



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, OKWENGU & G.B.M. KARIUKI, JJ.A)

CIVIL APPEAL NO. 271 OF 2010

BETWEEN

CITY FINANCE BANK LIMITED.....APPELLANT

AND

BETH MUTHONI NJAU.....1ST RESPONDENT

EDDIE NJAU.....2ND RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (J. Khaminwa, J.) delivered on 11th August, 2010

in

H.C.C.C. No. 107 of 2008)

JUDGMENT OF THE COURT

[1.] This is an appeal against the judgment and decree of the High Court (**Khaminwa, J.**) allowing the respondents' suit and entering judgment for the respondents against the appellant for Shs. 66 million with interest and costs.

[2.] The respondents are the legal representatives of **Jeremy Kambogo Njau** (deceased) who died after giving evidence but before the determination of the suit. The deceased pleaded in the suit, amongst other things, that by an agreement dated 28th January 2002, the appellant commissioned him to prepare and negotiate with engineer's representative, the Government of Kenya through the office of the President and other stakeholders for payment of the appellant's claim for Shs. 626 million, that the appellant agreed to pay fees at 40% of the total claim payable when the cheque is released and cleared by the appellant, that the deceased successfully negotiated for an agreement whereby the appellant was to be paid Shs. 466,764,461/80; that the debtor commenced payments; that the appellant received a total of Shs. 210 million in four installments of Shs. 50 million, 70 million, 80 million, and 10 million respectively, that the deceased was entitled to a commission of Shs. 84 million from the Shs. 210 million; that the appellant paid only Shs. 18 million, leaving a balance of Kshs.66 million which the deceased claimed.

[3.] The appellant in its amended Defence, set off or counter-claim denied the agreement and averred in

the alternative that any contract that appellant may prove to have existed was illegal, *ultra vires* the appellants articles, against public policy and unenforceable. The particulars of illegality pleaded against the deceased as plaintiff in the suit were that:

- (i) The alleged contract was corruptly procured by the plaintiff,
- (ii) The alleged contract was procured without any lawful authority of the defendants Board of Directors.
- (iii) The plaintiff not being a lawyer/advocate or an authorised auctioneer had no capacity to enter into enforceable contract for purported recovery of the debts.
- (iv) The alleged contract was entered into for an illegal and or corrupt purposes.
- (v) The plaintiff by entering into an alleged contract was peddling illegal government influence and was not thereby rendering any lawful service or consultancy.
- (iv) The plaintiff supposedly an engineer was not rendering any services as an engineer.

[4.] The appellant pleaded in the alternative in support of set-off or counter-claim that, even if there was such a contract, it had lent Shs. 42 million to the plaintiff being advance commission; that it only received a deposit of Shs. 50 million pursuant to the contract for which the respondent would have been entitled to Shs. 20 million being commission and counter-claimed for the difference of Shs. 22 million or a set-off of Shs. 22 million from any sum found payable to the deceased.

[5.] The deceased filed a reply to amended defence and counter-claim/set-off denying allegations including the allegation that he was advanced Shs. 42 million. The deceased gave evidence at the trial in support of the claim and produced various documents including the agreement dated 28th January 2002 which was in form of a letter from the appellant and was addressed to the deceased in the following terms:

“RE: COMMISSIONING OF CONSULTANCY SERVICES

We hereby confirm that following the paper presented to the Board on 21st November 2001 we the City Finance Bank Limited have commissioned Jeremy K. Njau as our consultant to prepare and negotiate with the Engineers representatives, the Government through the office of the President and all other stakeholders for the payment of our claim for Kshs. 626 million (Kshs. Six Hundred Twenty Six Million) being cost of financing the drought recovery programme in North Eastern Province through the contractor G.M. General Contractors.

The claim arose out of wrongful termination of the contract by the employer.

The role of our consultant will be to carry out the assignment professionally as possible to enable Bank recovery all the monies owed to them.

It is hereby agreed that the fee will be 40% of the total claim when the cheque is released by client and cleared by the Bank as earlier agreed. However no commission will be payable in the unlikely event of the money not being paid to the bank under the claim.

Signed by the clients:

- 1. S. V. Kamani (signed)***
- 2. S. K. Wakada (signed)***

Signed by Consultant:

1. Jeremy K. Njau (signed)”

As a further letter dated 10th January 2002 shows, S. V. Kamani and S. K. Wakada who signed the letter of 28th January, 2002 were the Managing Director and General Manager respectively of the appellant.

