



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 447 OF 2012

NYAGA STOCKBROKERS LIMITED.....APPELLANT

VERSUS

SOLOMON EMBENI BWONYA.....1ST RESPONDENT

EVERLYNE LODENYI T/A

DAVIAN CLEANING SERVICES.....2ND RESPONDENT

JUDGMENT

1. The respondents, *Solomon Embeni Bwonya* and *Everlyne Lodenyi* trading as *Davian Cleaning Services* were the plaintiffs in the lower court. They sued the appellant, *Nyaga Stockbrokers Limited* seeking judgment in the sum of KShs.488,250 together with interest from the date of filing suit and costs of the suit.

2. In their plaint dated 2nd December 2018, the respondents pleaded that vide a written contract dated 27th November 2007, the appellant contracted them to provide cleaning services in its various offices in the Republic of Kenya for a period of two years at a total monthly fee of KShs.162,750; that it was an express term of the contract that either party was at liberty to terminate the contract by giving the other party either three months' notice or by paying a sum equivalent to three months fees in lieu of notice.

3. The respondents further averred that as they were faithfully discharging their obligations under the contract, the appellant through a letter dated 23rd September 2008 terminated the contract with effect from 1st October 2008 without giving them the contractual three months' notice or paying them three months fees in lieu of notice which amounted to KShs.488,250, the sum claimed in the suit.

4. In its statement of defence dated 21st January 2009, the appellant admitted having contracted the respondents for provision of catering and cleaning services in several of their branch offices across the country in consideration of a total monthly fee of KShs.162,750. The various offices in which the services were to be offered and the amount payable in consideration thereof were specifically pleaded in paragraph 4 of the defence.

5. The appellant denied being indebted to the respondents for the sum claimed or at all claiming that all monies due to the respondents under the contract had been paid. It asserted that on 5th March 2008, it was placed under statutory management by the Capital Markets Authority (CMA) under *Section 33 A of the Capital Markets Act* (hereinafter the Act) after which all its branch offices were closed and all contracts subsisting between it and 3rd parties including the one entered into with the respondents were determined by operation of the law; that therefore termination of the contract was not necessary as it had already been frustrated.

6. The appellant further pleaded that though no new contract was entered into between its statutory manager and the respondents, the respondents continued to offer limited services at its head office for which they were paid in full.

7. After a full hearing, the learned trial magistrate *Hon. T.W.C. Wamae* (Chief Magistrate) entered judgment in favour of the respondents against the appellant with costs.

8. The appellant was aggrieved by the decision of the trial court. It proffered this appeal raising six grounds which can be compressed into three main grounds as follows:

- i. That the learned trial magistrate erred in law and in fact in awarding the respondents the sum of KShs.448,250 while the same had not been particularly pleaded and proved;
- ii. That the learned trial magistrate erred in law and in fact in finding that the respondents were entitled to the sum of KShs.448,250

being three months fees in lieu of notice in spite of the evidence adduced at the trial and the submissions made by the appellant;

iii. That the learned trial magistrate erred in law and in fact in finding that the contract between the parties was not frustrated by the appellant's statutory management status.

9. By consent of the parties, the appeal was prosecuted by way of written submissions which were highlighted before me on 11th March 2019 by learned counsel *Ms Kemunto* who appeared for the appellant and learned counsel *Mr. Njoroge* who represented the respondents.

10. This being a first appeal to the High Court, I am duty bound to revisit the evidence presented before the trial court and to reevaluate it to draw my own independent conclusions while bearing in mind that I did not have the benefit of seeing or hearing the witnesses and I should give due allowance for that disadvantage: See- ***Selle & Another V Associated Motor Boat Company Ltd & Others (1968) EA 123.***

11. I have carefully considered the grounds of appeal, the evidence on record and the parties' rival written submissions as well as the authorities cited. I have also read the judgment of the learned trial magistrate.

12. Having done so, I find that it was not disputed that the parties executed a contract under which the respondents were to provide cleaning and catering services to the appellant at a monthly fee of KShs.162,750. It was also not disputed that *clause 12 (c)* thereof provided that either party could terminate the contract upon giving the other three months' notice or by paying a sum equivalent to three months' charges/fees in lieu of notice.

13. What was disputed was the respondent's claim that the appellant had terminated the contract without giving them the contractual three months' notice and that they were therefore entitled to the sum claimed.

14. In its submissions through the firm of *Archer & Wilcock Advocates*, the appellant urged this court to find that the trial court erred in its findings that the respondents were entitled to the sum claimed because in its view, the sum claimed was not specifically pleaded and strictly proved during the trial; that there was no evidence of payment of KShs.162,750 per month to the respondents as the invoices raised by the respondents and produced in evidence were of different amounts; that therefore the sum of KShs.162,750 should not have been used as a basis for calculating what was owed to the respondents if any amounts were owed as alleged.

15. In addition, the appellant argued that during the contractual period, the parties varied the terms of the contract and reduced the monthly charges for cleaning services and that even if there was breach of contract, the entitlement of the respondents should have been less than the amount claimed.

16. The appellant further contended that the contract was frustrated when the appellant was put under statutory management and that this discharged the parties from their obligations under the contract including the requirement for giving the agreed three months' termination notice; that in the circumstances, the learned trial magistrate erred in law in her finding that the appellant was entitled to the sums claimed. On these submissions, the appellant urged the court to allow the appeal.

17. The respondents on their part through the firm of *Eboso & Company Advocates* urged the court to dismiss the appeal with costs as in their view, it lacked merit. They maintained that they were entitled to the sum claimed as the same was specifically pleaded and they had adduced evidence to prove that the appellant had breached the contract by terminating it vide letter dated 23rd September 2008 without serving them with three months' notice as required under the contract.

18. The respondents in their submissions denied the appellant's claim that the contract was frustrated once a statutory manager was appointed to run the affairs of the appellant. They referred the court to *Section 33 A (5)* of the *Capital Markets Authority Act* and urged the court to find that the provision does not state that all the contracts entered into by the licensed person stood suspended, revoked, annulled or invalidated upon appointment of a statutory manager. They beseeched the court to find that the appointment of a statutory manager did not frustrate the contract and that the appellant having failed to give notice had an obligation to pay the sum claimed in lieu thereof.

19. The respondents further denied the appellant's claim that the terms of the contract had been altered by an oral agreement entered into by the respondents and the statutory manager. They invited the court to find that this claim was not proved by the appellant on a balance of probability and that in any case the provisions of a written contract cannot be altered by an oral contract.

20. In view of the foregoing, I find that three main issues arise for my determination in this appeal which are:

- i. Whether the learned trial magistrate erred in her finding that the appointment of a statutory manager did not frustrate the contract;
- ii. If the answer to issue no. 1 is in the negative, whether the learned trial magistrate erred in finding that the respondents were entitled to the sum claimed; and
- iii. What orders should be made on costs?

21. Turning to the first issue, ***Black's Law Dictionary 10th Edition*** at page 785 defines the term frustration as:

"The prevention or hindering of the attainment of a goal, such as contractual performance ... an excuse for a party's non-performance because of some enforceable and uncontrollable circumstance..."

The learned authors proceed to define the doctrine of frustration in contracts as:

“The doctrine that if a party’s principal purpose is substantially frustrated, by unanticipated changed circumstances, that party’s duties are discharged and the contract is considered terminated.”

22. In *Gimalu Estates Limited & 4 Others V International Finance Corporation & Another [2006] eKLR* which was cited by the appellant, *Emukule, J* (as he then was), relying on Chitty on Contracts described the doctrine of frustration in the following terms:

“...the doctrine of frustration is relevant when it is alleged that a change of circumstances after the formation of the contract has rendered it physically or commercially impossible to fulfill the contract or has transformed performance into a radically different obligation from that undertaken in the contract. The doctrine is not concerned with the initial impossibility, which may render a contract void “ab initio” as where a party to a contract undertakes to perform an act which at the time the contract is made, is physically impossible according to existing scientific knowledge and achievement.”

23. The Court of Appeal in *Lucy Njeri Njoroge V Kaiyahe Njoroge, CA No. 161 of 2002 [2015] eKLR* cited with approval the case of *Davis Contractors Limited V Farehum UDC, [1956] AC 696* in which Lord Radcliff stated as follows:

“...frustration occurs whenever the law recognizes that, without the default of either party, a contractual obligation has become incapable of being performed because the circumstance in which the performance is called for would render it as a thing radically different from which was undertaken by the contract. “Non haec is foederi veni” It was not what I promised to do... There ... must be such a change in the significance of the obligation that the thing undertaken would, if performed be a different thing from that contracted for”.

24. Applying the above principles to the facts of the case that was before the trial court, it is not disputed that by a letter dated 5th March 2008, the Capital Markets Authority appointed *Mr. Wycliffe Shamiah* as the lead statutory manager of the appellant. The appointment was done pursuant to *Sections 33 A (1) (c) and (2)* of the Act. The question that I must now answer is whether this appointment led to frustration of the contract.

25. A reading of *Section 33 A (5)* of the Act which sets out the responsibilities of a statutory manager makes it clear that such a manager is mandated to take control of the management and operations of a licensed person, such as the appellant, in place of its Board of Directors.

26. Though *Section 33 A (5) (iv)* allows a statutory manager to enter into contracts in the ordinary course of business, the provision does not state whether expressly or by implication that this mandate means that the operation of existing contracts would be suspended or that such contracts would be rendered invalid. In the absence of evidence that the appointment of the statutory manager amounted to an intervening event which made it impossible for both parties herein to perform their obligations under the contract, I am not persuaded by the appellant’s argument that the mere fact of appointment of the statutory manager frustrated the contract.

27. It is clear from the evidence adduced by *Solomon Embeni Bwonya* who testified as PW1 and the Statutory Manager who testified as DW1 that after the appointment of DW1, the respondents continued to render cleaning and catering services to the appellant albeit on different payment terms and they were paid for their services. This continued until 23rd September 2008 when the respondents claim that the appellant terminated their services. In the circumstances, I am unable to fault the trial magistrate’s finding that the appointment of the statutory manager did not lead to frustration of the contract.

28. On the second issue, I wish to start with the appellant’s submissions that the sum claimed was not specifically pleaded and proved. A look at paragraph 4 of the plaint leaves no doubt that the respondents’ claim was specifically pleaded. Regarding proof of the sum claimed, the argument by the appellant that the same was not strictly proved as the invoices and documents evidencing payment were for different and less amounts cannot be sustained in view of the fact that as correctly stated by the learned trial magistrate, the bone of contention in the case was not about proof of payment for services rendered but whether there was breach of contract by the appellant for which the respondents were entitled to the liquidated damages stipulated in the contract.

29. The respondents’ claim was that the appellant vide letter dated 23rd September 2008 unlawfully terminated the contract as the required notice of three months was not given and that therefore they were entitled to the sum claimed. However, a close scrutiny of the said letter reveals that only one component of the contract, that is, provision of catering services was discontinued.

30. The evidence on record shows that the contract for cleaning services continued to be performed despite the issuance of this letter. The respondents continued to render cleaning services to the appellant on a reduced scale and they were paid for the same. In the premises, there is nothing to show that the contract was entirely terminated in view of the parties’ conduct. The respondents having offered to continue offering cleaning services although on different terms and accepting payment for the same after the alleged termination were in my view estopped from claiming payment in lieu of notice. If the contract had been terminated as alleged, the respondent would not have continued to offer any service to the appellant.

31. The parties conduct as described above supports the appellant’s submissions that they had varied the terms of the contract through an oral agreement. Though the respondents claimed that their oral agreement related to a different arrangement unrelated to the contract, the respondents’ letter dated 3rd August 2008 leaves no room for doubt that the parties had in fact varied the terms of the original contract through an oral agreement. The letter makes specific reference to the cleaning service contract and confirms that they had agreed to reduce the monthly charges for cleaning services from KShs.42,000 to KShs.34,000 though it is not clear whether this new payment terms applied to cleaning services offered only in the head office or whether it also related to some other branch offices.

32. While I agree with the learned trial magistrate that as a general rule, a written contract cannot be varied or altered by a verbal agreement, it is my view that there are exceptions to this general rule. I agree with *Hon. Omondi J* when she stated in *Building Contractors & Another V Elizabeth Kuher-Heier & Another [2010] eKLR* that:

“While it is true that a written agreement takes precedence and ordinarily will not be altered by an oral agreement, here there is more than just oral claims, there is the actual conduct of the parties – the defendants in fact confirm the existence of certain extra works which were not contained in the written agreement, and which they consented to. I make a finding as a fact that the Galana and extra socket units were extras which did not form part of the earlier written document, and just by that confirmation, I am persuaded that there were extra works carried out.”

33. In this case, the parties conduct especially that of the respondents of receiving less money than what was agreed in the original contract and PW1’s written confirmation in the letter dated 3rd August 2008 confirms that the parties had altered the terms of their original contract and this may explain why the letter dated 23rd September 2008 only discontinued the provision of catering services but said nothing about the provision of cleaning services.

34. The learned trial magistrate failed to appreciate that there were exceptions to the *parole evidence rule* and she did not consequently interrogate the conduct of the parties as well as the evidence on record on the claim regarding variation of the contract. This was an error on the learned trial magistrate’s part which led her to arrive at the erroneous conclusion that the respondents were entitled to the sum claimed. After analysing the evidence on record, it is my finding that the respondents failed to prove on a balance of probability that the letter dated 23rd September 2008 actually terminated the parties’ contract as alleged.

35. For all the foregoing reasons, I am satisfied that this appeal is merited and it is hereby allowed. The judgment of the trial court dated 27th July 2012 is hereby set aside and is substituted with an order dismissing the respondents’ suit with costs.

36. On costs, the order that best commends itself to me is that each party shall bear its own costs of the appeal.

37. It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 18th day July, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Ms Olunga for the appellant

Ms Njoroge for the respondent

Mr. Salach: Court Assistant