Fit Express Limited v China Sichuan International Techno- Economic Corporation (SIETCO Ltd) (Civil Appeal 105 of 2018) [2023] KECA 741 (KLR) (22 June 2023) (Judgment)

Neutral citation: [2023] KECA 741 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 105 OF 2018

DK MUSINGA, KI LAIBUTA & PM GACHOKA, JJA

JUNE 22, 2023

BETWEEN

FIT EXPRESS LIMITED ..... APPELLANT

AND

CHINA SICHUAN INTERNATIONAL TECHNO- ECONOMIC CORPORATION (SIETCO LTD) ..... RESPONDENT

(Being an appeal against the Judgment and Decree of the High Court of Kenya at Nairobi (Sewe, J.) delivered on 10th November 2017 in HCCC No. 334 of 2014)

JUDGMENT

1. Before this Court is an appeal from the judgment and decree of the High Court of Kenya at Nairobi (Sewe, J.) delivered on 10th November 2017 in HCCC No. 334 of 2014.

2. The appellant instituted the suit against the respondent by way of a Plaint dated 1st August 2014. The appellant pleaded that it entered into a Selling Agency Agreement (hereinafter referred to as "the Agreement") with the respondent on 15th March 2011 wherein it agreed to market and sell the respondent's Jacaranda Gardens Development at a commission. According to the appellant, the terms of the Agreement were, inter alia, that:

    a. the respondent would reserve and distribute 123 units to the appellant in the respondent's development;

    b. the respondent would sell to the appellant all the reserved units as follows:

        i. Phase 1 units: 3-bedroom houses at Kshs.6,700,000.00- and 4-bedroom houses at Kshs.8,800,000.00;

ii. Phase 2 units: 2-bedroom houses at Kshs.5,800,000.00- and 3-bedroom houses at Kshs.6,900,000.00.

c. the respondent would offer an eight percent (8%) discount on the ten percent (10%) amount of the full purchase price of each of the 123 units reserved by the appellant.

d. that the respondent would pay the appellant subject to the submission of monthly sales reports.

3. According to the appellant, it acquired the subject units and resold the same to various third parties pursuant to the said Agreement. It then requested the respondent to make payments to it upon completion of the first 55 units at the discounted price, and the respondent made payment to the appellant through its advocate. However, only a sum of Kshs.26,563,890.00 was paid to it, leaving a balance of Kshs.47,746,000.00. The appellant further averred that it resold 14 more units on behalf of the respondent in respect of which it was entitled to a further Kshs.11,981,000.00.

4. The appellant, therefore, prayed for judgment against the respondent for: - the sum of Kshs.47,746,000.00; payment for the further 14 units it resold on behalf of the respondent at the sum of Kshs.11,981,000.00; costs and interest at the rate of 18% from the date they fell due till payment in full.

5. The respondent through a statement of defence and counterclaim dated 1st September 2014, and, subsequently amended on 17th December 2014, admitted the existence of the Agreement dated 15th March 2011. It admitted that, as per the Agreement, it had agreed to reserve the 123 units at the prices stated by the appellant in the plaint.

6. The respondent contended that, pursuant to the provisions of Clause 4 of the Agreement, the appellant would be offered a discount of 8% on the 10% deposit amount of the full purchase price of each of the reserved 123 units; that the appellant undertook to ensure that the 10% deposit of the sale price of the reserved units would be fully paid on or before execution of the sale agreement with the third parties; and that the balance of the purchase price would be paid on or before the completion date or within seven days of the successful registration of the respective lease or charge. According to the respondent, the appellant never paid the requisite deposit amount for each of the 123 units reserved under the said agreement, but that, contrary to the said Agreement, began to accept deposits for units other than those reserved under the Agreement on a piecemeal basis.

