Affiliated Business Contractors Limited v Seyani Brothers & Company (K) Limited (Civil Appeal 228 of 2019) [2024] KECA 1903 (KLR) (11 October 2024) (Judgment)

Neutral citation: [2024] KECA 1903 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 228 OF 2019

F TUIYOTT, A ALI-ARONI & PM GACHOKA, JJA

OCTOBER 11, 2024

BETWEEN

AFFILIATED BUSINESS CONTRACTORS LIMITED ..... APPELLANT

AND

SEYANI BROTHERS & COMPANY (K) LIMITED ..... RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya at Nairobi (Nzioka, J.) delivered on 15th August 2017 in HCCC No. 178 of 2013)

JUDGMENT

1. The dispute before us arises from a construction agreement and to put the appeal in context, we shall give a summarized background. Pursuant to an agreement dated 20th November 2008, the appellant retained the services of the respondent to carry out construction works on the premises known as Abscon House. The property is situated on that parcel of land known as L.R. No. 209/9346. The parties agreed that the respondent would be paid the sum of Kshs. 61,510,064.10 as and when it fell due.

2. According to the respondent, it carried out the said works to the satisfaction of the appellant and handed over the premises. It then raised two interim certificates: interim certificate no. 2 and interim certificate 13. It accused the appellant of failing to pay the said certificates as well as the retention sums. To the respondent, the interim certificates and the retention sums, resultantly attracted interest in line with the terms of the agreement. Upon default of payment, the respondent filed HCCC NO.178 OF 2013 in the High Court, Nairobi seeking to recover the sum of Kshs. 42,998,667.58 and additional interest on the unpaid amount at the rate of 20% from 1st January 2013.

3. The appellant entered appearance and filed its statement of defence dated 21st June 2013. It was later amended on 8th February 2016 to include a counterclaim. In it, the appellant averred that the

respondent failed to complete the works undertaken and rectify the defects. As a consequence, the appellant repudiated the contract.

4. The appellant accused the respondent of failing to complete the contract within the agreed timelines; that is within 24 weeks from 1st December 2008 to 18th May 2009, carrying out sub- standard works and failing to rectify the defects. It lamented that because of those delays, the handover took place two years after the agreed date for handover date. It added that if there were any sums owing to the respondent, the appellant was not liable to pay those sums or release the retention sums since the respondent failed to complete the works as per the contractual terms. Thus the appellant reserved its right to set off/ abate those sums from what it counterclaimed.

5. Resulting from the delayed handover, the appellant lamented that it suffered a substantial loss estimated at Kshs. 100,000.00 per week for 72 weeks due to deprived use of the premises. It also sought interest on that sum totaling Kshs. 10,657,366.90. The appellant also blamed the respondent for setting up a faulty sewer line that dissuaded potential clients from using the premises, which was eventually ameliorated by the Nairobi City Council. In total, the appellant sought the sum of Kshs. 17,857,366.90 and interest at court rates from 31st March 2005 until payment in full.

6. In her judgment dated 15th August 2017, the learned judge (Nzioka, J.) found that as per clause 34 of the contract, payment would only be effected once an interim certificate of payment was issued by the project Architect. Although two interim certificates were issued, namely 2 and 13, the court observed that certificate no. 2 was based on the respondent's valuation report and not that of the quantity surveyor. Based on those errors, the court directed that it be remitted for re-evaluation, facilitated by the appellant, within 14 days from the date of the order, failing which the certificate would be deemed valid and due for payment. The learned judge then held:

> " I have considered the submissions on Certificate No. 13 and I find that as aforesaid, on the face value, the payment thereof should be made. With due respect, the Defendants (sic) argument is not convincing. First and foremost, the Certificate was based on the valuation of its agent, the Quantity Surveyor; the said valuation should have noted the alleged defects and made provisions for the same. Secondly, the Valuation was in relation to the works so far carried out and the material at site. Why would the Quantity Surveyor's (sic) include therein the retention sums. Thirdly, why hasn't the Defendant paid the sum admissible less the retention sums, if any, is included? Fourthly, aren't issues of defects remedied out of retention sums? Isn't the issue of defects a subject of the counter claim, (if the defendant rectified any?) All in all, I find that the Interim Certificate no. 13 was properly issued, it is valid and was due for payment within 14 days of presentation and request for the same. It is payable with interest as agreed by the parties from the date it become overdue until payment in full.
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> As regards the Retention sums, clause 34.16 provided that, the sum was payable upon the Architect issuing a Certificate for the balance of the amount retained but was subject to the expiry of the defects period and issuance of the certificate of completion of rectification. The Defendant submitted that since the required documentation has not been produced, the claim is pre-mature. The Plaintiff submitted that the Defendants (sic) took possession of the premises under clause 42.7 and thereunder the Defendant is entitled to retain 50% of the retention sum and the balance paid upon the expiry of the defect liability.
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> I note that from the Agreement executed by the parties that the repairs were to be undertaken within six months. I therefore find that as provided for under clause 42.7 the Defendant should pay the 50% aforesaid and in view of the fact that a certificate of

completion of rectification has not been issued, the balance of the retention amount will be paid in accordance with the terms of clause 42.8.

In that regard I direct that the Party responsible for issuance of the said Certificate of Completion of rectification of defects should comply with the Provision of clause 34.16 and 42.8 of the Agreement, and issue the Certificate within fourteen (14) days of this Order. Failure of which the sum shall be deemed due for payment. The Plaintiff has to cooperate and give all the required documentations for the preparation of the Certificate. If the Parties do not agree, each one is at liberty to list the matter before the Court within fourteen (14) days of non-compliance for final determination. In the same vein, the parties should within fourteen (14) days of this order deal with the issue of final accounts as provided for under the relevant provisions of clause 34.17 to 34.22. The Parties agreed that the final statement of account has not been prepared and the Defendant testified that once done it will pay. The defendant should take the lead in this activity.

I shall now deal with the Counter Claim...

I have considered the documents produced by the Defendant in support of its claim and I note that, there is a snag list updated from site on 16th September 2011. It classifies the disputed works in the following categories; additional requests, defective item, not complete, not as specified, missing item and rejected. It also indicates the Party who was responsible to deal with what. The Plaintiff is identified as one of the Parties. However, that document which runs into seven (7) pages does not show whether the Plaintiff were parties thereto or the Project Architect or the Quantity Surveyor. It is not signed and the maker is not identified. If the same is in support of the claim of Kshs 7 200 000.00 under paragraph 15 of the Counter Claim then I agree with the Plaintiff (sic) submission that the same cannot be relied on, as the said documents do not even reflect that sum. Be it as it were, I have ordered the parties to revisit the issue of defects and prepare the final accounts, that will deal with some of the issues raised by the Defendant.

The next set of documents produced by the Defendant is the Mortgage Account Statements running from page 8 to 11. With due respect these statements were not fully explained to the Court. According to paragraph 16 of the Counter Claim, a sum of Kshs 10, 657, 366.90 was incurred as interest on the loan repayment. The question is which loan? The Defendant did not even submit on this issue, only Zephaniah Gitau Mbugua, who states that the Defendant further incurred interest of ten million, six hundred and fifty-seven thousand, seven hundred and two and eighty-five cents, (Kshs 10, 657, 366.85 (sic), on the loan repayment for the period of delay." This averment was not expounded further. The Court cannot appreciate how the interest occurred and why. I find the claim not proved and I dismiss it.

Finally, ... I order that interest shall be paid on the sums of money awarded under certificate No. 13 and 50% of the Retention fees awarded. Interest on any other pending issues shall await the outcome thereof. The costs of the suit shall also await the final determination of the matter."

7. The appellant is dissatisfied with those findings. It filed a notice of appeal dated 28th August 2017. It also filed a memorandum of appeal dated 27th May 2019. The appellant raised 6 grounds challenging that judgment. We have taken the liberty to summarize them as follows: the learned judge erred in dismissing its counterclaim when the respondent admitted delayed works yet it is those delayed works that were the fulcrum of its counterclaim; certificate no. 13 was improperly issued since there was no

certificate of practical completion; the learned judge was wrong in holding that should re-evaluation not be done within fourteen days from the date of the court's judgment, then certificate no. 2 ought to be deemed as properly drawn; and that the learned judge granted orders that were not prayed for in the plaint.

8. In the premised circumstances, the appellant urged this Court to allow the appeal, set aside the judgment of 15th August 2017, uphold the finding that certificate no. 2 was improperly drawn, allow its counterclaim and costs of the appeal.

9. When the appeal was heard virtually on 7th May 2024, learned counsel Mr. Kahura appeared for the appellant while learned counsel Mr. Bundotich appeared for the respondent. Both parties relied on their respective written submissions. The appellant's written submissions were filed together with its list of authorities both dated 16th December 2022. On its part, the respondent relied on its written submissions dated 16th June 2020 together with its notice of grounds affirming the decision of the High Court dated 9th July 2019.

10. Abridging the facts arising from the construction contract, the appellant submitted that certificate no. 13 was not properly prepared since it was not accompanied by a certificate of practical completion, a fact admitted by the respondent.

    Furthermore, the appellant was dissatisfied with the works carried out by the respondent as they were marred with defects that were not rectified by the respondent.

11. Secondly, the appellant was unhappy with the fact that although the learned judge found that interim certificate no. 2 was not properly issued, the court deemed it valid and proper if, after fourteen days from the date of the order, the same had not been re-evaluated. In its interpretation of that finding, the learned judge converted the interim certificate to a final one based on those orders. The judge was thus in error, it submitted, for rewriting the contract of the parties.

12. Thirdly, the appellant complained that the learned judge issued orders in the nature of valuation and re-measurement of the works yet those orders were not pleaded in the plaint. Lastly, the appellant urged this Court to allow its counterclaim since its basis was admitted by the respondent. That the claim sought was based on clause 43 of the contract and was therefore lawful and justifiable since the respondent had not only delayed in completion of the works, but also gave substandard works marred with defects that the respondent failed to rectify.

13. On the part of the respondent, it was submitted that a scrutiny of clause 36 of the contract as read with clause 43, where the appellant sought to lay a basis for its counterclaim, coupled with DW1's evidence, the claim was not only unsustainable but also untenable and not made in accordance with the contractual terms. This is because the Architect, the appellant's employee, neither issued a certificate of delay on the respondent's account, nor documents relating to the loss occasioned by the respondent.

14. On whether certificate no. 13 was improperly prepared in the absence of a certificate of practical completion, the respondent reproduced the appellant's statement of defence and counterclaim in totality, clauses 34.20, 34.21 and 41 of the contract to argue that a certificate of practical completion was not a prerequisite to the issuance of interim certificates or preparation of final accounts. It thus stood due and payable.

15. Regarding whether the learned judge erred in finding that interim certificate no. 2 was improperly drawn and should a re- evaluation not be done, it would be payable after fourteen days, the respondent pointed out the evidence of DW1, clauses 34.1, 34. 2, and 34.3 of the contract to argue that the learned judge exercised her discretion judiciously to order re-evaluation within the timelines stated in line with

clause 34.8 of the contract. Besides, interim certificates, it contended, are raised and issued based on work done, the materials on site, and the amounts the contractor considers himself entitled to.

16. On whether the court granted orders not sought in the plaint, the respondent argued that the learned judge invoked the omnibus prayer sought by the respondent namely: "any other relief the court thought fit to grant." Therefore, that order was properly granted. It also pointed out that the appellant requested for re-evaluation and final account thereby compelling the court to issue the orders it so did. Additionally, contrary to the appellant's allegations, no orders of specific performance were granted and finally, it was entitled to costs of the suit since costs follow the event. The respondent ultimately urged this Court to dismiss the appeal with costs.

17. We have considered the record of appeal, the submissions and the authorities cited by the parties. As a first appellate court, an appeal is by way of a retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect. [See Gitobu Imanyara & 2 others vs. Attorney General [2016] eKLR].

18. In order to formulate the issues for determination, it is important that we summarize the facts as captured in the record of appeal before us. The respondent called its director one Hirji Khimji Seyani as a witness. He recalled that the appellant appointed the firm of Karago and Associates as the project Architects and Armstrong and Duncan as the Quantity Surveyors.

19. He testified that it was inter alia agreed as per the contract dated 20th November 2008, that on the presentation of an interim payment certificate to the employer, payment was to be effected within 14 days. If unpaid beyond that period required to be honored, interest on the unpaid amount accrued until payment in full as a consequence for breach. It was the respondent's position that it carried out the work and completed it in accordance with the contract. Furthermore, all defects were rectified in accordance with the contract and to the satisfaction of the Architect. It is for this reason that the building was handed over to the appellant.

20. Thereafter, the respondent raised two interim certificates: one dated 24th March 2011 for Kshs. 6,767,494.87 (interim certificate no. 2) and the other (interim certificate no. 13) dated 29th September 2011 for Kshs. 22,387,568.70. He testified that out of the sums raised in interim certificate no. 13, Kshs. 4,038,471.65 and Kshs. 3,613,307.25 were payable to Power Link Limited, Neliwa Builders and Civil Engineers Limited respectively while the rest was payable to the respondent.

21. The respondent confirmed that it is the one that prepared certificate No. 2 and that the appellant only paid Kshs. 1,000,000.00 arising from that certificate. It added that the retention sum of Kshs. 7,458,364.00 was also not remitted despite the expiry of the defects liability period. It is for those reasons that the respondent sought the sums as enumerated in its plaint. It was the respondent's position that since the Architect was satisfied that the works were completed, he did not need to prepare a certificate of completion and indeed the Architect issued several extensions in accordance with the contract.

22. The respondent submitted that though no certificate of practical completion was issued, he had written to the Architect informing him that it had completed the works. It denied that there were any defects in the work as submitted by the appellant.

23. On its part, the appellant's director, Zephaniah Gitau Mbugua, confirmed that indeed, the contract dated 20th November 2008, was entered between the parties herein. However, he accused the respondent of failing to complete the works as scheduled within the contractual period. That the

respondent caused numerous delays leading to a prolonged handover of the premises. Furthermore, the premises contained numerous defects including snagging, that were not repaired.

24. The appellant further stated that the respondent diverted the sewer line resulting in spillage on the entrance road. The same was repaired by the Nairobi City Council and that as result of the defective sewer line, the appellant was unable to attract tenants. It is for this reason that estimated financial loss at Kshs. 100,000.00 per week was claimed. The appellant also sought interest valued at Kshs. 10,657,702.85.

25. The issues in this appeal revolve around the interpretation of the contract dated 20th November 2008 and which of the conflicting claims was payable. We must however exercise caution as it is not our business to rewrite the contract between the parties (See Pius Kimaiyo Langat vs. Co-operative Bank of Kenya Ltd [2017] eKLR). It is not disputed that the parties freely and without impediment, executed the said agreement. However, several issues emerged after the respondent raised two certificates namely: interim certificate no. 2 and interim certificate no. 13.

26. One of the issues for determination is whether certificate no. 13 was properly raised as held by the trial court. According to the appellant, the court ought to have found the same illegitimate as it was not accompanied by a certificate of practical completion; a fact admitted by the respondent. Furthermore, the respondent's works were marred with defects and were not rectified by the respondent. For this reason, it was not entitled to recover for any sums due and owing.

27. We note that clause 34 of the contract deals with payments. The relevant provisions regarding interim payment certificates are as follows:

> " 34. At intervals stated in the appendix to these conditions, the contractor shall
> 1. submit to the Quantity Surveyor an application for payment giving sufficient details of the work done and the materials on site and the amounts which the contractor considers himself to be entitled to. The application for payment shall be copied to the Architect and the Employer.
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> 2. Upon receipt of the application and after verifying the amounts, the Quantity Surveyor shall prepare within seven days an interim valuation of the work done and materials on site during the relevant period and forward the same to the Architect. The valuation shall be copied to the Employer.
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> 3. The Architect shall issue an interim payment certificate within seven days from the date of receipt of the Quantity Surveyor's valuation. The payment certificate shall be copied to the Employer.
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> 4. Neither the Quantity Surveyor nor the
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> Architect shall be bound to issue a valuation or a payment certificate, as the case may be, whose value is less than the amount stated in the appendix to these conditions as the minimum amount of a payment certificate before the issue of the certificate of practical completion of the whole of the works or section thereof.
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> .....
>
> 34.9. The amount stated as due in an interim certificate, shall, subject to any agreement between the parties as to stage payments, be the total value of the work properly executed and the value of the materials and goods required for use in the works which have been delivered to the works..."

28. None of the parties raised an issue with the process delineated in clauses 34.1 and 34.2. It was also not argued by the appellant that the respondent did not comply with the same. Be that as it may, the Architect invoked clause 34.3 and drew the interim payment certificate no. 13 herein.

29. Clause 34.4 speaks to the circumstances under which a certificate of practical completion is prepared. However, we do not think the circumstances envisioned therein formulated those before us now. It is unequivocal that the said certificate is only required when the value is less than the amount stated in the appendix to the conditions of the contract to be declared as the minimum amount of a payment certificate. That was not the case herein. Clause 41.0, which also deals with a certificate of practical completion, similarly does not allude to the fact that it must be generated before an interim payment certificate is prepared.

