IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gicheru, Kwach & Omolo JJ A)

CIVIL APPEAL NO 87 OF 1988

BETWEEN

KISUMU MUNICIPAL COUNCIL..... 1ST APPELLANT

SOUTH BRITISH INSURANCE CO. LTD.....2ND APPELLANT

AND

BOT CONSTRUCTION {BETCO) LTD.....1ST RESPONDENT

BENJAMIN O. TOLO.....2ND RESPONDENT

JOSEPH AGER .....3RD RESPONDENT

ENOSH ADONGO.....4TH RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Nairobi (Mr Justice Trainor) dated the 7th day of March, 1985

in

HCCC No 1637 of 1978)

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JUDGMENT OF THE COURT

In this appeal, the first and second appellants have put forward ten (10) grounds of appeal, which are that:

> "1. The learned trial judge erred in fact and in law by not awarding the first appellant a sum of Shs 253,378/70 against the first respondent as damages in respect of the completion of the road works by another contractor after the first respondent had failed to complete those road works within the time allowed under its contract with the first appellant.
>
> 2. The learned trial judge erred in fact and in law by not holding on the evidence before him that the delay in the first appellant's completing the said road works was due to the lack of funds to do so and was therefore justifiable delay.
>
> 3. The learned trial judge erred in fact and in law when he held that, on the evidence before him,

the first appellant had funds to pay for the completion of those road works when it accepted the tender of the other contractor in February, 1975.

4. On the evidence before him, the learned trial judge erred in fact and in law by awarding the first appellant only Shs 10,000/= as damages for inconvenience. He should have awarded the first appellant at least the Shs 88,000/= claimed in the plaint as damages for the delay under the contract between the first appellant and the first respondent.

5. The learned trial judge erred in fact and in law by deducting the sum of Shs 100,207/50 from the damages due to the first appellant from the first respondent's breaches of its contract with the first appellant.

6. The learned trial judge erred in fact and in law by deducting Shs 56,332/50 a second time from the damages due to the first appellant from the first respondent.

7. The learned trial judge erred in fact and in law by making any deductions at all from the damages due to the first appellant from the first respondent. No such deduction was justified on the evidence before him.

8. The learned trial judge erred in dismissing the first appellant's claim against the first respondent with costs.

9. The learned trial judge erred in fact and in law by dismissing the second appellant's claim against the four respondents jointly and severally for Shs 114,000/=. The second appellant was legally liable to pay this amount to the first appellant and therefore had a right to recover it from the respondents with costs and interest.

10. The learned trial judge erred in fact and in law by awarding the first respondent any costs. The first respondent had pleaded only a set off and no counterclaim.In these circumstances the first respondent was not entitled to any costs.

In an agreement and schedule of conditions of building contract (without quantities) between the first appellant and the first respondent executed on 25th July, 1972 and attested on the part of the first appellant by its Mayor and Town Clerk and on the part of the first respondent by its Managing Director and two of its other, Directors, (the Agreement) the first respondent was, upon and subject to the conditions annexed thereto, to carry out and complete the works shown on the contract drawings and described by or referred to in the contract specification and the said conditions and the first appellant was to pay the first respondent the sum of Kshs 1,140,000/=, the contract sum, in consideration thereof or such other sum as became payable at the time and in the manner specified in the conditions aforementioned. The works comprised of erecting 50 low cost rental houses (Arina Estate Phase III) within the Kisumu municipality whose external works included road works. From the articles of the agreement, the term "the architect" in the conditions annexed thereto meant the person then holding the post of Town Engineer of the first appellant. Prior to the execution of the agreement, on 17th July, 1972 the second appellant entered into a bond with the first respondent and the first appellant in which it bound itself to the first appellant in the sum of Kshs 114,000/= being ten percent (10%) of the contract sum for the due performance of the contract. This bond was secured by a form of counter indemnity signed by the second, third and fourth respondents who were directors of the first respondent.

The appendix to the conditions annexed to the agreement which was signed by the first appellant and the first respondent indicated that the date for practical completion was 30 weeks from the date of possession of site. The latter date was not shown. Defects liability period was 6 months and the period of final measurement and valuation was also 6 months from practical completion of works. Liquidated and ascertained damages were shown to be at the rate of Kshs 1,000/= per week or part thereof and the percentage of certified value retained and the limit of retention fund was indicated in each case as ten percent(10%). The second appellant was named the surety in standard form of bond and the amount of surety was shown to be Kshs114,000/=.

Clause 15(1) of the conditions referred to above stipulated as follows:

> "15 (1) When in the opinion of the architect the works are practically completed, he shall forthwith issue a certificate to that effect and practical completion of the works shall be deemed for all the purposes of this contract to have taken place on the day named in such certificate."

As is pointed above, the date of taking possession of the site by the first respondent was not indicated in the appendix to the conditions annexed to the agreement. It was therefore uncertain as to when possession of the site was taken by the first respondent. However, it is evident that the first respondent commenced the works on the site, presumably after the execution of the agreement on 25th July, 1972 and with the tacit approval of the architect (Town Engineer) proceeded with it well beyond the 30 weeks period of practical completion so that on the inspection of the works on 17th July, 1973 by the said architect together with the first appellant's Director of Social Services, 30 houses handed over to the first appellant by the first respondent were found to be ready for occupation and were recommended for allocation with immediate effect. Exactly one month later- on 17th August, 1973 - the first appellant wrote to the first respondent in the following terms:

> "Dear Sir,
>
> Re: Arina Estate Phase 3 Contract K 59 B
>
> Although we are pleased to have accepted these 50 houses at last, please remember that they are accepted subject to certain provisions, namely;
>
> 1. That you are to fit night latches to all front and back doors as soon as possible.
>
> 2. That you finish the external painting and touching up.
>
> 3. That you provide oil-paint skirting as discussed.
>
> 4. That you fix curtain hooks throughout.
>
> I would also remind you that you should execute the road works as soon as possible.
>
> Finally, I confirm that during the six months period of making good defects you should have available, and on site for the first month,
>
> one carpenter
>
> " painter
>
> " plumber
>
> " mason
>
> " electrician
>
> " clerk
>
> and " foreman.
>
> I look forward to your prompt attention to these
>
> matters.
>
> Yours faithfully,

signed.

for

Town Engineer."

The contents of this letter were a clear manifestation that in the opinion of the architect (Town Engineer) the works were practically completed and in terms of the relevant provisions of clause 16 (b) of the conditions annexed to the agreement, he should have forthwith issued a certificate to that effect.

By the month of October, 1973 the first respondent had not completed the outstanding works listed in the letter set out above and in a letter dated 12th of that month, the first appellant reminded the first respondent that such outstanding works comprised of roads, kerbs and edgings, storm drains, latches to the front and back doors, curtain hooks and some painting. Because of this, although the houses were in fact occupied, the first appellant nevertheless reminded the first respondent that it was still bound by the contract to complete the outstanding works and that final payment was to be withheld until the said works were completed to acceptable standards. The first respondent's reply thereto in its letter dated 1st March, 1974 was that it had completed the external painting and touching up, the oil paint skirting in all the houses and that the curtain hooks had been fixed in all houses. Night latches were to be fixed on the front and back doors by the end of March, 1974 and the roads were to be started on 1st April, 1974 and completed by the end of that month. According to the first respondent, the delay in completing these works was occasioned by financial difficulties which it had encountered in the past months and "very strongly" apologized for any inconveniences such delay may have caused to the first appellant.

The next communication over this matter was by a letter dated 8th May, 1974 addressed to the first respondent by the first appellant the contents of which were as follows:

"Dear Sir,

Re: Arina Estate Phase III -50 Houses

I refer to your letter of 1st March, 1974 stating that you would commence work on the roads of this estate on 1st April, 1974. I also refer to the internal memorandum from the Town Engineer to the Town Clerk of the 29th January, 1974, copied to you, which makes reference to your promise to complete the contract by the end of February, 1974. However, no attempt to complete the road building has been made.

Since the completion date of your contract should have been in 1973 I consider that the council has been more than lenient in allowing you these extra months. However, we can allow this state of affairs to continue no longer.

I hereby give you notice under clause 25(1)(b) of the contract agreement to complete the works specified here above immediately failing which the council will have no alternative but to determine your contract under the said clause.

I am sorry that this step has become necessary. If the implication of this letter are not clear please contact me directly.

Yours faithfully,

Signed.

Town Engineer."

Save for the road works, there was no reference in this letter to the allegedly completed works referred to in the first respondent's letter to the first appellant dated 1st March, 1974 nor to the fixing of night latches

to the front and back doors which was to be carried out and completed by the end of that month. By 25th July, 1974, the first appellant's complaint in this letter regarding the non-completion of the road building had not been attended to by the first respondent. Consequently, by a letter of the same date, the first appellant terminated the agreement between itself and the first respondent under clause 25(1) (b) of the conditions annexed to the agreement and required the latter to forthwith discontinue any works it was then undertaking on the site.

Clause 25 (1) (b) referred to above stipulated that:

> "25 (1) If the contractor shall make default in any one or more of the following respects, that is to say:
>
> (b) If he fails to proceed regularly and diligently with the works,
>
> then the architect may give to him a notice by registered post or recorded delivery specifying the default, and if the contractor either shall continue such default for fourteen days after receipt of such notice or shall at any time thereafter repeat such default (whether previously repeated or not), then the employer without prejudice to any other rights or remedies, may within ten days after such continuance or repetition by notice by registered post or recorded delivery forthwith determine the employment of the contractor under this contract, provided that such notice shall not be given unreasonably or vexatiously."

According to the first appellant, its letters of 8th May and 25th July, 1974 addressed to and received by the first respondent constituted sufficient notices for the purposes of this clause.

Clause 25 (3) (a) of the conditions referred to above provided that:

> "25 (3) In the event of the employment of the contractor being determined as aforesaid and so long as it has not been reinstated and continued, the following shall be the respective rights and duties of the employer and contractor:
>
> (a) The employer may employ and pay other persons to carry out and complete the works and he or they may enter upon the works and use all temporary buildings, plant, tools, equipment, goods and materials intended for, delivered to and placed on or adjacent to the works, and may purchase all materials and goods necessary for the carrying out and completion of the works."

Pursuant to the foregoing provisions, in October, 1974 the first appellant invited tenders for the maintenance works on the 50 houses erected by the first respondent and for the uncompleted road works referred to above. The closing date for both tenders was 9th November, 1974 at 12.00 noon. In this regard, the lowest tenders received by the first appellant were in the sum of Kshs78,000/= for the maintenance works and Kshs 127,812/00 for the road works from Gordhan Karsan & Co and A K Chaundry of PO Box 8, Kisumu respectively. These tenders were accepted by the first appellant and in regard to the road works, A K Chaundry took possession of the site in February, 1975 after signing a contract with the first appellant for that purpose but it is not clear what date in that month either of this was done. The road works were to be completed within an estimated period of 8 weeks from the date of possession. Subsequently, however, the maintenance works were undertaken by the first appellant while the road works were undertaken by A K Chaundry's firm, M/s Broadways Construction Co, at a revised contract sum of Kshs 237,545/= in 1978 but were completed at a cost of Kshs 253,378/70 which the first appellant paid in that regard.

On the determination of the agreement as is outlined above, there was subsisting a balance of Kshs 100,207/50 being the remainder of the unpaid contract sum and by a letter dated 9th December, 1974 addressed to the second appellant by the first appellant, the latter asked the former to pay to it the sum of Kshs 114,000/= in accordance with a surety bond executed on 17th July, 1972 as is set earlier in this judgment. This sum of money was duly paid by the second appellant to the first appellant and the former was discharged from the said bond. Whereas therefore in the superior court the first appellant claimed

from the first respondent the sums of Kshs 78,000/=, Kshs 253,378/70 referred to above and Kshs 88,000/= as liquidated and ascertained damages being Kshs 1,000/= per week for 88 weeks from when the principal contract should have been completed to the date it was determined, the second appellant claimed from the first, second, third and fourth respondents jointly and severally the sum of Kshs 114,000/= paid to the first appellant as is mentioned above.

At the conclusion of the appellants' case in the superior court, the respondents offered no evidence but in their amended defence they had stated that the first appellant owed the first respondent a sum of Kshs 56,332/50 being half the retention money earned by and not paid to the first respondent. They therefore claimed a set-off against the first appellant in the said sum of money.

In his judgment, the learned trial judge quite correctly found that there was no time fixed for the completion of the works in the agreement. He also held that the letters of 8th May and 25th July, 1974 constituted notices duly served on the first respondent by the first appellant in terms of clause 25 (1) (b) of the conditions annexed to the agreement. To the learned judge therefore, the agreement was lawfully terminated and the first appellant was entitled to sue for any damages he may have sustained. According to him, the first appellant was entitled to receive the 50 houses the subject-matter of the agreement together with the roads connected therewith. It received the houses with incomplete roads. Hence, although the first appellant was not entitled to the claim of Kshs 78,000/= for the maintenance works of these houses as everything that was required to be done about them by the first respondent was done in accordance with the requirements of the agreement, for the inconvenience of the non-completion of the road works, it was entitled to be compensated in addition to its entitlement to have the road works completed and to recover from the first respondent any reasonable expense it may have incurred in that regard. In connection with the latter, the learned trial judge held that the measure of damages that the first appellant was entitled to was the sum of money it was liable to pay to A K Chaundry Kshs 127,812/= as is set out above - less the unpaid balance of the contract sum Kshs 100,207/50 - that is to say Kshs 27,604/50. And in regard to the former, the judge arbitrarily took 1st February, 1975 as the date of possession of the site for the purposes of the road works and as these works were estimated to be completed within 8 weeks from that date, he held that that period would have expired on 27th March, 1975 - 35 weeks from the date of termination of the agreement on 25th July, 1974. Considering that the first appellant had taken possession of all the 50 houses erected by the first respondent and was receiving rent from them and in the absence of any indication as to what it had lost as a result of the uncompleted road works, the trial judge again arbitrarily thought that a sum of Kshs 10,000/= was reasonable compensation to the first appellant for the inconvenience. The learned judge therefore concluded that the first appellant was entitled to a judgment in the total sum of Kshs 37,604/50 against the first respondent. However, in view of the fact that the first respondent had claimed a set-off in the sum of Kshs 56,332/50 as is outlined above, the learned trial judge held that that was the money which the first respondent had already earned and was therefore entitled to a set-off against the first appellant's claim to the extent of the said sum of money. As the latter sum of money exceeded the first appellant's entitlement and since the first respondent had not counter-claimed the balance of the money outstanding after the set-off, the judge dismissed the first appellant's claim with costs to the first respondent less ten percent (10%). The learned trial judge also dismissed with costs the second appellant's claim of Kshs 114,000/= against the first, second, third and fourth respondents for the reasons thqt there was no evidence as to why it had decided to pay to the first appellant that sum of money without informing the said respondents in order to afford them opportunity to oppose that payment if any of them so desired. In any event, since, according to the trial judge, the first appellant need not have been out of pocket by reason of the first respondent's failure to complete the road works, there was no legal obligation on the second appellant to pay it anything. The fact that the second appellant chose to do so was no concern of the first, second, third and fourth respondents.

At the hearing of this appeal on 17th October, 1994, counsel for the appellants argued all the ten(10) grounds of appeal set out at the beginning of this judgment with reference to the record of the proceedings in the superior court, the relevant part of which we have endeavoured to outline above, and attempted to show why and where the learned trial judge was wrong in dismissing the appellants' claims. Counsel for the respondents, however, was of the view that the appellants' appeal was without merit as the only evidence before the superior court was their evidence and that evidence was insufficient to prove their

claims.

Undoubtedly, in the absence of the date of possession in the agreement, the date of practical completion of 30 weeks from the date of possession inserted therein made no sense at all. Indeed, from the record of the proceedings before the superior court, the contract works proceeded without reference to the period of 30 weeks. When therefore by the letter of 17th August, 1973, which we have set out in this judgment, the first appellant accepted the 50 houses which were the subject-matter of the agreement, and confirmed that during the six months period of making good the defects the first respondent was to have available and on site for the first month certain technicians and a foreman as enumerated in that letter, the said letter amounted to a certificate that the works were practically completed and for all the purposes of the agreement, practical completion of the works was deemed to have taken place on the date of that letter of 17th August, 1973. Whatever else remained undone was in the realm of the defects liability period.

Under clause 30(4) (b) of the conditions annexed to the agreement, on the issue of the certificate of practical completion, the first respondent was entitled to the payment of one half of the ten percent (10%) of the contract sum retained by the first appellant as stipulated in the appendix to the conditions aforementioned. As the ten percent (10%) of the contract sum was Kshs 114,000/=, one half of that sum amounted to Kshs 57,000/=. From certificate No 473 dated 11th August, 1973, the retention money held by the first appellant as at that date amounted to Kshs 56,332/50. This indicated that as at the said date, over one half of the retention money had been paid out so that on the date of practical completion - 17th August, 1973 the first respondent was not entitled to one half of that money as the first one half of the said money was not there. The Kshs 56,332/50 held by the first appellant as on this date could only be paid to the first respondent on the expiration of the defects liability period - six months after 17th August, 1973 (the date of practical completion) - or on the issue of the certificate of completion of making good defects whichever was later - see clause 30 (4) (c) of the conditions mentioned above. The first respondent's claim for a set-off in the sum of Kshs 56,332/50 was therefore baseless and should not have been granted by the superior court. It was therefore erroneous to have had this sum of money set off against the total award of Kshs 37,604/50 to the first appellant as is set out above, which award we think was based on sound reasoning and cannot be faulted.

Concerning the surety bond in respect of which the second appellant paid to the first appellant a sum of Kshs 114,000/=, clause 31 of the conditions annexed to the agreement read as follows:

> "31 The contractor shall provide one surety which must be an established bank, Insurance Company or Fidelity Guarantee Corporation to the approval of the architect and who will be bound to the employer in the sum equivalent to ten percent (10%) of the contract sum for the due performance of the contract until the certified date of practical completion named in the appendix to these conditions subject nevertheless to the provisions for extension of time contained in clause 23 of these conditions".

It would appear from this clause that the second appellant was bound to the first appellant in the sum of Kshs 114,000/= for the due performance of the contract to erect 50 low cost rental houses (Arina Estate Phase III) within Kisumu municipality until the certified date of practical completion. That date was, as we have observed above, 17th August, 1973. From its pleadings, the second appellant indicated that it paid to the first appellant the above mentioned sum of money on 7th April, 1978. This was well after the date of practical completion. That payment was outside the purview of clause 31 as is set out above. As the learned trial judge quite rightly pointed out in his judgment, the second appellant was under no legal obligation to pay this sum of money to the first appellant. Its choice to do so was therefore of no concern to the respondents. In the circumstances, the judge quite correctly dismissed the second appellant's claim with costs.

Arising from what we have attempted to outline above, the first respondent's set-off of Kshs 56,332/50 granted by the superior court is set aside with the result that the judgment of that court in the sum of Kshs 37,604/50 in favour of the first appellant against the first respondent is sustained and to this limited extent only the first appellant's appeal succeeds and is allowed with 1/3 of the costs against the first respondent both in this Court and in the superior court but the second appellant's appeal against the first, second,

third and fourth respondents is outrightly unmeritorious and the same is dismissed with costs to these respondents.

Dated and delivered at Nairobi this 3rd day of April 1995

J.E GICHERU

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JUDGE OF APPEAL

R.O KWACH

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JUDGE OF APPEAL

R.S.C OMOLO

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JUDGE OF APPEAL

I certify that this is a true copy of theoriginal.

DEPUTY REGISTRAR