Compact Freight Systems Limited v Aswa Developers & Contractors Limited (Civil Appeal E003 of 2021) [2023] KECA 704 (KLR) (9 June 2023) (Judgment)

Neutral citation: [2023] KECA 704 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E003 OF 2021

P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA

JUNE 9, 2023

BETWEEN

COMPACT FREIGHT SYSTEMS LIMITED ..... APPELLANT

AND

ASWA DEVELOPERS & CONTRACTORS LIMITED ..... RESPONDENT

(An appeal arising from the judgment of the High Court at Mombasa by Hon. Justice P.J. Otieno and delivered by Hon. Justice D. Chepkwony on 7th December, 2018 in High Court Civil Case No. 85 of 2009)

JUDGMENT

1. This is a first appeal by the Appellant, Compact Freight Systems Limited against the judgment of the High Court (PJ Otieno J) delivered on December 7, 2018, in which he gave judgment in favour of the Respondent, Aswa Developers & Contractors Limited. The Respondent was the Plaintiff in the case before the High Court, and sued the Appellant in a plaint dated March 20, 2009, claiming Kshs 7, 234, 623. 30 as outstanding balance to the Respondent for work done and materials supplied. It was the Respondent's contention that it entered into an oral agreement with the Appellant on or about March 2008, contained in letters and other communication, in which the parties agreed that the Respondent would carry out civil works at the Appellant's premises in Miritini Mombasa. It was also agreed that Stroutel Afrique Consulting Engineers, the project engineers would certify the works and issue Certificates of Performance, and the Appellant was to make payment on them within five days from date of issue.

2. It was the Respondent's claim that the Appellant breached the agreement between it and the Respondent, particulars of which were pleaded in the Plaint, paragraph 11 thereof as failure to pay the sum of Kshs 6, 803, 985. 30 as certified by the Engineers in the certificate dated September 26, 2008; failing to make payments on time; and, failing to release materials on site at Maritini, Mombasa. It sought judgment against the Appellant on the pleaded sum with interest and costs.

3. The Appellant, in its defence dated May 29, 2009, contended that on March 15, 2008, in a contract comprised in letters exchanged between the Appellant, the Respondent and the project engineers, Stroutel Afrique Ltd, Bills of Quantities for the works, Design of works and Civil works quotation by the Respondent, it contracted the Respondent to design and build civil works to the structural and engineering standards suitable for the user as it had specifically stated.

4. The Appellant contended that subsequent to the Respondent's admission in writing to breaching the first agreement consequent to which cabro blocks paving in section 'B' sank and deformed, the parties entered into supplementary agreements on July 2, 2008 and August 2, 2008. The Appellant contended that the Respondent breached the subsequent agreements and failed to rectify defects observed in the works. That the certificates for payment issued by Stroutel Afrique Consulting Engineers were premature for being issued for substandard work, or alternatively were obtained by deceit and were fraudulent. The particulars of deceit and fraud are pleaded at paragraph 18 of the defence. That consequently, it was not liable to pay the sum claimed, and urged the court to dismiss the suit.

5. After considering the evidence before it, the submissions by counsel and the issues identified by the parties, the learned Judge of the High Court found that the only issue for determination was the one raised by the Respondent of whether or not the Respondent was entitled to the sum claimed on the basis of the valuation certificate issued by the project manager. The learned Judge found that once the project engineer engaged by the parties to certify the work done had issued a certificate, it was binding on both parties unless impropriety were proved against the expert. He found that fraud and impropriety was alleged against the Respondent and not the expert that was the author of the certificates. That since no fraud was proved against the expert, its findings that the Respondent was owed to the extent shown in the certificate was binding on the Appellant. Judgment was entered for the Respondent for the sum claimed.

6. The Appellant was aggrieved by the said judgment and raises 13 grounds of appeal in its memorandum of appeal dated December 22, 2022. In summary the learned Judge of the High Court is faulted for failing to hold the Respondent liable for continual breach of contract; awarding a defaulting party; wrong interpretation of the Project Manager's certificate; and, failing to determine all the issues brought before the court for determination.

7. The appeal was heard through this Court's virtual platform on the February 7, 2023. Present for the Appellant was learned counsel Mr. Gikandi Ngibuini and for the Respondent learned counsel Mr. Wafula. Both counsel highlighted their submissions dated February 25, 2022 and October 29, 2021respectively.

8. Mr. Gikandi for the Appellant submitted that the learned trial Judge erred in law and fact by failing to make determination of issues raised by the parties, urging that the resultant judgment however good ought not to be allowed to stand. He urged the Court to set aside the judgment and to send the file back to the High Court for hearing afresh by a different judge. He urged that the Respondent's work was mediocre and that the cabro works caved in with the very first truck which came in. He urged that there was breach of the contract of the parties by the Respondent, both for failing to complete the contract and for delivering substandard work.

9. Mr. Wafula for the Respondent supporting the learned Judge's decision urged that the Respondent filed suit to recover part of the contract sum not paid and the value of goods left at the site. He urged that the Respondent's claim was pegged on valuation report by the Appellant's agent forwarded by its letter dated October 8, 2008 annexed to the record of appeal which indicated the value of the work done was 95% and what was certified as due to the Respondent. He urged that the works was divided into four parts, two parts for heavy machinery and two parts for parking that was to be built with cabro

works. He urged that the Appellant utilized the cabro works parking for heavy machinery causing deformity.

10. This being a first appeal, it behooves this Court to re-evaluate, re-assess and re-analyze the evidence on record and then determine whether the conclusions reached by the learned trial Judge should hold. In the case of *Kenya Ports Authority v Kuston (Kenya) Limited* (2009) 2EA 212 this Court espoused that mandate or duty as follows:-

> " On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

11. We have considered the submissions by counsel, the cases relied upon and have analyzed and evaluated afresh the evidence adduced by the parties before the trial court. Having done so we think that the issue for determination is whether the learned trial Judge failed to consider the issues presented before him by the parties and thus failed to resolve the dispute between the parties in the suit.

12. When considering what the issues for determination were, the learned trial Judge considered the issue framed by the Respondent, which was whether or not the Respondent was entitled to the sum claimed on the basis of the valuation certificate issued by the project manager. The learned Judge also noted three issues raised by the Appellant being;

> "a. whether the Respondent was entitled to the payment of the sum sued for,
>
> b. whether the Respondent breached the contract fundamentally and
>
> c. whether the Respondent visited upon the Appellant fraud and negligent misrepresentation."

He then concluded by stating:

> "To this court, those issues as identified by the parties notwithstanding, having read the pleadings and the evidence led, the sole issue is whether or not the Respondent is entitled to the sum claimed on the bass and foot (sic) of the valuation certificate issued by the project manager after a joint measurement exercises."

13. There is no dispute that the Appellant sought the services of the Respondent to carry out construction works on the Appellant's premises at Miritini, Mombasa. The works involved paving and compacting the premises used by the Appellant for storage or warehousing of containers by Kenya Revenue Authority due to shortage of space. There is no dispute that the parties entered into the first agreement in March 2008, which agreement was contained in various documents including letters exchanged between the parties and the project engineer, Bill of Quantities and Design of works. That initial contract was followed by two others dated July 2, 2008 and August 2, 2008. Thereafter, the contract fell through before it was completed and the Respondent filed the suit out of which this appeal arises.

14. Mr. Gikandi for the Appellant urged that the Respondent breached the agreement of March 2008 in that by July 2, 2008 it had not completed the work and that the work it had done by then was mediocre, substandard due to use of minimal, inadequate and unsuitable materials leading to sinking

and deformity of the works. Counsel relied on the minutes of August 2, 2008 signed by all the parties' representatives, in which under the Heading 'Completion Date of the Contract' it is provided:

> " The original completion date of the contract was scheduled for the end of June 2008. This was never achieved. New completion date of the contract is August 27, 2008"

15. Under 'Contents', the minutes continued:

> " x. There were defects observations on paved area B which would have been caused by, the material underlying, processing, different levels, water or others. The contractor was asked to opened (sic) up all such areas observe the defects, (sic) rectified and redone as he paves the rest of the areas"

16. Mr. Gikandi submitted that the Respondent breached, not only the initial contract of March 2008, but also the supplementary ones of July 2, 2008 and August 2, 2008, as a result of which the project consultant terminated the agreement and the Respondent's engagement. Counsel relied on several inspection reports as annexed in the record of appeal. Counsel made reference to a report by the Ministry of Roads annexed to the record of appeal which had the remarks as follows:

> " Design consideration
>
> From the results above, shelly gravel of CBR of 14% is not suitable for base and sub base of highly loaded pavement as is the case of Compact Freight Yard
>
> Coral gravel thickness of 80mm-120mm used in the yard is not sufficient to resist the heavy equipment trafficking the Compact Freight Yard.
>
> Conclusion
>
> Due to the under design of the Compact Freight Yard, the following may be adopted to remedy the location
>
> Remove paving blocks and stack for re-use
>
> Excavate the exposed surface and cut to spoil to a depth of 600mm
>
> Scarify the exposed surface and process with adequate water to compact with a suitable roller at optimum moisture content to achieve 100%. Maximum Dry Density (MDD) standard compaction (T 99)."

17. Mr. Gikandi relied on the text *Anson's Law of Contract* 28th Edition page 589 and 590 for the proposition that every breach of contract entitles the injured party to damages for the loss suffered. He also cited *Mistry Amar Sungh v Serwano Wafunira Kulobya* UCA No 74 of 1060 and *Holman v Johnson* (1775-1802) All ER 98 for the proposition that no court ought to enforce an illegal contract. He also relied on a High Court case, *Abdi Ahmed Abdi Kawir trading as A.A. Kawir Building Contractors alias A.A. Kawir Building Contractors and Civil Engineering Company v County Council of Isilo* (2017) eKLR for the proposition that a party to a contract cannot be allowed to rely on its default and wrong to allege a breach of contract on the opposite party. He urged that there was overwhelming evidence, some of it admitted by the Respondent that the Respondent severally breached the agreements entered into by the parties, and that the learned Judge erred in granting judgment to the Respondent and by so doing punished the innocent party.

18. Mr. Gikandi submitted that the learned trial Judge misinterpreted the Project Manager's certificates, urging that they demonstrated that the contract was not performed to the expected and agreed upon standard. He urged that the report demonstrated that the Respondent failed to meet the contractual obligations and thus the work was of poor quality. He relied on the case of *William Kazungu Karis v Cosmus Angora Chanzera* (2006) eKLR where the court observed that the basic rule of the law of contract is that parties must perform their respective obligation in terms of the terms of contract executed by them.

19. Mr. Wafula's position was that the Appellant was bound by the valuation issued by its agent, the project engineer, urging that in the letter dated October 8, 2008, the Agent certified that the Respondent had completed 95% of the work. He also urged that the Appellant put to wrong use the parking areas by using heavy machinery on the area identified for packing therefore causing deformity of the paved works. Counsel urged that the Respondent's witness had shown that the Appellant's agent, the project manager, was a consultant appointed by the Appellant to supervise the works on its behalf, and that it had expertise in the field and their duty was to verify that the works undertaken by the Respondent from time to time and issue certificates. He urged that the project manager ultimately terminated the services of the Respondent, providing a valuation of the works done taking into account the incomplete work and the materials at the site.

20. Mr. Wafula urged that the effect of the valuation certificate by the Appellant's agent, that forwarded the report after it took into account various factors including adjusting the worked out quantities and materials on site, the work done and the incomplete works, the amount certified by the project manager as due to the Respondent was binding on the Appellant. Counsel relied on the case of *Weston Contractors Limited v Kenya Ferry Services* (2014) eKLR for the proposition that having procured services a party should in fairness pay for them. That where a party engaged the services of an expert it was unjust to delay such payment. Counsel also relied on the case of *Ramji Ratna & Co. Ltd v Cotton Board of Kenya* (2001) eKLR for the proposition of the importance of valuations made by professionals engaged by a party and that the party who engages professionals should not be allowed to run away from them. Counsel urged that the Appellant had not raised viable grounds of appeal and that the same should be dismissed with costs.

21. The learned trial Judge expressed the view that all the documents evidencing the agreement of the parties must be taken into account 'with a clear understanding that the latest of the agreements reflect the last position of the parties in the event of a conflict between an earlier term and a later one.' The learned trial Judge noted the Respondent's sole witness statement 'was clear that indeed there was the initial agreement and supplementary agreements but pointed out by the two letters dated 24th and September 29, 2008, the works had stopped due to non-payment of certified works...' The learned Judge proceeded to identify the documents 'to be of benefit in resolving the parties dispute', namely minutes dated July 2, 2008, letter by the project manager dated October 6, 2008, letters by the project manager dated October 8, 2008 and October 9, 2008. He then concluded that based on the letters and the certificate identified, it was clear that the Respondent was owed the amount he claimed in the plaint for work done.

22. The learned trial Judge, while stating clearly that there was need to consider all the documents that constituted the agreement of the parties did not consider those which were pleaded by both parties in the plaint and the defence as part of what formed the terms of the contract. They included letters exchanged between the parties, Bills of Quantities, Design of works, civil works quotation and the agreements dated March 15, 2008, July 2, 2008 and August 2, 2008.

23. The Appellant pleaded fraud and misrepresentation in its defence, accusing the Respondent of fraud and misrepresenting issues to the Appellant's agent. The learned trial Judge held the Appellant liable to pay the certificates issued by its agent, noting that the fraud alleged by the Appellant touching on the certificates implicated the Respondent and not the agent. He ruled that fraud was not adequately proved. The learned Judge did not set out the allegations of fraud alleged, nor analyze them nor give the reasons for arriving at the conclusion he did. With that sweeping comment, the learned Judge failed to consider fraud, as particularized by the Appellant in its defence.

24. From the evidence adduced by the parties and their arguments, it is clear that there was more than one report issued that constituted valuation of the work done by the Respondent. The parties used the term valuation and certificates interchangeably. There is mention of a report by the Ministry of Roads. The evidence of the Respondent's sole witness stated that the Appellant sought an opinion from the Ministry of Roads on the quality of works carried out by the Respondent. The report was dated December 13, 2008 and according to the witness gave the works a clean bill of health while blaming the Appellant for deforming the area by use of heavy equipment in an area designed to park small vehicles.

25. The second one was the report by the Appellant's agent, the project manager. Mr. Wafula's submission was that the report was a certificate by the Appellant's agent that assessed what the Respondent had done and what was due to it. He urged that the report was binding on the Appellant and the Appellant had no option but to pay what was certified as due. Mr. Gikandi in his submissions urged that the learned Judge misconstrued the report by the agent as supporting the Respondent's claim and stated that in fact it highlighted the delay in accomplishing the contract and the use of substandard material. That the report merely assessed the value of the work done and not the quality of the work done.

26. From the submission of counsel on the two reports it is clear that there was an issue that required to be resolved, including whether the report or certificate by the project engineer was a valuation of work done, or a report on the quality of the work done. Secondly, whether the findings in the report by the Ministry of Roads contradicted that of the project engineer. The learned trial Judge did not consider the reports and neither did he resolve these issues.

27. The Appellant challenged the Respondent's quality of work done, making it one of Appellant's complaint in the case and an issue for determination. That issue went along with the issue whether the Respondent had breached the contract between the parties. This was a pertinent issue, which touched on the Respondent's claim and the issue whether it had proved its claim or not. All the contractual documents, minutes of meetings of the parties, the communication between the parties and the Appellant's agent made mention of the quality of work done by the Respondent. Failure to make a determination on quality of the Respondent's work was a serious omission.

28. We have been urged to return this case to the High Court for a fresh trial. Rule 33 of this Court's *Rules* spells out the general powers of the Court and provides:

> "
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> "33. General Powers of the Court
> On any appeal the Court shall have power, so far as its jurisdiction permits, to confirm, reverse or vary the decision of the superior court, or to remit the proceedings to the superior court with such directions as may be appropriate, or to order a new trial, and to make any necessary incidental or consequential orders, including orders as to costs."

29. In the case of *Selle and another v Associated Motor Boat Co. Ltd* [1968] EA 123 the Court of Appeal set out the circumstances under which this Court can interfere with the decision of Superior Courts and held:

> "The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong." *United India Insurance Co. Ltd, Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd v East African Underwriters (Kenya) Ltd* [1985] eKLR."

30. The learned trial Judge, failed to determine issues raised by the parties in their pleadings, evidence and submissions. In so doing the learned trial Judge failed to resolve the dispute between the parties. We are satisfied, therefore, that the learned Judge misdirected himself. Rule 33 of the *Court of Appeal Rules* empowers this Court to remit the proceedings to the lower court with such directions as may be appropriate and to make any necessary incidental or consequential orders.

31. Therefore the orders that commend themself to us and which we hereby issue are as follows:

    a. The appeal be and is hereby allowed.

    b. The judgment of PJ Otieno, J delivered by D. Chepkwony, J on the December 17, 2018, in Mombasa High Court Civil Case No 85 of 2009 be and is hereby set aside.

    c. The case is remitted back to the High Court at Mombasa for hearing afresh before any other judge other than PJ Otieno, J.

    d. Each party to bear its own costs of this appeal.

    e. This judgment be placed before the Deputy Registrar of the High Court at Mombasa for Case Management for purposes of setting the case down for hearing. Given the age of the case, hearing dates should be given on the basis of priority.

32. Those are our orders.

DATED AND DELIVERED AT MOMBASA THIS 9TH DAY OF JUNE 2023.

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR