IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 3 OF 2018

BETWEEN

ALIFF CONSTRUCTION COMPANT LIMITED.....APPELLANT

AND

COUNTY GOVERNMENT OF TANA RIVER.....1ST RESPONDENT

JUMTECH LIMITED.....2ND RESPONDENT

(An appeal from the Judgment of the High Court of Kenya

at Garsen (Ongeri, J.)dated 2nd November, 2017

in

***H.C.C.C No. 2 of 2015*)**

****

JUDGMENT OF THE COURT

1. The dispute herein arises from a construction contract dated 4th August, 2014 between the 1st respondent, as the employer and the appellant as the contractor. Following a successful bid by the appellant to construct a footbridge at Gamba-Onkolde, the appellant and the 1st respondent entered into the abovementioned contract for an agreed total cost of Kshs. 11,762,395.40. Subsequently, the appellant was given possession of the site to commence works.

2. It appears that the appellant noticed there was some variance with respect to measurements as set out in the design and on the ground. Towards that end, it informed the 1st respondent who gave it the go ahead to make the necessary adjustments. Nonetheless, the project faced other challenges like the perennial rains which caused flooding of the site and damage of materials.

3. On 16th February, 2015 the 1st respondent directed the appellant to stop construction works pending evaluation and re-designing of the project. According to the appellant, by then it had carried out 90% of the works. Nonetheless, it stopped the works and waited for further instructions. The 1st respondent also directed the appellant to pay a sum of Kshs. 920,000 towards the evaluation and re-designing which it did through the personal account of the 1st respondent's employee, that is, the County engineer.

4. Later on, it noticed third parties interfering with the construction site and it took the same as an indication on the 1st respondent's part to terminate and/or breach the construction contract. As a result, the appellant filed a suit in the High Court seeking *inter alia*, a sum of Kshs.21,970,494 allegedly being the amount of unpaid extra works and Kshs.920,000 paid to the 1st respondent's officer.

5. Opposing the suit, the 1st respondent in its statement of defence, averred that the construction contract was clear on the agreed contractual sum. In any event, the 1st respondent had already paid the appellant the contract sum plus Kshs.5,210,693 for extra works. The 1st respondent also averred that the appellant was not being candid since after the evaluation and re-designing of the project, a fresh tendering process was done in which the appellant participated.

6. Eventually, the appellant and 1st respondent recorded a consent on 1st March, 2007 to the effect that:

> ***"Order By Consent***
>
> ***i. The amount owed to the plaintiff by the Defendant in respect of work done and approved by the 1st defendant regarding the contract dated 4/8/2014 and extension works thereof is Kshs.2,216,172.94.***
>
> ***ii. The 1st defendant to pay the sum stated in paragraph 1 (above) to the Plaintiff within 30 days from this day.***
>
> ***iii. The parties to litigate on the balance to the Plaintiff's claim in accordance with the issues to be framed and filed in court by the parties within 45days of this day.***
>
> ***iv. …"***

7. When the matter came up for hearing before the trial court, there was no appearance for the 1st respondent. Be that as it may, the matter proceeded with the appellant giving evidence through its director, Isaack Mohamed Abdulrahman. In his evidence, Isaack reiterated the appellant's position. He added that the appellant remained put on the site until it handed over possession on 11th May, 2017. By his own assessment, which he set out in a schedule produced in court, the total outstanding amount of extra works at the time he was giving evidence was Kshs.38,187,693 and he prayed for the same.

8. Upon addressing her mind on the evidence, the learned Judge (Ongeri, J.) in a judgment dated 2nd November, 2017 found that the appellant had failed to prove its claim and dismissed the same. It is that decision that the appellant has challenged in this appeal. In a nutshell, the appellant faults the learned Judge for what it believes was canvassing of the respondent's case; and finding that the appellant had not established its case despite the glaring evidence to the contrary.

9. At the plenary hearing, learned counsel, Mr. Wanga and Mr. Kibanga appeared for the appellant and 1st respondent respectively. Counsel relied on the written submissions filed on behalf of the parties and made oral highlights as well.

10. In the appellant's opinion, the absence of the respondent at the hearing meant that its case, as adduced by its sole witness, was unchallenged and/or uncontroverted. In that regard, we were referred to persuasive decisions of the High Court in ***Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited*** **[2009] eKLR &** ***Trust Bank Limited vs. Paramount Universal Bank Limited & 2 others*** **[2009] eKLR**. Consequently, the appellant argued that the learned Judge was wrong to dismiss its claim.

11. It was the appellant's contention that the learned Judge had misconstrued the evidence placed before the trial court leading to the erroneous perception that the appellant's claim was for Kshs.21million as opposed to 38 million. Expounding further, he submitted that the contract sum of Kshs.11,762,395 had to be revised upwards taking into account the adjustment made to the construction works due to the damage caused by perennial floods.

12. Besides, the payment sought by the appellant from the 1st respondent was in the nature of special damages which had been specifically pleaded and proved through the documentary evidence on record. To buttress that line of argument this Court's decision in ***National Social Security Fund Board of Trustees vs. Sifa International Limited*** **[2016] eKLR** was cited. We urged to allow the appeal on the aforementioned grounds.

13. On his part, Mr. Kibanga, submitted that the learned Judge's decision was made within the confines of the law. He reiterated that the appellant had failed to prove that the parties had agreed to payment of any amount over the contractual sum or in the alternative, that it was entitled to the amount sought. Furthermore, in seeking a sum of over Kshs.38,000,000 for alleged extra works carried out, the appellant had departed from its own pleadings which sought an amount of Kshs.21,9710,494.

14. Counsel also submitted that notwithstanding the fact that the documents produced at the trial by the appellant were not challenged the learned Judge was still obligated to evaluate the evidence before her. Conversely, the appellant had not proved the special damages it sought to the required standard. All in all, save for inadvertently failing to appear for the hearing, the 1st respondent had participated in the proceedings and vehemently opposed the appellant's claim.

15. We have considered the record, submissions by counsel and the law. This being a first appeal our jurisdiction was well captured in ***Kenya Ports Authority vs. Kuston (Kenya) Limited*** **[2009] 2 EA 212** as follows:

> ***"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 due 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."***

16. Looking at the gist of the appellant's case, it is not in dispute that it was anchored on a contractual relationship which existed between itself and the 1st respondent. Further and central to that relationship was the amount of unpaid extra work, if any, which was due to the appellant by virtue of the said relationship. Consequently, as was rightly appreciated by the learned Judge, the appellant had the onus of establishing that not only was its claim based on the contract of works but also that the same was due and owing.

17. As a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the

affirmative of the issue. See ***Sections 107 & 108*** of the ***Evidence Act***. In other words, the well-known aphorism, '*he who asserts must prove.'* See ***Jennifer Nyambura Kamau vs. Humphrey Mbaka Nandi*** **[2013] e KLR**.

18. It is instructive to note that in as much as the 1st respondent did not participate in the hearing, the appellant was still required to meet the burden of proof. Did the appellant discharge the burden? We do not think so. Firstly, the appellant's director did admit in his evidence that the contractual sum had already been paid by the 1st respondent. What the appellant was seeking was unpaid extra work. Our perusal of the contract in question does not reveal any such entitlement. As such, we concur with the following sentiments of the learned Judge:

> ***"I find that the plaintiff admitted in the evidence in court that he was paid Kshs.14million which is more than the 11,762,395.40 agreed on the initial contract. It is not clear on what basis the extra money was paid.***
>
> ***It is the duty of the plaintiff to prove his case on a balance of probabilities. Although the plaintiff produced receipts and correspondences between the plaintiff company and the 1st defendant, the plaintiff did not prove the extra work done was worth the amount he is now claiming.***
>
> ***I find that the plaintiff has also failed to prove that the defendant agreed to pay for the extra work done***
>
> **…**
>
> ***It is the duty of the plaintiff to prove that he is entitled to the amounts he is claiming from the defendant and that the same is based on a contractual relationship between the parties. There is no such evidence in this case."***

19. Secondly, like the learned Judge, we find that the appellant's claim was in the nature of special damages which should not only be pleaded but also strictly proved. The mere production of receipts without tying or connecting them to a claim of special damages is not enough. Proof of special damages must be clear. In this case, the appellant did produce several documents the bulk of which related to salary vouchers and car hire payments. How those documents related to unpaid extra works, we do not know.

20. Furthermore, the schedules prepared by the appellant's director setting out the amount of money owing cannot, in our minds, be sufficient to strictly prove the claim. There is no independent evidence with regard to the same. In our view, the claim of special damages was not established. Our positon is fortified by the case of ***Kenya Bus Services & Another vs. Fredrick Mayende*** **[1991] 2 KAR 232** wherein this Court expressed itself in the following manner:

> ***" … special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard, C.J. in Bonham Carter vs. Hyde Park Hotel Ltd. [1984] 64 T.R.L 177 thus;***
>
> ***"Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down particulars and, so to speak, throw them at the head of the court saying, 'This is what I have lost, I ask you to give me these damages.' they have to prove it."***

21. In the end, for the reasons stated herein above, we find that the appeal lacks merit and is hereby dismissed with costs to the 1st respondent.

Dated and delivered at Mombasa this 4th day of April, 2019.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR