IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MUSINGA & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 170 OF 2013

BETWEEN

FEBA RADIO (KENYA) LIMITED T/A FEBA RADIO...APPELLANT

VERSUS

IKIYU ENTERPRISES LIMITED.....RESPONDENT

(An appeal arising from the Judgment and Decree of the High

Court of Kenya at Nairobi (Khaminwa, J.) dated 2nd July, 2009

in

H.C.C.C. No. 640 of 2005 (O.S.)

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JUDGMENT OF THE COURT

BACKGROUND

1. On 30th January, 2001 the respondent herein filed a suit in the High Court of Kenya at Nairobi vide an Originating Summons dated 29th January, 2001 brought under **Order 36 rule 5** of the **Civil Procedure Rules** and **Section 3A** of the of the **Civil Procedure Act,** arising from a dispute of a construction contract, for the determination and declaration of the following questions, *inter alia*:

> *1.* ***A declaration that upon the true construction of the letter dated 5th June 2000, the 1999 Agreement published by the Architectural Association of Kenya and the Joint Building Council, (the 1999 Agreement) is the form of contract applicable between the parties herein and therefore the said parties are bound by the terms and conditions therein.***
>
> *2.* ***Whether the letters dated 15th September 2000, 21st September 2000, 26thSeptember 2000 and 29th September 2000 constitute a dispute as per Clause 45 of the 1999 Agreement.***

2. The application was supported by an affidavit sworn by **MAINGI KUBAI**, a director of **M/S Ikiyu Enterprises Ltd**, the respondent herein.

3. The gist of the suit is that on 23rd May, 2000 the appellant invited the respondent to submit a quotation for proposed alteration and extension of its premises on Kayahwe Road in Nairobi. On the same day the respondent forwarded a quotation in the sum of **Kshs.4,082,315**. By a letter dated 31st May 2000, the respondent amended the quotation.

4. On 5th June, 2000 the appellant wrote to the respondent accepting the quotation of 23rd May, 2000 and the amendments thereto and gave the respondent approval to begin the construction works immediately. The letter stated that the "***form of contract shall be the 1999 Agreement and Conditions of contract for building works published by the Architectural Association of Kenya and the Joint Building Council***."

The respondent took possession of the site immediately and began the work.

5. On 15th September 2000, the appellant wrote a letter to the respondent expressing its dissatisfaction over poor workmanship, delay in payments for materials and work progress. Further to that letter the appellant wrote a subsequent letter on 21st September, 2000 terminating the contract, citing several reasons.

6. The respondent wrote back on 26th September, 2000 stating that the termination of the contract was not done in accordance with **Clause 38** of the 1999 Agreement and that the appellant was in breach of the terms of the agreement. The appellant by its letter dated 29th September, 2000 reiterated that the termination of the contract still stood.

7. In response to the said letter, the respondent wrote another letter dated 26th October, 2000 giving Notice of a Dispute and proposed that the matter be referred to an arbitrator that would be agreed upon by both parties as per **Clause 45.1** of the 1999 Agreement. The respondent submitted three names of proposed arbitrators for the appellant?s consideration.

8. On 8th May, 2002 the respondent filed an application dated 7th May, 2002 by way of chamber summons seeking orders that the court gives directions that the suit be determined by affidavits and submissions.

9. The appellant filed its Grounds of Objection dated 25th May, 2002 stating, *inter alia*, that as **Feba Radio** it could not be sued as it was not a legal entity; that the dispute could not be determined by way of Originating Summons and urged the court to dismiss the application. Upon hearing the application, the learned judge directed that the matter be referred to arbitration.

10. The appellant, being dissatisfied with the decision of the High Court judge, lodged an appeal to this Court vide its memorandum of appeal dated 25th July, 2013 seeking orders that the appeal be allowed and the judgment of the High Court be set aside and substituted with an order dismissing the respondent?s suit. Fourteen grounds of appeal were adduced, the main ones being that *the learned judge erred in holding that the terms of the 1999 Agreement were incorporated in the contract and was binding upon the parties while* the *same had not been signed by the parties, that the learned judge failed to consider the basis of a valid enforceable contract when the appellant introduced new terms to which the respondent never responded to, and that the learned judge erred in referring the matter for arbitration under clause 45 of the 1999 Agreement while the respondent had not proved its case to the required standard.*

11. The appellant filed its written submissions on 11th April, 2017 and the respondent filed theirs on 9th June, 2017. The matter came up for highlighting of the submissions on 13th June, 2017 when **Ms. Maira**, learned counsel, appeared for the appellant and **Ms. Bisieri**, holding brief for Mr. Gitonga, was present for the respondent.

APPELLANT'S SUBMISSIONS

12. In her submissions, learned counsel for the appellant argued that this being a first appeal, the Court ought to evaluate the evidence that was adduced before the trial court and reach its independent finding. She cited

Selle and Another v Associated Motor Boat Company Ltd and Others

[1968] E.A. 123.

13. She referred to the letter dated 5th June, 2000 and emphasized three statements therein to demonstrate that the respondent began works without signing a formal contract. The statement were that:

a. ***The contract documents are under preparation for formal execution,***

b. ***The form of contract shall be the 1999 Agreement and conditions of the contract,***

c. ***You may take possession of the site immediately but formal commencement date is 12th May 2000.***

14. She proceeded to elaborate on the grounds of appeal that the 1999 Agreement was not formally prepared, signed or incorporated into the contract between the parties and was therefore not binding upon them. She cited various excerpts from the proceedings in the High Court where the respondent stated that there was no signed agreement but the contract had been executed by performance. The appellant reiterated that there was no signed agreement; that the contract documents were to be prepared and forwarded to the respondent; hence it could not be the basis of the contract.

15. She further submitted that the learned judge erred in concluding that the terms of agreement were incorporated into the contract and were binding upon the parties. She supported this argument by relying on **East African Fine Spinners Ltd and others v Bedi Investment Ltd Civil Appeal 72 of 1994** where the court found that; where a person accepts an offer subject to contract, it means that the matter remains in negotiation until a formal contract is settled and the formal contracts are exchanged. Until that contract is executed there is no contract between the parties which could be enforced by an order for specific performance or mandatory injunction.

16. On the ground that the court erred in failing to find that there was no unequivocal offer, absolute and unconditional acceptance, or a meeting of minds on the terms, counsel referred to the appellant?s letter dated 5th June, 2000 which introduced the issue of the 1999 Agreement as a formal contract which constituted an offer to the respondent.

17. She contended that there was no response to that offer by the respondent accepting or rejecting the proposal to contract under the 1999 Agreement, hence there cannot be legal grounds to conclude that a contract was made without an unequivocal, unconditional acceptance to the offer.

18. She outlined a brief comparison between the conduct of the parties and the provisions of the 1999 Agreement and concluded that there was incongruence as the parties did not act in accordance with any of the provisions of the Agreement, thus there was no offer, acceptance or a meeting of minds, hence there was no *consensus ad idem*.

19. The appellant?s counsel further relied on **Corn Products Kenya Ltd v Eldo City Ltd [2014] eKLR** where this Court held that correspondence exchanged between the parties simply referred to the already agreed terms of the intended contract and it was clear to the engaging parties that a further document was to follow. She distinguished the case from **Mumias Sugar Company v Freight Forwarders (K) Ltd** [**2005] eKLR 403** in which a contract was deduced from correspondence exchanged between the parties which did not make reference to any other existing document but only referred to a contract which was to follow for execution.

20. The appellant?s counsel further submitted that the court failed to appreciate that the parties were not well versed with the Terms and Conditions of contract and did not comply with clauses 1-44 of the said

agreement thus there was no agreement that they would refer their dispute to arbitration under Clause 45. She cited **National Bank of Kenya v Pipelastic Samkolit (K) Ltd & another [2001] eKLR** where it was held that a court of law cannot purport to rewrite a contract between the parties, the parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded.

21. Counsel submitted that the learned judge erred in proceeding to rewrite a new contract which was contrary to the parties? express communication and conduct as well as their intention by holding that the 1999 Agreement be incorporated into the parties? contract. In her view, the 1999 Agreement was only an offer which never crystallized, hence it did not create any right or duty that would be enforceable by law. She relied on the case of **Associated Motors Ltd and J.M. Githongo and 2 others [1995] eKLR** which restated the Judgment of Lord Denning in **Tiverton Estates v Wearwell Ltd, [1974] 2 WLR 176,** to the effect that in absence of an admission or denial of the existence of a contract there was no evidence of a concluded contract.

22. She further submitted that according to **section 107 and 108** of the **Evidence Act,** the burden of proving that there was an agreement between the parties lay upon the respondent and it failed to prove that there was a meeting of minds by the parties.

23. The appellant?s counsel added that the court was overtly biased in favour of the respondent as was in the case of **Kipkoech Kangogo and other v Board of Governors, Sacho High School and 5 others [2015] eKLR,** following **Tumaini v Republic, [1972] E.A 441,** where it was held that "in considering the possibility of bias, it is not the mind of the judge which is considered but the impression given to reasonable persons. She urged this Court to set aside the judgment of the High Court and to dismiss the entire suit and award costs to the appellant.

RESPONDENT'S SUBMISSIONS

24. In the written submissions, the respondent contended that the subject of contention is the interpretation/construction of the terms of the acceptance letter by the appellant dated 5th June, 2000.

25. The respondent submitted that once the true meaning, tenor and effect of the said letter is settled then the other issues will follow. The respondent referred to grounds 1, 2 and 3 of the appeal and stated that it was not denied that the parties entered into a building contract when the respondent took possession of the site and began the construction works.

26. The respondent?s counsel contended that it is trite law that parties are bound by the terms of contract agreed between them; the 1999 Agreement in this case. She further contended that the true construction and interpretation of the letter of acceptance incorporated the 1999 Agreement and such had to be incorporated by parties in the said contract.

27. The respondent urged this Court to find that the High Court judge was right in holding that the matter be referred to an arbitrator for determination of the substantive issues as per **Clause 45** of the 1999 Agreement.

28. For the proposition that the contract was concluded the moment the respondent accepted the appellant?s offer and conditions set out in the letter dated 5th June 2000, the respondent?s counsel cited the House of Lords decision in **Brodgen Vs Metropolitan Rly CO (1876-77) L.R. 2 APP CAS 66** where Lord Blackburn held as follows:

> ***"I have always believed the law to be this, that when an offer is made to another party and in that offer there is a request express or implied that he must signify his acceptance by doing some particular thing, then as soon as he does that thing he is bound."***

29. The respondent referred to **Halsbury's Laws of England, 4th Edition Re issue Volume 4 (2) 1992 at paragraph 315 page 285** which states that "*the use of the term of „**subject to contract'** is a strong indication that no enforceable obligation is intended to arise before execution of a formal*

document but a statement in the acceptance that a formal contract is being prepared may not prevent a binding contract."

*(*emphasis supplied*)*

30. She further cited **Hudson Building and Engineering Contracts, 11th Edition Vol 1 by I.N Duncan Wallace Q.C para 1.032** to the effect that where a subcontractor commences work when all terms have been negotiated and agreed upon but no formal acceptance has been recorded; and where the employer (by standing up and giving possession and the builder by doing work) that is sufficient evidence of acceptance of the contract terms, or in the case of offer, the latest state of the contract terms in the last counter-offer.

31. Counsel concluded by urging this Court to find that there was a contract between the parties and the 1999 Agreement was deemed as incorporated therein and dismiss the appeal with costs.

DETERMINATION

32. We have carefully considered the record of appeal as well as submissions by counsel and the cited authorities.

The main issue for determination in this appeal is whether there was a contract between the appellant and the respondent and if so, whether the 1999 Agreement should be incorporated into the contract.

33. Having perused the submissions, pleadings and evidence presented by both parties, it is clear to us that there was indeed a contract between the parties. The appellant?s letter dated 5th June,2000 addressed to the respondent clearly stated that:

> ***"We are glad to inform you that your quotation for the above work dated 23rd May 2000 in the sum of 4,082,315.00 (four million, eighty-two thousand three hundred and fifteen only) is hereby accepted subject to the amendments contained in your letter of 31st May 2000. The contract documents are under preparation for formal execution.***
>
> ***The form of contract shall be the 1999 Agreement and conditions of contract for Building works published by the Architectural Association of Kenya and the joint Building Council.***
>
> ***You may take possession of the site immediately but the formal commencement date shall be 12th May, 2000."***

34. Although it was not disputed that the 1999 Agreement was not signed by the parties, it is equally undisputed that the appellant expressly permitted the respondent to take possession of the site and commence the agreed works. The respondent embarked on the project and continued until 21st September, 2000 when the appellant raised the first complaint. The appellant had by then made several payments to the respondent in respect of the works so far done in accordance with agreed schedule of payments.

35. The 1999 Agreement was well known to both parties. **Clause 45.0** thereof is about **"Settlement of Disputes**". **Clause 45.1** stipulates that in case of any difference arising between the Employer or the Architect or Contractor during the progress or after the completion or abandonment of the work, such dispute shall be notified in writing by either party to the other with a request to submit to arbitration and to concur in the appointment of an arbitrator. This is what the respondent did. We cannot therefore agree with the appellant?s contention that the parties were not well versed with the terms and conditions set out in the 1999 Agreement.

36. We respectfully adopt the position taken by **Duncan Wallace, Q.C.** (supra) that where a contractor or subcontractor commences work when all terms have been negotiated and agreed upon but no formal

acceptable has been recorded, as was the case between the appellant and the respondent herein, that is sufficient evidence of acceptance of the contract terms.

37. From the letters exchanged by the parties, we are not in any doubt that even though no formal agreement had been executed as intended, it was clear to them that their contract was intended to be governed by terms and conditions as stipulated under the 1999 Agreement. There was no ambiguity at all in the appellant?s letter of 5th June, 2000.

38. In **JIWAJI v JIWAJI [1968] E.A. 547**, the predecessor of this Court held that **"where there is no ambiguity in an agreement it must be construed according to the clear words used by the parties."** We respectfully agree with that summation of the law.

39. In view of the foregoing, we find that there was a binding contract between the appellant and the respondent that incorporated the 1999 Agreement. Consequently, any dispute between the parties ought to have been referred to arbitration. That is what the impugned judgment directed.

40. We find no merit in this appeal and dismiss it with costs to the respondent.

Dated and Delivered at Nairobi at Nairobi this 28th Day of July, 2017.

R. N. NAMBUYE

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR