IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: ASIKE-MAKHANDIA, SICHALE

& J. MOHAMMED, JJ. A)

CIVIL APPEAL NO 351 OF 2018

BETWEEN

MISTRY JADVA PARBAT & CO. LTD.....APPELLANT

AND

KENYATTA UNIVERSITY.....RESPONDENT

(An appeal from the judgment and order of the High Court of Kenya at Nairobi (Tuiyott, J.) dated 27th July 2018 in HCCC No 121 of 2008)

JUDGMENT OF THE COURT

BACKGROUND

1) The dispute leading up to this appeal has a protracted history. It all began on 21st December 1987 when **Mistry Jadva Parbat & Co. Ltd** (the appellant) and **Kenyatta University** (the respondent) entered into a building contract for construction works at the Kenyatta University Campus (the Contract). Pursuant to that Contract, various construction works including the building of hostels, dining and kitchen facilities were undertaken by the appellant for which it presented to the respondent various certificates of works for payment.

According to the appellant, the respondent did not make payment in accordance with the terms of the Contract prompting the appellant to file suit in the High Court in Mombasa being **Civil Suit No. 109 of 1991** (the Mombasa suit) vide a plaint dated 13th February, 1991 claiming the following sums against the respondent:

S. No.	**Certificate No.**	**Date**	**Outstanding balance**
1.	10	11th August, 1989	1,999.00
2.	12	26th October, 1989	13,150,901.00
3.	13	28th March, 1990	21,956,289.60
4.	14	14th June, 1990	20,308,917.00
	Total		57,

outstandin	415,818.00
Special damages	16,374,553.10
Total claimed	**73,790,371.10**

The appellant prayed for judgment against the respondent for the following:

i) Ksh 73,790,371.10

ii) General damages for breach of contract

iii) Interest on (i) and (ii) at court rates

iv) Costs of the suit.

2) The suit was determined in the following terms:

a) A consent judgment was entered on 31st January, 1992 in favour of the appellant for the sum of Kshs 50,243,818.00 together with costs and an agreed interest of Kshs 8,608,283.50.

b) The respondent was given credit of Kshs. 13,150,901.50 which the respondent had paid directly to the appellant.

c) Per the consent order, the parties also agreed that the court would hear and determine two disputed claims for the sum of Kshs 7,172,000.00 and Kshs 16,374,553.00 respectively. In a ruling delivered by Wambilyanga, J. on 29th June, 1995, these sums were awarded to the appellant plus costs and interest at court rates of 14%.

3) A dispute on the status of payments that had already been made led the respondent to file an application in the High Court dated 30th November, 2006 by way of chamber summons wherein it urged the court to refer the accounts in respect of the decretal sum for examination and determination of indebtedness, if any of the respondent to the appellant to the **Interest Rates Advisory Centre (IRAC).** Maraga, J. (as he then was) recorded an order by consent dated 6th July, 2007 in the following terms:

"1. That this Honourable Court be pleased to refer the accounts respecting the payments of decretal sum for examination and determination of indebtedness (sic), if any, of the Defendant to the Plaintiff pursuant to the Court Orders of 29th May, 1995 and 29th June, 1995 to Interest Rates Advisory Centre.

2. That the costs attendant to the examination of accounts be borne by the defendant/applicant."

4) On 24th July, 2007**, IRAC** filed a report dated 12th July 2007. In the report, **IRAC** found an overpayment of Kshs 28,440,268.14 by the respondent to the appellant and noted that even though **Certificate No. 15**, which was for the sum of Kshs 17,701,448.10 was not part of the suit, it had been debited and thus the overpayment by the respondent to the appellant had been reduced to the sum of Kshs 10, 738,820.04.

5) The **IRAC** report was adopted by the Court (Azangalala, J.) through an order of the court made on 30th July 2009. In that order, the court held as follows:

"…I see no reason why the report of Interest Rates Advisory Centre dated 12th July, 2007 and filed on 13th July, 2007 should not be adopted to the extent that I find and hold that the decretal amount herein has been paid in full. With regard to costs it is my view that this long standing litigation should come to an end. The order that commends itself to me is that each party shall bear its own costs of the application. This file is now ordered closed."

6) Undeterred, the appellant filed a suit in the High Court at Nairobi (**HCCC No 121 of 2008**) (the Nairobi Suit) vide a plaint filed on 7th March, 2008 which is the subject of this appeal claiming the sum of Kshs 19,800,642.00 together with interest at 25% per annum from March 2002 to the date of judgment, totalling Kshs 75,533,450. It was the appellant's claim that this amount was owed to it in respect of the construction works undertaken on behalf of the respondent's university campus and had been certified as due and owing in **Certificate No. 15** which had been presented to the respondent for payment, but remained unpaid. The appellant also claimed special damages due to loss of interest on the outstanding amount at 25% per annum, as well as general damages for breach of contract and interest on the entire sum at

court rates. In total, the appellant's claim was for the sum of Kshs 75,533,452.00, general damages, interest and costs.

7) The respondent denied the claim by way of a defence dated 8th April, 2008 and claimed a Set-Off and raised a Counter-claim for a refund of Kshs. 10,738,820.04. The respondent relied on the fact that the IRAC report had confirmed that the respondent had overpaid the appellant a sum of Kshs. 28,440,268.14.

8) At the hearing of the Nairobi Suit, both parties had an opportunity to present their cases by way of oral evidence. **Paresh Shivji Varsani, (Paresh-PW1)** the appellant's Chief Executive Officer (CEO) testified that the appellant undertook the construction works described in the Contract. However, at no time did the respondent honour the interim certificates as and when they were presented. He further testified that at some point, there was complete failure on the part of the respondent to honour the certificates; the appellant filed the Mombasa Suit to claim payment for certificate numbers 10, 12, 13 and 14.

9) **Paresh** further stated that once the IRAC report was applied to the Mombasa suit, it could not apply to the Nairobi suit, as it only brought to a close the issue of unpaid certificates, being **Certificate Nos. 10, 12, 13 and 14** and thus, it could not have any effect on the amount owed by the respondent to the appellant under **Certificate No. 15.** The appellant also raised various issues with respect to the IRAC report, citing various errors, and stated that the **IRAC** report was biased, having been written only after taking into account the respondent's account of events. **Paresh** conceded that the appellant did not appeal the ruling in the Mombasa suit, but referred the court to correspondence from the respondent indicating that the amount due to the appellant was Kshs 17,701,448.10, and therefore urged the court to disregard the **IRAC** report, and grant the prayers sought in the plaint.

10) **Wilson Mutai** (**Wilson - PW2**) who conducted the audits of the appellant's books for the time in question also testified on behalf of the appellant. He stated that in the course of conducting an audit, he noted that **Certificate No. 15** had remained unpaid for a period of time and adduced computations to establish how the appellant had arrived at the amount claimed in the plaint. He also cast aspersions on the IRAC report, stating that it was arrived at after a faulty computation and also because **IRAC** went beyond their terms of reference in arriving at their conclusion. In his view, **Certificate No. 15** remained unpaid and urged that the outstanding amount be paid to the appellant inclusive of interest.

11) The respondent called one witness, **Peter Kabuthi Muiruri (Peter -DW1**) who testified that the claim by the appellant did not lie as **IRAC** had found an overpayment by the respondent to the appellant of Kshs 10,738,820.04 which was adopted by Azangalala, J. in the suit. **Peter** further testified that since this decision had not been appealed against, the fact remained that the appellant received an overpayment from the respondent and cannot now claim that the respondent was indebted to it.

12) In reaching its decision, the trial court noted that the dispute before it solely revolved around whether **Certificate No. 15** had been paid. This certificate had been issued on 18th May 2001 and was for a total amount of Kshs 17,701,448.10. The trial court considered whether the decision by Azangalala J of 30th July 2009, had any effect on the Nairobi suit. First, it noted the chronology of events that led up to the adoption of the **IRAC** report as an order of the Court by Azangalala, J. on 30th July 2009. The court then found that there was definitive finding: that there was an overpayment by the respondent to the appellant in the sum of Kshs 28,440,268.14 as at 7th January 1998; and further that **Certificate No. 15** which was for the sum of Kshs 17,701,448.10 was issued three years after the overpayment by the respondent and thus would settle the outstanding certificate. Regarding the counterclaim, the trial court found that the respondent had proved its case on the counterclaim on a balance of probabilities, as

> ***"… it would be unconscionable to allow the Plaintiff to obtain the judgment herein when it has been overpaid. In addition, it cannot be equitable for the Plaintiff to retain the overpayment, an overpayment made from Public Funds 10 years before filing the suit."***

13) The end result of the Nairobi suit was that the appellant's claim was dismissed with costs and judgment entered in favour of the respondent for Kshs.10,738,820.04 with interest at Court rates from the date of filing of the counterclaim. The respondent was also awarded costs of the Counterclaim.