30. Suffice to add that clause 34.9 states that the amount in the interim certificate shall be the total value of the work properly executed and the value of the materials and goods required for use in the works which have been delivered. In other words, the said certificate was conclusive proof that the works were properly executed. We are reminded that this is a certificate raised by the Architect and works inspected by the Quantity Surveyor. Had there been defects as alluded to by the appellant, nothing would have been easier than for its consultants to state otherwise and not proceed to issue the interim certificate.

31. We thus find that the appellant misinterpreted the provision since a certificate of practical completion is not a pre-requisite to the issuance of an interim payment certificate. Consequently, we find that the interim certificate no. 13 was proper as found by the trial court. We will therefore not interfere with those findings.

32. Our next issue for determination is whether the learned judge erred in finding that interim certificate no. 2 was not properly issued, but deemed it valid and proper if, after fourteen days from the date of the order, the same had not been re-evaluated. In stating so, the learned judge observed that the process of its issuance was not complied with and directed the appellant to ensure that it is re-evaluated but within a limited period failing which, the same shall stand valid.

33. The rationale behind the trial court's findings was inspired by the provisions of clause 34.8 of the contract which provides:

> "The Architect may, by a subsequent or supplementary certificate, make any correction, amendment or modification to any previously issued certificate and shall have the authority, if work is not carried out to his satisfaction, to omit or reduce the value of such work in any certificate."

34. If we understand the appellant, they were unhappy with the fact that the trial court validated an invalid interim certificate. In our view, the learned judge acknowledged that the buck stopped with the appellant and its consultants. The court allowed the appellant to challenge the certificate as per the terms of the contract but within a limited period. The contract between the parties had clear terms on how the interim certificates were to be prepared. The appellant has not submitted what was difficult with having the re-evaluation done or that the 14 days' period was not adequate.

35. We do not see how the learned judge injudiciously exercised her discretion when issuing those orders. The appellant had an opportunity to comply and failed to do so. Accordingly, we do not find the argument that the learned judge converted the interim certificate to a final certificate as argued by the appellant meritorious. Accordingly, we reject that ground of appeal.

36. Thirdly, the appellant lamented that his counterclaim was dismissed. It urged this Court to allow it since its basis was admitted by the respondent, was based on clause 43 of the contract and was therefore

lawful and justifiable, since the respondent, had not only delayed in completion of the works, but also gave substandard works marred with defects that the respondent failed to rectify.

37. The appellant cited clause 43.0 which provides:

> "43. 1. If the Contractor fails to complete the works by the date for practical completion stated in the appendix to these conditions, or within any extended time fixed under clause 36.0 of these conditions, and the Architect certifies in writing that in his opinion the same ought reasonably so to have been completed, then the contractor shall pay or allow to the employer a sum calculated at the rate stated in the said appendix as liquidated damages for the period during which the works shall so remain or have remained incomplete and the employer may deduct such sum from any money due or to the contractor under the contract or recover the same from the contractor as a debt.
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> 43.2. The payment or deduction of such damages shall not relieve the contractor from his obligations to complete the works or any part thereof of from any other obligations and liabilities under the contract."

38. Looking at clause 43.1 above, the appellant did not adduce a certificate by the Architect confirming that in his opinion, the works were not completed within the timelines set out in the construction agreement. We note that the contract had elaborate clauses on the procedure to be followed upon delays by the respondent, including termination under clause 38, but no such evidence was placed before the trial court. Accordingly, the grounds of appeal relating to the counterclaim are bare and have no merits.

39. Furthermore, the sums claimed in the counterclaim were not supported by any empirical evidence or demonstration as to how those figures were arrived out. They would appear that they were merely conjectures. Accordingly, we see no reason to disturb the findings of the trial judge.

40. Lastly, did the trial court issue extraneous orders not captured in the pleadings? The appellant complained that the learned judge issued orders in the nature of valuation and re- measurement of the works yet they were not pleaded in the plaint. He also mentioned orders in the nature of specific performance that were not the subject of determination before the trial court. As already held, the dispute was based on a contract that had guidelines as to how interim certificates were to be prepared and verified. The contract was the basis of the claim and the counterclaim that was determined by the learned judge. In our view, the judgment properly determined the issues that arose from the pleadings and issued appropriate orders and we see no basis for disturbing those orders.

41. The upshot of our above analysis is that the present appeal lacks merit. It is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF OCTOBER 2024.

F. TUIYOTT

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JUDGE OF APPEAL ALI-ARONI

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JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

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JUDGE OF APPEAL

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

Signed.

DEPUTY REGISTRAR