Attorney General v Kabuito Contractors Limited (Civil Appeal 638 of 2019) [2023] KECA 230 (KLR) (3 March 2023) (Judgment)

Neutral citation: [2023] KECA 230 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 638 OF 2019

HM OKWENGU, MA WARSAME & JM MATIVO, JJA

MARCH 3, 2023

BETWEEN

ATTORNEY GENERAL ..... APPELLANT

AND

KABUITO CONTRACTORS LIMITED ..... RESPONDENT

(Being an appeal from the Judgment and decree of the High Court of Kenya at Nairobi (Sergon, J.) dated May 25, 2018. in HCC No 284 of 2008)

JUDGMENT

Introduction

1. In order to contextualize the issues presented in this appeal, it is necessary to briefly highlight the respective parties' case in the High Court as disclosed in their pleadings and the evidence adduced before the trial court. In its amended plaint dated March 23, 2019, the respondent claimed from the appellant Kshs 1,22,668,596.76, interests thereon from the date of filing suit,costs of the suit and interests. Its dealings with the appellant stems from a contract dated March 14, 1997 between the respondent and with the appellant through the Ministry of Local Government pursuant to which the respondent was to undertake periodic maintenance of roads within the Nairobi Central Business District (CBD).

2. The point of divergence is the respondent's claim that on February 16, 1998 the Permanent Secretary, Ministry of Local Government orally extended the said contract to include repairs to other roads. It averred that this was followed a letter dated February 16, 1998 from the Ministry and its letter of acceptance dated December 17, 1998 translated into a valid and binding contract which extended the contract whose terms were that it would undertake emergency repairs on Kenyatta Avenue and roads within the CBD, and that it would submit to the project manager monthly statements of estimated value of the work executed less the cumulative amount certified previously. The respondent averred

that certified amounts were payable within 28 days of each certificate in default late payment interest at commercial rates would apply. It averred that it undertook the agreed work satisfactorily under the supervision of the appellant's agents and submitted its claim for payment. However, it averred that no payment was made despite the appellant's engineers/consultants confirming that that the work was undertaken as per the contract and certificates were issued. Further, that the Ministerial Tender Board, Ministry of Local Government was satisfied with the work and recommended payment. The respondent contended that on March 26, 2008, the Permanent Secretary, Treasury wrote stating that the Pending Bills Closing Committee had evaluated the claim and found that it was not payable, that it was not privy to the composition and deliberations of the said committee nor was the said committee contemplated under the extended contract. Lastly, the respondent contended that the appellant's failure to pay the said sum constituted breach of the extended contract, and that the appellant should not be permitted to benefit from the works and fail to pay which amounts to unjust enrichment.

3. The appellant's defence as we glean it from its statement of defence is that it denied the claim and averred that if at all any contract existed, the full consideration was paid. It denied that the contract was extensions and averred that the engineer who allegedly supervised the contract had no authority to do so, and if at all any work was done, it was done without the requisite approval. It averred that the Pending Bills Closing Committee was lawfully established, that respondent voluntarily submitted its claim to the said committee and upon evaluation, the Committee found that the work was undertaken without a formally procured variation order.

The evidence

4. The respondent's case rested on the testimony of three witnesses.

   Its Managing Director, a one Amip R. Patel testified that in 1998 the contract was extended to cover emergency repairs on Kenyatta Avenue and other roads in the CBD, and because the work was emergency in nature, it was undertaken pursuant to oral instructions by the Permanent Secretary, Ministry of Local Government and under the supervision of its engineers on the assurance that the requisite approvals would be sought as the works progressed, and upon completion. He testified that the amount due and payable for the work done was Kshs 114,068,444.10 which was payable within 28 days upon certification by the project manager, which amount attracted interests of Kshs 1,000,600,152.61 inclusive of VAT aggregating to Kshs 1,122,668,596.71.

5. Next to testify for the respondent was one Florence Purvin Awino, its accountant cum the project accountant. Her evidence was that after completion of the work, they raised certificates but they were not paid, that she was familiar with FIDIC contracts which provide payment periods and accrual of interests in the event of default and as at February 27, 2018, the outstanding sum stood at Kshs 3,324,734,622.53.

