



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 663 OF 2009

JERIAH MASIRA T/A AMEKEM AGENCIES.....APPELLANT

- V E R S U S -

ATTORNEY GENERAL.....RESPONDENT

(Being an appeal against the decision of Hon. Ragot Mrs. SPM in CMCC 2784 of 2003 delivered on 29th October, 2009)

JUDGEMENT

1) Jeriah Masira T/A Amekem Agencies, the appellant herein, sued the Attorney General, the respondent herein, before the Chief Magistrate's Court claiming for payment of kssh.370,000/= plus interest and costs of the suit. The appellant had averred that she was contracted to assemble and install a Geothermal Model for display in the Nairobi 2002 ASK show. She also alleged that she delivered a conceptional geothermal model to the ministry of Energy but was not paid by the aforesaid ministry. The suit was heard and dismissed by Hon. J. Ragot (Mrs), learned Principal Magistrate. Being aggrieved with the dismissal order the appellant preferred this appeal.

2) On appeal, the appellant put forward the following grounds in her memorandum.

- 1. The learned magistrate erred in law and in fact in considering and/or awarding claims/matters that were neither pleaded or in issue.***
- 2. The learned magistrate erred in law and in fact in failing to make a finding that there was a valid contract between the appellant and the respondent and that there was breach of the same by the respondent.***
- 3. The learned magistrate erred in both law and facts by considering terms and conditions that were not in the contract between the appellant and the respondent.***
- 4. The trial magistrate erred in both law and facts in failing to make a finding that the plaintiff had proved her case against the defendant on a balance of probability.***
- 5. The appellant shall upon the receipt of the typed proceedings file a supplementary memorandum of appeal to include other further grounds that may become apparent therein.***

3) When the appeal came up for hearing, this court was prompted by the appellant's counsel to issue directions to the effect that the appeal be disposed of by written submissions. At the time of writing this judgment, this court had the benefit of the appellant's submissions since the respondent failed to file submissions.

4) I have re-evaluated the case that was before the trial court. I have also considered the submissions filed by the appellant. The appellant testified and summoned one witness to testify in support of her case before the trial court. The appellant stated that she responded to an advertisement from the Ministry of Energy and bid to assemble and install a conceptual geothermal model. It is her evidence that she won the bid and she thereafter proceeded to assemble the model and had the same delivered to the ministry on 24th September 2002 but she was not paid. She said that she instead received a letter cancelling the L.P.O on 30.9.2002. The respondent on the other hand summoned Joshua Okoth Ouma to testify in support of the defence case. He told the trial court that in the year 2002, he was the chairman of the ministerial show committee which rejected the appellant's geothermal model because it did not meet the standards required. The learned principal magistrate considered the evidence tendered by both sides and came to the conclusion that there was a contract between the parties. The learned principal magistrate further considered the question as to whether or not there was breach of the contract. It was found that the appellant did not deliver the geothermal model by 15th September 2002 in breach of condition 3 of the contract. The learned principal magistrate formed the opinion that the respondent was therefore entitled to cancel the contract. The learned principal magistrate also formed the opinion that the respondent was entitled to reject geothermal model supplied because it did not meet the standards. On the basis of the above reasons the learned principal magistrate dismissed the appellant's suit.

5) On appeal, the appellant has argued that pursuant to the contract she entered with the respondent, she supplied the respondent with a conceptual geothermal model which model was received through F. N. Ngaluka, the officer in charge of stores on behalf of the permanent secretary on 24/9/2002. It is also argued that the same was inspected the respondent's representative who certified that the same was as per the specifications and hence acceptable. The question which the appellant posed is whether in light of the evidence tendered, the appellant was entitled to reject the supplied model. This is actually the only question this court has been asked to answer.

6) After a careful consideration of the arguments put forward it is apparent that there is no dispute that the appellant and the respondent entered into a valid contract. The question is whether there was a fundamental breach of the contract which entitled the respondent to cancel the agreement.

7) The recorded evidence shows that the appellant summoned Balozi Morara George (PW1) to testify in support of the appellant's case before the trial court. According to PW1, the respondent invited bids vide a notice pinned on the ministry of Energy's notice board dated 15.8.2002. PW1 averred that the appellant successfully applied and was on 23rd August 2002 issued with a Local Service Order (L.S.O) giving the required specifications. The Local Service Order was produced in evidence as an exhibit. This witness further stated that the appellant proceeded to design the geothermal model according to the specifications given to her and had the same delivered on 24.9.2002 by one Mr. Nyakundi who certified and approved the same as meeting the set specifications. PW1 produced a delivery note showing that the respondent acknowledged receipt of the model. PW1 said that the appellant was shocked to receive the letter 30.9.2002 cancelling the Local service order. The cancellation letter prompted the appellant to file the suit before the trial court. The respondent did not cross-examine PW1 on his evidence to test its veracity. The record shows that on 20.7.2009, a consent order was recorded to have PW1 recalled to be cross – examined on 14.10.2009. On the aforesaid date, the appellant summoned instead one Wesley Obae Imanyara, to testify. He told the trial court that on 1st August 2002 he saw an advertisement inviting bids to assemble and install the conceptual geothermal model at a cost of ksh.370,000. The appellant complained that despite complying with the terms and conditions of the delivered Geothermal model, no payment was forthcoming. According to PW2, the ministry of Energy disputed the standard applied to determine whether or not the model met the specifications. In cross-examination PW2 stated that the appellant used the specified material to come up with the model. PW2 further stated that the respondent disputed the standard claiming the appellant was required to deliver an artistic impression and not the Geothermal model. PW2 also claimed that the appellant delivered Geothermal conceptual model with artistic. The appellant further argued that the date of delivery was not the reason for refusal to pay and in any case the L.S.O. did not indicate the date. In its defence, the Ministry of Energy, summoned Joshua Okoth Ouma (DW1) to testify. DW1 said he was the chairman of the ministerial show committee. He pointed out that the Ministry of Energy (Geothermal department) was required to exhibit at the show a conceptual Geothermal model. DW1 also stated that the department was supposed to have given a design

creating geothermal model showing the processes in Geothermal station. He stated that instead what was received from the appellant was an artistic impression which was not near what was expected. DW1 further stated that the same was brought late i.e on 24.9.2002 instead of 1st September 2002 hence it was rejected. DW1 further averred that the item could not be received by a storeman on behalf of the permanent secretary. DW1 also stated that what was delivered by the appellant was valued at ksh.80,700/= in the month of November 2007. In cross-examination DW1 admitted that the appellant's Geothermal model was received by Peter Nyakundi a representative of the department of Geothermal in the show committee. DW1 further stated that the ministry did not pay for it because it was not what was asked for and was not worth the value stated. I have carefully examined the documents presented before the trial court. There is no doubt that the appellant was issued with a local service order which was produced as PExh. 1. The approved Local Service Order stated the value of the conceptual Geothermal model plus the cost of assembling and installing at ksh.370,000/=

8) The appellant further produced in evidence a copy of the specifications given as PExh 2. The specification clearly mentions that the delivery date to be 15th September 2002. The appellant also produced the delivery note showing the respondent acknowledged receipt of the model on 24.9.2002 and noted the same met the specifications.

9) The appellant further produced in evidence the letter of cancellation of the LPO. It is stated that the layout is a simplistic geothermal production rather than a conceptual geothermal model. After a careful re-evaluation of the evidence, it clear to this court that the specifications given to the appellant by the ministry were as follows:

i. The model should measure 30" by 54"

ii. The model should show all the stages in the geothermal process from steam filled exploitation to power house, cooking towers, steam transmission lines and electricity lines.

iii. Should be made of ceramic, plastic or suitable material

iv. Should be portable.

10) The letter of cancellation stated that the model supplied was a simplistic layout of a geothermal production rather than a conceptual geothermal model. In my view the letter of cancellation is very general. The letter did not pinpoint which of the specifications were not met in developing the model. In my humble opinion, I think the contract was cancelled in a rush and without due consideration. The author of the letter of cancellation did not bother to take into account the fact that the officer representing the department of geothermal acknowledged receipt and specifically stated on the face of the delivery note that the model was as per the specifications. I find that the contract was cancelled capriciously and such an action cannot be countenanced in law.

11) The other ground which the learned principal magistrate relied to dismiss the appellant's suit is that the model was delivered too late. I have carefully perused the letter of cancellation and it is apparent that the question of time was not one of the grounds relied upon to cancel the contract. The document outlining the specifications merely indicated that the date of delivery was 15.9.2002. The same did not state the consequence of a late delivery. It was therefore wrong for the learned principal magistrate to rely on the ground of late delivery to dismiss the suit.

12) In the end, I am convinced that the appeal must succeed. The appellant in my view had established her claim to the required standards.

13) Consequently the appeal is allowed. The order dismissing the suit is set aside and is substituted with an order entering judgment as prayed in terms of prayers (a) and (c) of the plaint dated 21.5.2003.

14) The appellant to have the costs of the appeal.

Dated, Signed and Delivered in open court this 2nd day of December, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent