



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 85 OF 2009

ASWA DEVELOPERS & CONTRACTORS LIMITED.....PLAINTIFF

VERSUS

COMPACT FREIGHT SYSTEMS LIMITED.....DEFENDANT

J U D G M E N T

1. The plaintiff sued the defendant for the recovery of the sum of Kshs.7,234,623.70 on account of duly certified construction works in the sum of Kshs.6,803,985.30 and value of materials the plaintiff was allegedly prevented for collecting from the site in the sum of Kshs 430,638.40. On that sum the plaintiff prayed for costs and interests from the 26/9/2008 till payment in full.

2. The factual foundation of the claim is that by an agreement both oral and in writing made in March 2008, the plaintiff was engaged by the defendant to design and execute agreed civil works.

3. By a defense dated 29/5/2009 and filed in court on the same day, the defendant admitted the agreement between the parties but contended that it was not written but oral constituted by various letters exchanged, discussions at meetings and telephone conversation between officers for respective sides as well as by the project consultants. The contract was additionally evidenced in bills of quantities, design works and civil works quotation from the plaintiff to the defendant. The fundamental terms of the contract were that the plaintiff would design and build according to the structural engineering standards suitable for the intended use as a godown parking area for use by heavy laden trucks and machinery thereby demanding use of standard materials to be met by adequate resources, equipment and competent staff; the work would commence on 15th March 2008 to last 8 weeks and that payment would be by instalments against delivery of works to the specified and certified standards comparable to other works elsewhere and it was contended by the defendant that in breach of the fundamental terms of the agreement, the plaintiff employed minimal, inadequate, substandard and/or unsuitable materials, equipment and staff and thus delivered works that were themselves substandard and wholly unsuitable for the intended purpose and use and at the end of the contractual period had only delivered 30% of the total works.

4. As a consequence of such alleged breaches, the *cabro-block* paving in **area 'B'** sank and failed leading parties to enter into a supplementary contract dated 2/8/2008 whose fundamental terms were that; henceforth the measurement of works executed would be undertaken jointly as works progressed; all imported fill materials would be classified as sub-grade; the client would retain 5% of the value of total costs of area B for a period of 12 months as surety for any repair work and that the plaintiff would get additional six weeks to complete subject to the plaintiff providing agreed additional equipment.

6. Even that subsequent agreement was breached and parties once Again, by a subsequent supplemental agreement dated 2.8.2008 agreed that the plaintiff would correct the defects noted in area "B" which according to the defendant the plaintiff failed to effect. The contract was then terminated by the project consultant as a way of mitigating own losses after the plaintiff exhibited unwillingness and inability to redo the substandard works. To the defendant therefore, the certificates issued by the consultant were issued for substandard works and before the full extent of the defects became apparent after the works were put to use as intended. There was an alternative plea that the certificates were obtained by deceit and fraud by virtue of incorrect statements in the certificates whose particulars were then given. On those grounds the defendant faults the certificates as a legal basis for the plaintiff's claim, dismissing the plaintiff

entitlement to the sum of Kshs.6, 803,985.30 on the foot of such certificates; denied having detained any of the materials and invited strict proof and prayed that the suit be dismissed with costs.

7. On 16/5/2014, the plaintiff filed a witness statement by Stephen Kemuthia Wangombe, a director of the plaintiff together with a list and copies of some 10 documents which included copies of minutes taken at site meetings, correspondence between parties and the consultant together with a valuation report indicating works done and payment made as well as report by Ministry of roads dated 13.12.2018 prepared at the defendants request. That witness statement was at trial adopted as the plaintiff evidence in Chief and the documents produced as filed without objections upon which the witness was cross examined.

8. For the defendant, Samuel Kairu Njonde filed a witness statement dated 29/9/2015 pursuant to directions of the court made on 28/9/2015. That witness statement is, for all intents and purposes, a reproduction of the pleadings at paragraphs 4, 5, 7 8, 9 and 19 of the defense with very minimal variations not more than paraphrasing. No independent documents were however filed and at trial the witness statement was adopted as evidence in chief and the witness then relied on the documents by the plaintiff to discredit the plaintiff case.

Testimony by the plaintiff

9. At trial the evidence by single witness was short and succinct. The witness statement by PW 1 which was adopted as evidence in chief was clear that indeed there was the initial agreement and subsequent supplemental agreements but pointed out by the two letters dated 24th and 29th September 2008, the works had stopped due to non-payment of certified works and a request was made for a joint valuation to determine how much was due for payment.

10. There was also exhibited a letter dated 8/10/2008 by the project manager which confirmed that the works were at 95% complete pursuant to a joint measurement exercise conducted on 1/10/2008 pursuant to which a certificate was issued in the sum of Kshs.6,803,985.30 and concerned completed works and not incomplete works.

11. The plaintiff's case remained that the certificates were issued pursuant to measurement of works undertaken jointly. In addition when the question was to determine the quality of works carried out, an opinion was sought by the defendant from the Ministry of Roads, Republic of Kenya, which by a report dated 13/12/2008 gave to the works a clean bill of health while blaming the defendant for deforming the area by use of heavily equipment in an area designed to park small vehicle. The witness then contended that the entire area, divided into sections, had been designed and built for specified use and that the area paved with paving slabs was for parking of custom bonded vehicles and for visitors' vehicle while the area for operation and storage of containers was concreted.

12. On the materials detained he maintained that materials valued at Kshs.430,638.40 were determined and the plaintiff denied the liberty to take possession.

13. On cross examination, the witness admitted that there need been complaint and that the contractual period was not met but gave the reason that the same was caused by late delivery of materials by the manufactures which was understood by all as well as whether conditions. The witness was referred to various documents in the plaintiff's bundle of documents including minutes and correspondence to the effect that on determination of the works would be measured jointly and costed.

14. On re-examination, the witness referred court to pages 28 – 31 of the plaintiffs bundle in which there is a valuation report which according to him took regard of all the issues raised by the defendant including payments with a rider that all defects would be met by a retention money calculated at 5% of the certificates.

Testimony by the defendant

15. Even the defendant only called and relied on the evidence of a single witness. That witness however did not file a witness statement but relied on the witness statement filed by one Samuel Kairu Njonde. That development was occasioned by the fact that on the date set for hearing of the defense case, the counsel

applied for an adjournment on the basis that his witness was away from court because he had been engaged as an observer for the elections due some two weeks later. When the application was refused the counsel sought to call a witness who essentially adopted the witness statement filed and was thereafter examined. That request was not opposed but conceded by the plaintiff's counsel. As pointed out before, the defendant filed no documents and has relied on the plaintiff's exhibits to prove its defense.

16. The witness said he was employed by the defendant as the manager in-charge of releasing goods from the yard. On the plaintiff's claim for sums owed, he referred court to pages 25 -26 of the plaintiff bundle to show that some payment of Kshs.10,613,895/= had been made and acknowledged by the plaintiff and there was an outstanding sum of Kshs.4,052,811/= on two certificates for the period 31st July to 13th August 2008 and 14th August to 27th August 2008. The witness said that for the period up to 27th August 2008 there had been certificates totaling Kshs.6,680,795.64/= of which Kshs.3,000,000/= was paid leaving a balance of 3,680,795.64 and not the sum of 6,680,795.64/=.

17. He denied that the defendant ever breached any term of the contract and maintained that the area done by the plaintiff broke down barely one worth after completion. On cross examination by the plaintiff's counsel, the witness said he joined the company on 1/9/2008 as a clerk. He admitted that the execution of the contract involved three parties, the plaintiff, defendant and the project manager one STROUTTEL AFRIQUE LTD. He however denied knowledge of what the responsibility of the project manager was but admitted the contents of letters at page 45 by the project manager which said the sum due to the plaintiff was Kshs.6,803,985.30 as at 1/10/2008 and confirmed that the sum was yet to be paid and had not been paid for reasons he said he did not know. He equally admitted that the defendant requested a report from the Ministry of Road which said the yard was deformed by heavy trucks but the paving slabs remained intact.

