Njoka t/a Jofoco Contractors v Karanja & 2 others (Civil Appeal 32 of 2020) [2024] KECA 1537 (KLR) (25 October 2024) (Judgment)

Neutral citation: [2024] KECA 1537 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 32 OF 2020

W KARANJA, LK KIMARU & AO MUCHELULE, JJA

OCTOBER 25, 2024

BETWEEN

JOSEPH KARIUKI NJOKA T/A JOFOCO CONTRACTORS ..... APPELLANT

AND

P MBOGO KARANJA ..... 1ST RESPONDENT

SIMON N KIRUGURA ..... 2ND RESPONDENT

NASALIA NJURA NJERU ..... 3RD RESPONDENT

((Being an appeal from the judgment of the High Court of Kenya at Embu (Muchemi, J.) dated 14th November, 2019 in Civil Appeal No. 27 of 2018))

JUDGMENT

1. In a plaint dated 12th February 2007, the appellant instituted a suit against the respondents, in their capacity as the officials of Mufu/Rukuriri Water Project Committee, before the Senior Principal Magistrate's Court at Embu. The appellant alleged that the respondents, on 29th May 2006, contracted him to undertake rehabilitation of Mufu/Rukuriri Water Pipeline, particulars of which were contained under paragraph three (3) of the plaint.

2. The appellant averred that he completed the first phase of the project whose quoted cost was Kshs.2,142,280.00, and was paid part of the agreed contractual sum. The appellant contended that the respondent failed to pay him the balance of Kshs.543,008.00. It was the appellant's case that he began works in phase two of the project and diligently performed his part of the contract until the respondents stopped him from further performance of the contract on or about November, 2006.

3. The appellant urged that he was entitled to payment of Kshs.66,000.00, with respect to the 2nd phase, which payment was for excavation of 200 meters, at the rate of Kshs.330.00 per meter. He urged the

trial court to enter judgment in his favour for the sum of Kshs.609,008.00; interest on the said sum; general damages for breach of contract; as well as cost of the suit.

4. In response, the respondents filed a statement of defence dated 12th March 2007. They admitted to having entered into a contract with the appellant, but denied the particulars of the works to be done as detailed in paragraph three of the plaint.

   The respondents averred that if the appellant undertook any extra work, then it was outside the respondents' knowledge and approval. The respondents urged that the appellant was never awarded a contract for phase two of the project, and that he was not entitled to the monies pleaded in the plaint.

5. On 29th April 2008, a partial consent was entered into by the parties and adopted as the order of the Court, to the extent that judgment was to be entered in favour of the appellant for the sum of Kshs.214,224.00. Execution proceedings for the said sum was stayed by an order of the Court dated 19th August 2017, pending hearing and determination of the main suit.

6. The court heard viva voce evidence. It was the appellant's case that he was awarded a tender by Mufu/Rukuriri Water Project Committee for rehabilitation of the water pipeline, which project was sponsored by the Constituency Development Fund, Runyenjes. He was informed that the project would be undertaken in phases. It was his evidence that he duly executed his duties and completed phase 1 of the project, for which he was paid Kshs.2,142,280.00, less 10% retention sum. The appellant testified that he incurred extra costs of Kshs.121,500.00 in construction of the intake chamber, and Kshs.17,500.00 which he used to purchase five pipes. He testified that the respondents informed him that they had received funds from Runyenjes Constituency Development Fund (CDF) to pay for the project, but demanded a kickback which the appellant was not agreeable to. He testified that it was after that that the respondents hired another contractor. It was his evidence that he performed his part of the contract, and that his claim against the respondents totaled to Kshs.609,008.00.

7. Upon cross-examination, the appellant confirmed that he did not sign a contract with respondents for the extra works that he performed which caused him to incur the extra costs. He testified that he entered into a contract with the respondents, and not the Runyenjes Constituency Development Fund.

8. PW2, Humphrey K. Norman, testified that in 2007, he was the chairman of the tender committee of Mufu/Rukuriri water project, while the respondents formed the executive committee. It was his evidence that the tender for phase one of the project was awarded to the appellant, trading as Jofoco Contractors. He stated that the total cost of the project was Kshs.3 million, and that the appellant duly completed phase one of the project, but was not paid by the respondents. It was his evidence that he was not involved in phase two of the project, but was informed by the respondents that they had decided to go ahead with a different contractor.

9. Upon cross-examination, PW2 stated that the project was a public project sponsored by CDF funds. He asserted that he left office when phase two of the project began. He denied being aware of any extra work done by the appellant with respect to phase 1 of the project. He stated that he was not aware that the respondents had retained 10% being retention sum.

10. PW3, Paul N. Nthiga, stated that he was the Funds Manager at Runyenjes Constituency Development Fund, since April 2009. It was his evidence that prior to 2007, there was lack of proper structures at the CDF with respect to implementation of projects. He recalled that when he was appointed to the office, he did not find any records with respect to the project undertaken by the appellant at the Runyenjes CDF offices.

11. The 2nd respondent, Simon Njiru Kirungura, testified on behalf of the respondents. It was his evidence that Mufu/Rukuriri water project Committee entered into an agreement with the appellant for

rehabilitation of their water project. He stated that the appellant completed phase 1 of the project and was paid a total sum of Kshs.2,340,002.00, with the remaining balance being Kshs.108,278.00. He testified that the retention amount was payable after conclusion of the whole project, which in this case did not materialize.

12. It was his testimony that the water project was a public project funded by the Runyenjes Constituency Development Fund, and not the respondents. He recalled that the respondents left office in 2007 after the General Elections, but that the project was still in existence, under different office bearers. He stated that the respondents did not breach any terms of the agreement as the appellant left the project on his own volition. He testified that the respondents entered into the consent judgment because Runyenjes CDF had agreed to settle the admitted outstanding balance.

13. After hearing the parties, the trial court decided in favour of the respondents. The Court held that the appellant was awarded the Mufu/Rukuriri Water Project vide the agreement dated 29th June 2006, and that he was paid a sum of Kshs.2,142,280.00, less 10 % retention sum. The Court determined that the project was public in nature as it was funded by Runyenjes Constituency Development Fund (CDF), and that the respondents ceased to be officials of the project in 2007. They could not therefore be sued in their respective personal capacities. The trial court found that the appellant did not provide any evidence to prove that the 2nd phase of the project was ever implemented. The Court, in the premises, dismissed the appellant's suit.

14. The appellant, being dissatisfied with the decision of the trial court, filed an appeal before the High Court at Embu. In his memorandum of appeal, the appellant was aggrieved that the trial court erred in finding that the Mufu/Rukuriri Water Project committee was appointed by Runyenjes Constituency Development Fund (CDF), in the absence of any documentary evidence to that effect. The appellant urged that Runyenjes CDF was not a party to the contract that was entered into between the appellant and the respondents, and that the respondents paid him directly from their bank account.

15. The appellant was aggrieved by the trial court's dismissal of his claims of work done that was allegedly not listed in the LPO, yet the learned magistrate did not visit the site project to determine the actual works done in execution of the contract. He faulted the trial court for setting aside the consent judgment in favour of the appellant, for payment of Kshs.214,228.00. He was of the view that the learned magistrate erred in finding that retention sum was payable after inspection of the completed projected, contrary to the terms of the agreement between the parties. He faulted the trial court for dismissing his suit, even after finding that the appellant had a case against the respondents and Runyenjes CDF for breach of contract. He was of the view that the decision of the trial magistrate was made against the weight of the evidence on record.

16. The first appellate court, after a re-evaluation of the evidence tendered before the trial court, saw no reason to interfere with the decision of the trial court. The learned Judge found that the respondents could not be sued in their own capacity, as the agreement was between the appellant and Mufu/Rukuriri Water Project Committee, under the auspices of the Runyenjes Constituency Development Fund. The appellant's appeal was dismissed with costs.

17. Aggrieved by this decision, the appellant proffered thirteen (13) grounds of appeal before this Court. In summary, the appellant faulted the learned Judge for finding that the appellant filed his suit in 2018, after the committee had allegedly been disbanded, yet his plaint is dated 12th February, 2007. He was aggrieved that the learned Judge, in the absence of any evidence, found that the respondents were CDF officials, appointed by the area Member of Parliament, for a period of five years. He averred that Mufu/Rukuriri Water Project Committee was community-based organization, registered with the Ministry

of Culture and Social Services, as per Ministry of Social Act 2005, and that the committee could not be disbanded based on the outcome of 2007 general elections.

