Golden Jubilee Limited v Misty Jadva Parbat & Company Limited (Civil Appeal 8 of 2018) [2022] KECA 905 (KLR) (28 April 2022) (Judgment)

Neutral citation: [2022] KECA 905 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 8 OF 2018

K M'INOTI, KI LAIBUTA & HM OKWENGU, JJA

APRIL 28, 2022

BETWEEN

GOLDEN JUBILEE LIMITED ..... APPELLANT

AND

MISTY JADVA PARBAT & COMPANY LIMITED ..... RESPONDENT

(Being an Appeal from the Ruling and Order of High Court of Kenya at Nairobi (Ochieng, J) dated the 8th day of June 2016 in High Court Civil Case No. 608 of 2014)

JUDGMENT

1. On 8th May 2007, the appellant and the respondent entered into a "Construction Contract Agreement" for the construction on LR Numbers 209/6265 and 6266 of the works therein specified in accordance with the drawings prepared by the Architects (M/s. Shamla Fernandes Architect) and bills of quantities prepared by the Contractors (the respondents herein), both showing and describing the Works to be done, for the contract sum of KShs. 143,028,729.

2. Subsequently, the appellant and the respondent entered into a second Construction Contract Agreement dated 3rd December 2007 for "completion and finishing of the hotel structure" constituting the works referred to in the 8th May 2007 agreement. Clause 15.1 of the Construction Contract Agreement made on 3rd December 2007 provides:

> "When in the opinion of the Architect the Works are substantially completed, he shall forthwith issue a certificate to that effect and Substantial Completion of the Works shall be deemed for all the purposes of this Contract to have taken place on the day named in such certificate."

3. Clause 21 of the Agreement makes provision for possession, completion and postponement of the works. It reads:

> "21.1.....
>
> 21.2 ...
>
> 21.3 The Contractor may suspend the carrying out of the works if –
>
> a. he has not received a payment certificate which he applied for in accordance with Clause 30(1).
>
> b. he has not received payment within the period for honouring certificates stated in Clause 30(1):
>
> Provided that the Contractor shall not suspend the carrying out of the works before he has served the Owner with a 7 days notice of intention to suspend the carrying out of the works and no certificate or payment, as the case may be, is received within the period of the notice, and that such suspension shall cease upon receipt by the Contractor of the certificate or payment as the case may be subject to provisions of Clause 26(1) paragraphs (a) and (b) ...."

4. Clause 22 of the Contract read together with the appendix provides the terms on which damages for non-completion were recoverable. It reads:

> "If the Contractor fails to complete the Works or any specified part thereof by the Date for Substantial Completion stated in the appendix of these Conditions or within any extended time fixed under Clause 23 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 Owner a sum calculated at the rate stated in the said appendix as Liquidated and Ascertained Damages for the period during which the Works shall so remain or have remained incomplete, and the Owner may deduct such sum from any moneys due or to become due to the Contractor under the Contract. The rate of Liquidated and Ascertained Damages stated in the said appendix shall be deemed to be a genuine covenanted pre-estimate of damage and will not be subject to adjustment."

5. The appendix referred to in Clause 22 sets out the amounts recoverable for non-completion as liquidated and ascertained damages. Under the appendix, the amount recoverable on that account is KShs. 700,000 per week or part thereof. With reference to the default liability period (provided for under Clauses 15, 16 and 30) the appendix stipulates 6 months from the date of Substantial Completion as the default liability period.

6. Clause 30.7 of the Construction Contract Agreement provides:

> "30.7 Unless a written request to concur in the appointment of an arbitrator shall have been given under Clause 40 of these Conditions by either party before the Final Certificate has been issued or by the Contractor within 14 days after such issue, the said certificate shall be conclusive evidence in any proceedings arising out of this Contract (whether by arbitration under Clause 40 of these Conditions or otherwise) that the Works have been properly carried out and completed in accordance with the terms of this Contract and that any necessary effect has been given to all the terms of this Contract which require an adjustment to be made to the Contract Sum, except and in so far as any sum mentioned

in the said certificate is erroneous by reason of the matters specified in paragraphs (a), (b) and (c)."