[6.] The appellant called two witnesses at the trial, Abraham Muriithi Kimani and Mary Ciamwari Mwaniki. The first witness was appointed General Manager of the appellant on 20th April 2009. He gave evidence based on the records held at the bank relating to the transaction. According to his evidence, there was no Board resolution to appoint the deceased; there was no evidence to show work done by the deceased; Shs. 42,240,000/- was credited to the account of the deceased and the bank received shs. 130 million only. The second witness was the Company Secretary of the bank from 2007. She testified that the bank did not pass a resolution to approve the proposal to appoint the deceased and pay him 40% commission.

[7.] The learned judge considered the evidence and made a finding partly thus:

“Upon examination of this case, it is clear that the contract was not illegal. It is to be seen that there was no illegality. The amount was a huge sum but so is the amount received by the bank. It appears to me it was a genuine contract. The only problem is that the Bank seems to have been greedy otherwise why the Defendant two directors sign the letter (sic). The plaintiff was an engineer and therefore a professional. Upon considering the defendant’s case he did benefit and no evidence has been led on the counter-claim. This case has not been a claim between the plaintiff against the Kenya Government or against G.M. Contractors. It is a claim the defendant as agreed to pay the plaintiff upon the performance of a certain job. (sic)”

[8.] The appeal is generally against the findings that there was a genuine contract, that the contract was not illegal, that the appellant received Shs. 210 million and that the counter-claim was not proved.

[9.] The evidence both oral and documentary established the following facts.

On 18th October, 1994 the office of President awarded a contract for improvement of sections of Tarbaj-Elwak Road to GM Contractors whose directors were Julius Maina and Grace Maina. The contract was for a sum of Shs. 150,736, 804/88. The contract period was 12 months from 13th December 1994 to 13th December, 1995. The contract was to be supervised by Chief Engineer (Roads) of the Ministry of Public Works and Housing who in turn appointed M/s **Abdul Mullick Associates** to supervise the project on behalf of Ministry of Public Works as the resident engineer. However, the contract was terminated by the employer in September 1996 due to default by contractors in completing the project. The contractor challenged the employer’s actions. Several consultations were held after which the dispute was referred to the Attorney General for a legal opinion.

[10.] In January 1997, the Attorney General advised that the matter be settled amicably. Thereafter the contractor submitted a claim for Shs. 539,882,250/-. On 14th September 2001, the contractor gave a power of Attorney to Jeremy K. Njau (deceased) to deal with the claim including demanding, receiving and compromising any claim.

[11.] The contractor had borrowed Shs. 220 million from Kenya Finance Bank (appellant) to finance the project. The loan account had become dormant and the balance outstanding as at 31st December 2000 was Shs. 744 million. As the appellant had an interest in having the loan recovered, it entered into the impugned contract with Jeremy K. Njau on 28th January, 2002. By letters dated 6th March 2000 and 2nd August 2001 the contractor had irrevocably instructed the office of the President to make payments in respect of the claim to the bank to settle the outstanding loan. The deceased negotiated the claim and by

letter dated 2nd April 2002, the office of the President agreed to pay Shs. 466,764,461/80 to the contractor as full and final settlement of his termination claim. The first installment of Shs. 50 million was paid by the office of the President on or about 6th April 2002. On 29th April 2002, the contractor revoked the power of Attorney donated to the deceased on 14th September 2001. By a subsequent letter, the contractor instructed the office of the President to pay Shs. 216,764,461/80 in addition to Shs. 50 million to the bank and to pay the balance of Shs. 200 million to his lawyers.

[12.] Although the appellant denied in his pleadings the existence of a contract as pleaded, there was ample oral and documentary evidence that the agreement dated 28th January, 2001 was entered into between the deceased and the appellant. The issue of the existence of the contract has not been pursued in this appeal. The issue framed in this appeal by the appellant is whether the contract was illegal for being a corrupt activity. It has been submitted by Mr. Mwangi, learned counsel for the appellant that the issue of illegality is the main ground of appeal.

[13.] On the question whether the contract was illegal for not having been approved by the resolution of the Board of Directors of the appellant, there was evidence that a paper was presented to the Board on 21st November, 2001 regarding the payment of 40% commission to the deceased. The payment of the commission was justified by the Managing Director and the Assistant General Manager. There was no evidence by the two defence witnesses that the recommendation was rejected. It was admitted by the appellant that some commission was in fact paid to the deceased thereby indicating that the contract was ratified. Furthermore, the passing of the resolution was an internal matter and the deceased was entitled to assume that a resolution authorising the payment of the commission had been passed.

[14.] The appellant's counsel has made extensive submissions in order to show that the contract was illegal. The learned counsel referred to documents particularly the contents of the paper presented to the Board on 21st November 2001 and the oral evidence of the deceased and submitted that the deceased did not do any work as a professional engineer; that the contract was to corruptly procure funds from the office of the President and that the deceased was a mere courier of illicit funds.

