IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, SICHALE & KANTAI, JJ.A.)

CIVIL APPEAL NO. 137 OF 2018

BETWEEN

BAMBURI CEMENT LIMITED.....APPELLANT

AND

DINESH CONSTRUCTION LIMITED.....RESPONDENT

(Appeal from the judgment and Decree of the High Court of Kenya at

***Nairobi (O. Sewe, J.) dated 16th February, 2018* in H.C.C.C. No. 300 OF 2015)**

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JUDGMENT OF THE COURT

The parties to this appeal, **Bamburi Cement Limited (the appellant)**and **Dinesh Construction Limited** (the respondent) entered into a written consent on 8th December, 2000. By that agreement the appellant appointed the respondent as contractor for **"Relocation of ready mix plant from Kay Construction Site, erection of buildings, structural and external works including services"** at Mavoko for the contract price of **Kshs.85,442,705/80**. The architect for the works was Third Dimension Concepts while the Quantity Surveyor was M/S Bills & Speks and the contract period was 60 days from 7th August, 2008. The date of practical completion was identified in the contract document as 5th October, 2008.

There is no issue on the fact that the respondent carried out works as identified in the contract document but an issue arose upon completion of the works as the appellant raised certain questions on the way the works had been carried out and for that reason it did not pay the sum in the final certificate, **Certificate No. 6** issued by the lead consultant, Professional Consultants, appointed by the appellant, in the sum of **Ksh.21,976,123.18**, a sum later revised to **Ksh.19,082.192.88**.

The contract entered by the parties is a standard contract **"Agreement and Conditions of Contract for Building Works"** published by The Joint Building Council, Kenya with the sanction of The Architectural Association of Kenya and The Kenya Association of Building and Civil Engineering Contractors. The obligations of parties in agreements is duly identified and so were the obligations of the architect in construction works which was stated:

> ***"The Architect shall upon execution of the agreement;***
>
> ***5.1 …..***
>
> ***5.2 Expeditiously supply information, instructions and interpretations required or requested by the Contractor to ensure the timely carrying out of the Works.***
>
> ***5.3 Issue all necessary approvals and certificates and take other required action as soon as practicable.***
>
> ***5.4 Where the Architect is required under the contract to exercise***
>
> ***his discretion by giving his decision, opinion, consent or approval or by taking any other action which may affect the rights and obligations of the Employer or the Contractor, he shall exercise such discretion impartially within the terms of the contract."***

There is no dispute that the lead consultant, upon completion of the contracted works, issued "Contractors Final Payment Certificate No. 6" for Ksh.19,082,192.88 on 26th May, 2010. The appellant raised certain issues and did not pay that sum leading to the suit filed at the High Court of Kenya at Nairobi where that sum with interest at 18% from 24th June, 2010 was claimed. The suit was heard by **Olga Sewe, J.** who in a judgment delivered on 16th February, 2018 found in favour of the respondent entering judgment accordingly with interest at court rates from 26th June, 2010.

The appellant is aggrieved by those findings hence this appeal drawn for the appellant by its advocates **M/S Gikera Vadgama Advocates** where 9 grounds of appeal are raised. The learned judge is faulted for finding that clause 34.6 of the contract only related to payment of interim certificates but not the final certificate; for finding in favour of the respondent on the issue of payments in respect of variations and additional works; for not finding that variations and additional works were above 0.01% of the contract price contrary to the contract; for awarding interest when a clause on interest in the contract had been deleted; for finding that it was the appellant's responsibility to demonstrate that the approvals were effected without the architect's prior approval, and finally, that:

> ***"The Honourale Learned Judge erred in law when she held that it was the responsibility of the Architect and not the Respondent to obtain prior approvals from the Appellant for additional and variation of works which finding is contrary to Clause 4.3 and Clause 30.4 of the duly signed contract by the parties."***

We are therefore asked to set aside the judgment of the High Court and in the alternative make a finding that:

> ***"…. any interest payable on sums held to be due then the same is applicable from the date of judgment and not from 26th June 2010 ….."***

We are also asked to find that the respondent was not entitled to any order for additional works.

This is a first appeal from the decision of the High Court sitting in first instance and our duty in that regard was well identified by this Court in the case of **Abok James Odera t/a Odera & Associates v John Patrick Machira t/a Machira & Company Associates [2013] eKLR** quoting from **Kenya Ports Authority v Kuston (Kenya) Limited [2009] 2 EA 212** as:

> ***"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 the 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."***

We bear that mandate in mind as we consider the record before us.

The appellant denied the claim through a statement of defence filed at the High Court on 20th August, 2015. It was taken as a defence that the respondent had declined, failed or neglected to follow laid down procedure contractually stipulated between it and the appellant; that the contract limited variations to 0.01% of the contract price; that the respondent carried out unauthorized works leading to the contracted works exceeding what was envisaged in the contract; that:

> ***"13. The Defendant in attempt to resolve the outstanding issues called for a site meeting which was held on 30th March, 2010, this meeting was attended by the Defendant's Representative and the Plaintiff's Representative, Mr. Dinesh Bhachu.***
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> ***14. The Defendant communicated to the Plaintiff its reasons for declining to make payment based on Interim Payment Certificate Number 6, this was due to errors under items 1, B and G of the said Interim Payment Certificate Number 6, these included but were not limited to;***
>
> ***a. The re-measured works were inconsistent with the work actually executed on site especially in regard to the electrical works, weighbridge office and ablution bloc;***
>
> ***b. The variations were executed without formal approval;***
>
> ***c. The quality of some of the materials used at the site was substituted while the rates were held constant……"***

It was further taken as defence that the amount claimed on Certificate No. 6 was too high; that the suit was filed about 6 years after the said Certificate which the appellant considered to be too late and in bad faith and for all that the suit should be dismissed.

Each of the parties called one witness. **Fredrick Opondo**, the respondent's Head of the Technical Team in charge of Projects had made a written witness statement which he adopted as part of his evidence. In that statement dated 17th June, 2015 he stated that the parties to this appeal had entered into contract in July, 2008; that the appellant had appointed Professional Consultants to oversee and manage the project; that the respondent had executed its duties diligently to completion and to the satisfaction of the consultants; that despite doing so, the appellant had failed to pay the sum due on the final certificate and had ignored demands to pay and the trial court should give judgment for the sum claimed. The witness produced various documents in support of the respondent's case and stated that the final sum due from the appellant was agreed at a meeting on 24th June, 2010. Of the variations and additional works he stated in cross-examination:

> ***"Such variations were to be approved by the Architect. The variations are above 15%. Approvals of the employer were obtained and passed onto the contractor for implementations (sic). At pages 26-27 of PBD is a tabulation of the variations. They were all***

proposed and approved at the instance of the employer. The approvals were made by the Architect …"

He also stated that all issues raised by the appellant had been resolved and a final account prepared and that Certificate No. 6 reflected the final account as agreed by the parties.

Fidelis Sakwa, the **Technical Manager** for the appellant also adopted a witness statement he had made on 26th August, 2015. He stated in that statement amongst other things that variations of the works in the contract were subject to approval by the appellant (as employer); that the respondent had carried out variations without approval of the appellant; that he had held a meeting with a director of the respondent on 30th March, 2010 where he had raised certain issues with that director on the way the works had been undertaken; that:

"9. After the Defendant recovered Interim Payment Certificate Number 6, I personally visited the site and noted that equipment purported to have been dully (sic) installed by the Plaintiff had actually NOT been installed.

10. The Defendant explained to the Plaintiff that the Defendant's final account as verified by M/S Professional Consultants had serious errors and that further the consultant had failed to respond to two letters written to them for reevaluation ….."

In oral evidence the witness stated that the date of practical completion was 26th November, 2008 after which no instructions for variation could be given. He produced various documents as part of the appellant's defence and of the claim subject of the suit where he said amongst other things:

"I believe there is some money owing to the contractor but the sum is yet to be ascertained. Until that is done, we are unable to pay."

The learned judge considered the matter before her and found in favour of the respondent as we have already stated.

When the appeal came up for hearing before us on 9th October, 2019 learned counsel **Mr. Stephen Gikera** assisted by **Mr. Andrew Njenga** appeared for the appellant while learned counsel **Mr. Geoffrey Nyaanga** appeared for the respondent. Both parties had filed written submissions and appeared before us for a highlight of the same.

Mr. Gikera submitted that the respondent had carried out variations without the express authority of the appellant or the architect, and according to counsel, this was in breach of the contract between the parties to the agreement. Further, that the High Court erred in shifting the burden of proof by requiring the appellant to prove that it did not give consent for variation of works.

On the issue of interest awarded by the judge counsel faulted the judge for doing so when, according to counsel, the contract excluded payment of interest. Mr. Gikera submitted that although it was at the discretion of a judge to award interest that discretion should be guided by certain principles, and in the case before the judge discretion should have been guided by the express terms of the contract entered by the parties.

It was then Mr. Nyaanga's turn to respond.

He submitted that the contract appointed professionals to oversee the execution of the contract; that a final Certificate had been issued by a

Consultant; after a dispute arose, the parties agreed to appoint a different consultant to re-value the works; that revaluation had been done leading to a Final Certificate for Kshs.19,082,192/88 and according to Clause 34.2 of the contract that Final Certificate (for Ksh.19,082,192/88) of the contract was conclusive evidence of what was due to the respondent. On the award of interest it was Mr. Nyaanga's submission that interest was awardable at the discretion of the judge and we should not interfere with the discretion of a judge as was held by this Court in the case of **United India Insurance**

Company Limited & Others v East African Underwriters (Kenya) Limited [1985] EA 897 that:

"The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. 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."

For all that counsel for the respondent asked us to dismiss the appeal.

We have considered the whole record and the submissions made before us by learned counsel for the parties and these are our thoughts on this appeal.

We take as central to this appeal the issue of whether the respondent carried out the works as per contract; whether Certificate No. 6 issued by the lead consultant is payable and finally, whether the judge was right in awarding interest on the sum claimed.

Those issues are intertwined and can be taken together.

The trial judge found as a fact that a certificate of practical completion had been drawn by Professional Consultants dated 16th February,2009 confirming that practical completion of the works was achieved on 26th November, 2008, and that the defects liability period would end on 26th May, 2009. The judge also found that it was not until 15th July, 2009, well after the end of the defects liability period, that the appellant took issues with the way the works had been undertaken by the respondent. The judge also found that representatives of the appellant and the respondent had at a meeting held on 30th March, 2010 resolved that a new Quantity Surveyor be appointed by the appellant to measure the works and re-evaluate the final accounts with Professional Consultants, in the presence of the respondent's agent. It had been resolved, further, that after that exercise, the final Certificate be paid by 30th April, 2010.

In furtherance of that agreement the appellant appointed M/S Bills & Speks to undertake re-evaluation and as mandated, that firm issued a revised

Final Certificate No. 6 dated 26th May, 2010 for Ksh.19,082,192/88, the sum claimed in the plaint. The trial judge found that:

> ***"A careful perusal of the contract reveals that the works were executed by the Plaintiff under the close supervision of the Project Architect as well as the Project Manager, M/s Professional Services. Thus, Clause 4.1 was explicit that the Plaintiff was to carry out and superintend upon and complete the works and rectify any defects "...to the reasonable satisfaction of the Architect..." unless it was legally or physically impossible to do so; and, whenever there was need for any variation or clarification, the Plaintiff was required, by dint of Clause 4.2 to:***
>
> ***"Give a written notice to the Architect specifying any discrepancy, ambiguity, or divergence in these conditions, the contract drawings, the contract bills or specifications immediately such discrepancy or divergence is detected. The Architect shall thereupon issue instructions in regard thereto as soon as is practicable."***
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> ***Similarly, the Plaintiff was obliged by Clause 22.1 to comply with all instructions issued to him by the Architect, such that if, within 14 days after receipt of written notice from the Architect requiring compliance with an instruction, the contractor had not complied therewith, then the Defendant was empowered to employ and pay other persons to execute the works and recover the costs from the Plaintiff. It is thus in line with the foregoing provisions that Clause 30.14 of the Contract, which was heavily relied on by the Defendant in support of its case, expressly provided that:***
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> ***"The Architect shall not issue an instruction requiring a variation for additional work exceeding 0.01% of the contract price without the prior approval of the Employer unless otherwise communicated by the Employer to the Architect and to the Contract." (Emphasis supplied)***
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> ***It is plain from the aforestated clause that it was therefore the responsibility of the Architect, and not the Plaintiff, to seek and obtain prior approval for the variations from the Defendant. There is absolutely no evidence to show that the variations were implemented against the advice or instructions of the Architect; granted that the Defendant opted not to call the Project Architect, M/s Third Dimensions Concepts, as its witness. The Defendant, having alleged that it did not issue any such authorization, was under duty to prove his allegations, for Section 107(1) of the Evidence Act, Chapter 80* of the *Laws of Kenya, is explicit that:***
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> ***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."***

We earlier in this judgment identified the role of the architect as provided in **"Agreement and Conditions of Contract for Building Works".** The architect was appointed to *inter alia* give instructions and interpretations required or requested by the contractor to ensure the timely execution of the works and issue all necessary approvals and certificates and take all other required action as soon as was practicable and to use his discretion by giving his decision, opinion, consent or approval, and to do so impartially within the terms of the contract.

On the issue of variations there is a letter on record (the date is not clear but it was received by the respondent on 31st July, 2008) authored by the appellant to the respondent where the contract price was varied in the following terms:

> ***"We refer to your tender of 11th July 2008 amounting to KSHS.91,363,606.80 and a completion time of Sixty (60) days. We have omitted Structural Works under BINS PG SW/5/1 items J to O and PG SW/5/2 items A to C amounting to KSHS.5,519,541.00 hence reducing the contract sum to KSHS.85,844,065.80. further following discussions with your Mr. Dinesh and discussions of the error of Ksh.401,360.00 in our favour and confirmation that the same be deducted, the revised contract sum is Kshs.85,442,705.80 inclusive of VAT @16%.***
>
> ***We are pleased to advise that we award you these works at the reduced scope based on the above sum amounting to Kshs.85,442,705.80 inclusive of VAT @16% and a completion time of Sixty (60) working days.***
>
> ***The domestic subcontractors for Electrical Works of Contemporary Electricals Enterprises and RMX Relocation and Structural Steel Works as David Engineering Ltd and Vekaria Plumbers as plumbers indicated by you have been accepted. You and your subcontractors are required to attend a mandatory safety induction immediately at Athi River. Please get in touch with our Eng Fidelis Sakwa for further details on the safety induction.***
>
> ***Also kind liase with our consultants M/S Professional Consultants (Eng. Jude Loveday on cell +254 723 720293) for further technical and contractual details and possession of site on Thursday 31, 2008 and three days from that will be taken as the commencement.***

The contract documents are under preparation and will be available for signature in due course. Please sign a copy of this letter and the three schedules as acceptance of this award and avail your performance bond and program of works accordingly."

There were various variations undertaken by the respondent and it is on record that the respondent always sought approval from the architect (Professional Consultants) before undertaking the works and the architect gave approval. For instance by letter dated 10th September, 2008 the architect under copy to the appellant, approved:

"…. quotation to use additive options of Sika NN and Power Plus for

the following requested:-

Batching plant bases and walls.

Ground beam for the Ramp footing.

Silo support footing and walls.

Plant column bases only.

We write to confirm that you proceed with Sika NN at two 92) percent dosage….."

No variation or additional work was undertaken by the respondent without the architect's approval and, when the project was completed, the architect wrote a letter to the appellant on 31st May, 2010 forwarding revised final accounts and final valuation Certificate No. 6. The revision had been done after the appellant had raised issues on certain aspects of the way the contract had been implemented and after the meeting between the parties on 30th March, 2010 where a new Quantity Surveyor had been appointed to revise the works. The trial judge found that there was no basis for the appellant to refuse to pay final (revised) Certificate No. 6 of the contract between the appellant and the respondent.

We have reviewed the whole record and agree with the trial judge in the findings that she made in that regard. The respondent carried out the works as per contract and the works were certified by the architect and the lead Engineer as per the contract. When the appellant raised certain issues way out of the defects liability period it was agreed that the works be re-evaluated and a Quantity Surveyor revised the sum payable and it was after that exercise that

Certificate No. 6 was issued. The appellant had no basis to resist the claim in the circumstances and it is our finding that the respondent was and is entitled to the sum of Ksh.19,082,192.88 as certified by the consultants in Certificate No. 6 issued on 26th May, 2010.

The other issue raised by the appellant concerns the award of interest by the judge at court rates from 26th June 2010. Counsel for the appellant concedes that award of interest is at the discretion of a judge but submits that in the circumstances such discretion was wrongly exercised.

The learned trial judge recognized that the clause on payment of interest in the contract document had been crossed out by the parties but held that since Certificate No. 6 had been issued but had not been paid the respondent was entitled to interest, not at the claimed rate of 18%, but at court rates. The judge considered the provisions of the Civil Procedure Act on the issue of award of interest and such cases as **Ajay Indravan Shah v Guilders International Bank Limited [2003] eKLR** and **Highway Furniture Mart Limited v Permanent Secretary Office of The President & Another [2006] eKLR.** It was held in the latter case:

"The justification for an award of interest on the principal sum is to compensate a Plaintiff for the deprivation of any money, or specific goods through the wrong act of a defendant."

We agree.

The appellant caused a re-evaluation of the works and a final revised Certificate No. 6 was issued by its consultant. It did not pay the sum certified by its consultant which led to filing of the suit. The sum on the certificate was a debt due from the appellant to the respondent and the judge was right to award interest on the said sum in the way that she did. It was a specific sum and the judge was entitled to appoint the date that interest accrued.

We have considered the whole matter and having done so we find no merit in any of the grounds of appeal taken by the appellant. The appeal is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 21st day of February, 2020.

M.K. KOOME

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR