



IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPEAL NO. 12 OF 2017

BETWEEN

HEZEKIAH ADALA T/A

HEZEKIAH ENGINEERING SERVICES.....APPELLANT

AND

TANA TEACHERS SACCO SOCIETY LTD.....RESPONDENT

*(An appeal from the judgment of the High Court of Kenya at Mombasa*

*(Mwangi, J.) dated 14<sup>th</sup> December, 2016*

in

H.C.C.C. No. 120 of 2012)

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**JUDGMENT OF THE COURT**

1. The appellant successfully bid for the respondent's Tender No. RB/FOBO/TTS/04/2008 for the rehabilitation and refurbishment of its FOSA offices. A contract to that effect was executed by the parties on 27<sup>th</sup> December, 2008 indicating the contract price as Kshs.7,856,490. According to the appellant, he noticed while in the process of executing the contract, that renovations could not be undertaken in the current state of the respondent's building and best option would be to demolish the entire building and put up a new.

2. Since the bill of quantities initially agreed upon could not cater for such works, the appellant wrote to the respondent highlighting the foregoing. The respondent vide a letter dated 17<sup>th</sup> February, 2009 agreed to the variation of the contract in the terms proposed by the respondent. The letter in question read in part as follows:-

**“RE: ONGOING CONSTRUCTION/REHABILITATION OF FOSA/BOSA OFFICES**

*We acknowledge receipt of your letter dated 7<sup>th</sup> February, 2009 on the above.*

*It is true that there were some items of building elements that were over looked in the initial inspection and preparation of bills of quantities of the building as indicated in your letter.*

*You are hereby instructed to proceed with the execution of the said works on the same regarding the floors and the walling elements as per your proposals in your letter referred above.*

*We have arranged to meet with our appointed consultant where we shall review, agree and adjust the bills of quantities accordingly and communicate to you.*

*In the meantime, we are optimistic that your office will do everything humanly possible to ensure the works is completed within the time scheduled.”*

3. It is pursuant to that letter that the appellant commenced the varied works and prepared a new bill of quantities for the cumulative sum of Kshs.16,185,543.80. After completing the construction works the appellant demanded payment of the outstanding amount but the respondent refused and/or neglected to honour the same despite numerous requests. The appellant went as far as seeking the assistance of the District Co-operative Officer who by a letter dated 18<sup>th</sup> October, 2010 directed the respondent to finalize the payments. However, the respondent did not oblige causing the appellant to file a suit seeking a total sum of Kshs. 7,004,163.80. That sum was made of Kshs. 4,621,178.55 being the balance of the principal sum plus interest thereon which stood at Kshs. 2,818,620 as 30<sup>th</sup> May, 2012. The interest accrued at the rate of 2% per month.

4. In its statement of defence, the respondent averred it had never agreed to any variation of the contract or interest on any outstanding amount. In point of fact the respondent had paid the appellant  $\frac{3}{4}$  of the contract price. It was the appellant who had breached the terms of the contract by failing to complete the works agreed upon. Therefore, the appellant could not demand for payment of the balance until he honoured the terms of the contract.

5. At the hearing the appellant gave evidence and called no other witness.. He acknowledged receiving the respondent's letter dated 23<sup>rd</sup> July, 2010 setting out the incomplete works. He testified that he had substantially dealt with concerns raised therein. However, he did not know what kind of fire extinguishers the respondent desired and further consultation was necessary. He also admitted that he had not put up metal grills on the building. The reason being that the respondent had forcefully taken over the site before he could do so. In any event, there was a defect liability clause in the contract that allowed the respondent to retain 5% of the contract price as security for any uncompleted works or defects. In his view, the respondent ought to have retained the sum of Kshs. 434,500. being the value of the works to be rectified instead of withholding the entire balance due to him.

6. Upon weighing the evidence before her, the learned Judge (Mwangi, J.) by a judgment dated 14<sup>th</sup> December, 2016 dismissed the appellant's suit. In doing so, she held that the appellant had not proved that the contract had been varied in the terms alluded to and further that the appellant had not completed the project. In conclusion she expressed:-

***“It is apparent that the plaintiff did not complete the project he undertook under the contract in issue. This led to breach of contract. The least that the plaintiff could have done was to undertake a valuation of the work done and claim the amount of money outstanding from the work he performed under the form of agreement dated 27<sup>th</sup> December, 2008. It would be unlawful for this court to make an award on unquantified work since it is apparent that the plaintiff failed to meet part of his obligations. The instructions issued by the District Co-operative Officer Tana River for payment to be done cannot come to the aid of the plaintiff. Much as the said officer stated that the defendant could retain 5% of the contract price, this would have been possible if the work undertaken had been quantified and the work outstanding established to be equivalent to 5% of the project value.”***

7. It is that decision that is the subject of the appeal before us. The appellant's complaint is that the learned Judge erred in law and fact by-

***i. Dismissing the appellant's case which was not controverted.***

***ii. Holding that there was no evidence of variation of the contract hence disregarding the respondent's letter dated 7<sup>th</sup> February, 2009.***

8. Learned counsel, Mr. Wafula appeared for the appellant while learned counsel, Mr. Kongere appeared for the respondent. Both counsel relied on the written submissions filed on behalf of the respective parties.

9. It was the appellant's case that it was common ground that the parties had entered into a contract in regard to the construction of the respondent's offices. The respondent had pleaded in its statement of defence that it had paid  $\frac{3}{4}$  of the contract price. The appellant asked us to take that averment as an admission of the variation of the contract. This is because the appellant had testified that the respondent had so far paid him Kshs.12,000,000 out of the varied contract price of Kshs. 16,185,543.80 which translates to  $\frac{3}{4}$  of the contract price.

10. Making reference to this Court's decision in ***Independent Electoral & Boundaries Commission & Another vs. Steven Mutinda Mule & 3 Others [2014] eKLR***, it was submitted that the respondent was bound by its pleadings and could not turn around to dispute variation of the contract. Moreover, the respondent's letter dated 17<sup>th</sup> February, 2009 bore witness to the variation. In the end, the appellant's evidence was not challenged by the respondent who failed to attend the trial.

11. It was further contended that the respondent had not proved that the appellant had not completed the project. In any event, it was the respondent who forcefully took over the suit before the official handing over was done. It is on those grounds that we were urged to allow the appeal.

12. On its part, the respondent submitted that the fact that it was not present during the hearing did not in any way water down the burden on the appellant to establish his case on a balance of probability. There was no evidence tendered to prove that the contract had been varied as suggested by the appellant. Furthermore, the evidence on record indicated that the appellant had not completed the project. It was argued that the learned Judge's decision could not be faulted.

13. We have reappraised the record of appeal under ***Rule 29 (1) of the Court of Appeal Rules*** in the manner of a retrial in order to arrive at our own conclusions in the matter. As always, we shall not lightly differ with the findings of fact made by the trial Court, which had the added advantage of seeing and hearing the witnesses, but will not hesitate to do so if, in our assessment, the findings were made without any evidential basis or through an error in principle.

14. A close reading of the letter dated 17<sup>th</sup> February, 2009, in our view, does not indicate variation of the contract in the terms alluded to by the appellant. The respondent while acknowledging in that letter that there could have been items which had been overlooked indicates in clear terms that it would consult its consultant and inform the appellant of its decision. Accordingly, we agree with the following sentiments of the learned Judge:-

**“This court however notes that none of the documents produced by the plaintiff shows that the issue of the variation of contract was discussed and approved by the defendant’s Tender Committee after which the defendant issued the plaintiff with a letter notifying him of the said approval and the costs of the said variation of contract. A very important aspect of contract variation was therefore missing from the plaintiff’s evidence.”**

15. In addition, the respondent having been registered under the *Co-operative Societies Act* was within the definition of a public entity as set out under *Section 2* of the *Public Procurement and Disposal Act (PPDA), 2005 (repealed)*. As such, it was subject to the provisions of that *Act* and the learned Judge was right in holding that *Section 47* thereof was applicable. It stipulated:-

**“An amendment to a contract resulting from the use of open tendering or an alternative procurement procedure under part VI is effective only if-**

**a) The amendment has been approved in writing by the tender committee of the procuring entity; and**

**b) Any contract variations are based on the prescribed price or quantity variations for goods, works and services.”**

16. Equally, we find that the appellant by his own admission had not completed the contract works and could not be able to quantify the value of the work it had done. Consequently, we, like the learned Judge, find that the appellant had not established its case on a balance of probabilities.

17. Based on the foregoing, we find that the appeal lacks merit and is hereby dismissed with costs.

**Dated and delivered at Mombasa this 15<sup>th</sup> day of February 2018.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**M. K. KOOME**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**