



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

HCCC NO. 13 OF 2013

BRIT AHLFERT.....PLAINTIFF

=VERSUS=

NAWAZ MUSSA T/A HASH CONSTRUCTION.....DEFENDANT

J U D G M E N T

The two parties entered into a construction agreement on the 14th of February 2012. The Defendant was to construct a residential house known as Villa Milele on plot no. 4545(original 493/2) Malindi. The agreed cost was Kshs.21,348,362/-. The agreement was not fulfilled and the Plaintiff who was the owner of the suit premises filed this suit in May 2013 claiming a sum of USD 77,302 together with interest and costs.

In her evidence before the court the plaintiff testified that she has been visiting Kenya for the last 14 years. Her original home is Sweden. She entered into a contract with the defendant while she was on holiday. She was constructing a holiday home located at Marafiki village within Malindi. The agreement provided for 365 days completion period. She was expected to pay 50% deposit of the contractual sum and thereafter the balance was to be paid by way of installments as the work progressed. On 21st February 2012 she transferred USD 130,000 to the defendant's account being 50% deposit. The work started but was not done to her satisfaction. In July 2012 the defendant requested for a further 30% deposit. The initial 50% deposit was to cover specific areas of the building. On 30th July 2012 she transferred 77,302 USD an equivalent of Kshs.6,000,000 to the defendant's account. This was the 30% further payment requested by the defendant. During all this time she would come to Kenya and go back to Sweden. According to the agreement, the 30% payment was to cover areas like internal plastering, doors, windows, plumbing and electric among others. When she came to Kenya she found that none of those items had been done or fixed. This was on 7th October 2012. She took photographs of the building. The contract expired on 14th February 2013.

It is the Plaintiff's evidence that the works stalled and the 30% payment was never utilised for purposes of constructing the building. By March 2013 there were no workers or materials on site and nothing was going on. She denied that she kicked out the defendant from the site or that she took some of the materials. The defendant abandoned the site and refused to take her calls. She engaged the services of a quantity surveyor who assessed the work done and found that what was done was only about 50% of the works. According to the quantity surveyor (PW2) the value of the works done was Kshs.10,665,202. The value of the work not done is Kshs.10,683,159. She is therefore claiming the 30% payment that was not utilised on the building. She denied that the contract was frustrated due to the long rains as well as the 2013 general elections. She completed the remaining works on her own.

PW2 ERUSTUS WANJAMA KATANI is a registered quantity surveyor. He is one of the directors of Precise Coast Engineering Co. Ltd. He testified that he was contracted by the Plaintiff to determine the value of the works done on the site. He went to the site on the 22nd of March 2013 and prepared his report dated 3rd May 2013. According to his assessment the value of the work done was Kshs.10,665,202 while the outstanding works would cost Kshs.10,683,159. He charged Kshs.100,000 for his report and Kshs.20,000 for court attendance.

The defendant did not call any evidence or appear in court. His advocates, M/s Kilonzo Aziz & Co. Advocates participated in the proceedings during the hearing of the Plaintiff's case. The said advocate applied to be allowed to cease acting for the defendant and the request was granted on the ground that they could not trace their client.

The main issue for determination is whether the Plaintiff has proved her case on a balance of probabilities. The evidence shows that indeed the two parties entered into a construction agreement. The Plaintiff produced the contract as well as photographs of the incomplete house. The defendant raised a counterclaim in his defence but no specific amount is being claimed. It is indicated in the defence that the works were 80% complete.

Given the evidence on record, it is established that the defendant did not fulfill his part under the terms of the contract. The plaintiff was out of the country and used to transfer the money in form of U.S dollars. She contends that at the then prevailing rate, USD 77,302 was equivalent to Kenya Shillings six million. This would give an exchange rate of Kshs.77.61 to the dollar. The contractual sum was Kshs.21,348,362. This translates to about 275,000 USD. The plaintiff paid a total of Kshs.8,207,302 leaving a balance of about 68,698 USD, an equivalent of about Kshs.5,254,041 at the then prevailing rate of Kshs.77.61 to the USD.

According to PW2, the value of the remaining works is Kshs.10,683,159. That amount translates to USD 137,600. The works done was valued at Kshs.10,665,202 an equivalent of USD 137,400. The evidence does prove that the building was a mere shell with no doors or windows. Only about Kshs.5,254,000 was remaining to be paid. This could not have completed the works.

It is the plaintiff's evidence that the sum of USD 77,302 was not utilised on the project. The defendant had done work equivalent to Kshs.10,665,202 as per the evidence of PW2. This amount is more than the 130,000 USD sent to the Plaintiff. I do find that the defendant had an extra 7,400 dollars over and above the 50% deposit of USD 130,000. This amount has to be deducted from the sum of USD 77,302. This will give a balance of USD 69,902.

The evidence on record is sufficient to fund for the Plaintiff. I do find that the defendant breached the contract by failure to complete the works. There is no evidence that the plaintiff failed to pay the money on time. I do grant the plaintiff a sum of USD 69,902 being a refund out of the sum of USD 77,302 sent to the defendant. That amount was not utilized on the project. The defendant was overpaid for the works done to the extent of USD 69,902.

I do also find that since the defendant did not fulfill his part of the contract, he should be condemned to pay general damages for breach of contract. I do find that a sum of Kshs.500,000 is sufficient in the circumstances of this case.

In the end, I do enter judgment for the Plaintiff against the Defendant as follows:-

- (i) Over payment-USD 69,902**
- (ii) General damages of Kshs.500,000**
- (iii) Costs**

Dated and delivered in Malindi this 24th day of February 2016

S.CHITEMBWE

JUDGE