[15.] On the other hand, Mr. Kandere, learned counsel for the respondents submitted, *inter alia*, that the contract required the deceased to act professionally; that fraud or illegality was not proved to the required degree and that if the contract was illegal the appellant could not have made part payment. As the learned judge implicitly observed, the suit was for enforcement of the contract between the deceased and the appellant which was distinct from the contract between GM Contractors and the Office of the President. By the contract between the appellant and the deceased, the deceased was to prepare and negotiate the contractor's claim of Shs. 626 million arising from wrongful termination of the contract to enable the bank recover its loan to the contractor.

[16.] The submissions that he deceased did not prove the work that he did is not entirely correct. The deceased testified that he had to establish whether the contractor had done some work, that he hired engineers and took them to the site. He also testified that the Government hired engineers and that the appellant also hired an engineer. According to him, most contractors do not know how to negotiate an amicable settlement. He denied giving any money corruptly and stated that he had no relationship with people in the office of the President.

[17.] The correspondence shows that after the contractor made his claim, the Ministry of Public Works instructed their agent, M/s Abdul Mullick and Associates, to evaluate the claim and a legal opinion was sought from the Attorney General who recommended an amicable resolution of the dispute in terms of the contract. The correspondence also shows that the Technical Evaluation Committee of the Ministry of Public Works was instructed to prepare an evaluation of the contractor's claim for use in the amicable settlement.

[18.] Finally, the National Project Coordinator in the office of the President by a letter dated 2nd April 2002 wrote to the Permanent Secretary, Ministry of Roads and Public Works partly as follows:

“Kindly refer to your letter of 13th November 2001 through which you forwarded two copies of the contractor’s termination claim as submitted by the contractor and as analysed by both the consultant – M/s Abdul Mullick Associates and a Technical Evaluation Committee in the Ministry of Roads and Public Works.

This is to let you know that the Employer has no objection to the committee’s recommendation that the contractor be offered Kshs. 466,764,461/80 as full and final settlement of his termination claim and is willing to make payment arrangements if the same is accepted by the contractor.

You may thereof make the offer to the contractor and inform us of their position accordingly.”

[19.] It is apparent that the settlement of the contractor’s claim in which the deceased was involved was reached after technical evaluation by the various professionals involved and the settlement sum ultimately approved by the Office of the President. It is also apparent that deceased used other professionals for the technical evaluation of the contractor’s claim and his professional skills to negotiate the claim. The sum awarded to the contractor was not directly an issue before us and we cannot pass judgment on the decision of the professionals involved in the determination of the quantum of the claim. The appellant admits that it received Shs. 130 million out of the award. In the premises, the contention by the appellant that the contract was to corruptly procure funds from the office of the President is a mere suspicion which was not supported by any concrete evidence. The ground that the contract was unenforceable for illegality has no merit.

[20.] The other contentious issue relates to the amount of money that was paid to the appellant. The appellant claimed in its defence that it received only Shs. 50 million. However, the appellant’s first witness admitted that Shs. 130 million was received. The payment of Shs. 50 million, 70 million and 10 million pleaded by the deceased was supported by documents. That makes a total receipt of Shs. 130 million which was admitted by the appellant. In respect of Shs. 80 million, the deceased did not show the date the money was paid nor produce payment documents.

[21.] The deceased relied on the appellant’s letter dated 10th January 2003 which stated that the outstanding balance was Shs. 256,764,461/80. If the outstanding amount is subtracted from the sum awarded of shs. 466,764,461/80, then, the amount received by the appellant would be Shs. 210 million pleaded as received by the deceased.

[22.] The deceased had instructed the Office of the President to pay the proceeds of the entire award to the appellant but changed the instructions by a letter dated April 2002 which would show that, in addition to Shs. 50 million already paid to the appellant, the appellant would be paid Shs. 216,764,461/80 bringing the total to Shs. 266,746,461/80. By the time the letter of 10th January 2003 was written, the appellant had not received the entire amount of Shs. 266,764,461/80.

[23.] Furthermore, the payment vouchers from the Office of the President, which were the accounting records showing the basis on which payment cheques for Shs. 50 million, 70 million and 10 million were issued indicated the previous payments already made. For instance, the payment voucher shows that before the payment of Kshs. 70 million was processed, a total of Shs. 130 million had already been paid to the appellant for the account of the contractor.

[24.] Moreover, the payment voucher for the last payment of Shs.10 million shows that a total of Shs. 200 million had already been paid before the cheque of Shs.10 million was issued. We would infer from the voucher that the payment of shs.10 million brought the total amount already paid to Shs. 210 million. Lastly, Julius Maina Mwangi, a director of GM Contractors, admitted by a letter dated 29th January, 2003 that the Office of the President had already paid Shs. 210 million to the appellant in reduction of the loan balance.

[25.] We have no doubt from the foregoing that the deceased proved on a balance of probabilities that the appellant had received Shs. 210 million and the deceased was thus entitled to a contractual commission of

Shs. 84 million. Having admitted that he had already received Shs. 18 million, the claim for a balance of 66 million was proved.

[26.] If one Cyrus Jirongo was paid Shs. 80 million by the Office of the President, as alleged but not proved, it must have been in addition to the Shs. 210 million paid to the appellant. Nor would the revocation of the power of Attorney on 29th April 2002 affect the contract entered into on 28th January, 2002 since the deceased had successfully negotiated the claim by 2nd April 2002 and was entitled to commission as and when any cheque towards the settlement of the claim was released and cleared.

[27.] Turning to the counter-claim or set-off, the deceased insisted that he was paid Shs. 18 million and denied the contents of the bank statement of his account.

On the other hand, the appellant's first witness relied on the bank statement and insisted that the appellant credited Shs. 42,240,000/- to the deceased's bank account which sum is partly the basis of the counter-claim. The learned Judge considered the statement and made a finding that the statement alone could not be conclusive evidence of any payment as alleged and that it was not just to deduct the amount allegedly paid to the deceased.

[28.] The statement of the bank account of the deceased between 3rd May 2002 and 4th September 2013 held at the appellant's bank had ten credit entries. Two of them were for Shs. 40,000 and 200,000/- respectively – total Shs. 240,000/-. The source was cash credit and report/office of the President respectively. The other eight credits for a total sum of Shs. 42 million were for large sums of money ranging from 1,000,000 to 18,000,000 as payment for consultants fees or payment for professional fees. It is submitted that those credits coincided with the time the claims were paid by the Office of the President and that the money was withdrawn soon after. The appellant's witnesses did not say that the Shs. 42 million was paid in one lumpsum, nor did the deceased say that Shs. 18 million paid to him was paid in one lump sum.

[29.] The learned Judge relied on section 37 of the Evidence Act which provides that entries in books of accounts regularly kept in the course of business are admissible evidence but that such statements alone are not sufficient evidence to charge any person with liability. The applicable law should have been section 176 of the Evidence Act which deals specifically with evidence relating to bank books. By section 176 as read with section 177(1)(d), a certified true copy of an entry in a bank book, is in all proceedings, *prima facie* evidence of such entry and of the matters, transactions and accounts therein recorded.

The respondent's counsel in his written submissions, like the learned Judge, invoked section 37 of the Evidence Act and submitted that the burden of proof was on the appellant.

[30.] It was a mis-direction in law for the learned Judge to have relied on section 37 thereby shifting the burden of proof to the appellant. In view of the provisions of sections 176 and 177 aforesaid, the burden of proof rested on the deceased to explain the entries in the bank statements relating to payment of professional fees which he did not discharge. The payments in the bank statements related to consultancy fees, the total of which is the amount of Shs. 42 million that the appellant claimed to have paid the deceased in advance and which also reflected the Shs.18 million which the deceased admitted to have been paid.

[31.] We are satisfied that the appellant proved on a balance of probabilities that it had made previous payment in pursuance of the contract in the sum of Shs.42 million. As the sum of Shs.42 million includes the sum of Shs.18million, for which credit has already been given to the appellant, the appellant was entitled to a set-off of Shs. 42 million less Shs.18 million – that is for a total of Shs. 24 million. The sum claimed as set off is Shs.22 million which is an apparent error in view of the evidence. In the interest of justice, we correct the sum to read Shs. 24 million.

[32.] Consequently, the appeal against the judgment allowing the respondents' claim is dismissed. The appeal against the judgment dismissing the set-off is allowed. In the result, the judgment of Shs. 66 million in favour of the deceased is set aside and substituted for a judgment of Shs. 66 million less set-off

of Shs. 24 million (net Shs. 42 million). As the appeal has partly succeeded, the respondents are entitled to half the costs of the suit and of the appeal.

[33.] In summary therefore, judgment is entered for the respondent for a net of Shs.42 million with half the costs of the appeal and half of the costs of the suit.

Those are the orders of this Court.

Dated and delivered at Nairobi this 16th day of June, 2017.

E. M. GITHINJI

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

G.B.M. KARIUKI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR