



REPUBLIC OF KENYA



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**Total Kenya Limited v D Pasacon General Construction & Electrical Services
(Civil Appeal 119 of 2019) [2022] KECA 593 (KLR) (8 July 2022) (Judgment)**

Neutral citation: [2022] KECA 593 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL 119 OF 2019
MA WARSAME, MSA MAKHANDIA & J MOHAMMED, JJA
JULY 8, 2022**

BETWEEN

TOTAL KENYA LIMITED APPELLANT

AND

**D PASACON GENERAL CONSTRUCTION & ELECTRICAL
SERVICES RESPONDENT**

*(An appeal from the Judgment of the Honorable Justice D. S. Majanja
delivered on the 28th August 2018 in H.C.C.C. No. 3 of 2018)*

JUDGMENT

Background

1. Pasacon General Construction and Electrical Services Limited (the respondent) was the appellant before the High Court in an appeal arising from RMCC 1306 of 2016 (Pasacon General Construction and Electrical Services Limited vs. Total Kenya Limited.) Total Kenya Limited (the appellant) engaged the respondent on 14th July, 2010 to carry out additional contractual works to the tune of Kshs. 611,378.00 which works involved excavations, pipe sleeves laying, storm water drainage, manholes and mild steel covers and forecourt bollards. The additional works were carried out on the basis of verbal instructions issued to the respondent by one, Eng. Collins Kipkorir, (Eng. Kipkorir) an agent/representative of the appellant. The respondent averred that it completed the works on 24th September, 2010 and issued a job completion form which was duly executed by the appellant and a representative of the respondent. It was the respondent's claim that the appellant failed to settle the claim and denied the existence of an oral contract between the parties claiming that, for there to be a valid contract between the parties, the appellant must issue a Local Purchase Order (LPO) for the works to be carried out.



2. The matter proceeded to full hearing wherein the respondent's suit was dismissed by the trial magistrate on grounds that, since there was no valid local purchase order issued by the appellant to the respondent, no payment could be effected for the purported additional works. On 1st appeal, the trial Court's decision was overturned with the learned Judge (Majanja, J.) holding as follows: -

“An agreement for such works is not required in law to be in writing but rather, a contract may be oral or may be inferred from the circumstances...”

3. Dissatisfied with the above finding, the appellant has filed this instant appeal.

Submissions by counsel

4. The parties to this appeal filed their written submissions, lists and digest of authorities which they adopted during the hearing. The hearing proceeded virtually in keeping with the practice directions for the containment of the Covid-19 global pandemic, with learned counsel, V. N Okata for the appellant, submitting that the issues for determination before the Court were whether there was an existing oral contract between the appellant and the respondent for the additional works. Secondly, the Court was invited to determine whether Eng. Kipkorir had the ostensible authority to request for additional works. The third issue for determination was whether the learned Judge (Majanja, J.) had shifted the burden of proof to the appellant. Finally, the question of who should bear the costs of this appeal was raised.
5. Learned counsel for the appellant further submitted that, the learned Judge fell into error by failing to find that there was no nexus between the appellant, the respondent and Eng. Kipkorir who issued instructions for additional works. Accordingly, the learned Judge introduced the ground that the appellant had given Eng. Kipkorir ostensible authority to enter into a contract for additional works when this evidence was not adduced of the trial court. To this end, the appellant avers that this Court ought to relook and reevaluate the evidence and uphold the decision of the trial court.
6. It was the appellant's submission that the burden of proof as to whether or not there was an existing contract between the parties rested solely on the respondent and at no point did this burden shift to the appellant as the law is that he who asserts must prove. Counsel submitted that no evidence was produced on the existence of a contract for initial works that gave rise to additional works.
7. The appellant further submitted that the delivery note dated 29th September, 2010 was signed and received by one Masika Isaac, who was not an employee of the appellant. The delivery note was stamped by Jomo Kenyatta Service Station and that there was no impression of a receiving stamp from the appellant. Learned counsel submitted that this was an opportunity for the respondent to enjoin Kenyatta Service Station in the suit but instead, the respondent neglected to do so.
8. The appellant's final submission was that Eng. Kipkorir did not have any ostensible authority to enter into a contract for additional works and that all their works were initiated upon the issuance of a local purchase order which the respondent failed to produce as evidence in the trial court. Consequently, the absence of signed documents issued by Eng. Kipkorir simply implied that there was no previous or current local purchase order issued and as such, there was no nexus between the appellant and the respondent.
9. Counsel for the respondent, on the other hand submitted that there existed an oral contract between the appellant and the respondent. They submitted that the respondent had undertaken construction works for the appellant on previous occasions and that the contract in question was one for additional works, a fact not denied by the appellant. It was further stated that Eng. Kipkorir was a representative/



agent of the appellant who had supervised the initial works and it was he who orally instructed the respondent to carry out additional works after the respondent had completed the initial works on the site. Counsel further submitted that Kenyatta Total Service Station was owned by the appellant and the appellant had acknowledged ownership of the service station. Further that the appellant had admitted that Eng. Kipkorir was in charge of construction at the service station. It was submitted that consequently, the appellant cannot successfully argue that there was no nexus between the appellant, the respondent and Eng. Kipkorir who had the ostensible authority to request for additional works. Further, the assertion that the appellant did not know Masika Isaac was a sham intended to confuse the Court.

10. As to whether the learned Judge shifted the burden of proof to the appellant, it was submitted that the appellant discharged its burden of proof when it testified that the respondent's agent, Eng. Kipkorir, orally instructed them to carry out further works. The appellant having denied the assertion, the burden of proof shifted to the appellant to adduce evidence that it did not issue oral instructions to the respondent to carry out the additional works.

Determination

11. We have considered the record, the grounds in support of the appeal, the submissions filed by the parties, the authorities cited and the law. This is a second appeal. As such, the Court should address itself purely on questions of law, rather than fact. In *Kenya Breweries Limited v Godfrey Odoyo* [2010] eKLR this Court pronounced itself thus:

“In a second appeal, however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.”

12. The first issue of law raised by the appellant was; whether or not there was an oral agreement for additional works by the appellant to the respondent? To that end, Section 119 of the *Evidence Act* provides that:-

“The Court may presume the existence of any fact which it thinks likely to have happened, regard being to the common course of natural events, human conduct and private and public business, in relation to the facts of the particular case”

The circumstances in the instant appeal suggests that Eng. Kipkorir, who was in charge of supervision of construction at the Jomo Kenyatta Total Service Station, requested the respondent to do additional works on the appellant's site. The said additional works were done for a protracted period of time (from 14th July 2010 to 26th September 2010) with no objections from the appellant or its agent/representative. Evidence was adduced during trial that a job completion form and a delivery note both dated 26th September, 2010 were duly received by the appellant and executed by both parties herein. At no point did the appellant raise any objections to the works done by the respondent. It is therefore conclusive that Eng. Kipkorir issued verbal instructions to the respondent to do the additional works which were done under his supervision until completion. The key elements that apply for a valid contract to exist have been established in this case and therefore we agree with the finding of the High Court that indeed, there existed an oral contract between the parties herein for the additional works.



13. The foregoing leads us to the second issue of law to be determined in this appeal; whether or not Eng. Kipkorir had the ostensible authority to enter into a contract for additional works with the respondent? In the instant appeal, it is apparent that the appellant instructed the respondent herein to carry out additional works at the Jomo Kenyatta Total Service Station from 14th July, 2010 to 26th September, 2010. We agree with the High Court’s finding that the agreement between Eng. Kipkorir, an agent of the appellant, and the respondent was binding. *Black’s Law Dictionary* 9th Edition, at page 72 defines an apparent agent thus:

“A person who reasonably appears to have authority to act for another, regardless of whether actual authority has been conferred – also termed ostensible agent.”

14. It is not in dispute that the Eng. Kipkorir who supervised initial works as well as the subject works at the Kenyatta Total Service Station - owned and affiliated with the appellant had the ostensible authority to enter into a contract for the additional works. Regardless of whether or not he had the authority to enter into a contract, the respondent rightly believed he had the authority to enter into such a contract and as such it is this Court’s finding that Eng. Kipkorir had ostensible authority to request for additional works.
15. The third issue raised by the appellant concerns the burden of proof and whether or not the respondent properly discharged its duty in this regard. It was the appellant’s assertion that the trial court shifted the burden of proof to the appellant when it did not obligate the respondent to prove its assertion that the appellant had issued oral instructions for additional works.

Section 107 of the *Evidence Act* puts it thus:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

In the instant appeal, the respondent has claimed the existence of an oral contract and has further described the circumstances that gave rise to the agreement. We are satisfied that the respondent has properly discharged his burden of proof. This Court relies on Section 119 of the *Evidence Act* which states that:

“The Court may presume the existence of any fact which it thinks likely to have happened, regard being to the common course of natural events, human conduct and private and public business, in relation to the facts of the particular case”

16. As such, going by the conduct of the parties herein as well as the prevailing facts, it is clear that there was an orally binding contract. Further, the additional construction works went on at the appellant’s premises. Such additional construction work was neither halted nor stopped by the appellant, despite the fact that the Eng. Kipkorir, an agent of the appellant, was present at the appellant’s Jomo Kenyatta Total Service Station by virtue of his position as supervisor. This can therefore be properly viewed as a tacit acknowledgment of the oral contract for additional works.
17. In the circumstances before this Court, we find that there was evidence of a valid oral contract between the parties. We find that the lack of a local purchase order issued by the appellant did not in any way render the oral contract between the appellant and the respondent void. In the circumstances, we find that the High Court properly addressed itself to the issues at hand and reached the correct conclusion in entering judgment in favour of the respondent herein.



18. Consequently, we do not find any valid ground to disturb the High Court's decision. This appeal therefore stands dismissed with no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF JULY, 2022.

M. WARSAME

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