6. The third witness was a one Engineer Timothy Onyango. His evidence was that the Ministry's Central Tender Board approved a contract of Kshs.64,282,199.75 which entailed re-carpeting several roads within the CBD, that the contract was extended to cover more roads at a sum of Kshs.45,056,874.10 and a further extension was done to cover emergency repairs at a cost of Kshs.16,637,500/=, and that the Ministry also requested for a further approval for another extension of the contract to include other roads. It was his evidence that the respondent received instructions from the Permanent Secretary, Local Government and commenced the works from April to July 1998. Further, that the work was inspected by a one Engineer Ingusa Murila, and there was no dispute on the quality of the work. He testified that despite the works being undertaken, the Ministry's Engineer never issued any certificates even though their engineers were involved in the works. He stated that the unpaid sum inclusive of

interests stood at Kshs. 1,122,668,596.71 and in a meeting held on March 20, 2001, the Ministerial Tender Board acknowledged the high standard of the work done.

7. The appellant's only one witness, Engineer Caleb Ingusu Murila, a civil engineer testified that sometimes in January 1997 the Central Tender Board of the Ministry deliberated and approved the award for re-carpeting of Nairobi-Kamukunji roads at Kshs.64,282,199.75 including re-carpeting some roads in the City Centre covering 9.50 KM. He stated that on May 15, 1997, the Central Tender Board approved the extension of the contract to cover roads in the CBD covering 4.4KM and a parking area measuring 18080 Square Meters at a sum of Kshs.45,056,874.10. Further, on February 12, 1998, the Central Tender Board approved another extension of the contract to cover emergency repairs on Kenyatta Avenue and other CBD roads at the sum of Kshs.16,637,500/=, that the Ministry also requested the Central Tender Board to approve a further extension of the contract, but the Central Tender Board on April 16, 1998 rejected the application and recommended that new tenders be processed in accordance with the existing regulations. However, the respondent claimed that he received verbal instructions from the then Permanent Secretary, Local Government and proceeded to begin the works, and that the works were done to acceptable standards but he never prepared any sight minutes because the instructions to supervise were oral. It was his evidence that the works undertaken pursuant to oral instructions were for Ngara Road, Langata Road, High Court Parking Area, Ronald Ngala, Moi Avenue, Bank Street, Mondlane Street, River Road and Ambassador Hotel Parking.

8. He testified that the respondent's claim could not be assessed sufficiently because of:- (i) absence of information on the state of the roads before and after the works were carried out; (ii) absence of proper documentation including a contract or certificates of work done; (iii) that the contract was never formalized; (iv) there was no basis for claiming the interest because the certificates were never approved; (v) that the claims for the emergency repairs were assessed and found not to be payable.

The verdict

9. In the Judgment, the learned Judge (Sergon J) distilled two issues for determination, namely:- (a) whether there was a valid contract for the work, and (b) whether the Plaintiff is entitled to the reliefs sought. Regarding the first issue the learned judge stated: -

> " 8) ...it is clear to this court that the parties do not dispute the fact that there were extensions made on contract no. PKG/5B. The defendant admits that there were two valid extensions by DW1 disputes the third extension. A careful consideration of the evidence of DW1 will reveal that the defendant does not seriously dispute the plaintiff's assertion that there was a third extension of contract no. PKG/5B. The defendant's main contention is that the extension was verbal. It is not disputed that pursuant to the verbal instructions by the Permanent Secretary, Ministry of Local Government, the plaintiff proceeded to carry out the works which the defendant was unable to assess because of lack of documentation since it was not in writing.
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> 9. The defendant expressly stated that the work under extension three was unpaid for because the same was neither approved nor formalized by the Central Tender Board nor by the Ministerial Tender Committee. It is the evidence of Amip Rajendra Patel and Timothy Onyango that it was normal in the circumstances for the permanent Secretary to give instructions since he was very powerful and could at any point override written instructions when the work is of urgent nature like in this case..... (Emphasis added)

10. There was no dispute that the El Nino phenomenon brought destruction of the road infrastructure of high magnitude. Decisions had to be made urgently to restore the destroyed infrastructure without undergoing the laborious tendering process.

