension, the parties ought to have, as before, negotiated and settled that matter by a way of a formal contract or some informal agreement. The second building contract was primarily extending the contract period but relating to the same works. Besides, even regarding the first contract the parties herein agreed separately on the terms.

40. It seems that after the execution of the second contract between the Appellants and the contractor, the Respondent proceeded with the project supervision and did not engage the Appellants regarding the terms of his payment until December 2011. The second building contract did not spell out the payment terms in regard to the Respondent.

41. For these reasons, the Respondent's arguments on this appeal are difficult to understand; it is the Respondent in my view, who is asserting a variation of the initial agreement to extend the terms of payment of KShs.225,000/= to eight months, rather than 4 months and therefore, to cover the period of the second building contract. In my view, the decisions cited by the Respondent do not support his case.

42. There is no agreement or written contract between the Respondent and the Appellants regarding the amount of payment to be made to him in respect of the period of the second contract. The contract the Respondent relies on was between the Appellants and the contractor and did not contain any terms on that score.

43. In the case of **Pius Kimaiyo Langat v the Kenya Commercial Bank of Kenya Ltd [2017] e KLR** the Court of Appeal restated its decision in **William Muthee Muthami v Bank of Baroda [2014] e KLR t**o the effect that:

> **"In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the in breach."**

44. The court proceeded to state:

> "**Lord Clarke, in RTS Flexible Systems Ltd v Molkerei ??Aloi Muller GM BH [2010] I WLR 753 at [45], [2010] UK SC 14 put it this way:**
>
> ***"The general principles are not in doubt. Whether there was binding contract between the parties and if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement."(****emphasis added****)***

45. Certainly in this case, there is no evidence of discussion/agreement concerning further payment regarding the period of the second contract or extension period, and if indeed that was the intention , the Respondent ought to have raised his invoice as early as May 2011 when the Appellants allegedly ceased making payments to him. It seems from the Respondents emails in December, 2011, that he was only hoping for payment under the assumption that the monthly payments agreed in November/December 2010 could be applied to the extension period.

46. In her judgment, the learned trial magistrate captured the dispute somewhat accurately but did not analyze the evidence in detail, or

address her mind to the question whether the parties agreed to extend the terms of the payment in the initial contract to the extended period. She however went ahead to conclude that:

> **"The Plaintiff was able to demonstrate that he had worked for the Defendant for an extra period after the lapse of the initial period of contract."**

47. The issue in dispute was not merely whether the Respondent worked the extra period (consideration) but whether the parties had agreed to extend the monthly payment of KShs.225,000/= beyond the initial agreed period. Had the trial court directed its attention to this matter, it would have found that there was no such agreement and that the Respondent was not entitled to a further payment, even admitting the execution of the second contract,

48. On the question of the Respondent's performance of his work, this was a peripheral matter as the Appellants did not counterclaim on that score. Besides, the Appellants had retained the Respondent as the project manager for the entire period of the project which action seems to contradict their assertions of negligence against him. In light of the findings above, the issue of the Respondent's performance is moot.

49. On the question of disbursements, such would by definition be expenses incurred by the Respondent on behalf of the Appellants in the course of his work. It cannot be true that he was entitled to refund of any and every cost he claimed from the Appellants, without proof of expenditure. At any rate, the particular claim having been denied in the Amended defence, the onus fell on the Respondent to establish his claim in the sum of Sh.316,000/- odd.

50. Regarding the particular claim for KShs.316,460/= as disbursements the trial court correctly observed that:

> **"The court has perused the Plaintiffs documents. None shows that he had made disbursement from his pocket to warrant this court to order the Defendant to pay the Plaintiff. The acknowledgment in the email (of Appellants dated 8th December 2011) was not sufficient to show that he (Plaintiff) had incurred the expense on behalf of the company. None of the recipients signed or acknowledged receipts of the money from the Plaintiff."**

51. Despite this finding, the trial court proceeded to award this sum and the sum of KShs.20,000/= in respect of which no specific finding had been made. The sums however do not appear in the final judgment sum. The Respondent's entire claim as contained in paragraph 7 of the Plaint having been denied in the amended defence, the Respondent bore the duty to prove the same.

52. For my part, I would agree with the trial magistrate in so far as unreceipted disbursements are concerned, that they were not proven. However, with regard to the sum of KShs.5,000/= paid on 3.6.11 in in the name of the Appellants to the Water Resources Management Authority, and KShs.26,760/= paid in respect of the approvals of building plans by the County Council of Murang'a , the receipts tendered were adequate evidence of payment and should have been allowed as proven disbursements.

53. In the circumstances, the award in the court below in respect of the sum of KShs.900,000/= being payment for the months of May to August 2011 is set aside. The sum of KShs.250,000/= awarded in respect of the payment for preparation of BQs is upheld, and the further sum of KShs.31,760/= is awarded under the claim for disbursements. This court substitutes the total award in the lower court with judgment in the total sum of KShs.281,760/= in favour of the Respondent against the Appellants. Two thirds of the costs of the appeal are awarded to the

54. Appellants, the appeal having substantially succeeded.

**DELIVERED AND SIGNED AT KIAMBU THIS 15TH DAY OF MAY 2019**

**……..**

**C. MEOLI**

**JUDGE**

**In the presence of:**

**Mr. Olaka holding brief for Mr. Michuki for the Appellants**

**Respondent absent.**

**Court Assistant - Nancy**