IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), OKWENGU, ASIKE-MAKHANDIA, JJ.A)

CIVIL APPEAL NO. 5 OF 2018

BETWEEN

SYNRESINS LIMITED.....APPELLANT

AND

PRAVIN VORA T/A VORA CONSTRUCTION.....RESPONDENT

*(An appeal from the judgment of the High Court of Kenya at Nairobi (**Sergon, J.**) dated 19th February, 2016*

in

***H.C.C.C No. 1095 of 2003*)**

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JUDGMENT OF THE COURT

[**1**] This appeal arises from litigation involving a contract for construction of office blocks and warehouses/factory on land owned by the appellant, **Synresins Limited**. According to the appellant, the agreement was entered into with the respondent, **Pravin Vora t/a Vora Construction** on 14th November, 2002 and the work was to be completed by 17th April, 2003. The appellant sued the respondent contending that despite being paid directly and indirectly a sum of Kshs. 11,496,686.75, the respondent only did work worth Kshs. 6,168,120 and abandoned the site. The appellant therefore sued the respondent claiming Kshs. 5,328,566.75 being the amount that the respondent was overpaid. The appellant also sought damages for breach of contract and interest.

[**2**] The respondent filed an amended defence and counter claim in which it admitted having entered into a contract with the appellant, but denied owing any money or failing to perform its part of the contract. In particular, the respondent denied having been paid the sum of Kshs. 11,496,686.75 and maintained that it only received Kshs. 5,605,515 from the appellant, and that it is the appellant who owed it a sum of Kshs. 7,301,683.50, being the balance of the full value of the work that it had done. The respondent therefore, lodged a counterclaim against the appellant in which he sought judgment for the sum of Kshs. 7,301,683.50 as well as damages for breach of contract and demolition of storage shades that the respondent had built on the site.

[**3**] At the hearing of the suit, **Michael Mungai** (Mungai), a production manager with the appellant, gave evidence and also adopted his written statement which had earlier been filed in court. Likewise, **Everlyne Kahaki** an administrator of the respondent testified and relied on a statement that she had earlier filed.

[**4**] Upon considering the evidence and the submissions made by the parties, the learned Judge delivered a judgment in which he identified three issues for determination. First, whether there existed a valid contract between the parties, and if so, whether the same was breached and by who? Secondly, whether the prayers sought by the appellant should be granted, and thirdly, whether the respondent's counterclaim has any merit.

[**5**] In regard to the first issue, the learned Judge found that there was an agreement entered into between the appellant and the respondent, and that Vora Construction Co. Limited was not privy to the agreement as that company was incorporated long after the agreement was executed. In regard to the second issue, the learned Judge found that the appellant failed to facilitate the execution of the contract as there was delay in obtaining approval from the Nairobi City Council, and excavation and construction could not go on before the building plans were approved. Secondly, the appellant was not paying the agreed contractual sums as due, but instead paid suppliers of building materials directly, and these suppliers failed to deliver materials on site. The learned Judge concluded that the appellant was not entitled to the penalty

sum for delay of the completion of the contract as it was the one in breach of the agreement. The learned Judge also rejected the appellant's claim for Kshs. 5,328,566.75 for lack of evidence. Consequently, the learned Judge dismissed the appellant's suit with costs.

[**6**] In regard to the respondent's counterclaim for Kshs. 7,301,683.50 for work done, the learned Judge similarly rejected the counterclaim holding that there was no privity of contract between the appellant and Vora Construction Co. Ltd. On the respondent's counterclaim for damages for breach of contract, the learned Judge found the appellant in breach as it arbitrarily, unilaterally and without sufficient notice terminated the contract and evicted the respondent from the site. Consequently, the respondent was awarded Kshs. 5,000,000 as damages for breach of contract.