11. .....PW1 and PW2 adduced evidence and tendered a bundle of documents to show that the work was done and DW1 confirmed. The plaintiff's evidence therefore remains uncontroverted.

12. In the circumstances of this case the defendants is not permitted in law and in equity to turn around and plead invalidity of the claim and make a contrary pleading to the effect that none of the actions created a legal or contractual obligation under the said contract. Section 120 of the *Evidence Act* expressly provides...

13. ...I agree with the plaintiff's submission that the defendant acted in bad faith when it failed to settle the claim on the basis that the contract was not in writing nor subjected to a competitive procurement process. It is also apparent that the contract was executed in 1997/1998, therefore the *Public Procurement Act, 2005* was not in force and could not be applied retrospectively.

14. ... In the unique circumstances of this case section 3(1) of the *Law of Contract Act* does not bar the plaintiff from enforcing an oral agreement against the defendant. The works done by the plaintiff were supervised by the defendant's engineers and works officers."

10. Regarding the second issue, the learned Judge had this to say:-

> " 29) (...I agree with the Plaintiff's averment that the defendant cannot rely on its own failure to sign the certificate to deny the plaintiff its claim on the principal amount and interest..."

11. Having concluded as herein above, the learned judge was satisfied that the respondent had proved its claim against the appellant on a balance of probabilities and entered judgment in its favour for Kshs. 3,170,908,263/25 as at June 30, 2017 plus interests at court rates from the date of judgment together with costs.

The appeal

12. The appellant seeks to overturn the Judgment of the High Court citing a raft of 17 grounds which in summation can be reduced into one ground, namely; whether the respondent proved its case against the appellant on a balance of probabilities.

Submissions

13. The appellant's counsel cited *William Muthee Muthami v Bank of Baroda* [2004] eKLR and *Fidelity Commercial Bank Limited v Kenya Grange Vehicles Industries Limited* (2017) eKLR in support of the proposition that for a claim for breach of contract to succeed, there must be offer, acceptance and consideration. Acknowledging that not all agreements must be in writing, the appellant's counsel questioned why the respondent could execute an undocumented contract of such a magnitude. He submitted that the respondent failed to prove the existence of a legally binding extension of the contract. He submitted that the mere fact that the respondent produced documents to show that the

work was done does not prove the existence of a valid contract and as such the respondent was only entitled to claim under the doctrine of quantum meirut and faulted the finding that a valid contract existed.

14. Additionally, the appellant's counsel faulted the learned judge for entering Judgment for Kshs.3,170,908,263.25 which was not claimed because in the Plaint the respondent claimed Kshs. 1,226,685,96.71. He submitted that parties are bound by their pleadings and evidence in variance of pleadings must be rejected and cited *Daniel Otieno Migore v South Nyanza Sugar Co Ltd* (2018) eKLR. He submitted that the duty of the court is not to formulate pleadings on behalf of the parties and cited the Malawi Supreme Court of Appeal decision in *Malawi Railways Ltd v Nyasulu* (1998) MWSC 3 in which the court cited "The Importance of Pleadings; (1960) Current Legal Problems at page 174 where it is stated that the court could be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. He faulted the learned judge for granting the respondent leave to amend the plaint without affording the respondent a hearing and cited *JMK v MWA & Another* (2015) eKLR which underscored the right to be heard guaranteed under Article 50 of the *Constitution* .

15. The respondent's counsel submitted that the appeal has no merits. Regarding the trial court's decision to allow the amendment of the plaint, he cited *Kassam v Bank of Baroda (Kenya) Ltd* (2002)1 KLR 296 which held that it is within the court's discretion to allow an application for amendment at any stage of the proceedings. He argued that the amendment complained of only amended the prayer for interest and that the appellant did not oppose the amendment nor did it seek leave to amend its defence and in any event the judge did not allow the said claim.

16. Responding to the ground challenging the court's finding that there existed a valid contract, the respondent's counsel cited this Court's decision in *Ali Abed Mohamed v Kenya Shell Company Ltd* (2017) eKLR which held that a contract can be inferred from the circumstances and it need not be in writing. He also cited the Court of Appeal decisions in *William Muthee Muthami v Bank of Baroda* (2014) eKLR and *Charles Mwiritu Mititi v Thanganga Tea Growers Sacco Ltd & Another* [2014] eKLR in support of the proposition that the essentials of a contract are offer, acceptance and consideration and argued that the respondent demonstrated the existence of a written contract which was subsequently extended verbally by the Permanent Secretary. He argued that the work was done as was confirmed by Engineer Murila but despite raising the certificates, no payment was made. He submitted that the court correctly found that the appellant by his conduct made the respondent to act on its words and it should not deny the existence of the contract.

17. Additionally, the respondent's counsel submitted that even though the original contract was in writing, it was not mandatory for the extensions to be in writing. To buttress his argument, he cited *Abdulkadir Sharif Abdirahim & Another c Awo Sharif Mohamed* (2014) eKLR (Havelock J) in support of the proposition that there is no general rule that all contracts must be in writing. Counsel relied on the High Court decision in *Johnnewton Communications Ltd & 5 others v Ministry of Information & Technology* (2021) eKLR which held that the listing of a contract in pending bills was evidence that the contract existed.

18. Lastly, the respondent's counsel submitted that the contract provided for payment of interests on late payment, hence, the award on interests was justified and that the respondent adduced evidence on how the interest was tabulated.

Determination

19. Any contractual dispute invariably requires an interpretation of the contract concerned to determine the obligations of the parties involved. Accordingly, to resolve the contested issue of the existence or otherwise of the alleged "oral extension of the contract," an inevitable starting point is the written contract between the parties dated March 14, 1997. Implicitly, it is vital to establish whether the written contract which is alleged to have been "extended orally" provided for variation(s) or extension(s). We say so because we take judicial notice of the fact that in most jurisdictions non-variation clauses are commonplace in commercial and construction contracts. Non-variation clauses are common place because parties to such contracts may exercise their contractual freedom in an effort to constrain such liberty in the future. Such provisions are important because they place emphasis on the absolute contractual freedom of parties to amend their contracts or they sacrifice absolute contractual freedom for the sake of certainty and formality.

20. Granted, contracting parties may validly agree in writing to an enumeration of their rights, duties and powers in relation to the subject matter of a contract, which they may alter only by again resorting to writing. The principle flowing from the above statements is that contracting parties are able to limit their future contractual freedom by stipulating that any variation is only valid if done in the form prescribed in the relevant contract (typically in writing). In interpreting such contracts, courts will favour certainty and formality.

21. In an effort to establish whether the written agreement between the parties whose existence is not disputed provided for variations or non-variations, we examined he entire Record of Appeal. We note that in its Supplementary List of Documents dated June 13, 2017, the respondent only annexed extracts of pages of the Contract No PKG/5B dated March 14, 1997. The documents which are located at pages 20 to 24 of the record comprise of the front page of the contract, page one of the contract with only 4 clauses, the last page of the contract containing the parties signatures and two selected pages containing clauses relating to cash flow forecasts, payment certificates, payments and compensation. In short, the respondent only produced before the trial court selected pages of the contract and omitted to table before the trial court the entire contract.

22. It's not clear why the respondent did not avail the entire contract to the trial court. Also, it is not clear how the trial judge conclusively determined the validity of the oral extension of the written contract without the benefit of the entire written contract particularly to satisfy himself that the written contract did not have an express non-variation clause or whether it provided for extensions whether written or oral. In addition, on record is the evidence of Engineer Murila, the appellant's witness who testified that the Ministry requested the Central Tender Board to approve a further extension of the contract, but the Central Tender Board on April 16, 1998 rejected the application and recommended that new tenders be processed in accordance with the existing regulations. There was no effort to establish what these existing regulations were and whether the oral contract conformed to the regulations. In our view, it was necessary for respondent to establish the nexus between the written contract and the oral extension of the written contract. It was also necessary for the court to satisfy itself that the oral extension met the approval of the Central Tender Board and that it was obtained in accordance with the Ministry's regulations. We say so because under the law of contract, a contract is the source of primary legal obligations upon which each party ensures that whatever has been promised is done.

23. As stated above, the respondent only relied on selected pages of the contract which are of no help as far as the questions raised above are concerned. As Lord Sumption held in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd (Rock Advertising)* [2018] UKSC 24, (2019) AC 119 [Rock

Advertising (SC)] at [7], "party autonomy operates up to the point where the contract is made, but thereafter only to the extent that the contract allows." The question whether the written contract allowed an extension whether written or oral remains unanswered. By addressing the said question, the court could have satisfied itself that there was no attempt to bypass the written agreement by informal means, and the same time uphold legal certainty by addressing all the issues before the court.

24. Next, we will address the issue whether the respondent proved its claim to the required standard on a balance of probabilities. To successfully claim damages for breach of contract, a plaintiff must show that: (a) a contract exists or existed; (b) the contract was breached by the defendant; and (c) the plaintiff suffered damage (loss) as a result of the defendant's breach. The test to be applied is whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. This implies that the plaintiff has to make out a prima facie case, in the sense that there is evidence relating to all the elements of the claim. The court must consider whether there is evidence upon which a reasonable man might find for the plaintiff.

25. Before the learned judge were two mutually destructive versions relating to the existence or non-existence of a contractual relationship between the respondent and the appellant. The respondent's position was that there existed a valid oral contract which extended the scope of a written contract to cover repair of additional roads. To the respondent, the contract was extended orally by the Ministry's Permanent Secretary which constituted a legally enforceable agreement between the parties. Further, that the work was done to the required standard and there is no dispute on the quality of the work.

26. The appellant took a diametrically opposed position. It disputed the oral extension of the contract. It argued that the alleged extension did not meet the approval of the Ministry's Central Tender Board. It argued that the Engineer who allegedly inspected the work had no authority and if any work was done pursuant to the alleged extension, the same is not payable because the claim could not sufficiently be assessed because of:

> (i) absence of information on the state of the roads prior and after the works; (ii) absence of proper documentation including a contract or certificates of work done; (ii) that the contract was never formalized; (v) that the certificates prepared by the contractor were never approved, (vi) that the claims for the emergency repairs were assessed and found not to be payable.

27. It must be decided whether, on all the evidence, the respondent's version is more probable than that of the appellant's. Useful guidance can be obtained from *Stellenbosch Farmers' Winery Group Ltd and Another v Martell and Others*, 2003 (1) SA 11 (SCA) at para 5 in which the Supreme Court of Appeal of South Africa explained how a court should resolve factual disputes and ascertain, as far as possible, where the truth lies between conflicting factual assertions:-

> " To come to a conclusion on the disputed issues a court must make findings on:
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> a. the credibility of the various factual witnesses;
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> b. their reliability; and
>
> c. the probability or improbability of each party's version on each of the disputed issues.
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> In light of the assessment of (a), (b) and (c), the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be a rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The

more convincing the former, the less convincing will be the latter. But when all factors equipoised probabilities prevail."

28. In any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff (now the respondent) as in the present case, and where there are two mutually destructive stories, the plaintiff (now the respondent) can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant (now the appellant) is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the court will weigh up and test the plaintiff's (now the respondent's) allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff (now the respondent) then the court will accept his version as being probably true. If, however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case (now the respondent) any more than they do the defendant's, (now the appellant), the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.

29. When we talk about a plaintiff having discharged the onus which rested upon him on a balance of probabilities one really means that the court is satisfied on a balance of probabilities that he was telling the truth and that his version was therefore acceptable. In the instant case, the respondent was required to prove that: (a) a contract existed; (b) the contract was breached by the appellant; and (c) it suffered damage (loss) as a result of the breach.

30. The respondent's claim is anchored on an alleged oral contract.

Several requirements must be met in order to form an oral contract. The following provides a basic list of oral contract requirements: - (a) The terms of the contract must be valid and legally enforceable; (b) It must contain the necessary elements found in all contracts (e.g. offer, acceptance, consideration, and mutuality or a "meeting of the minds"); and, (c) the oral agreement must not violate laws or regulations/policies; (d) capacity of the parties.

31. Undeniably, verbal contracts can be enforceable, but only if they are provable in court, and the contract meets the requirements of contract formation outlined above. For oral contracts, the courts will first be concerned with whether an oral contract exists and then with ascertaining the terms as these are, by their very nature, not written down. Ascertaining the terms of an oral contract has been held to be a question of fact. (See *Carmichael v National Power Plc* (1999) 1 WLR 2042 (HL)). This means that all evidence to assist that task is admissible, including evidence of the parties' subjective intentions and subsequent conduct. As Lord Neuberger stated in *Thorner v Major* (2009) UKHL 18, (2009) 1 WLR 776 "the interpretation of an oral contract is a matter of fact (I suggest inference from primary fact), rather than one of law, on which the parties' subjective understanding of what they were agreeing is admissible."

32. The respondent's cases rested on its assertion that the oral instructions were given by the Permanent Secretary owing to the urgency of the works which were to be done. This assertion is attractive. Be that as it may, the respondent's claim that there existed an oral contract between itself and the Ministry ought to be proved on the balance of probabilities. Oral contracts are harder to prove. An oral contract is not legally enforceable unless it is provable in court. This means that in the event of a breach, it is up to the plaintiff to prove the existence of the oral contract by adducing the necessary evidence.

33. The party seeking to enforce an oral agreement has the difficult task of proving the terms of the agreement as well as the existence of the verbal agreement. A written agreement is itself a proof that there was an agreement, but an oral agreement is merely a verbal communication of proposal and acceptance which is difficult to prove in future if any disputes arises. The burden of proof totally lies on the person who is claiming the right to prove the existence of an oral agreement. The plaintiff in this matter had that burden of proving the existence of the oral contract and the terms of the oral agreement.

34. An oral agreement must as well satisfy the requirements of a valid agreement such as offer, acceptance consideration, capacity to contract etc. (See the Supreme Court of Uganda in *JK Patel v Spear Motors Ltd* SCCA No. 4 of 1991 (1991)1 KALR 40). Although it may seem abundantly clear that the elements are sufficiently certain, the real problem is overcoming the burden of proof. Where a person alleges the existence of an oral contract, that party has the burden of proving the assertion to the satisfaction of the court. In doing so, there will be an onus to highlight the key terms of the contract and to prove the existence of the essential elements. In this case, since the respondent asserted that the Permanent Secretary authorized the extension of the contract orally, it was incumbent upon the respondent to call the Permanent Secretary as a witness to support his claim. It was also necessary to call the author of the letter dated February 16, 1998 which the respondent described as an offer. The learned judge heavily relied on the said letter yet the author was not called as a witness and overlooked the fact that on record was clear evidence that the Ministry's Central Tender Board declined to approve the extension of the contract. There was no evidence that the Permanent Secretary had powers to unilaterally award a contract or veto the decision of the Central Tender Board, the body that is mandated to consider and approve tenders. In declining the approval, the Central Tender Board was clear that the contract was not awarded as per the Regulations. Again, the learned judge did not address his mind to this pertinent prerequisite in awarding public tenders. The learned judge took refuge on the finding that the *Public Procurement and Asset Disposal Act*, 2005, did not exist at the material time. However, this did not mean that the Central Tender Board did not exist nor did it mean that the Permanent Secretary could suo moto award tenders whether written or oral or that he could by-pass the Regulations governing public procurement of goods and services.

35. Therefore, it is our finding that there was no evidence before the trial judge to support the finding that the ingredients of a valid oral contract had been proved. Having so concluded, we find and hold that this appeal succeeds. Accordingly, we allow the appellant's appeal dated December 18, 2019, set aside the Judgment of the High Court in HCCC No. 284 of 2008 dated May 25, 2018 and substitute it with an order dismissing the respondent's suit with no orders as to costs. The appellant shall have the costs of this appeal and High Court.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF MARCH, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

M WARSAME

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JUDGE OF APPEAL

J MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR