**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GITHINJI, KARANJA & KANTAI, JJ.A)**

**CIVIL APPEAL NO. 41 OF 2012**

**UNIVERSITY OF NAIROBI……..……....APPELLANT**

**AND**

**THE DEVCON GROUP LIMITED……...RESPONDENT**

*(Being an appeal from the High Court of Kenya at Nairobi (Khaminwa, J) dated 18th February, 2011*

in

**H.C.C.C. No. 125 of 2005)**

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**JUDGMENT OF THE COURT**

The respondent, **The Devcon Group Limited** sued the appellant **University of Nairobi** at the High Court of Kenya at Nairobi. It was stated in the plaint *inter alia*that by an agreement dated 20th November, 2003, the respondent was contracted by the appellant to construct student hostels at the appellants' Kikuyu campus at a contract price of Kshs.57,746,119/=. It was further stated that the contract period was to be from 20th November, 2003 to 25th May, 2004 and that in view of the said contract the respondent engaged service of other contractors and service providers to undertake the project. It was also said that clause 22 of the said contract allowed for variations and that by clause 23(1) of the same the appellant was to make payment to the respondent within seven (7) days of a certificate being issued by a consultant. It was further stated that the appellant contravened the contract and breached the same by failing to pay certificates on time, that the appellant failed to pay for variations, and that the appellant paid subcontractors and suppliers directly instead of doing so through the respondent. It was also claimed that the appellant failed to provide maps and drawings required for the contract to be undertaken and further committed many breaches of contract.

The respondent further accused the appellant of failing to agree on an arbitrator when a dispute arose in breach of clause 37 of the contract. For all that, it was prayed that judgment be entered for the respondent against the appellant for Kshs.35,988,000/=; an injunction be issued against the appellant and damages for breach of contract and incidental loss due to breach of contract be awarded to the respondent.

The appellant filed a statement of defence where the claim was denied. The matter was heard by the late Hon. Lady Justice Khaminwa and in a judgment delivered on 18th February, 2011 the respondent was awarded the sum of Kshs.35,988,000/= claimed in the plaint. This appeal is a challenge to that judgment.

In the memorandum of appeal drawn for the appellant by its advocates, the learned judge is faulted for delivering the judgment late contrary to the provisions of the Civil Procedure Rules, as it is said that the judgment is void as the trial ended on 17th December, 2009 and judgment was delivered on 18th February, 2011.

The learned judge is also faulted for granting judgment to the respondent when it is said that the claim was not proved. It is also said that the trial judge erred by granting judgment to the respondent when the sole witness for the respondent disowned all the documents that were produced in court, that the judgment was erroneous because the respondent did not prove the contract relied onor prove the sums claimed, that there is no nexus between the proceedings and that the judgment is not supported by the evidence. The appellant further states in the memorandum of appeal that the judgment is an unjust enrichment of the respondent againsta public institution and that the same is not maintainable.

This is a first appeal and it is our duty to re-evaluate the evidence and reach our own conclusion remembering that we did not see or hear the witnesses. See for an enunciation of this principle the recent case of**Nation MediaGroup Limited & 2 Others V John Joseph Kamotho & 3 Others, [2010]eKLR w**here this Court said that:

> ***"An appeal to this court from a trial from 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."***

In submissions before us when this appeal came up for hearing, Mr. Donald Kipkorir learned counsel for the appellant collapsed all the grounds of appeal and urged the appeal as an omnibus. Learned counsel submitted that because judgment appealed from was delivered fourteen (14) months after hearing had been concluded, the same offended **Order 21**of the **Civil Procedure Rules** and should be nullified. In support of the other grounds, learned counsel submitted that the contract alleged in the plaint was not produced in court as part of the evidence and neither were bills of quantities produced and therefore, in counsel's view, there was no nexus between the plaint, proceedings and the judgment.Counsel further submitted the case before the trial judge was not proved and should have been dismissed.

Mr. Kimwere Josphat, learned counsel for the respondent, submitted that the trial judge was unwell and that is why the judgment was delivered late and that the learned trial judge should not be faulted for the delay.

On whether the contract was proved on evidence, learned counsel submitted that the bundle of documents to be relied on was very volumnious and would have been expensive to produce it and that is why neither the contract nor other documents were produced as evidence in the case. For all these he asked us to dismiss the appeal.We have considered the record, cases cited, submissions made and the law and have come to the following view of the appeal.

On the complaint by the appellant that judgment delivered by the trial court is invalid for being delivered late, we note from the record that the matter was before the said judge on 17th December, 2009 when submissions were made. Judgment was reserved to be delivered on 23rd February, 2010 but it was not delivered until 18th February, 2011**. Order 21**of the **Civil Procedure Rules**, requires that where in a suit a hearing is necessary the court after hearing the case shall pronounce judgment in open court either at once or within 60 days from the conclusion of the trial and a notice ought to be given to the parties or the advocates. It is further required that if judgment is not delivered within the said period, the judge shall record reasons why the same was delayed and a copy thereof shall be forwarded to the Chief Justice and a date for judgment given.

