REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 182 OF 2013

MILDRED MACHANJA Trading As LEARN IT.....APPELLANT

VERSUS

JOSNAH PRIMARY SCHOOL.....RESPONDENT

(Being an appeal from the Judgment/Decree delivered on 8th March, 2013

by Hon. Mr. D. Ole Keiwua (Principal Magistrate) Chief Magistrate's Court

at Milimani Commercial Courts in CMCC No. 8127 of 2005).

JUDGMENT

1. The Appellant, Mildred Machanja Trading as **Learn IT** through a plaint dated 27th July, 2005 instituted a suit against the Respondent, Josnah Primary School, in the Lower Court for a sum of Ksh.1,399,999/= plus interest at 12% per annum for breach of contract. The claim arose from an agreement between the parties wherein the Appellant was to install, maintain and service computers at the Respondent school. That the contract provided for the Appellant to manage the school's computer Department for 5 years from 10th January, 2000 at a fee of Ksh.100,000/= per term payable within 15 days at the commencement of each school term.

2. The Appellant's contention was that the school failed to pay Ksh.100,000/= for the term commencing May, 2000. That consequently the Appellant issued a Notice as per clause 10 of the agreement and demanded that the school do pay within 7 days but there was no payment leading to the termination of that agreement.

3. The claim was denied as per the written statement of Defence dated 31st August, 2005. The Respondent admitted having entered into the contract with the Appellant but denied breach of the same. The Respondent stated that it paid the Appellant's dues for the term commencing January, 2000 to March, 2000 and a substantial fee for the term commencing May to July, 2000 and averred that no training was carried out from the month of September, 2000 due to the frustration of the contract by the Appellant.

4. It was further contended that the terms of the contract were unenforceable and voidable for being oppressive and that the Appellant illegally and unprocedurally offered computer training.

5. The Appellant filed a reply to the Defence. The Appellant reiterated the contents of the plaint and joined issues with the Defence.

6. After a full trial, the trial magistrate entered judgment in favour of the Appellant for the sum of Ksh.104,900/=, costs and interest. The said sum comprised of the unpaid balance of Ksh.4,900/= for the second term and Ksh.100,000/= for the third school term commencing September 2000. Noting that services were rendered in the month of September 2000, the trial magistrate observed that payment for the two months of October and November 2000 would be reasonable notice for the Appellant to reorganize her business following the termination of the contract.

7. The Appellant was aggrieved by the said judgment and appealed to this court on the following grounds:

> **1. The magistrate erred in law by failing to award the Appellant Ksh.1,266,666.60 as liquidated damages upon having affirmatively upheld the claim for breach of contract and having found the said liquidated damages due on account of the breach of contract;**
>
> **2. The magistrate erred in law by invoking Article 53 of the Constitution of Kenya, 2010 in dismissing the Appellant's claim**

for Ksh.1,266,666.60 in a case that did not concern children but a claim for breach of contract;

3. The magistrate erred in law by invoking Article 53 of the Constitution of Kenya, 2010 in dismissing the Appellants claim for Ksh.1,266,666.60 without evidence in regard to how the award of this claim would adversely affect children;

4. The magistrate erred in law and in fact by presuming that Article 53 of the Constitution of Kenya, 2010 may accord a party exoneration from contractual liability;

5. Consequently the magistrate's decision occasioned a miscarriage of justice.

8. The appeal was canvassed by way of written submissions which I have considered.

9. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

> **"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it 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 this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed sholan (1955), 22 E.A.C.A. 270)".**

10. PW1 Mildred Machanja testified on the Appellant's side. Her evidence was that she complied with the terms of the agreement which commenced on 10th January, 2000. She blamed the school for not making the payments for the 2nd and 3rd terms. Her further evidence was that the school explained the difficulties it was facing due to parents not paying and power rationing by Kenya Power & Lighting Company. That the school wanted to discontinue the services. That it became impossible for the Appellant to continue providing the services as the Appellant could not be able to service the loan for the computers or pay the tutors and she ended up collecting her computers from the school.

11. In his evidence of DW2 Joseph Mericho Nderitu the proprietor of the school admitted having entered into a contract with the Appellant. His evidence was that the school was to provide a room for the computer laboratory and the Appellant was to supply everything else. PW1 pointed out the challenges with the computer classes as not being properly conducted due to being provided with the first two teachers who had communication problems. That learning materials which included diskettes, programmes and syllabus were also not provided. That these challenges were exacerbated by rationing of power by Kenya Power & lighting Company leading to non-payment by parents as no computer lessons were being offered.

12. DW1 Dorothy Awuor Opil the teacher who had been posted to the school by the Appellant in her evidence blamed the problem on ineffective teaching due to lack of materials e.g diskettes, text books, printer, programmes and syllabus. DW1 testified that 80% of the work was practical and the same was affected by power rationing by Kenya Power & Lighting Company leading to the computer class being suspended by the school.

13. Clause No. 15 and 16 of the agreement dated 8th December, 1999 provided for the termination of the contract as follows:

> **"15. If the School shall be in breach of any of its responsibility in respect of payment of the fees under Clause 10 hereof, the Company shall be at liberty to give notice to the School requiring the School to pay such fee or part thereof within seven (7) days after receipt of such notice and if the School shall fail to comply with such notice the company may forthwith summarily terminate this agreement in its entirety whereupon the School shall become liable to pay to the Company a sum equivalent to the remaining duration of the initial period as liquidated damages and not as a penalty.**
>
> **16. If the Company shall be in breach of its obligations under this agreement the School may give notice requiring the Company to undertake such obligations and upon so doing may withhold payment of the fee accordingly and if the Company shall fail to undertake such obligation within seven (7) days after receiving such notice, the School may forthwith summarily terminate this agreement in its entirety and claim a *pro rata* refund of the proportion of the fee (if already paid) for the remaining period of the term."**

14. Each of the parties in their evidence blames the other for the breach of contract. The Appellant in a letter dated 18th September, 2000 and produced in court as exhibit gave 7 days notice of payment in accordance with clause No. 15 of the agreement. The Appellant also produced a letter from the Respondent dated 17th July, 2000 which acknowledges payment of some of the Appellant's dues but blamed it on non payment of computer fees by the pupils. The letter requests for more time for payment of Ksh.26,400/= balance. Another letter by the school reflects that the school was discontinuing the computer classes due to power rationing by Kenya Power & Lighting Co.

15. A letter dated 29th September, 2000 by the Appellant's computer teacher at the Respondent, Dorothy Awuor Opil (DW1) terminating her services with the Appellant was produced as an exhibit. In the letter, the said teacher also complains of lack of materials e.g. diskettes, printer, printing papers, folders progammes, guide books and revised syllabus. A signed note between the Appellant and the school dated 27th November 2000 and duly signed by both parties reflects that the Appellant collected the computers from the school on 27th November, 2000.

16. From the aforestated exhibits and the evidence of both parties, this court's conclusion is that there were challenges of payment by the school by the month of July, 2000. Although the school has raised issues of non provision of materials by the Appellant, no notice was given to the Appellant as provided in the agreement. If the school had served the notice on the Appellant, under clause No. 16 of the agreement, the school could have summarily terminated the contract as provided therein. The termination letter by the teacher (DW1) is not a notice by the school.

17. The issue of the frustration in conducting the computer classes due to power rationing has been acknowledged by way of evidence by both parties. The agreement did not provide for such an eventuality. As was stated by the Court of Appeal in the Case of **Kenya Airways Ltd v Satwant Singh Flora [2013] eKLR:**

> **"The modern context of frustration was first formulated by Lord Radcliffe in the case of Davis Contractors Ltd v Fareham U.D.C (1956) A.C 696 which sets out the radical change in the contractual obligation at Page 729;**
>
> **Frustration occurs whenever the law recognizes that, without the default of either party a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it a thing radically different from that which was undertaken by the contract** *"Non haec in foedera veni***". It was not what I promised to do."**

18. Clause No. 7 of the agreement provided that the computers, teaching manuals and other materials would remain the Appellant's property during the continuance of the agreement and would pass on to the school at the expiry of the initial contract period. Following the frustration of the contract, I would agree with the Respondent's contention that it would be oppressive and onerous for the full payment to be made for the entire remaining period of over 4 years and further taking into account that the Appellant collected the computers from the school. This would be unconscionable taking into account that in case of breach by the Appellant, clause No. 16 provided payment on *pro rata* basis.

19. A letter by the Ministry of Education, Science & Technology dated 20th September, 2005 reflects that by the year 2000, the Appellant was not registered with the said Ministry as required from the Directorate of Quality Assurance and Standards. This issue was also not factored in the agreement between the parties, giving credence to the Respondent's contention that the Appellant was illegally and unprocedurally offering computer training to schools.

20. This court agrees with the submission by the Appellant's counsel that the case herein is based on the contract between the parties and does not concern the rights of the children. However, after evaluating the evidence, this courts conclusion in the circumstances of this case is that the judgment of the trial magistrate that the Appellant be fully paid for the entire period that the services were provided with a two months pay *in lieu* of notice was reasonable.

21. With the foregoing, I find no merits in the Appeal and dismiss the same with costs.

Dated, signed and delivered at Nairobi this 15th day of Oct., 2019

B. THURANIRA JADEN

JUDGE