REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCA NO. E001 OF 2023

WINNIE MUSILA ..... 1ST APPELLANT

KILIMANI BREEZE HOTEL ..... 2ND APPELLANT

-VERSUS-

COLLABORATION ENGINEERING SOLUTIONS & PRODUCTS ..... RESPONDENT

(Being an appeal from the Judgment of Hon. J. Otieno, SRM delivered on 15/12/2022 in CM Court Makueni Civil Suit No. E104 of 2021)

JUDGMENT

1. In the lower Court, the Plaintiff (Respondent) instituted a claim against the Defendants (Appellants) seeking Kshs.400,000/= being the alleged balance of a

contractual sum for the supply, installation, testing and commissioning of a wastewater treatment plant.

2. The Respondent's case was that the parties' engagement was grounded on a quotation dated 11th November, 2019 for a contractual price of Kshs.800,000/=, half of which was paid upon placement of the order while the balance became payable upon testing and commissioning of the plant. It was contended that the works were completed and commissioned on 3rd October, 2020 but the Appellants failed to settle the outstanding balance.

3. The Appellants denied liability and asserted that the Respondent failed to complete the works within the agreed timelines, supplied substandard and incomplete components and abandoned the project, thereby compelling them to engage another engineer at additional cost.

4. The Appellants filed a counterclaim for Kshs.615,000/= alleging losses arising from unfinished and defective works. Upon hearing the parties, the trial Court found that a contract existed between the parties, that the Respondent had proved its claim on a balance of probabilities, and that the Appellants had failed to prove

their counterclaim. Judgment was consequently entered for the Respondent as prayed, prompting the present appeal on the following grounds:

a) ***The learned Senior Resident Magistrate erred in Law and in fact by failing to read and take into considerations the submissions of the appellant.***

b) ***The Learned senior resident magistrate erred in law and in fact by failing to hold that the burden of proof was discharged by the Respondent.***

c) ***The Learned Senior Resident Magistrate erred in Law and in fact by holding that the emails send by the respondent were never responded to by the Appellant and this was the only way to prove that the Appellant work was satisfactorily done.***

d) ***The Learned Senior Resident Magistrate erred in law and in fact by holding in fact that the contract was breached by the Appellant.***

e) ***The Learned Senior Resident magistrate erred in Law and in fact since the Respondent did not deliver the works within the period the Respondent had given to do the works since the period of 1 week expired while works took 6 weeks thus breaching the contract.***

f) ***The Learned senior resident Magistrate erred in law and in fact by making a Judgement against the Appellant to pay for a none functional plant.***

g) ***The Learned Senior Resident Magistrate erred in Law in fact by re-writing the contract between the Appellant and Respondent on what was to happen in case each of the parties were to breach the contract which was neither express or could be implied from the circumstances of the situation.***

h) ***The Learned Senior Resident Magistrate erred in law in fact by re-writing the contract entering judgement against the***

Appellant on contract that had no terms as to what was the labor charges and the material costs of the component of the installation works.

i) ***The learned Senior Resident Magistrate erred in Law and I fact by failing to resolve all the issues that had been raised by the pleadings the evidence and the parties' submissions.***

j) ***The Learned Senior Resident Magistrate erred in law and in fact by making Judgement that was against the weight of the evidence.***

Submissions:

5. The Appellants submit that the impugned judgment ought to be interfered with on the basis that the learned magistrate failed to properly evaluate the totality of the evidence, the pleadings and the written submissions placed before the trial Court. They contend that the Court did not adequately consider their documentary material, particularly the email correspondence, quotations and

communications which, according to them, demonstrated that the Respondent had not completed the contractual works within the agreed timelines and had not undertaken testing, commissioning or training as required under the parties' agreement.

6. The Appellants argue that the learned magistrate misapplied the burden and standard of proof. They maintain that the Respondent bore the evidentiary burden to demonstrate full performance of the contract, including proof of testing, commissioning and training of staff, yet failed to do so. They rely on the principles articulated in ***Mumbi M'Nabea v David M. Wacharia (2016) eKLR*** together with **Section 107** of the **Evidence Act**, contending that the trial Court wrongly shifted the burden to them despite the Respondent allegedly failing to prove completion of the works.

7. The Appellants' case is that although a quotation dated 11th November, 2019 formed the basis of the parties' engagement, the Respondent did not meet the agreed delivery timeline of one week, instead taking several months, and ultimately leaving the wastewater treatment

plant incomplete and non-functional. They further submit that the learned magistrate effectively rewrote the contract by imposing obligations and consequences not expressly provided for within the quotation or the oral agreement. To demonstrate that oral agreements are nonetheless enforceable but must be proved by credible evidence, they cite *Patrick* ***Njuguna Kimondo v Geoffrey Vamba Mbuti [2019] eKLR.***

8. Additionally, the Appellants contend that their submissions filed before the trial Court were not taken into account and that the Court placed undue reliance on the absence of written complaints or expert reports while ignoring the context of the parties' communications. It is their position that a proper evaluation of the evidence would have revealed that the Respondent breached the contract first, thereby disentitling it from claiming the balance of the contractual price.

9. On the other hand, the Respondent submits that the learned magistrate correctly identified the issues for determination, properly analyzed the evidence and applied the law to reach a sound conclusion. The Respondent argues that both parties acknowledged the

existence of negotiations culminating in the quotation dated 11th November, 2019, which outlined the payment terms of 50% upon placement of the order and 50% upon testing and commissioning. According to the Respondent, the Appellants admitted remitting Kshs.400,000/= pursuant to those terms, thereby confirming the existence and content of the contract.

10. The Respondent submits that the trial Court properly evaluated the documentary and oral evidence and found that the installation reports, email correspondence and testimony of **PW1** established that the wastewater treatment plant had been supplied, installed, tested and commissioned by 3rd October, 2020. It is argued that the Appellants' allegations of delay and poor workmanship were unsupported by credible evidence, as no expert witness, inspection report, receipts or testimony from the alleged substitute engineer was produced to substantiate the counterclaim.

11. The Respondent relies on the general principle that he who alleges must prove, invoking **Section 107** of the **Evidence Act** and authorities including ***Susan Kanini***

***Mwangangi & Another v Patrick Mbithi Kavita [2019] eKLR, William Kabogo Gitau v George Thuo & 2 Others [2010] 1 KLR 526 and Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another [2015] eKL*R.** Reference is also made to **Miller v Minister of Pensions (1947) 2 All ER 372** on the meaning of proof on a balance of probabilities.

12. With respect to the role of the first appellate court, the Respondent cites ***Philemon L. Wambia v Gaitano Lusitsa Mukofu & 2 others [2019] eKLR, Ephantus Mwangi & Another v Duncan Mwangi (1982–1988) 1 KAR 278, Williamson Diamonds Ltd v Brown (1970) EA and Janet Kalondu Musembi v Kahindi Katana Thoya & Another [2021] eKLR,*** urging this Court to reconsider the evidence but ultimately affirm the findings of the trial Court.

13. The Respondent further grounds its submissions on statutory provisions under the **Sale of Goods Act, Cap 33 Laws of Kenya**. It invokes **Section 2 (1)** on delivery, **Section 36** on acceptance of goods, **Section 19** on the passing of property in specific goods, and **Section 49 (1)** on the seller's right to maintain an action for the price

where the buyer wrongfully refuses to pay after property has passed.

14. It is argued that once the wastewater treatment plant was delivered, installed and commissioned and remained in the Appellants' possession without rejection, property in the goods passed to them and the Respondent became entitled to the balance of the purchase price.

15. The Respondent therefore maintains that the learned magistrate meticulously analyzed the pleadings, the testimonial and documentary evidence and the applicable law, and that the Appellants' grounds of appeal amount merely to a disagreement with the trial Court's findings rather than demonstration of any error in law or fact. It is urged that the appeal be dismissed with costs, the Respondent contending that the Appellants have failed to demonstrate any misdirection that would warrant interference with the judgment of the lower Court.

Analysis & Determination:

16. This being a first appeal, this Court is under a duty to reconsider the evidence on record, evaluate it afresh and draw its own independent conclusions, while bearing in mind that it neither saw nor heard the witnesses testify and must therefore make due allowance for that. An appellate court will however be slow to interfere with findings of fact unless it is shown that the trial Court acted on no evidence, misapprehended the evidence, applied wrong principles or arrived at a plainly wrong conclusion.

17. ***The court in Abok James Odera t/a A.J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR*** set out this duty in the following terms:

> ***"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."***

18. Having regard to the record herein, the sole issue that arises for determination in this appeal is whether the learned magistrate erred in law and in fact in finding that the Respondent had proved its case on a balance of probabilities and in consequently entering judgment against the Appellants while dismissing the counterclaim.

19. Before the trial Court, the Respondent called one witness, its Director, who testified that the parties adopted the quotation dated 11th November, 2019 as the basis of their engagement. He stated that the agreed consideration was Kshs.800,000/= and that the Appellants paid Kshs.400,000/= as the initial instalment. In support of the claim that the works were completed, he produced two installation reports dated 21st February, 2020 and 3rd October, 2020.

20. He further relied on email correspondence exchanged between the parties, asserting that requests were made to the Appellants to provide trainees for purposes of training and handover, but that no trainees were provided. His evidence was that the plant was installed and ready for operation, that training could not

be undertaken due to the Appellants' conduct, and that the Respondent was subsequently denied access to the site after demanding payment of the outstanding balance.

21. Under cross-examination, the Respondent's witness acknowledged that there was no formal written contract signed by the parties but maintained that the quotation governed the engagement. He reiterated that testing and commissioning were completed on 3rd October, 2020 and that no complaint regarding defective or incomplete works was raised contemporaneously by the Appellants through the available channels of communication.

22. The Appellants called the 1st Appellant as **DW1**. She admitted receiving and accepting the quotation dated 11th November, 2019 and confirmed paying Kshs.400,000/= pursuant to it. Her testimony, however, was that the Respondent delayed in completing the project, failed to install certain components and did not undertake testing, commissioning or training of staff. She relied on SMS and WhatsApp communications and photographs to support her assertions and stated that she later engaged another engineer to rectify the alleged defects at a cost of Kshs.615,000/=.

23. She conceded that she did not call the said engineer as a witness and did not produce invoices or an expert report to substantiate the alleged losses. She also acknowledged that she did not formally respond to some of the emails sent by the Respondent.

24. The bulk of the evidence of the parties rested on communications shared between them. This Court has re-examined the communications produced before the trial Court. Two different sets emerge from the record. The first comprises exchanges which plainly bear the features of a text messaging app with timestamps, attachments, and continuous dialogue. The second is the document referred to as Annexure 4, a typed compilation of alleged messages.

25. The exchanges beginning in January, 2020 show the parties actively coordinating drawings, structural details and site activities. On 13th January, 2020 the 1st Appellant confirmed payment of Kshs.400,000/=. Thereafter, the communication largely concerned revised plans, layout approvals and arrangements for site visits. Messages dated 10th March, 2020 indicate that structural drawings

were being revised and that the Respondent's representative was sent to the site at the Appellant's request. A further exchange on 11th March, 2020 shows the Respondent forwarding a plant layout and requesting approval before construction proceeded, to which the 1st Appellant responded that the same would be ready by Wednesday.

26. What is notable is that, within these exchanges, there is no sustained complaint of delay or defective works until much later. When the Respondent informed the 1st Appellant on 27th August, 2020 that he would be at the site to start works, the response recorded was simply **"Ok noted Engineer."** The message does not convey frustration or an assertion that the Respondent had already breached the agreement.

27. The first message that reflects dissatisfaction appears on 4th September, 2020 where the 1st Appellant stated:

> ***"Chris please clear up my plant... I am opening my facility next month and we need to test the plant."***

28. Even then, the complaint appears directed at expediting completion and does not indicate abandonment or defective installation. Annexure 4 on the other hand stands on a different footing. It is a typed document described as SMS communication but it does not display the features of an original message extract. It bears no timestamps, sender identification or platform formatting. In contrast with the actual messaging exchanges, it reads as a reconstructed narrative. Without supporting metadata or independent verification, little weight can be attached to it.

29. Indeed, the learned trial magistrate addressed the document described as Annexure 4 and stated as follows:

> ***"The court has looked at the said document, unlike annexure 1 which is clearly an extract of phone messages. Annexure 4 appears to be a typed word document. The same do not show the recipient nor do they bear a time stamp of the communication. Additionally, the email message does not indicate the recipient. Considering the noted gaps, the Court will not***

give much attention to the said document. I find annexure 1 more authentic hence will rely on the same."

30. That finding is material because the Appellants' case on delay and poor workmanship rested heavily on alleged complaints said to have been made during the progress of the works. Once annexure 4 is placed aside for want of authenticity, the Court is left with the exchanges which bear timestamps and reflect the actual interaction between the parties.

31. Turning to the email correspondence, the Respondent relied on an email dated 8th October, 2020 addressing several outstanding issues including a request for trainees for purposes of training and handover. The trial Court noted that no evidence was produced to show that the Appellants responded to that email.

32. During cross-examination, **DW1** acknowledged that she did not respond officially to the emails and further stated that no trainee was provided because, in her view, testing and commissioning had not been undertaken. **PW1's** evidence, on the other hand, was that training

could not proceed in the absence of a trainee from the Appellants' side.

33. What emerges from the communications, taken as a whole, is not a picture of a project that had been abandoned months earlier, but rather one where drawings were routinely revised, site approvals sought, and works coordinated up to the period close to installation and testing. The messages do not demonstrate that the Appellants rejected the works at the time or raised technical complaints supported by professional assessment.

34. The burden therefore lay on the Respondent to prove that the contractual works were completed so as to justify the claim for the balance of the contract price. Equally, the Appellants bore the burden of proving the allegations they raised in defence and in the counterclaim, namely that the works were delayed, incomplete, substandard and that they incurred additional costs amounting to Kshs.615,000/=.

35. In civil claims the applicable threshold is proof on a balance of probabilities. In ***Mumbi M'Nabea v David M. Wacharia (2016) eKLR*** the Court stated:

"In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable… on the evidence, which occurrence of the event was more likely to happen than not."

36. The Appellants, on their part, asserted that the works were incomplete and that they engaged another engineer at a cost of Kshs.615,000/=. However, **DW1** conceded in cross-examination that she did not call the alleged engineer as a witness, did not produce invoices or receipts to substantiate the claimed expenditure, and did not place before the Court any expert report assessing the alleged defects.

37. The learned trial magistrate ultimately found that the counterclaim "fell short of proof." Having independently reviewed the record, I am unable to fault that conclusion. The Appellants' assertions of defective installation and financial loss were not supported by independent technical evidence, and the court was left

only with **DW1's** opinion against the Respondent's installation reports and communications. On a balance of probabilities, that evidentiary posture did not discharge the burden imposed by law.

38. I cannot fault the learned trial magistrate for observing that some of the exchanges between the parties amounted to little more than casual banter. The tenor of the communication reveals that the parties operated in a rather informal and, at times, cavalier manner. In circumstances where the Appellants now contend that the Respondent had delayed or failed to perform critical aspects of the contract, one would reasonably expect clearer and more clearer expressions of dissatisfaction from their end, given that they were the recipients of a specialized technical service. The absence of such communication was a factor the trial Court was entitled to take into account when assessing the credibility of the competing versions.

39. It must also be borne in mind that the trial Court had very little by way of independent technical evidence to guide it. The Appellants' case oscillated between two positions; on the one hand that the works were

abandoned, and on the other that the works were completed but were substandard. On the material placed before the Court, it was not immediately apparent which of those positions was more probable.

40. In the absence of a professional inspection report or testimony from the alleged substitute engineer, the trial Court was left largely with competing assertions, a circumstance that inevitably informed the manner in which the evidence was weighed. The same position obtains before this Court on appeal, with no additional material having been placed before it to disturb the trial court's assessment, the consequence of which is that the appeal finds little traction to stand on.

Disposition:

41. Accordingly, the appeal lacks merit and is hereby dismissed. The judgment of the lower Court delivered on 17th December, 2022 is affirmed.

42. The Respondent shall have the costs of the appeal.

43. It is so ordered.

DATED, DELIVERED and SIGNED at NAIROBI through the Microsoft Teams Online Platform on this 18TH day of FEBRUARY, 2026.

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HON C. KENDAGOR

JUDGE

In the presence of;

Court Assistant: Beryl

Mr. Ambala for the Respondent

No attendance for the Appellant