14) Aggrieved by this decision, the appellant filed the instant appeal in which it challenged the decision of the trial court on various fronts. These, briefly summarized, are that the court erred by: dismissing the appellant's claim which was premised solely on the non-payment of **Certificate No. 15**; failing to critically examine and tally the accountable paying document in support of the respondent's defence and counter claim; by relying on the decision of Azangalala, J. in the Mombasa Suit; and finally by misdirecting itself in finding that there was evidence to justify the award of Kshs 10,738,820.04; misunderstanding the purpose and import of the orders of Azangalala, J. of 30th July, 2009 which defined the scope of the dispute in the Mombasa Suit; and that the learned Judge was openly biased in favour of the respondent.

15) The appellant seeks the following orders:

a) That the instant appeal be allowed and the impugned judgment be set aside;

b) That judgment be entered for the appellant as prayed in the Plaint in the Nairobi Suit;

c) That the respondent's counterclaim dated 8th April, 2008 be dismissed with costs and interest; and

d) That the costs of this appeal and costs in the High Court be awarded to the appellant.

Submissions by counsel

16) The appellant expounded on these grounds in its written submissions as well as at the plenary hearing. Learned counsel, **Mr. Gitonga**

Muriuki represented the appellant. Counsel assailed the application of the orders reached in the Mombasa Suit to the Nairobi Suit. Counsel submitted that the trial court erred in relying on the report from **IRAC** yet that report was never tested before the court in Mombasa. Counsel submitted further that by the time the outstanding amounts were ascertained with respect to **Certificate No. 15,** the ruling in the Mombasa Suit had already been delivered. However, negotiations had already taken place between the parties, and the respondent, through its Deputy Vice Chancellor had already admitted that the amount indicated in **Certificate No. 15** was due and owing to the appellant. The appellant argued that **Certificate No. 15** was not part of the dispute that was adjudicated upon in the Mombasa Suit and any orders made in that suit should not have affected the Nairobi Suit.

17) With respect to the adoption of the **IRAC** report, the appellant submitted that the trial court erred as its interpretation failed to take into account the uncontested evidence that **Certificate No 15** was not part of the amounts settled under the Mombasa Suit.

18) Counsel for the appellant also took issue with the award granted to the respondent arguing that there was no evidence, either documentary or oral, to warrant a finding that there had been an overpayment by the respondent to the appellant. In particular, the appellant submitted that the evidence led on behalf of the respondent by **Peter** (DW1) was unreliable as he had come onto the scene well after the construction works had already been undertaken. Further, that the documentary evidence adduced by the respondent clearly showed that the respondent did not pay the full amount of money owed for work done by the appellant.

19) Counsel for the appellant's final submission was on the adoption of the **IRAC** report by the trial court. The appellant stated that the **IRAC** report was only meant to finalize the Mombasa suit, by determining that the decretal sum was satisfied; that in any event, the **IRAC** report was arrived at a wrong computation as it did not have any supporting documents; and that it ignored an award of interest that had been granted by the court. Based on these errors, as well as the fact that **Certificate No. 15** was never the subject of the dispute in the Mombasa Suit, the appellant further contended that it was inconceivable that the trial court would find that there had been an overpayment by the respondent and enter judgment in its favour. For these reasons, the appellant urged us to allow this appeal, set aside the judgment of the trial Court and enter judgment as prayed in the plaint, and award it costs.

20) The respondent was represented by learned counsel, **Ms. Margaret Kabuthi** who opposed the appeal by way of written submissions which she also highlighted orally. Opposing all the grounds of appeal, counsel conceded that the Mombasa suit was actually in relation to **Certificates Nos. 10, 11, 12, 13 and 14**. It was counsel's further submission that this notwithstanding, in the course of the Mombasa suit, a dispute arose between the parties, and they, by consent, opted to have the matter referred to **IRAC** for the purpose of determining the level of the respondent's indebtedness to the appellant, if any. Counsel submitted that the **IRAC** report was produced in evidence by the respondent as it had been adopted as an order of the court, and this order had never been reviewed or appealed against. Counsel contended that the **IRAC** report was therefore an order of the court to which the trial court could refer to when arriving at its determination. Counsel urged us to dismiss the appeal with costs.

Determination

21) We have considered the record of appeal, the rival submissions of the parties before us, the authorities cited and the law. This is a first appeal. In ***Musikari Kombo v Royal Media Services Limited [2018] eKLR Civil Appeal 156 of 2017*** this Court stated as follows:

> ***"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 allowances in this respect."***
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> See ***Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR (Civil Appeal No. 161 of 1999)***.

22) We have set out the evidence that was led before the trial court as well as the submissions made before us in a bid to do our duty. Having undertaken a review of all the issues raised before us under consideration, it is clear that the dispute between the parties revolves around the extent of indebtedness of the respondent to the appellant with regard to **Certificate No. 15** which was presented for payment by the appellant to the respondent in May 2001. The gist of the appellant's claim was that this certificate had remained unpaid from 2001, and it was thus entitled to this sum together with interest at the rate of 25% per annum until payment in full. The respondent's position on the other hand is that in the Mombasa suit, the High Court, by adopting the **IRAC** report, had determined that there was an overpayment by the respondent to the appellant amounting to Kshs 28,440,268.14.

23) The respondent did not dispute that **Certificate No. 15** was due and owing. It is clear that this certificate was generated for work done and that the amount certified therein was due and owing to the appellant.

24) Having found that the **Certificate No. 15** is valid, the next issue for consideration is the respondent's defence, which is that there was an overpayment on the previous certificates (Nos. 10,12,13 and 14) which entitled it to a set off and counterclaim.

25) It seems clear to us that the starting point in determining this appeal is to determine the standing of the **IRAC** report that was adopted by Azangalala, J. as an order of the Court in the Mombasa suit. The appellant would have us disregard the findings of that report, and the consequent court order, and instead focus on the fact that the amount owing in respect of **Certificate No. 15** was unpaid. From the record, the order dated 30th July, 2009 was never contested and has not been set aside, revised or varied by a review or appeal and therefore remains a valid court order to date. The **IRAC** report was presented as evidence before the trial court as evidence of the overpayment. It was at this point that the appellant raised questions as to the manner in which the report was arrived at. But even then, the manner of challenge was mainly through assertions made during the oral evidence of the appellant's witnesses, wherein they stated that they did not agree with the IRAC report. It is notable that the order of the court dated 30th July, 2009 adopting the IRAC report was not appealed against or a review sought, that would make us deem the court order inappropriate for adoption in the instant appeal. It is therefore manifestly clear that we cannot disregard the **IRAC** report nor the conclusion made by the court in the Suit.

26) The trial court stated, correctly in our view, as follows:

> ***"33. Well aware of the possible implication then I must wonder why the Plaintiff did not seek to Review or Appeal the Decision of 30th July 2009, if it thought it was an error on the part of the Court to accept the IRAC Report as being a true position of payments made by the Defendant to the Plaintiff. The Plaintiffs must live with the consequences of that Decision. It would be unconscionable to allow the Plaintiff to obtain Judgement herein when it has been overpaid. In addition, it cannot be equitable for the Plaintiff to retain the overpayment, an overpayment made from Public Funds 10 years before the filing of this suit."***

27) From the record, **Certificate No. 15** arose from work done under the Contract for construction works, and it was in the course of satisfying other certificates under that contract that the overpayment was made. When a dispute arose as to how much money had already been paid to the appellant, the parties agreed, by consent, to refer the matter for accounting purposes to **IRAC**. Both parties were heard on the adoption of the report generated by **IRAC** whereupon Azangalala, J. adopted the order as an order of the court, and then proceeded to order the file closed.

28) This meant that the question of how much money was owed by the respondent to the appellant as indicated in the **IRAC** report and served to resolve the dispute which had arisen between the parties in respect of **Certificate Nos. 10-14**. The IRAC report indicated that the respondent had made an overpayment to the appellant amounting to Kshs 10,738,820.04. This was the amount claimed by the respondent in its Counter-Claim in the Nairobi Suit.

29) Having so found, it is manifestly clear to us that the appellant's claim is bereft of merit. The upshot is that this appeal has no merit and is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 20th day of November, 2020

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

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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