



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 502 OF 2015**

**WAHIRA BUILDERS LTD.....APPELLANT**

**VERSUS**

**D.M. ENTERPRISES LTD.....RESPONDENT**

**( Being an appeal from the judgment and decree of the Hon. Magistrate M. Chesang delivered on 29<sup>th</sup> September 2015 in CMCC NO. 1650 of 2012)**

**JUDGMENT**

The appellant herein entered into a contract with the respondent whereby the respondent was to carry out some work on behalf of the appellant who had secured a tender from Kenya Ports Authority. The parties executed an agreement dated 26<sup>th</sup> July, 2011 which contained terms and conditions binding the two parties.

The respondents is said to have completed the works and paid part of the contractual sum leaving a balance of Kshs. 1,990,546.67. That was the subject matter of the case in the lower court. The appellant denied the claim and blamed the respondent for not completing the works assigned and instead undertook shoddy and substandard work. The appellant then raised a counter claim of Kshs. 786,550/= being the sum incurred for repairs, cost of materials, machinery and labour.

After listening to the evidence the lower court delivered judgment in favour of the respondent which aggrieved the appellant herein leading to the present appeal. In arriving at the said decision, the trial court relied on clause 4 of the agreement which stated as follows,

**“Please note that any dissatisfaction while work is in progress should be reported within the same working day in writing. No complaints will be accepted after completion of works.”**

The court observed that the appellant having failed to raise any complaints as provided under the agreement the appellant was bound to pay the balance on completion of the works.

I have evaluated the evidence adduced before the lower court and related the same to the pleadings which include documents by both parties. As this transaction was based on a written agreement, the trial court was correct to have relied on the same agreement to determine the same. The appellant was bound to show the trial court that the respondent was in breach. This was not shown. The court cannot rewrite the contract between the parties; otherwise it will be entering the arena of conflict instead of resolving the conflict. I am unable to fault the trial court and find that the appeal lacks merit and is therefore dismissed with costs to the respondent.

***Dated, signed and delivered at Nairobi this 14<sup>th</sup> day of November, 2018.***

**A. MBOGHOLI MSAGHA**

**JUDGE**