[**7**] The appellant has filed a memorandum of appeal raising 9 grounds in which it faults the learned Judge for: delivering a judgment that was contrary to the evidence placed before him; disregarding the terms of the contract entered into between the parties, and awarding damages at large for breach of contract; awarding the respondent an arbitrary sum of Kshs. 5,000,000 as damages for breach of contract when such damages if payable should have been computed in accordance with the terms of the contract as read together with correspondences exchanged between the parties; seeking to impose contractual terms that were not agreed upon by the parties and in effect rewriting the contract in regard to payment of suppliers; finding that there was no privity of contract between the appellant and Vora Construction Company Limited, when the evidence of the respondent confirmed that Vora Construction Company Limited took over the assets, liabilities and contractual obligations of the respondent upon its incorporation; summarily declaring that the appellant was in breach of contract when the evidence before him pointed to desertion of the site by the respondent; failing to objectively determine which party was entitled to damages by selectively considering the respondent's quantity surveyor's computation of work done while completely disregarding the computation by the appellant's architect of work done; and holding that the award of Kshs. 5,000,000 made to the respondent was reasonable, when the amount viewed against the total payments made by the appellant was very excessive.

[**8**] The respondent has also filed a notice of cross appeal in which it seeks to have the judgment varied to the extent that the learned Judge erred in failing to award it the sum of Kshs. 7,301,638.50 being the balance of the work it had already done.

[**9**] In support of the appeal, the appellant filed written submissions in which it compressed the grounds of appeal into four issues. These were: whether the appellant was in breach of contract; whether the respondent owes the appellant Kshs. 5,328,566.75 in respect of overpayment for work done; whether damages, if any, were payable to the respondent as held by the learned Judge, and whether the respondent ought to be awarded Kshs. 7,301,683.50 being the balance of the work done.

[**10**] On the issue of whether the appellant was in breach of contract, the appellant submitted that though the contract did not have a termination clause, there was a provision for early or late handover as per clause 1(ii); that according to the contractual period of 22 weeks, the contract expired on 17th April 2003 which was the expected hand over date; that the respondent was in constructive breach as there was delay of about 16 weeks which gave the appellant a valid basis for terminating the contract; and that the respondent abandoned the site on 31st July, 2003 a whole month before the appellant terminated the contract and hired another contractor. Relying on **Caltex Oil Kenya Ltd. vs Evanson Njiiri Wanjihia [2017] eKLR**, the appellant contended that it had given the respondent a reasonable notice and opportunity to resume the work, before it terminated the contract.

[**11**] In addition, the appellant argued that time was of the essence as the respondent had not completed the construction by the end of the 22 weeks stipulated in the contract, and that the delay was of the respondent's own making. The appellant pointed out that Nairobi City Council stopped the excavation that was being carried out by the respondent on 13th May, 2003, which was already past the time stipulated for the hand over.

[**12**] As regards payments, the appellant maintained that it had made payments to the respondent and approved suppliers, as provided for in Clause 1(vii) of the contract; that the respondent used the materials that were supplied; and that the delays in payments were due to the respondent's failure to produce certificates for the progress made in the works. Relying on **Sun Sand Dunes Ltd vs Raiya Construction Ltd [2018] eKLR**, the appellant argued that it was justified in withholding the payments as the respondent was not working in accordance with the schedule.

[**13**] Furthermore, the appellant maintained that it paid the respondent and suppliers as agreed in the contract, and that upon termination of the contract, it commissioned a professional valuation of the works done as compared against payments made. This valuation revealed that the respondent had been overpaid by an amount of Kshs. 5,328,566.75. The appellant therefore faulted the learned Judge for failing to order that the amount be refunded to it.

[**14**] The appellant submitted that there was no justification for the award of damages made to the respondent as it did not breach the contract, nor was there any legal or factual basis for the figure of Kshs. 5,000,000 arrived at by the learned Judge; that clause 1(ii) of the contract stipulated what was to happen in the event there was a delay in handing over the works; that the provision was sufficient to cover damages for breach of contract; and that the figure of Kshs. 5,000,000 was unreasonable and grossly unfair to the appellant who was the victim of the breach. In the appellant's view, the cases relied upon by the learned Judge in support of the award of damages were not applicable.

[**15**] With regard to the cross-appeal, the appellant argued that it had paid the respondent in excess of the work that the respondent had done, and that the respondent was therefore not entitled to any further payment. In addition, the respondent did not appear in court to defend his own suit nor did he give a power of attorney to the person who testified on his behalf; that the respondent was a sole proprietor and the company that was incorporated came into existence long

after the contract had been entered into; that as held by the learned Judge, the incorporated company was not privy to the contract between the appellant and the respondent, and could not purport to execute an award for damages that were wrongly awarded in favour of the respondent. Finally, the appellant urged the Court to allow its appeal, enter judgment in its favour and dismiss the cross appeal.

[**16**] The respondent also filed written submissions in which he replied to all the grounds and the cross-appeal together. The respondent reiterated that he led evidence which showed that the delay to complete the works was caused by the appellant because there were delays in payments, while some payments were made to strangers; and that there was no approval of Nairobi City Council for the work. As regards the counterclaim, the respondent relied on documents which were produced in evidence by his witness. These included a quantity surveyor's report, wherein the surveyor had analyzed the works undertaken by the respondent up to termination, and valued it at Kshs. 7,301,683.50; photographs of the works done; and a letter from the Nairobi City Council stopping the excavation works until the buildings plans were approved.

[**17**] In addition the respondent referred to a letter dated 19th June 2003 which he had written to the appellant raising concerns regarding: the delay and breach of the agreement arising from delayed payments; unilateral variation of architectural certificates contrary to the contract; bringing another contractor on site without notice to it; and giving half day notice in purported termination of the contract. The respondent urged that the learned Judge correctly held that there was breach of contract by the appellant, and properly awarded damages of Kshs. 5,000,000. In this regard the respondent relied on **David Mose Gekara vs Hezron Nyachae [2012] eKLR.**

[**18**] The respondent further submitted that the appellant's claim for Kshs. 5,328,566 was not particularized and therefore lacked any basis. He urged the Court to affirm the award of damages made in his favour and also allow his counterclaim of Kshs. 7,301,683.50 for the balance of the work done and not paid for. As regards the company, the respondent maintained that the appellant was aware of the incorporation of the company and is therefore estopped through its conduct from denying association with the company. Finally, the respondent urged the court to dismiss the appeal and allow the cross-appeal.

[**19**] This being a first appeal, the primary role of this Court is to re-evaluate, re-assess and re-analyze the evidence on record in order to make its own conclusions, including whether the conclusions reached by the trial judge should stand. In doing so, the Court is conscious of the fact that it did not have the advantage that the trial Judge had of seeing and assessing the demeanour of the witnesses. (See **Kenya Ports Authority vs. Kuston (Kenya) Limited [2009] 2 EA 212**.)

[**20**] It is not disputed that there was a contract entered into on 14th November, 2002 between the appellant and the respondent for construction of office bloc and warehouses/factory, on the appellant's land. What is disputed is whether there was any breach of this contract. If so, by whom, whether there was any overpayment made that should be refunded and whether damages are payable to any party.

[**21**] On the issue of the contract, both the appellant and the respondent referred to the contract in their pleadings and in their evidence, and each party included it in their list of documents. However, while the appellant produced a full copy of the contract which was duly signed by both parties, the respondent produced a copy which was missing pages 1-5, that included clause 1(i) to clause 1(x) of the agreement. This is important because some of the missing clauses are relevant to this litigation.

[**22**] We wish to flag out the following crucial parts of the agreement which are missing from the copy produced by the respondent:

> **"(ii) The contractor agrees to complete the excavation**
>
> + **filling and construction and hand over the site exactly 22 weeks from the date of signing this agreement.**
>
> **Furthermore, both parties agree that in the event of early handover there will be a bonus of Kshs. 25,000 per day payable by the client and similarly if there is delay in handing over, the contractor will pay a penalty of Kshs. 40,000 per day."**
>
> **…..**
>
> **(vi) The contractor will also be responsible for excavation and filling. It is explained in annex 1**
>
> **…**
>
> **(viii) The contractor, within six weeks of starting the site, will give a list of all bought out items that the client is required to supply so that this may be made available in time. Also indicate date by which they are required."**

[**23**] These provisions confirm that the contractual period was 22 weeks which was expected to expire on or around 17th April 2003. It is not disputed that by this date the respondent had not fully honoured the contract. The question is whether this amounted to a breach of the contract. The fact that the contract provided for penalty for delayed payment, presupposes that delay *per se* did not terminate the contract, but would attract the penalty provision that was provided. The respondent has explained that the delay was not of its making, but was caused by the appellant because of delayed payments, unilateral payments to suppliers, variation of contractual certificates, and failure to obtain necessary approval from the Nairobi City Council, resulting in the Council stopping the excavation works.

[**24**] With regard to the issue of City Council approval, the respondent did produce a notice dated 13th May, 2003 served on it by the Nairobi City Council in which the Council directed the respondent to stop carrying out the excavation or further construction, until the proposed building plans were approved. The appellant has not responded to this issue but has claimed that the notice from the council was written when the respondent was already in breach. The contract made reference to architectural and electrical drawings according to which the contract was to be performed. Although the respondent was responsible for excavation and filling, it is clear that the appellant who was the client was responsible for getting the necessary approvals from the Nairobi City Council. Without the necessary approvals, the respondent could not do the work without breaking the law.

[**25**] Moreover, according to a letter dated 19th June, 2003 addressed to the appellant by the respondent, the appellant brought another contractor on site without any communication to the respondent. Although the appellant claimed that by this time the respondent had abandoned the site, it is evident that the respondent was still on the site even though little or no work may have been going on, due to the dispute over the payment and the absence of council approvals. This is confirmed by a letter dated 2nd August, 2003 in which the respondent declared a dispute protesting over the delayed payments and giving notice of its intention to close the site. Also, in letters dated 25th August and 26th August, 2003 written by the appellant to the respondent, in which the appellant required the respondent to vacate the construction immediately. This means that the respondent was still on the site. For these reasons, it cannot be said that the respondent was the one who was in breach, as it is the appellant who brought the contract to an end without properly following the terms of the contract.

[**26**] The learned Judge awarded the respondent Kshs. 5 million as damages for breach of contract. It was submitted that the learned Judge ought to have computed the damages in accordance with the penalty clause that was provided for in the contract. However, clause 1(ii) of the agreement only provided for penalty or bonus payment for late or early handover. It did not provide for penalty for breach of contract. This means that having found the appellant to be in breach of contract, the learned Judge had the discretion to assess and award damages. The Judge took into account appropriate authorities in assessing the damages and the appellant has not satisfied us that the amount of Kshs. 5,000,000 which was awarded, was so excessive as to justify our intervention. Accordingly, we uphold the finding of the learned Judge in this respect.

[**27**] With regard to the payments, although delay was alleged, the respondent did not produce the necessary certificates upon which payments were to be made, and when the payments were actually made, if at all. In addition, although the respondent maintained that the value of the work that it had completed was more than the amount that the appellant had paid it, the respondent only produced a schedule of its evaluation of the work done. This was not supported by any report from the Quantity Surveyor or an independent valuer or an architect's certificate. The learned Judge was therefore right in rejecting the respondent's counterclaim as the same was not proved.

[**28**] As regards the appellant's contention that it overpaid the respondent, there was a letter dated 28th March, 2003 written by Robi & Partners purporting to show the percentage of the work that had been done by the respondent. The writers of that letter were not called to testify, and in any case, that letter did not reflect any overpayment. In paragraph 6 of the plaint, the appellant contended that the respondent had only carried out construction work valued at Kshs. 6,168,120 but no evidence was adduced in this regard.

[**29**] In addition, the appellant produced a letter dated 25th July, 2003 in which it purported to have made payments to the respondent amounting to Kshs. 7,945,033.50 as per some accounts which were attached to the letter. These accounts were never explained in evidence nor was the maker of the accounts identified. Thus, there was nothing produced in support of the alleged payments or the accounts. In his evidence, Mungai the appellant's witness testified that as at the termination of the contract, the respondent had been paid Kshs. 10,216,686.75. In cross-examination, he claimed that he paid Kshs. 10,296,686.75 to the respondent, but that some of the money was actually paid to Vora Construction Company Limited. According to para 6 of the appellant's plaint, the appellant claimed to have paid the respondent a total of Kshs. 11,496,000.75. There was no evidence adduced to explain the apparent contradiction. For these reasons, we find that the appellant failed to prove its claim that what it paid the respondent was more than the value of the work done.

[**30**] The upshot of the above is that we find no merit in both the appeal and the cross-appeal. Accordingly, both are dismissed and each party shall bear their own costs.

Dated and delivered at Nairobi this 9th day of October, 2020.

W. OUKO (P)

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR