REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL NO. 27 OF 2018

JOSEPH KARIUKI NJOKA

T/A JOFOCO CONTRACTORS.....APPELLANT

VERSUS

P. MBOGO KARANJA.....1ST RESPONDENT

SIMON N. KARUGURA.....2ND RESPONDENT

ANASTACIA NJURA NJERU.....3RD RESPONDENT

J U D G M E N T

A. Introduction

1. This is an appeal against the judgment of the Principal Magistrate Embu in CMCC No. 53 of 2007. The appellant instituted this suit against the respondents for payment of Kshs. 609,008/= general damages for breach of contract, interests and costs. The trial court found that the appellant failed to prove his case against the respondents and proceeded to dismiss the appellant's case with costs to the defendants.

2. Being dissatisfied with the trial court's judgement, the appellant filed this appeal based on twelve grounds which may be summarised as follows;

a) *That the learned magistrate erred in fact and in law in entering judgement against the appellant by ignoring to consider the adduced evidence by the appellant.*

b) *That the learned magistrate erred in fact and in law by holding that the respondent could not be sued in their own capacity and that the CDF Runyenjes should have been sued instead yet it was not a party to the contract.*

c) *That the principal magistrate made an error by dismissing the orders given by Senior Principal Magistrate dated 3rd July 2008 of payment by consent partial judgement of Kshs. 214,228/=.*

d) *That the learned magistrate erred in fact and in law by dismissing the suit with costs to the respondents.*

3. The parties disposed of the appeal by way of written submissions.

B. Appellant's Submissions

4. It was submitted that judgement of the trial magistrate relied on documents which were fraudulently authored as well as impersonation by the respondents. The appellant further submits that CDF members are appointed and gazetted whereas there was no appointment letters by CDF adduced in court by the respondents.

5. It was further submitted that the contract was advertised, procured and signed by the respondents and not by CDF members. Further that the respondents confessed to have received Kshs. 4,909,000/= in donation towards the project execution whereas the sum of the contract was Kshs. 3,320,830 thus the surplus was for the extra works done by the appellant.

C. Respondent's Submission

6. It was submitted that there was no way the respondents could be held liable to pay money for a public funded project by the CDF as the respondents had been sued in their official capacities and thus after they left office they couldn't be pursued in their individual capacities.

7. It was further submitted that there were garnishee proceedings against the Runyenjes CDF account which were only terminated by consent which was later set aside by the court on the 13/08/2013.

8. On the issue of fraud, it was submitted that the appellant had failed to raise such issues with the relevant authorities and his failure t do the same shows that he is raising the same now as a tactic to gain sympathy

D. Analysis & Determination

9. As the first appellate Court, my role is to revisit the evidence on record, evaluate it and reach my own conclusion in the matter. (See the case of **Selle & Anor. v. Associated Motor Boat Co. Ltd (1968) EA 123**). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni v Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga v Kiruga & Another (1988) KLR 348).**

10. I have carefully perused the record of appeal and the parties' submissions. The issues for determination in my view are as follows:

a) *Whether the learned magistrate erred in fact and in law by holding that the respondent could not be sued in their own capacity and that the CDF Runyenjes should have been sued instead yet it was not a party to the contract.*

b) *Whether the learned magistrate erred in fact and in law in entering judgement against the appellant against the weight of evidence adduced.*

c) *Whether the learned magistrate erred in fact and in law by dismissing the suit with costs to the respondents.*

11. From the record, it is undisputed that the appellant entered into an agreement with the Mufu/Rukuriri Water Project committee. The respondents herein were officials of the aforementioned Mufu/Rukuriri Water Project committee. In cross-examination, the appellant testified that the project was a pubic funded project and that the respondents were officials of the project established under the CDF Act No. 10 of 2003. PW1 further testified that the respondents, who were executive members of the project got money from the CDF.

12. It is also not in dispute that the Mufu/Rukuriri Water Project was disbanded after the general elections of 2007 and thus the respondents ceased being officials of the said project. I also note that the agreement between the appellant and the Mufu/Rukuriri Water Project committee was drawn under the auspices of the *Runyenjes Constituency Community Development Fund Project (CDF)*. The question thus arises as to whether the appellant could sue the respondents in their own capacity. From all the above, it is my considered view that the trial magistrate did not err in finding that the respondents could not be sued in their own capacity. The contract for the water project was between the appellant and the Mufu/Rukuriri Water Project committee which was under the Runyenjes CDF.

13. The appellant further claims that the judgement of the trial court was made against the weight of evidence. On this I do note that the trial magistrate addressed himself to issues raised by the appellant. Firstly, on the issue of retention of 10% money owed to the appellant, the trial magistrate noted that the same was only payable 6 months from the date of completion of the project. The learned magistrate rightly noted that the Mufu/Rukuriri Water Project Committee was disbanded in 2007 and that the project they were managing was a CDF funded one. The appellant filed his suit in 2018 which was eleven (11) years after the disbandment of the committee. The appellant ought to have sued Runyenjes CDF who had the responsibility of the project including financing. The trial magistrate noted in his judgment that the committee had ceased to exist at the time the suit was filed.

14. The appellant ought to have amended his pleadings to join the Runyenjes CDF as a party to the suit since the project was established under the Constituency Development Fund Act No. 10 of 2003. He failed to do this and his case was therefore bound to fail.

15. I have analysed the evidence on record and considered it in view of the grounds of appeal. In my considered view the trial magistrate based his finding on cogent evidence.

16. Having found for the respondents against the appellant, the trial court proceeded to award costs to the respondents. It is trite law that costs follow the event and are granted at the discretion of the Court. In this regard, **Section 27 of the Civil Procedure Act**, states as follows;

"subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court of judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers;

Provided that, the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order." (emphasis mine).

17. It is quite clear therefore that the key word in the said provision is "event". As stated in the submissions by the Respondent, this word has been addressed in the Judicial hints on Civil Procedure by Justice (Rtd) Kuloba as follows;

> ***"The words "the event" mean the result of all the proceedings to the litigation. The event is the result of entire litigation. It is clear however, that the word "event" is to be regarded as a collective noun and is to be read distinctively so that in fact it may mean the "events" of separate issues in an action. Thus the expression "the costs shall follow the event" means that the party who on the whole succeeds in the action gets the general costs of the action, but that, where the action involves separate issues, whether arising under different causes of action or under one cause of action, the costs of any particular issue go to the party who succeeds upon it. An issue in this sense need not go to the whole cause of action, but includes any issue which has a direct and definite even in defeating the claim to judgment in the whole or in part".***

18. Consequently, having lost his claim before the trial court, the appellant was condemned to bear the costs therein which was in order, in my considered view.

19. I find no merit in this appeal and it is hereby dismissed with costs to the respondents.

20. The judgment of the trial court is hereby upheld.

21. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 14TH DAY OF NOVEMBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Kiai for Mr. Andande for Respondent

Appellant present in person