7. Clause 40 of the Contract constitutes an arbitration agreement within the meaning of section 3 of the *Arbitration Act*, 1995 (Revised 2019), which requires submission to arbitration of "all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not." Clause 40 is such an agreement. It reads:

> " "40. 1 Provided always that in case any dispute or difference shall arise between the Owner or the Architect on his behalf and the Contractor either during the progress or after the completion or abandonment of the Works, as to the construction of this Contract or as to any matter or thing of whatsoever nature arising thereunder or in connection therewith (including any matter or thing left by this Contract to the discretion of the Architect or the withholding by the Architect of any certificate to which the Contractor may claim to be entitled or the measurement and valuation mentioned in Clause 30.5 (a) of these Conditions) or the rights and liabilities of the parties under Clause 25, 26, 33 or 34 of these Conditions, then such dispute or difference shall be and is hereby referred to arbitration and final decision of an Arbitrator to be agreed between the parties, or, failing agreement within 14 days after either party has given to the other written request to concur in the appointment of an Arbitrator, then an application to appoint an Arbitrator shall be made in writing by either party to the Chairman or Vice Chairman for the time being of the Chartered Institute of Arbitrators (Kenya Branch)."

8. By a Plaint dated 15th December 2014 filed in HCCC No. 608 of 2014 out of which this appeal arises, the respondent sued the appellant claiming that: "... it diligently carried out the [contracted] Works and discharged all its obligations under the aforestated Construction Contract Agreement and, upon the conclusion of which final accounts between the [respondent] and the [appellant] were rendered and signed off by all parties in October 2013."

9. In the suit, the respondent claimed –

   a. KShs. 15,388,977 certified as due and owing by the appellant to the respondent in respect of the 1st Agreement of 8th May 2007;

   b. KShs. 13,527,561 certified as due and owing by the appellant to the respondent in respect of the 2nd Agreement of 3rd December 2007;

   c. interest on (a) and (b) in the sum of KShs. 3,996,858.84 as particularised in paragraph 9 of the Plaint;

   d. further interest from 1st September 2014 to the date of payment in full at the Commercial Lending Rate of 16% per annum;

   e. costs of and incidental to the suit; and

   f. interest on (e) above at court rates.

10. As is the practice in cases where a defendant did not wish to submit to the jurisdiction of the court in anticipation of submission to arbitration, the appellant did not enter an appearance or file a Defence to the respondent's claim but, instead, filed a Notice of Motion dated 6th February 2015 under sections 2 and 6 of the *Arbitration Act*, 1995, the Arbitration Rules, 1997 and sections 1A, 1B and 3A of the *Civil Procedure Act*. In its Motion, the appellant sought orders that –

1. Spent;

2. Pending hearing and determination of this application, there be a stay of further proceedings in this suit.

3. There be a stay of any further proceedings in this suit and the matter be referred for hearing and determination before an arbitrator to be agreed on between the parties, within 14 days, or in default an arbitrator to be appointed by the Chairman of the Chartered Institute of Arbitrators (Kenya Branch).

4. The court do issue such further and other orders as may be in the interest of justice.

4. Costs be in the cause.

11. The appellant's Motion in the High Court was supported by the annexed affidavit of Ali Akbarali, a director of the appellant, sworn on 6th February 2015. In his affidavit, Mr. Akbarali correctly pointed out the fact that the respondent's claim in the suit was founded on the two Contracts aforesaid. According to him, Clause 40.1 of the Agreements required any dispute or difference arising between the appellant and the respondent to be submitted to arbitration. Paragraph 7 of his affidavit reads:

> "The claim put forward by the [respondent] arises out of a construction contract and is premised on certificates issued by the project architect which would ordinarily be final and conclusive as to what the [respondent] as the contractor would be owed."

12. In paragraph 9 read together with paragraphs 10, 11 and 12 of his affidavit, Mr. Akbarali alleged that the appellant was owed by the respondent a sum of KShs. 8,055,087 on account of delays the quantum of which was provided for in Clause 22 of the Contract. He stated in paragraph 10 that time had been extended upon request by the respondent to facilitate completion pursuant to Clause 23 of the Contract. He claims in paragraph 11 that the respondent acted in breach of "the adjudicated and conclusive extension period that was determined by the architect," by completing the works on 17th February 2010, "... a whole 51 weeks after the extended certified date." We take note of the respondent's application for extension of time for completion vide its letter dated 6th May 2008 on the grounds therein specified, and the contents of the architect's letter dated 31st July 2008 allowing extension of time for an additional 6 weeks for completion of the contracted works. It is noteworthy from paragraph 3 of the Architect's letter that the period allowed for extension of time for completion was on account of "time lost due to riots and civil disorder during the last general elections" and "increased rock excavations required due to change in structural design to accommodate the lift pit".