7. In response regarding the amount claimed by the appellant, the respondent contended that, as per the Agreement, the appellant would receive an 8% discount on the 10% deposit and not 8% of the full purchase price. It argued that the appellant had therefore misinterpreted the provisions of Clause 4 of the Agreement. According to the respondent, it had fully paid the appellant the commission contemplated under Clause 4 of the Agreement for the units sold, although the appellant had not fully accounted for the 123 units reserved for it under the said Agreement. Further, the amounts it had paid to the appellant were based on figures and invoices submitted by the appellant, and which had since been found to have been grossly misstated in so far as the figures were based on wrongful calculations of the applicable discount. Accordingly, the respondent counterclaimed against the appellant for the sum of Kshs.19,269,646.00 which it had wrongfully overpaid to the appellant.

8. At the hearing of the suit, Karim Dhalla, a director of the appellant, testified as PW1, and as the sole witness on behalf of the appellant. He adopted his revised witness statement dated 29th June 2016 and reiterated that the commission payable to the appellant was based on 8% of the full purchase price,

and not on 8% of the 10% deposit on the purchase price. He denied that the respondent had made any overpayments of the commission due from it.

9. On its part, the respondent through its Sales Manager, Xu Chengquan, contended that the commission due to the appellant was based on 8% of the 10% deposit and not 8% of the full purchase price. The witness testified that the respondent had overpaid the appellant in the sum of Kshs.19,269,646.00, which the respondent claimed in its counterclaim.

10. After a full trial, the trial court, in a judgment dated 10th November 2017, held, inter alia, that the intention of the parties was that Clause 4 of the Agreement provided for an 8% discount on the 10% deposit component of the purchase price and not 8% of the full purchase price. The learned judge held that the various correspondence exchanged between the parties did not in any way vary the provisions of clause 4 and, therefore, the appellant's argument that the respondent was estopped by conduct from denying that the parties intended that the discount be calculated at the rate of 8% of the full purchase price was untenable.

11. As regards the counterclaim, the trial court noted that the respondent had produced before the court a list of the 123 units which were to be sold by the appellant. However, the appellant, without the consent or concurrence of the respondent, sold an additional 21 units, payment whereof had already been paid by the respondent. The court noted that the appellant did not rebut the evidence provided by the respondent in this respect. Accordingly, the trial court held that the respondent was entitled to a refund of Kshs.19,269,646.00 which it had overpaid to the appellant.

12. In sum, the trial court held that the appellant's claim for Kshs.47,746,000.00 as the amount due for the 54 units sold after the initial payment, and Kshs.11,981,000.00, being the commission due to it for the final 14 units sold, was unwarranted, as those sums were not in accord with the Agreement and, in particular, Clause 4 thereof. Accordingly, the appellant's suit was dismissed with costs. On the other hand, the court held that the respondent had demonstrated to the required standard that it overpaid the appellant to the tune of Kshs.19,269,646.00, and, accordingly, entered judgment in favour of the respondent against the appellant in the said sum of Kshs.19,269,646.00 together with interest.

13. Dissatisfied with the entire judgment of the trial court, the appellant preferred this appeal. Vide a Memorandum of Appeal dated 29th March 2018, the appellant argues that the learned judge erred in law and fact by, inter alia: misdirecting herself in failing to hold that vide an email dated 24th June 2014, the respondent admitted owing the appellant Kshs.47,746,000.00; misdirecting herself in failing to hold that payments to the appellant were on the basis of 8% discount on the full purchase price; misdirecting herself in failing to hold the respondent expressly acknowledged the computation of 8% discount on the full purchase price; in construing the full purport of the agreement dated 15th March 2011, by failing to interpret it in a manner that gave full effect to the expressed intentions of the parties; in failing to hold that sufficient evidence had been tendered proving that the appellant was entitled to a sum of Kshs.47,746,000.00; and in failing to find that appellant's invoices were based on written instructions on the rate to use as directed by the respondent, and hence the respondent was not entitled to the amount in the counter- claim.

14. At the hearing of this appeal, learned counsel Mr. Wandabwa appeared for the appellant. There was no appearance on behalf of the respondent despite the service of a hearing notice. The gravamen of the submissions by the appellant was on the interpretation of the provisions of Clause 4 of the Agreement. Highlighting the appellant's written submissions dated 16th October 2018, counsel submitted that the intention of the parties was that the 8% commission was to be based on the full purchase price, and not on the 10% deposit on the purchase price. He submitted that the said clause should be construed in the manner alluded to by the appellant, to mean that the applicable discount was 8% of the whole

purchase price, and not 8% of the deposit amount. Counsel contended that the terms of Clause 4 of the Agreement had, by conduct of the parties, been varied to reflect this position. It was contended that the respondent had acceded to this position through its email dated 24th June 2014, wherein it acknowledged owing the appellant the sum of Kshs.47,746,000.00. Counsel urged the court to be guided by the common law rules of construction of contracts as summarized in Ansons Law of Contract, 2nd Ed, Pg.199 in which the learned author, quoting the Investors Compensation Case [1998] l WLR 896, enumerated the applicable principles in construction contracts.

15. In sum, counsel submitted that the learned judge had failed to give effect to the full purport of Clause 4 of the Agreement, bearing in mind the intention and conduct of the parties, and that the respondent had clearly understood and performed his part of the agreement based on 8% of the purchase price and not 8% of 10% deposit of the purchase price.

16. On the counterclaim by the respondents, counsel submitted that it was an afterthought on the respondent's part, which only arose after the respondent changed key officeholders. He submitted that the same was unmerited.

17. The respondent filed written submissions dated 12th June 2019. The respondent contends that the provisions of Clause 4 of the Agreement represented the intention of the parties, which was that the commission payable to the appellant was to be calculated at the rate of 8% of the 10% deposit of the purchase price, and not at the rate of 8% of the full purchase price. Reliance was placed on, inter alia, the cases of *Magezi & Anor vs. Ruparelia* [2005] 2 EA and *Kairu vs. Shaw* [1986-1989] EA 221 for the proposition that in interpreting contracts, the court ought to give effect to the intention of the parties as far as possible and, in particular, avoid deviating interpretations, however easy or plausible they may appear to be. It was submitted that the learned judge correctly interpreted the provisions of Clause 4 of the Agreement and that the appellant had not demonstrated in any way that the terms of the Agreement had been varied.

18. We have considered the rival submissions by counsel and examined the record of appeal. This being a first appeal, we are conscious of our duty to re-evaluate the evidence before the trial court and determine the matter afresh with the usual caveat that we did not hear or see the witnesses testify. See the case of *Selle vs. Associated Motor Boat Company* [1968] EA 123, where it was held:

> " An appeal to this Court from a trial by the High Court is by way of 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 allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif -v -Ali Mohamed Sholan* (1955), 22 E. A. C. A. 270)."

19. Although the appellant has raised various grounds of appeal, in our view, this appeal stands or falls on a single issue: whether the learned judge erred in her interpretation of Clause 4 of the Agreement executed by the parties on 15th March 2011. Closely related to this is the question of whether the parties to the said Agreement did ever, at some point in time, amend and/or vary the provisions of Clause 4 of the Agreement.

20. The contention between the parties is whether the 8% discount payable to the appellant was based on the 10% deposit of the purchase price or 8% of the entire purchase price for each of the 123 units reserved by the appellant. Clause 4 of the Agreement reads as follows:

> " That under this Agreement the Developer (read the respondent herein) shall offer an 8% discount on the 10% deposit amount of the full purchase price of each of the 123 units reserved by the Agent (read the appellant herein)."

21. We fully agree with the views expressed by the learned judge that the provisions of Clause 4 of the Agreement are express and unambiguous. It is clear to us beyond any peradventure that the appellant was to be paid a commission equivalent to 8% of the 10% deposit made on the purchase price for each unit sold. The 8% commission was not pegged on the full purchase price but on the 10% deposit on the purchase price. Our reading of this Clause does not yield any other interpretation. In fact, the appellant, vide a letter from his advocate (Wandabwa Advocates) dated 9th July 2014 and which was addressed to the respondent stated as follows in paragraph 2 thereof:

> " On the 15th day of March 2011, you entered in an agreement with my client in which it was agreed as follows:
>
> a) ....,
>
> b) that he would enjoy an 8% discount on the 10% deposit payable in respect on each unit." [Emphasis added]

22. It is a longstanding principle of law that parties to a contract are bound by the terms and conditions thereof, and that it is not the business of courts to rewrite such contracts. This Court in National *Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR stated thus:

> " A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved."

See also *Pius Kimaiyo Langat vs. Co-operative Bank of Kenya Ltd* [2017] eKLR.

23. The object of interpretation of a written contract is to discover the real intention of the parties. See Halsbury's Laws of England, 4th Edition Reissue, paragraph 772. In the circumstances herein, the discernible intention of the parties was that the commission due to the appellant would be payable at the rate of 8% of the 10% deposit made on the purchase price and not on 8% of the full purchase price. The argument and the pleading by the appellant in paragraph 4 of its plaint dated 1st August 2014 that the commission was based on the full purchase price as opposed to 8% of the 10% deposit on the full purchase price is therefore flawed and is extraneous to the express provisions of Clause 4 of the Agreement.

24. The contention by the appellant that the commission was payable from the full purchase as opposed to a percentage of the deposit on the purchase price is informed by, inter alia, what the appellant claims to be subsequent communication between the parties post execution of the Agreement. The germane question, therefore, is whether this communication and or engagement between the parties post the Agreement date did amend and/or vary the terms of the Agreement on the question of the commission payable to the appellant and how the same was to be arrived at. The basis for this argument is, inter alia, a letter dated 9th September 2013 which was allegedly authored by one Nancy Yu on behalf of the respondent requesting the appellant to provide a report which would form the basis of payment of the commission due to it. We have perused the contents of the said letter and have no hesitation in

agreeing with the trial court that nothing in the letter could have amounted to varying the terms of the Agreement dated 15th March 2011. In fact, in the letter, the said Nancy Yu stated as follows:

> "Once your report is ready, please submit to my assistant Ms. Lian at Jacaranda Gardens. It may take a few days because we also need some confirmation from our lawyer. As soon as the financial reconciliation is confirmed, I will immediately arrange the payment to you." [Emphasis added]

25. The letter did not, in any way, constitute an admission of the commission due to the appellant at the rate of 10% of the full purchase price. Payment of the commission was subject to financial reconciliation, which, in our view, was to be according to the provisions of Clause 4 of the Agreement.

26. Further, the said letter was authored by Nancy Yu in her capacity as the Chief Executive Officer of an entity known as Jacaranda Gardens. The Agreement was between the appellant and the respondent. Jacaranda Gardens, the entity which the said Nancy Yu purported to represent, was not a party to the said Agreement. Therefore, by operation of the doctrine of privity of contract, the letter dated 9th September 2013 was of no import to the dispute between the parties herein.

27. In sum, it is our view that the learned judge correctly held that the appellant had not adduced any evidence to demonstrate that the terms of the Agreement dated 15th March 2011 had been amended and/or varied. Clause 10 of the Agreement provided, inter alia, that the Agreement superseded all previous agreements between the parties herein. Our understanding of this clause is that the parties would be fully bound by the terms of the Agreement, and any other extraneous terms would not be binding upon them.

28. Having noted as above, it follows, therefore, that any payment to the appellant based on 8% of the full purchase as opposed to 8% of the 10% deposit on the purchase price was pursuant to an erroneous interpretation of the provisions of Clause 4 of the Agreement and would constitute an overpayment on the appellant's part.

29. The long and short of it is that the appellant has not been successful in convincing this Court that the learned trial judge made an erroneous interpretation of the provisions of Clause 4 of the Agreement and therefore arrived at a wrong decision. Accordingly, this appeal is without any merit and is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY JUNE, 2023.

D. K. MUSINGA, (P.)

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR