



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(Coram: Kneller, Nyarangi, JJ A and Gachuhi, Ag J A)**

**CIVIL APPEAL 5 OF 1984**

**BETWEEN**

**BAKSHISH SINGH & BROTHERS ..... APPELLANTS**

**AND**

**PANAFRIC HOTELS LIMITED ..... RESPONDENT**

(Appeal from a judgment of the High Court of Kenya at Nairobi ( Masime, J dated June 10, 1983

in

Civil Case 2715 of 1976 )

**JUDGMENT OF THE COURT**

Panafric Hotels Limited (the employer) is a company that carries on a hotel business in Nairobi. Bakshish Singh & Brothers (the contractor) is a firm with its principal place of business in the same city. The employer alleged that on August 11, 1975 the contractor offered in a form of tender sent to Dalglish Marshall & Associates, Chartered Architects (the architects) as agents of the employer, 'to carry out to completion' certain alterations (the works) to the Panafric Hotel (the hotel) for Shs 675,038.37 which the architects on instructions by the employer accepted in a letter of September 5, 1975. And thus there was a contract made, or so said the employer. The contractor then refused to carry out the works which was a breach of the contract. The employer had to put the works out to tender again and suffered considerable loss which was particularised.

	Shs	Cts
A.The difference between the contractor's tender		
and the actual costs incurred in carrying out the works	107,871	12
B.Four weeks delay in beginning the works @		
Shs 10,000.00 a week	40,000	00
C.Seven weeks delay in extra time taken by the		

the contractors to complete the works

@ Shs 10,000.00 a week	70,000	00
TOTAL	217,871	12

Which the contractor refused to pay the employer who filed a plaint in the High Court in Nairobi in December 1976 claiming that sum with costs and interest on both sums.

Why did the contractors reject that claim? By its defence of December 21, that year it did by pleading-

(a)the tender and letter did not make a contract because the date of giving possession of the site to the builder by the employer was not agreed and that was an essential term which was one that could only be agreed or decided after September 5, 1975: or

(b)the letter was a counter offer, which was not accepted because it was not an unconditional acceptance; or

(c)the tender and the letter constituted a complete contract but it was subject to a condition precedent that the contractor and employer would agree on the date when the one gave the other possession of the site which they never did; or

(d)the architects, by their letter of September 12, 1975, waived the obligation of the contractor to perform it or confirmed his release from it; or

(e)the employer was estopped from enforcing the contract or relying on its breach because the architects by their second letter told the contractor it need not begin the works but it would not be asked to tender again which the contractor relied upon to its detriment.

The employer in its reply of late January the next year denied the second letter was a waiver or release in itself or that there was consideration for either or that its representation raised an estoppel and, if it raised any of those defences, then the architect had actual or implied authority to do so.

Those, in brief, were the pleadings which were closed at the end of January 1977. The trial began before Mr Justice Masime in mid-November 1980. An agreed bundle of correspondence was put in and the employer called Mrs Hepple, an architect and partner in Dalglish & Marshall, and Mr Levitan, a quantity surveyor with Barker & Richard, a Nairobi firm of quantity surveyors. The contractor called no witness.

Mrs Hepple and Mr Levitan provided this material for the learned judge. The contractor's tender was one of six for the hotel's extensions. Barker & Richard reported on each. The employer told Mrs Hepple to accept that of the contractor which she did in the letter of September 5, 1975. A few days later the contractor met Mrs Hepple and Mr Levitan to agree on a date for the contractor to begin the work but the contractor without giving a reason announced the withdrawal of their tender. It was advised to think again and promised to do so but there was no change of attitude, so, by the letter of September 12, the architects reluctantly accepted the withdrawal of their tender (but did not release the contractor from the contract) and added that this and another similar incident meant they would delete the name of the contractor from their list for tenders for future projects of any size.

Mrs Hepple in her letter of September 5 had this last paragraph-

"Will you please contact the writer as soon as possible so that a date may be agreed for commencement of the work?"

but the date was never agreed. And in the appendix to the conditions of the contract are these two lines-

Clause 21 To be arranged upon signing the contract"

## “Date for possession

This was usually part of such a contract because, among other things, the contractor has to mobilize his men, machines and materials from his stores or other sites before bringing them to the site and the employer has to rearrange his business (in this case that of an hotel) to make the site available. More often than not the parties assume the work will begin as soon as possible. When this date has been agreed, it and the consequent date for completion would be put in these schedule to the contract and the employer would sign the contract. It is not feasible to write these dates into the contract earlier.

The contractor would have been given possession of the site ‘pretty well immediately’ according to Mr Levitan if it had not gone back on its tender.

Didar’s tender as slightly higher than that of Sarikas Decorazzo & Contracting Co. (Sarikas). Mr Levitan recommended Didar because Sarikas did not specify their unit rates which meant their unit process could not be determined. The employer had to wait for its Board of Directors to approve of Didar’s tender which took ten days. Didar was given possession of the site a month later (on October 21, 1975) and completed the extensions satisfactorily and on time.

The delay cost the employer Shs 217,817.12 which was calculated in the way set out in the plaint. The price to be paid to the contractor and paid to Didar were known, the employer provided the figures for the loss of rental income and in clause 8 of the Bill of Quantities and clause 22 of the contract damages for delay are fixed at Shs 10,000.00 a week.

Mr Couldrey (for the employer in the High Court) submitted the only issue was whether the contractor’s tender and employer’s letter of acceptance of September 5, 1975 constituted a contract? They did, he asserted, even though date for possession of the site was at large and a formal agreement was to be executed.

Mr Esmail (for the contractor in both courts) declared it abandoned the defences of waiver and estoppel so there remained four issues which were-

- (1) Did the tender and letter of September 5 amount to a concluded contract?
- (2) Did the last paragraph of the letter indicate the employer’s acceptance was conditional?
- (3) Was it a condition precedent?
- (4) If there was a concluded contract, what damages?

The last one was affected by three matters which were

- (a) Did the employer mitigate them?
- (b) Was there any delay in completion?
- (c) Was Shs 10,000.00 a week damages for delay a panel clause?

Then he submitted that the date the contractor was to begin his work was an essential term in any building contract and because that had not been agreed there was no contract. He did not rely on the fact that there was no formal executed expression of it. The parties could not be “*ad idem*” because the contract was incomplete. A realistic specific date in the tender for beginning the work was the solution to the question of how to have such a date without negotiation. Here it was left to later agreement. Alternatively, the fact that the parties would meet and agree on when the contractor could have the site was either a counter-offer or condition precedent.

Turning to damages, Mr. Esmail claimed the evidence of Mrs Hepple and Mr Levitan was too thin to

amount to proof of the sum claimed as damages. There was no attempt to persuade Sarikas to submit their unit rates. And, he asked rhetorically how can there be delay in completion by the contractor or Didar if the date when the contractor had to begin its work was not known? Or how could damages be calculated? So Shs 10,000.00 a week was clearly a penalty.

And those were the submissions on that evidence put before Mr Justice Masime. His judgment was for the employer against the contractor for Shs 107,915.00 with interest on that sum at eight per cent a year from December 2, 1976 to March 31, 1982 which amounted to Shs 46,027.95 and further interest at twelve per cent a year on both sums from April 1, 1982 to June 10, 1983 which came to Shs 15,468.80. Those figures when totalled up came to Shs 169,411.75, on which interest at twelve per cent a year was to run from June 19, 1983 until it is all paid off.

The learned judge set out a resume of the evidence of Mrs Hepple and Mr Levitan, the contractor's tender with its clause about a formal agreement being prepared and his three issues which were-

1. does the exhibited correspondence exchange between the parties constitute a complete contract?
2. if a complete contract is constituted was there a breach of it?
3. if so, what damages are payable for such breach? thrown up by them.

He also referred to relevant paragraphs of *Halsbury's Laws of England*, 4th ed (1973), *Branca v Cobarro*, [1949] 2 All ER 101 and *Tarmohammed v Lakhani*, [1958] EA 567 and the submissions of Mr Couldrey for the employer and Mr Esmail for the contractor on them.

He held that the tender and first letter amounted to a complete offer and acceptance. The fact that the parties desired the contract to be put into more formal legal shape did not make it an incomplete one. The uncertainty of the date for beginning and, therefore, finishing the work did not affect the completeness of the contract. There were only matters for negotiation and agreement for the purpose of executing the contract. When the contractor resiled from the contract it committed a breach of it. The architects were obliged to find others to carry out the work.

Coming to the issue of quantum of damages, Mr Justice Masime found that the employer had failed to prove that fact that Didar began these works four weeks later than the contractor would have (all being well) was attributable to the contractor's withdrawal from the contract. Didar was hired ten days after the contractor defaulted and the employer took another month to hand over the site.

So he went on to allow the claim for damages for the delay in having the works completed but he reduced the period from seven to four weeks. His reasons for doing this were, that the Standard Building contract form provides, for the time for completion to be extended for good cause so it would be unjust to compute that period with reference to the contractor's estimate of twenty seven weeks and Didar's of twenty, and secondly, the contractor's figure for the completion in a shorter time while Didar claimed a higher sum for doing this in a longer time.

He refused to reduce the figure of Shs 10,000.00 damages a week for delay although there was no evidence to indicate how it was reached because it was in the terms which the contractor accepted.

When it came to what sum the contractor was liable to pay the employer for the difference between the former's tender and price Didar was paid it was Shs 107,871.00.

This table shows the difference between the relevant tenders-

	Prices in Shs	Period in weeks
The contractor	675,038.37	20

Sarikas	742,953.40	16
Didar	788,191.24	27

By deducting the contractor's bid from Didar that leaves that Shs 107,871.00 which is what the employer claimed. Subtract the contractor's claim from that of Sarikas and Shs 67,915.03 is left. Mr Justice Masime chose the latter smaller one. He rejected the larger one because it was based on the fact that Sarikas was not chosen because it had kept mum about its unit costs.

He agreed it was the duty of the contractor to mitigate the losses they suffered by asking Sarikas for its unit costs. He added the award of Shs 40,000.00 for delay in completion to the Shs 67,915.03 for the extra costs in hiring a more expensive contractor and the award came to Shs 107,915.03 to which he added interest at court rates.

The contractor appealed and the employer cross-appealed. The contractor was dissatisfied because it maintained there was no contract between the parties since the essential terms of it had not been agreed or the acceptance of the tender submitted by the employer was an agreement to enter into a further agreement which was never reached. It asserted that without an agreed date to begin the work the employer could not say there had been any delay in completing it, if the tender of Sarikas had been accepted there would have been no delay, Shs 10,000.00 damages for each week of delay was a penalty and the contractor's failure to object to it was immaterial.

The employer complained of the judge's refusal to award them any damages for Didar's delay in beginning the job and taking time to finish it and reducing the damages claimed for having to accept Didar's higher bid on the ground that the employer should have accepted that of Sarikas which was contrary to the advice of Mr Levitan.

The submissions for the employer and for the contractor by Mr Deverell ( in place of Mr Couldrey for the employer) and by Mr Esmail (again for the contractor) in this Court were most helpful but we have to add that they were along the same lines as those put forward in the High Court but in more detail so we had, among other matters, more authorities cited to us than those put before the learned judge.

Now the reported East African or Kenyan authorities on building contracts brought to our notice were meagre. The English ones were numerous and so were references to text books on them by English qualified authors. Nevertheless, we will take notice of the latter only when there is nothing local on the point and when the English ones are correct and appropriate.

The first, it cannot be a matter of surprise, is that the result always depends on the circumstances, the proved circumstances of each trial and appeal. Then follows the basic one that to be a good contract there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties.

Viscount Dunedin in *May and Butcher Limited v The King* [1934] 2 KB 17, 21 (H.L.); *British Bank for Foreign Trade Limited v Novinek Ltd* [1949] KB 623 (CA). So, an agreement between two parties enter into an agreement on which some crucial point of the contract matter is left undetermined is no contract at all. Lord Buckmaster. *May and Butcher*, 20. But if there is silence on that point sometimes it is provided for by implying the test of reasonableness e.g. the reasonable price of goods which the Sale of Goods Act, 1893 supplies or the contractor will complete the work within a reasonable time of being given possession of the site. On the other hand it is a perfectly good contract if it is agreed that one party should decide the point. Where there is provision for the parties to agree the critical point later (and they never do) there is no contract. Viscount Dunedin (*ibid*) 21.

If a provisional agreement intended to be binding is reached until a subsequent agreement in precise and formal language is drawn and executed the provisional one is fully and immediately binding. *Branca v Cobarro* [1947] 2 ALL ER 101 (CA); *Karmali Tarmohamed & Anor v Lakhani & Co* [1958] EA 567, 568 (CA-U).

When the time of completion in a written building contract signed by the employer is blank even if he and the contractor are told verbally of the date it is not enough to seek an order to introduce this term into such a contract by parol evidence. There must be something very strong in the case before this can be done, especially where it introduces a penalty or forfeiture. *Kemp v Rose* (1858) 65 ER 910, 913, 914 Sir John Stuart, Vice-chancellor.

Finally, a party is entitled to resist an action for breach of contract on any ground that is available even though before action he gave no reason at all. *British & Benningtons Ltd v NW Gahar Tea Co* [1923] AC 48, 71 Lord Sumner (HL).

Turning back to the relevant circumstances in this appeal, we appreciate that they include the form of the tender in which the contractor declared it had examined the drawings, conditions of contract, bills of quantities and specifications for the works and then ‘offered to perform and complete the works in conformity with them for Shs 675,938.37’. It also undertook to complete and deliver the first phase ( to turn some rooms on the seventh floor of the hotel into offices ) for use and occupation by the employer within eight weeks of being given possession of the site and the second (turning the existing ground floor offices into bedrooms ) within twelve weeks of completing the first. All that is clear.

Then comes:-

“Unless and until a formal agreement is prepared and executed this tender together with your written acceptance thereof shall constitute a binding contract.”

And this tender was accepted by the employer in its architects’ letter of September 5, 1975.

The date for the possession of the site is not specified in the tender or that letter of acceptance. Nor is the date for the beginning of the works. And upon the date when possession is given hang the dates for the completion of the two parts of the works. The date for possession must, therefore, be what Viscount Dunedin in *May and Butcher Limited* called a critical point in the agreement.

Does this silence, seeming silence, mean the employer can unilaterally choose the date he will give possession of the site? In fact, there is no silence on the matter. The conditions of the contract, mentioned in the tender, stated that it will be found in the appendix to the local standard agreement and schedule of conditions of a building contract and the conditions for this particular contract declared that that date was ‘to be arranged upon the signing of the contract’. (See clause 21 of the standard form and its appendix and the special conditions ). It was not in the appendix and it was not arranged by the parties. The employer’s architect asked the contractor in the letter accepting the tender to get in touch with,her for a date to be agreed for the work to begin. So, in short, this was not a date in a contract which was left blank but one to be arranged or agreed by the parties. There was no concluded bargain. It follows that there was no breach of it and the employer suffered no damage. The appeal is allowed with costs (including the abortive part heard appeal which was overtaken by the retirement of Mr Justice Chesoni J), the judgment of the High Court is set aside and one for the contractor against the employer dismissing the latter’s suit with costs substituted. The cross-appeal is dismissed with costs.

Orders accordingly.

**Dated and delivered at Nairobi this 8th day of October, 1986.**

**A.A.KNELLER**

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**JUDGE APPEAL**

**J.O.NYARANGI**

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**JUDGE OF APPEAL**

**J.M. GACHUHI**

.....

**JUDGE OF APPEAL**

I certify that this is the copy of the original

**SENIOR DEPUTY REGISTRAR**