13. Before the hearing and determination of the appellant's Motion, the respondent filed a Notice of Motion dated 26th February 2015 seeking summary judgment against the appellant for the aggregate sum of KShs. 32,913,396.84 together with interest thereon at commercial lending rates of 16% per annum and costs of the suit and of the application. The respondent's application was supported by the affidavit of Shivji Varsani (a director of the respondent) sworn on 25th February 2015. It was the respondent's case that the appellant had no defence to its claim. According to him, the appellant's conduct was not bona fide, but was merely aimed at denying and frustrating the respondent from obtaining what was rightfully and justly due to them.

14. The appellant opposed the respondent's Motion for summary judgment and filed a replying affidavit sworn on 24th March 2015 by Anish Akbarali, who contended in paragraph 4 that "... the appellant has a good and tenable defence the gist of which is their right to set-off and counterclaim against the [respondent's] claim." In this regard, he averred that the appellant sought leave to rely on the

construction agreement. In particular, Mr. Akbarali states that "it was an express term of the agreement by virtue of Clauses 30.6 and 22 of the construction agreement that the [appellant] bore the right of set-off against any sum certified as owing to the [respondent] under the contract."

15. In paragraph 10 of his replying affidavit, Mr. Akbarali states that "the [respondent] was notified of the [appellant's] intention to set-off the Liquidated and Ascertained Damages from the amounts in the final certificates by way of a letter dated 15th April 2014." According to its letter, the appellant purported to counterclaim in the sum of KShs. 8,055,087 against the sum acknowledged of KShs. 26,929,958 then stated as owing to the respondent as evidenced in the certificates of completion acknowledged by the appellant. We need to observe at this point that we find nothing on record to suggest that the sums sought to be "set off" or "counterclaimed" by the appellants were certified as due by its architect as contemplated in Clauses 22 and 30 of the Contract.

16. By a Ruling delivered on 8th June 2016, the High Court (Fred A. Ochieng, J.) dismissed the appellant's Notice of Motion dated 6th February 2015 with costs to the respondent, and entered summary judgment in favour of the respondent as prayed in its Notice of Motion dated 26th February 2015. In his Ruling, the learned Judge held that:

> " The final certificate which was issued by the architect in this case, was final and conclusive evidence both before this court and also before the proposed arbitrator. There is no outstanding dispute or difference which can be referred to an arbitrator for determination and in light of the finality of the final certificate the same is binding upon the parties, and therefore no triable issue arises."

17. Aggrieved by the Ruling and orders of the High Court (Fred A. Ochieng, J), the appellant lodged this appeal on the grounds that –

    a. The learned Judge ought to have appreciated that the court could not deal with the matter when there was a valid arbitration agreement. The order offends section 10 of the *Arbitration Act*.

    b. The learned Judge failed to appreciate that a proper construction of Clause 22 of the agreement between the parties placed no time limit on the defendant to claiming a set-off and the question should at any rate have been for determination by an arbitrator.

    c. the learned Judge failed to appreciate that liability imposed under Clause 22 of the agreement was not qualified by any other provision of the agreement.

    d. The learned Judge ought to have held, or at least left for determination of an arbitrator, that even an established claim, in this case based on a final certificate, was liable to a set-off under Clause 22.

    e. The learned Judge ought to have allowed the claim under Clause 22 of the agreement between the parties to be the subject of arbitration.

    f. The learned Judge ought to have held that the interpretation of the terms of the agreement between the parties, which was in serious contest, would be properly before an arbitrator appointed under the agreement.

    f. The learned Judge, in error, turned his entire decision on his interpretation of Clause 30.7 of the agreement between the parties, a matter that should have been before an arbitrator."

18. We need to point out at the onset that this being a first appeal, it is also our duty, in addition to considering submissions by learned counsel, to analyze and re-assess the evidence on record and reach our own conclusions in the matter. This approach was adopted by this Court in *Arthi Highway Developers Limited v West End Butchery Limited and 6 others* [2015] eKLR citing the case of *Selle v Associated Motor Boat Co*. [1968] EA p.123.

18. In *Selle's* case (ibid), the Court held that:

> " 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."

20. Having considered the record of appeal, the written and oral submissions of learned counsel for the appellant and learned counsel for the respondent, we are of the considered view that the appeal herein stands or falls on 2 main grounds, namely:

    a. whether there arose a dispute or difference between the appellant and the respondent over and concerning the respondent's claim against the appellant for the contract sum requiring submission to arbitration pursuant to Clause 40 of the Contract; and

    b. whether the appellant's alleged set-off or counterclaim had fallen due and recoverable from the respondent either in the suit or in the proposed arbitral proceedings.

21. As to the first issue, our reading of Clause 30.7 of the Contract settles the matter. The finality of the certificates issued by the architect, and on the basis of which the respondent sued and obtained summary judgment, were not in contention. Clause 30.7 of the Contracts only contemplates submission to arbitration "before the final certificates have been issued." On the other hand, if the Contractor does not, within 14 days of the issue of final certificates submit any dispute relating thereto to arbitration, "the said certificates shall be conclusive evidence in any proceedings arising out of [the] Contract ... that the Works have been properly carried out and completed in accordance with the terms of this Contract and that any necessary effect has been given to all the terms of this Contract which require an adjustment to be made to the Contract Sum ...."

22. The fact that no submission to arbitration was made by the respondent within 14 days of the issuance by the architect of the final certificates on which its claim was founded, and no steps were taken by the appellant to secure any adjustments to the contract sum, shut out any subsequent claims in set-off or counterclaim by the appellant under the terms of the contract. The only avenue open to the appellant thereafter was to institute civil proceedings to recover whatever it considered to be lawful compensation for the alleged breach of contract and, even so, on formal certification by the architect in ascertainment of the claim. In the absence of such certification, the appellant's bare claim in its letter of 15th April 2015 could not stand in the way of the respondent's claim for the sums duly certified as due and payable. Neither could the appellant's letter aforesaid constitute "a dispute or difference" arising and falling to be submitted to arbitration pursuant to Clause 40.1 of the Contract. In our considered judgment, we agree with the learned Judge that there was no dispute or difference arising between the parties capable of submission to arbitration. That settles the first issue before us.

22. On the 2nd issue, the appellant cited the authority of *Modern Engineering v Gilbert Ash* [1974] AC p.689 where the court defined a set-off as an equitable remedy in which a cross-claim arising out of the same transaction, or closely associated with the original claim, acts as a defence to the claim to the extent of the value of the cross-claim. On the other hand, a counterclaim may be defined as a claim or relief filed against an opposing party after the original claim is filed, most commonly, a claim by the defendant against the plaintiff.

24. In the context of the Construction Contract Agreement in issue before us any original claim, set-off or counterclaim crystalised or became due for recovery from one party by the other upon final certification by the appellant's architect pursuant to Clauses 22 and 30.1 (a) (as the case may be) of the Contract. We are not persuaded by the appellant that written demand without more of the alleged "liquidated and ascertained" damages would suffice to find a set-off or counterclaim. The word "ascertained" says more than meets the eye. The question is: by whom should such damages be ascertained? Is it by the appellant? No, it cannot be. If this were the case, the Contract would not go to the lengths of requiring final certificates to support payment of contract sums claimed by the Contractor. In equal measure, any damages claimed by the appellant on account of non-completion would require verification or ascertainment on the basis of similar certificates. None were obtained by the appellant independent of or in reduction of the sums certified as payable to the respondent for the contracted works.

24. In their submissions, learned counsel for the respondent contended that "the appellants were precluded from withholding any moneys on account of alleged delay pursuant to Clause 22 of the Agreement following the issuance of the Final Account and Final Certificates in this case, but most importantly, in the absence of an architect's certificate which was a pre-condition to any entitlement." They invited us to consider the decision in Hosier and Dickinson Ltd v P and M Kaye Ltd [1971] 1 All ER p.301 for the proposition that "... the architect's certificate was conclusive evidence that the work had been properly carried out and completed in accordance with the contract." If not, this Court would expect the same certificate, or other certificate obtained by the appellant on its own account, to expressly state what sums (if any) would have to be withheld or recovered separately from the respondent by the appellant on account of delay or non-completion of the works as contemplated by Clause 22 of the Contract.

26. We agree with learned counsel for the respondent that the appellant's alleged right to set off or counterclaim can only accrue within the terms of the Contract. Indeed, only if the alleged debt is established under the terms of the Contract can such a claim be sustained. In other words, the "liquidated and ascertained damages" claimed by the appellant could only be established on certification on the same terms that apply to the contract sums recoverable by the respondent. Simply put, a set-off accrues at law only if the claim is liquidated and ascertained at the time of pleading. In our considered judgment, that could not be said of the appellant's claim for set off or counterclaim. They were yet to be certified. That settles the second issue.

27. In view of the foregoing, we are satisfied that the learned Judge was correct in dismissing the appellant's Motion for stay of proceedings, and in allowing the respondent's application for summary judgment as sought. Accordingly, we hereby order and direct that –

    a. The appellant's appeal be and is hereby dismissed;

    b. the Ruling and order of the High Court (Fred A. Ochieng, J) delivered on 8th June 2016 is hereby upheld; and

    c. the costs of this appeal be borne by the appellant.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL, 2022

HANNAH OKWENGU

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR