

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 2074 OF 1975

KETTLES-ROY & WILSON LTD PLAINTIFF

versus

L L PATEL & 4 OTHERSDEFENDANT

JUDGMENT

The 1st defendant, who is deceased came to Kenya in the 1940s and started business as a small contractor in 1967. At first he did small jobs only. He was said to be illiterate but experienced in the building trade. He then formed a business partnership in taking his brother, the 2nd defendant, his brother-in-law, 3rd defendant and his 2 sons, 4th and 5th defendants, into partnership and carried on his business as Chania Building Contractors.

In 1970 a decision to tender for a large City Council job, that of Aerodrome Road Housing Scheme was reached. The defendant entered into an arrangement with Kettles-Roy & Wilson Ltd, the plaintiff, to pay a commission to this company of 2½% of the contract sum, excluding PC sum, should his bid succeed in this contract business. This consideration was stated as, “the assistance you are giving us during the preparation of our tender price.”

Chania Building Contractors’ bid for this contract was successful and they were awarded the contract to build the scheme. The date of the completion of the scheme was December 12, 1972 but completion was extended to July, 1973. They subsequently completed the scheme and the final certificate of completion was given on September 19, 1974. The money received for this scheme amounted to Kshs 26½ million, approximately.

The plaintiff was paid a sum of Kshs 90,000 but all payments then ceased, and the defendants refused to pay anything further and have failed to render any account to the plaintiff of the money they received.

It is admitted by the defendants that the agreement of April 15, 1970 was executed but the defendants justified their refusal to pay any further commission on a number of grounds. In the first place it is alleged that the agreement was ultra vires the plaintiff company. I have considerable doubt as to the right of the defendant to make this point.

However, having read the memorandum and articles of association of the plaintiff company my view is that the combined effort of objects 3C and J of the memorandum and articles of association of the company authorizes the plaintiff to enter into the agreement in question. Secondly, the defendant says that the agreement was not an act or deed of the defendants or either of them as the same was prepared by the plaintiff and the signatory thereto did not know the nature of the document to which he was appending his signature.

Other than rather vague statements that the 1st named defendant was illiterate, no evidence has been given in support of this allegation and the admitted payments of the Kshs 90,000 to the plaintiff by the defendant negative any such allegation. They have further alleged in paragraph 3 of defence that the agreement was obtained by the plaintiff by virtue of some false representation. There is no evidence whatsoever to support this allegations.

The defendant then alleges that the plaintiff did the work so badly that they suffered damages as a result of the manner in which the plaintiff did the work. This plea amounts in my view to a claim that the

plaintiff was in breach of contract because he has failed properly to perform his obligations in the said agreement of April 15, 1970. No special damages have been alleged nor proved and I am satisfied that there is no completed cause of action for a breach of contract and that I would not be entitled to award the defendant anything against the plaintiff on this plea.

The defendant final answer to plaintiff's case is that the defendant paid Kshs 90,000 to the plaintiff on a consideration that has failed in 'toto' as the defendant pleads.

It is not disputed by the defendant that the plaintiff performed his obligations or at least some of them under the agreement but it is said that he performed them badly. This in my view cannot amount to a total failure of consideration nor can, as is alleged in the amended counter-claim, the alleged no value to the defendant of the services provided or that they were absolutely useless amount nor does it entitle me to declare that the agreement of April, 1970 has become null and void.

I cannot pretend to be impressed with the defendant's case. It is not edifying to see people who have landed a big fish going back on the bargain that contributes to their successful landing of the desired prize. Nor was I impressed by Mr Khanna's frequent appeals to justice when seeking to amend a defence involving the law to help his clients to evade their obligations.

I would accordingly grant the relief claimed and I direct that the defendant do account for all payments received by them for the housing scheme mentioned in paragraph 3 of the plaint and do pay all monies found due to the plaintiff on the taking of such account with the interest thereon at court rates together with the costs of this suit.

Counterclaim dismissed with costs.

Delivered at Nairobi this 17th day of April, 1986.

F SHIELDS

JUDGE