18. The appellant faulted the learned Judge for disregarding the Public Procurement and Disposal Act 2005 (now repealed), which dictated that a budget has to be drawn before any services are procured. He averred that the drawn agreement was between the appellant and the respondents, that payment was made by the respondents, and that Runyenjes Constituency Development Fund was not a party to the agreement. He was aggrieved that the parties entered into a consent judgment, where the respondents agreed to pay the appellant a sum of Kshs.214,228.00, but that they failed to honour the agreement. He faulted the learned Judge for failing to find that the documentary evidence adduced by the respondents was fraudulent.

19. The appeal was canvassed by way of written submissions. The appellant appeared in person. He did not address any of his grounds of appeal in his written submissions. It was his submission that a suit cannot be defeated for reason of misjoinder or non-joinder of parties, and that the Court has a duty to deal with the issue at hand so far as regards the rights and interests of the parties before it. The appellant urged us to remit his file back to the trial court for retrial, so that necessary amendments could be made, given the fact that the appellant was unrepresented before the two courts below.

20. Mr. Andande, learned counsel for the respondents, on his part, was of the view that the grounds of appeal raised by the appellant constituted issues of fact and not law. Counsel urged that the appellate court properly found that the contract was between the appellant and Mufu/Rukuriri Water Project Committee, which was under Runyenjes CDF. He submitted that the project was funded by the government, and the respondents could not, therefore, be sued in their private capacities. It was his submission that Section 30(4) of the Constituency Development Fund *Act No. 10 of 2003*, directed that the Constituency Development Committee was responsible for monitoring of projects, and that the committee was at liberty to designate a project committee the functions of monitoring an ongoing project. Counsel reiterated that Runyenjes Constituency Development Fund was liable in law and not the respondents.

21. This being a second appeal, our duty was well stated in Kenya Breweries Ltd v Godfrey Odoyo [2010] eKLR, where this

Court held:

> "In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. In the case of Stephen Muriungi and another vs. Republic (1982-88) 1 KAR 360, Chesoni Acting JA (as he then was) said at page 366:
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> 'We would agree with the view expressed in the English case of Martin vs Glywed Distributors Ltd (t/a MBS Fastenings) 1983 ICR 511 that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law'".

22. Guided by the foregoing principles, the grounds of appeal, as well as the parties' submissions, we find that the main issue arising for our determination is whether the first appellate court erred in finding that the appellant's suit was not sustainable against the respondents in their private capacities.

23. It was common ground, and it can be deduced from the copy of the agreement dated 29th June 2006, that the appellant entered into an agreement with Mufu/Rukuriri Water Project Committee. The invitation to tender, which preceded the agreement between the parties, was advertised by Mufu/ Rukuriri Water Project. The 1st and 2nd respondents executed the agreement in their capacity as the then officials of the said committee. The agreement further showed that the water project was a public project funded by Runyenjes Constituency Development Fund (CDF). These facts were uncontroverted.

24. It is for this reason that the respondents communicated to the Coordinator, Runyenjes Constituency Development Fund, in their letter dated 18th July 2007, regarding payment of the amount owing with respect to the consent decree. It is also for this reason that the appellant did not pursue the respondents directly or personally in his execution proceedings, but rather pursued the account allegedly held by Runyenjes Constituency Development Fund at the Co-operative Bank of Kenya Ltd. The respondents left office in August 2008, after the 2007 General Elections, when a new Member of Parliament was elected. We agree with the finding by the two courts below that having left office, the respondents could not be sued in their private capacities, as the project was essentially a CDF project.

25. We further hold that the agreement signed by the parties was in regard to phase one of the project. The quoted price for the said phase one was Kshs.2,142,280.00. The appellant in his pleadings admitted to having received the said payment for the first phase of project, that is, Kshs.2,142,280.00, less 10% retention sum. His assertion that he was not paid for services rendered cannot therefore stand. No agreement was entered into between the parties with respect to phase two of the project. The appellant failed to provide any documentary evidence that authorized him to undertake the extra works pleaded in his plaint, or any works rendered with respect to phase two of the project. These extra works, for which the appellant claimed payment, did not form part of the only agreement entered into between the parties.

26. The appellant's contention that this Court ought to remit this case back to the trial court for retrial since he was unrepresented in the two courts below is unconvincing. The record shows that the firm of Magee wa Magee Advocates were on record for the appellant before the trial court. His case against the respondents is unsustainable. We see no reason to depart from the concurrent finding of the two courts below.

27. For the above reasons, we find no merit in this appeal. We hereby dismiss it with costs to the respondents.

DATED AND DELIVERED AT NYERI THIS 25TH DAY OF OCTOBER, 2024.

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.