The record shows that on 1st July, 2010 the matter was before the said judge who noted that parties had filed submissions and judgment was then reserved to be delivered on 26th July, 2010. There is a note that

the file was before the same judge on 11th August, 2010 when she ordered that judgment be delievered on 31st August, 2010 then the file was before the same judge on 21st December, 2010 when it was ordered that judgment be delivered on 21st December, 2010. It was not delivered on that day but was delivered on 18th February, 2011. During all those appearances, no reason is recorded why judgment was being delayed. So from 1st July, 2010 when the learned judge noted that submissions had been filed there is no reason recorded why judgment was not delivered within 60 days until it was delivered on 18th February, 2011, about 7 months later.

In **Johnson M. Mburugu vs Fidelity Shield Insurance Company Ltd[2006] eKLR** this Court while dealing with the similar provision of the previous **Civil Procedure Rules** was confronted with the question of validity of a judgment which was not delivered within the time provided in the rules, this Court stated:

> ***"From what we have stated above, it is possible that the delay in delivering judgment which was from 15th March, 2002 when the submissions were made by the counsel in the case and also written submissions were filed on 28th February, 2003 when judgment was delivered which is eleven and a half (11½) months could have interfered with the learned judge's grasp of the entire case that was before him. However, we are of the view that in general, his judgment appears to have put into consideration all the salient aspects of the case. Further, and in any event, although Order XX rule 1 states that in suits where a hearing is necessary, the court, after the case has been heard, shall pronounce judgment in open court, either at once or within 42 days from the conclusion of the trial of which due notice shall be given to the parties or their advocates, there is no provision as to the consequences of failure by the court to comply with the same rule."***

The court concluded thus:

> ***Whereas we feel the lengthy delay here was not warranted and would urge judicial officers involved in the hearing of cases including applications to ensure compliance with Order XX rule 1, we feel the same as we felt on Ogora's case (****supra****) that it would create injustice and confusion in the court corridors if non compliance were to be met with orders declaring such judgments or rulings void. In this case, as we have stated, the effect of the delay is in our view, minimal and we have dealt with the same in this judgment."***

The same path was taken by this Court in **Nyagwoka Ogora alias Kennedy Kemoni Bwogora vs Francis Osoro Maiko Civil Appeal No. 271 of 2000(**unreported) where it was held:

> ***"The real question is what is the consequence of non-compliance therewith? No doubt that rule is an important one in the expeditious dispensation of justice. And it is made to be obeyed. However, if non-compliance with the rule were to have the effect contended for by the appellant, we think the overall result would be more injustice than justice to the parties. A lot of time and resources spent in litigation would come to naught if judgments delivered after the expiry of 42 days were to be voided or declared void IPSO facto. The rule cannot and in our view could not have been intended to deprive a trial judge of his jurisdiction to write and pronounce judgment in a case he has heard. In our considered view, while non-compliance with the rule and particularly persistent non-compliance or inordinate delay in compliance should call for censure of the judicial officer concerned from those in-charge of judicial administration, it should not be a ground for vitiating a duly delivered judgment. Being of that persuasion we would reject ground 1 of appeal.***"

A different approach was adopted by this Court in the case of **Kenya Airports Authority versus Industrial Court of Kenya & 2 Others [2014] eKLR** where the appellant had argued that there was an inordinate delay of 4 years in delivery of the ruling by the High Court which was not explained and was contrary to **sections 77** and **79** of the repealed **Constitution** on the requirement for a fair hearing within a reasonable time and that it also contravened **Order 21 rule 1** of the **Civil Procedure Rules** on the

requirement for delivery of judgments and rulings within 60 days. **Waki, Kiage and Murgor JJA** adverted to the case of **Manchester Outfitters Services Limited & Another vs Standard Chartered Financial Services Limited & Another [2002] eKLR** citing the case of **Elizabeth Barganzavs Tysons Habenga Civil Appeal No. 285 of 1997**where this Court stated:-

> ***"In this case the delay of (15 months) was too inordinate and should not have occurred unless there were compelling reasons which the learned judge should have explained in the judgment. No doubt by the time she wrote her judgment, human as she is, the learned judge lacked the "feel" of the case. Also the length of time between the hearing and the case and writing of judgment gave rise to a suspicion that a miscarriage of justice had occurred through submissions being forgotten or lost.***
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> ***The observations equally apply to the four years delay of the learned judge in delivering his judgment which is the subject matter of the appeal before us. In the circumstances I would agree with Mr. Nowrojee that such a judgment so delayed lacked credibility of a judgment. For this reason alone the appeal is allowed."***

There has therefore not been unanimity in this Court on the correct position to take in situations where there is lack of procedural compliance where the time of 60 days provided in **Civil Procedure Rules** for delivery of judgment is not met. We shall come to this issue again later.The appellant complains that the judgment as written has no nexus with the pleading or the proceedings that followed.

As we have already stated, it was stated in the plaint that a contract was made between the parties on 20th November, 2003 and various provisions of the contract are referred to in the plaint to allege breaches of the same.

In evidence before the trial court, **Mr. Bromely Kebles Smith** who described himself as the respondent managing director,was the sole witness called for the respondent and he testified that his company was awarded a tender to construct hostels at Kikuyu Campus and that there were various variations that were carried out in the course of construction work. He produced a bundle of documents but there is no evidence on record on what those documents were or what they were about. In the Index to this appeal various pleadings, applications and letters are set out but there is no indication of any documents produced as exhibit before the trial court. We have perused every page of the record and did not see any document produced into evidence as an exhibit before the learned judge.

In cross examination, the witness stated:

> ***"I confirmed the contract but it is not in the bundle before the court, Bills of Quantities are documents preceding contract, I do not see any documents before court."***

That was the only witness called and the appellant chose not to call any evidence but proceeded to make submissions where the appellant took as a principle point the absence of the contract documents, submitting that in building contracts, the contract(s) must be produced otherwise the claim cannot be proved. That is the same position the appellant took before us.

The learned judge in the absence of the contract or the bills of quantities considered some other documents which are not in the record and held that although the contract was not produced, she could rely on other documents to find for the respondent.

**Section 97 (1)** of the **Evidence Act** provides *inter alia* that:

> ***"(1) When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the***

***provisions of the Act."***

In addition **Section 98** of the same **Act** provides:

> ***"When the terms of any contract or grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to Section 97, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to or subtracting from its terms"***

That is to say that where parties have entered into contract, they are bound by the terms thereof and where a dispute arises, it is to be governed by the four corners of the contract and no other evidence may be introduced except secondary evidence where the law allows production of such evidence. We have perused the judgment appealed from. There are various instances where the learned judge considered letters and documents which are not on record and which we must take not to have been before her. For instance there is reference to a letter dated 13th January, 2004 where the respondent was allegedly complaining that bill of quantities were based on site levels unrelated to the relevant site. This letter is not on record. There is also reference to a letter dated 8th December, 2003 where the respondent was allegedly raising issues of valuations. We have not seen that letter. The learned judge also refers to unpaid certificate issued by a consultant but again those alleged certificates are not on record.

We asked Mr. Josphat Kimwere, learned counsel for the respondent, in the course of hearing of this appeal where the contract and other documents referred to in the plaint and in the judgment were, and his answer was that the documents were produced before the trial court. He had no answer to the question why he had not availed himself of the Rules of this Court to file a Supplementary Record of Appeal, if, indeed, a document had been produced at the trial and been omitted while record of appeal was being compiled. We noted, in any event, that in the direct evidence of the respondents' witness during cross-examination, he stated that the contract stated in the plaint was not before the court at all. Mr. Donald Kipkorir, learned counsel for the appellant, took that issue in cross-examination; in submissions before the trial judge and in submissions before us.

We agree with learned counsel for the appellant that the learned judge was clearly wrong in entering judgment for the respondent where the course of action was based on a contract, which contract was not produced in evidence at all. The respondent had a responsibility to produce the contract in proof of the same and, absent the contract, judgment could not be entered at all, as there was no proof of the contract and it followed that allegations of breach of the alleged contract could not be proved at all.

Returning to the issue raised by the appellant that the judgment which was not delivered within the time prescribed in **Civil Procedure Rules** – learned counsel for the respondent informed us from the bar that the learned judge was unwell and that is what led to delay in delivery of judgment. There is no evidence on record to back that allegation. What is on record, and which we have set out in this judgment is that the file was placed before the learned judge on various occasions – on 15th July, 2009 when submissions were noted and it was ordered that judgment be delivered on a date where judgment was not delivered but was deferred on at least four occasions before finally being delivered on 18th February, 2010. At no occasion was there a record on why judgment was not being delivered as scheduled in accordance with the **Civil Procedure Rules** and even when it was eventually delivered, the learned judge did not make any note to indicate why judgment was being delivered about seven months after submissions had been made.

As we have shown in this judgment the learned judge imported evidence and material which was not before her as she crafted the judgment. Letters and documents which were not before her are referred to in the judgment and we are not able to speculate where these letters and documents came from to be referred to in the judgment. We think that it is proper, in this case to hold, as we hereby do, that the delay of about seven months was inordinate. However we are aware and take judicial notice of the prolonged illness of the learned judge at the material time. Since we are allowing the appeal on other substantive grounds we do not find it necessary to deal with the question whether the delay was a mere irregularity or rendered

that judgment invalid.

As we have shown in this judgment the learned judge imported into her judgment documents and materials that were not produced in evidence and there is no nexus between the same with the pleadings and proceedings that took place before the learned judge. We have also shown that the learned judge ignored and did not follow the principle that where the case involved an alleged contract which was not produced in evidence judgment could not be entered as the contract could not be proved. On these grounds the appeal succeeds and is allowed with costs to the appellant.

**Delivered and Dated at Nairobi this 9th day of December, 2016.**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**W. KARANJA**

**……**

**JUDGE OF APPEAL**

**S. ole KANTAI**

**……**

**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**