REPUBLIC OF KENYA

IN THE HIGH COURT

AT MALINDI

CIVIL APPEAL NO. 13 OF 2009

WOLFGANG JOSEF MIEHLE ……..……APPELLANT

VERSUS

ATHACON GENERAL CONTRACTORS ……..…….RESPONDENT

R U L I N G

Wolfang Josef Miehle (the appellant) has filed this appeal against Athacon General Contractors (respondents) arising from a decision made by the Resident Magistrate's court, Kilifi in SRMCC No. 274 of 2008. ATHACON GENERAL CONTRACTORS V WOLFGANG JOSEF MIEHLE the trial magistrate Mr. Nduna J. M. awarded a sum of kshs. 705,862/30cts with interest at court rates in favour of the respondent herein.

The claim was based on a breach of contract whose background was that the appellant had engaged the services of the respondent to construct a residential house at Mtwapa on plot No. 2064/I/MN at a cost which was to be paid, upon completion of the contract. The agreement was partly in writing, oral and by conduct.

The respondent then procured material on behalf of the appellant, whilst appellant made payments to the suppliers for and on behalf of the respondent.

The appellant made part payment of the sum due, leaving a balance of kshs. 705,862/30cs which is what formed the basis of the claim before the SRM's court.

The appellant's listed the following grounds of appeal

1) The trial magistrate was not seized of the jurisdiction to try the suit filed before it.

2) The trial magistrate failed to consider the interpretation of section 11 and 12 of the Civil Procedure Act.

3) The trial magistrate failed to find that the respondent did not comply with the mandatory procedure as regards filing of suits.

4) That although the house was constructed in Mtwapa, the agreement was entered into in Mombasa and

that ought to have been the place of instituting the suit.

5) The trial magistrate constituted his own version of facts in complete depature from the pleadings and arrived at a conclusion without any legal basis.

It is due to the aforegoing that appellant prays for setting aside of the judgment and that the same be substituted with an order dismissing the suit.

The appellant's defence had been that due to the respondent's unprofessionalism, he had to pay over and above the agreed amount and that respondent did a sloppy job in total disregard to the architectural plan ending up with the building being unfit for human habitation. The result was that the appellant had to undo what the respondent had done so as to bring the house to a habitable condition.

The evidence of Athanas (PW1) was that after the request to construct a two-floored house, based on a plan (Ex.1) he gave the appellant the estimates of the costs, which amounted to Kshs. 6,144,570/- and after negotiations, they scaled it down to Kshs. 5,700,000/=. The job was to take 8 1/2 months to complete and they signed a written agreement dated 10-12-05 and work began on 19-12-05. An initial payment of kshs. 617,500/- was made in respect of the substructure i.e the floor of the house. The appellant brought in additional works which were not in the initial quotation – those additions amounted to kshs. 201,112. Further additional works of kshs. 225,797 were again introduced, thus increasing the costs by kshs. 397,025/37cts. They agreed that respondent would do the job, then both parties would measure and quantify the work done, upon completion of the construction. The letter of instruction was produced as exhibit 4.

So remeasurements were done together with one Engineer Martin, who was introduced to the respondent by the appellant. Respondent quantified the work done and the unpaid sum, giving a total cost of kshs. 7,234,651 less discount of 7.24% to give a net figure of kshs. 6,710,862/30. By that time appellant had paid him kshs. 6,005,000/-, leaving a balance of kshs. 705,862/30 cts

On cross-examination he stated that once the appellant made changes in the construction, then the costs were bound to change. He confirmed that he had already been paid a total of kshs. 5.7million and stated that:-

"There is no agreement for the extra costs….it took more than 8 ½ months because of the amendments …I did not hand over the house officially…I don't know whether the house is substandard."

On re-examination the respondent insisted that there was communication on the additional works as per the letter dated 8-4-06 (produced as Ex.5).
The letter written by the respondent was forwarding a schedule of rates for variations one and two requested by the appellant. It was respondent's evidence that appellant frustrated him and took away keys to all the doors and refused to let him conduct a handing over. Further, that there was no written communication or demand that respondent had done a shoddy job.

In his evidence, appellant old the trial court that they entered into the agreement at an initial price of kshs. 6,144,570, which was scaled down to kshs. 5.7m after negotiations being a 10% discount. His evidence was that most of the materials used was second hand and not original and the work was performed in a substandard manner. He maintained that he paid what was agreed upon as per the contract including an extra 385.950 making a total payment of kshs. 6,085,950/- and there is nothing more owing, and the demand for kshs. 705,862/30cts is unknown to the appellant. He mentioned the substandard work as being rusted sinks, taps no working, and a dangerously done roof – he showed the trial court pictures of the house.

On cross-examination he stated:

"I am aware that there were some variations in the construction of the house…I don't know the cost of

the variation …the variations which were done midway were with the consent of my wife as the variations were done when I was in Germany. She sent text messages to me about the variations"

In essence the appellant confirmed that there were variations which he and his wife ordered then states on re-examination as follows;

"there were variations. My wife and I ordered for the variations because the garage was too narrow to park a car. Athacon is to blame for that. We were to do the calculations for the variations after the work was done. I paid kshs. 385, 950 after the variations, to me that was enough"

The appellant's wife (Florence Onyango Maina) testified as DW2 – she is actually the one who signed the agreement on behalf of the appellant who was then in Germany. She confirmed there was variation in the construction because the front portion as a parking was not sufficient to accommodate two cars, so the walls of the garage had to be changed. However she lay the blame on respondent saying he created the problem by failing to take the correct measurements.

She confirmed as correct a letter exhibit 4 referred to kshs. 350,522 which was meant for variations on the ground floor and on the second floor and which sum they agreed to.
Her evidence was that respondent did a shoddy job because he placed small sinks, and water it the showers were running into the bedrooms and the garage had to be turned into a room because it was too small for the cars.

On cross-examination DW1 confirmed that apart from the written agreement, they had some talking and she authorized variation of the building and that fresh measurements had to be down because of the variations.

The trial magistrate made the following findings:

(a) The cost of the extra work was ascertained after completion and in the presence of an engineer hired by the appellant

(b) By authorizing the variations, the appellant invited extra costs, and by not agreeing on the costs in advance, then he agreed to be bound to and pay a future extra costs to be quantified by measurements after completion.

(c) The appellant was aware of the extra costs, that is why he paid some kshs. 365,950/- over and above the agreed initial sum – this is why he held that the balance claim was Kshs. 705 862/30cts.

(d) He found that there was no evidence to support the purported shoddy work and that would explain why appellant did not even file a counterclaim to recover any losses for the alleged substandard work.

At the hearing, Mr. Gakuo submitted on behalf of the appellant that the trial magistrate failed to appreciate that the matter concerned construction of a house in Shanzu which is situated within Mombasa District, so the mater should have been filed in Mombasa and not Kilifi. The Council reffered to section 11 and 12(d) of the Civil Procedure Act, to support his argument.
Section 11 states:

"Every suit shall be instituted in the court of the lowest grade competent to try it, except that where there are more subordinate courts than one with jurisdiction in the same district competent to try it, a suit may, if the party instituting the suit or his advocate certifies that he believes that a point of law is involved, on that any other good and sufficient reason exists, …be tried in any one such of subordinate courts…"

This is further expounded by section 12 of the Civil Procedure Act which states:

"subject to the pecuniary or other limitation prescribed by any law suits

(e) For the determination of any other right to an interest in immovable property here the property is situated in Kenya, shall be instituted in the court within the local limits of whose jurisdiction the property is situated"

Mr. Gakuo further argues that the drawings/plans presented for approval were approved by the Town Clerk of Mombasa Municipal Council and that his confirms where the property is situated. It is his contention that the point of law is on jurisdiction, which goes to the root of everything, relying on the decision of Court of Appeal in the case of **FLORICULTURE INTERNATNIONAL LIMITED & OTHERS (1995-1998)1 ea61 (CAK)** saying although the issue of jurisdiction was not denied by the appellant, yet parities cannot consent to jurisdiction.

In opposing the appeal, Mr. Tarus for the respondent submits that this is not an appeal, because the issue of jurisdiction was raised as Preliminary Objection before the lower court and then abandoned, and this appeal is just the preliminary objection which ought to have been argued before the trial court, and the cited decision is not relevant and the circumstances are different from the present case as in that cited case, the lower court decided to move without jurisdiction, hear a matter which had not been scheduled for hearing and allow oral amendments, which is not the position here.

The issue on jurisdiction is seen as a way of scuttling the proceedings in the lower court and Mr. Tarus points out that even when the appellant was given a chance to amend pleading, the question for the trial court's jurisdiction was never raised and the matter has been overtaken by events.

It would seem that Mr. Gakuo has abandoned all the other grounds of appeal and concentrated on the question regarding jurisdiction.

Clearly the **FLORICULTURE case** put matters in perspective, that the appellate court had power to entertain a point raised for the first time on the appeal by such a point goes to jurisdiction.

The amended pleadings dated 10th December 2007 at paragraph 3, state that the property is situated in MTWAPA NOT SHANZU. This issue is very easy to resolve – until 2010 when the Interim Boundaries Commission redrew boundaries in Kenya, Mtwapa fell under Kilifi District. The Comprehensive Primary School Atlas Published by Longhorn 2010 edition has the map of each County (formerly referred to as Districts) and Mtwapa falls within Kikambala Division which is within Kilifi County and therefore within the jurisdiction of Kilifi SRM's court. My finding is that, as at the time of filing suit, the property was in Kilifi District, the approval of Plans by the Mombasa Town clerk, notwithstanding.

As regards the substance to the judgment, I failed to detect a re-drawn version of facts by the trial magistrate, in fact he considered every contested aspect, properly analysed both evidence by plaintiff and defendant and correctly applied the legal principle based on written document, denied oral agreements and conduct of the parties, in making a finding that the matter had been proved on a balance of probabilities (which by the way, is the recognized standard of proof in civil matters). From the evidence on record, I would find no reason whatsoever to interfere with the trial magistrate's findings and I decline to do so, I uphold the trial magistrate's judgment and the appeal is dismissed with costs to the respondent.

Delivered and dated this **1st** day of **March 2011** at Malindi.

H. A. OMONDI
JUDGE

Respondent present
Appellant absent