18. He denied any area was reserved for parking of light vehicles and that he did not understand how valuation for construction works is done. On re-examination, he denied knowledge how the project managers came into the contract but reiterated that to purpose of the contract was to lay paving blocks for heavy trucks to pass over. When questioned by court the witness said he did not have any documents to show that any payments were ever made after the 18/9/2018. On measurement of the works said by the project manager to have been done jointly he was unaware if the defendant was involved.

Submissions by the parties

19. After both sides closed respective cases, they both filed written submissions. The plaintiff's submissions are dated 28/8/2017 and filed on 30/8/2017 while those by the defendant are dated 29/01/2018 and filed in court the next day.

20. In their submissions the plaintiff contend that there is only one issue for determination and crafted same as whether or not the plaintiff is entitled to the sum sued for. In working the issue to that one point the plaintiff has placed emphasis on the fact that the question of the value of works done by the plaintiff at the defendant's site was one for determination in terms of the contract between the parties – works being measured jointly and certified by the project manager.

21. It is submitted that was done and the question of fraud pleaded was not adequately proved to the requisite standards. Reliance was placed on the decision in ***Evans Otieno Nyakwana vs Clephan Bwana Ongaro [2015] eKLR*** for the proposition of law that proof of fraud, even in civil cases, carried a heavier burden than the ordinary balance on a probability and the court of appeal decision in ***Rosemary Wanyika Mariithe vs George Maina Ndinwa [2014] eKLR*** for the proposition of law that merely raising fraud in a defense is not sufficient proof of fraud.

22. On the effect of the valuation certificate, the plaintiff stressed the fact that the final certificate took account of all works done, payment made and the materials on site to be used for further execution of the works. For good measure reference was made to the valuation report at page 43 indicating the value of the material on site and the fact that the final certificate revealed the valuer of executed works at Kshs.6, 803,985.30.

23. Reliance was then place on the decision by **Kasango J** in ***Weston Constructors Ltd vs Kenya Ferry Services (2014)eKLR*** for the proposition that a certificate issued by the project architect, an agent of the employer in a contraction contract, bound the employer and that it is arrogant for the employer to fail to honour such certificates.

24. For the defendant elaborate submissions were made to the effect that the document the plaintiff founded his claim upon was never a genuine certificate but merely a purported one. Heavy premium was placed on the breaches on time for completion and that the works executed failed when used by heavy equipment. It was equally contended that there having been such breaches including substandard works the plaintiff was not entitled to the payment and that the certificate could not be relied upon for being tainted with fraud. The decision in *Cheall vs Association of Professional Executive Clerical and Computer Staff [1983], ALL ER* was then cited for the proposition of law that a party cannot rely upon an event brought about by his own acts leading to a breach.

25. On the sum claimed and the propriety of the certificate, reliance placed on a letter dated 6/10/2018 by which the project manager asked the plaintiff to remove his equipment and materials less coral stones. On fraud and misrepresentation reliance was sought on the decision in *CM Computation East Africa Ltd vs Tax Homes Ltd [2017] eKLR* where the court held that failure to avail contracts for execution, land for development and availing non-genuine documents of title to land, all amounted to fraudulent misrepresentation.

Issues for determination

26. Even though there was filed by the plaintiff a list of some 11 issues, in Submissions, the plaintiff narrowed down the issues to one, ***whether or not the sums were due?*** For the defendant three issues were isolated being whether the plaintiff was entitled to payment of the sum sued upon; whether the plaintiff breached the contract fundamentally and whether the plaintiff had visited upon the defendant fraud and negligent misrepresentation.

27. To this court, those issues as identified by the parties notwithstanding, having read the pleadings and evidence led, the sole issue is whether or not the plaintiff is entitled to the sum claimed on the basis and foot of the valuation certificate issued by the project manager after a joint measurement exercises. Of course there is the ancillary issue of costs which ought not to be an issue for determination by the court as the law demands that costs follow the events unless the court for good reasons to be recorded, decides otherwise.

Analysis and determination

28. That the parties entered into a contract which was then altered or amended twice by what parties called supplementary agreements is not in dispute. There being an agreement, as subsequently amended or indeed a series of agreements, I do take the view that all the documents evidencing that agreement must be taken into account with a clear understanding that the latest of the agreements reflect the last position of the parties in the event of a conflict between an earlier term and a later one. In this matter the contract between the parties was never coded in a single agreement but on a series of documents including site meeting minutes, correspondence between them and correspondence by the project manager in some of which certificates were forwarded and reservations made.

29. I have had the benefit of reading the entire bundle of documents and I take the following documents, among the many, to be of benefit in resolving the parties dispute:-

- Minutes dated 2/7/2008
- Letter by the Project Manager dated 6/10/2018
- Letters by the Project Manager dated 8/10/2008 and 9/10/2018.

30. The minutes dated 2/7/2008 at page 14 of the plaintiffs bundle indicates that the parties resolved that measurements and certification be done fortnightly and the defendant to honour same within 5 days of receipt.

31. The letter of 6/10/2018 informed the plaintiff that measurements were being done to determine the sum due for payment while the letters dated 8/10/2008 and that of 9/10/2008 were to the effect that measurements were taken on 1/10/2008, the defendant had decided to terminate the contract and sent to the plaintiff the valuation of works conducted on the 1/10/2008 and reflecting the adjustment made regarding previous payments made and the materials by the plaintiff on site and desired by the defendant for use to complete the remaining works.

32. That certificate reveal unequivocally that the plaintiff was owed the sum of Kshs.6,803,985/= after due regard was taken

of the payment made, materials removed and those retained at the site.

33. I do find that the desirability to engage project engineer is for the need to have a professional on site to certify the quality and quantity of works done. When he renders a certificate that should be a professional opinion to which the employer and employee have entrusted the expert to do and none of them can be permitted to run away for being bound unless an impropriety be alleged and proved against the expert.

34. Here the impropriety of fraud and misrepresentation have been alleged, with little proof, against the plaintiff and not the project manager, as the author of the certificate. I do find that even if fraud and misrepresentation had been adequately proved against the plaintiff, it would require a proof how that affected the opinion of the project manager. No attempt was made in that regard.

35. Consequently, I do find that the certificate of works done, as jointly Measured, bind the plaintiff and the defendant and in so far as it shows that the plaintiff was entitled to Kshs.6,803,985.30, which sum the defendants witness admitted to be owing, that sum is due and payable to the plaintiff for which reason I do enter judgment for the plaintiff.

36. There was also a claim for the sum of Kshs.430, 638.40 being cost of materials left on site. For that claim the defendant invited strict proof and for this court no attempt was made to prove the same. It is a claim one would say was just thrown at the court without more and I have nothing towards its proof. I do find that it was never proved and cannot be awarded. That limb of the claim fails and is thus dismissed.

37. The upshot is that I enter judgment for the plaintiff against the defendant in the sum of Kshs.6,803,985.30 plus interest thereon at the prevailing court rates from the 14/10/2008, being the 5th day after the final certificate was issued, till payment in full.

38. I also award to the plaintiff the costs of the suit and interests on such Costs as agreed or taxed by the taxing officer.

Dated and signed at Mombasa this 7th day of December, 2018

P J O OTIENO

JUDGE

Signed and delivered at Mombasa this 7th day of December 2018.

D O CHEPKWONY

JUDGE