



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI (PCA), KARANJA & G.B.M. KARIUKI, JJ.A)

CIVIL APPEAL NO 170 OF 2011

BETWEEN

STEPHEN KARIUKI WAIRIA.....APPELLANT

AND

HARAKA ENTREPRISES LIMITED.....RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nairobi (Sitati, J.) dated 14th April, 2011

in

H. C. C. A. No. 734 of 2007)

JUDGMENT OF THE COURT

1. Stephen Kariuki Wairia, the appellant herein, was sued in the Nairobi Milimani Chief Magistrate Court at Nairobi by Haraka Enterprises Ltd, the respondent herein. By way of a plaint dated the 14th November 2005, the respondent alleged that he had been contracted by the appellant to construct for him a residential house on L.R. No 3734/118 in Lavington, Nairobi. The respondent further alleged that after completion of the work, the architect issued a final completion certificate on 21st July 2004 for the sum of Kshs. 1,413,075.00. However, when the respondent demanded payment, the appellant paid Kshs. 600,000.00 in three equal instalments, thus leaving the balance of Kshs. 813,075.00 unpaid. The respondent's claim was for the said sum of Kshs. 813,075.00 together with costs of the suit and interest on the amount until payment in full.
2. The appellant filed a statement of defence wherein he denied the respondent's claim. He admitted that he had contracted the respondent as described in the plaint, but stated that the respondent did not complete the work to the agreed standard as a result of which a fire occurred and he lost various personal items; and that the respondent never issued him with a certificate of occupation from the City Council of Nairobi, which was a condition precedent to final payment. The appellant confirmed that he had paid the respondent the sum of Kshs.600,000.00 but was withholding payment of the balance pending completion of rectification of various faults noted, which was also a condition precedent to final payment. The appellant also counterclaimed for an order of specific

performance to compel the respondent complete the construction to the required standard as well as an order for compensation of losses that he had incurred as a result of the fire.

3. The respondent's evidence in the magistrate's court was that the house had been properly designed and constructed, and where structural defects were noted, these were rectified. In addition, a practical completion certificate was issued to enable the appellant occupy the house.
4. The appellant's evidence was that even after he occupied the house, he noted that there were many defects. These included cracks in the walls which were big enough to break the ceramic tiles and a hole in the chimney, which eventually led to a fire. The fire destroyed his wall hangings and some other personal effects. He also suffered smoke inhalation and had to seek treatment at the Nairobi Hospital.
5. After receipt of oral testimony, the trial magistrate found that the respondent had not repaired the defects to the satisfaction of the appellant, and that it did not therefore complete the house to the required standard. For this reason, the trial court found that the respondent was not entitled to the money it claimed.
6. The trial magistrate also found that the appellant had not proved his counterclaim in respect of damage that he alleged to have suffered, and his claim failed as well. The suit was therefore dismissed with an order that each party bears its own costs.
7. Being aggrieved by that decision, the appellant filed an appeal in the High Court, and that court, after reminding itself of its duty as a first appellate court to consider the evidence, re-evaluate it with a view to reaching an independent conclusion, found that the contention that the respondent had not carried out the work to the agreed standard was unsupported by the evidence. The court's view was that the respondent had completed the contract works and that any subsequent defects were thereafter remedied. On the counterclaim, the court stated that the appellant had not raised the issue of the defects before filing suit, and as such, there was no basis for the granting of the orders sought in the counterclaim. The first appeal succeeded, and the court set aside the judgment of the trial court and in its place, entered judgment for the respondent for the sum of Kshs. 813,075.00 together with interest and costs. The counterclaim was dismissed with costs to the respondent.
8. The appellant, now the aggrieved party, has brought this second appeal. The grounds upon which he bases his appeal are contained in the memorandum of appeal dated the 11th August, 2011, and include that the first appellate court erred by disregarding material evidence; by failing to appreciate that the appeal was made out of time and without leave; by relying largely on the evidence and submissions of the respondent; and was contrary to the law for failing to do justice to the parties.
9. The duty of this Court on a second appeal was succinctly articulated in ***Kenya Breweries Limited v Godfrey Odoyo [2010] eKLR (Civil Appeal No. 127 of 2007)*** wherein Onyango Otieno, JA stated:

“In a second appeal, however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court on a second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse”

10. We have considered the totality of the evidence that was adduced before the trial court, and re-evaluated by the High Court. The appellant's first challenge to the decision of the High Court is that the learned judge failed to consider that the appeal from the decision of the trial court was filed out of time, and without leave. Ms V. Kemunto Ntenga, learned counsel for the appellant submitted that there was no leave to file the appeal out of time, yet the memorandum of appeal

was filed on the 30th August 2007. Mr T.K. Kariba Mbobu, learned counsel for the respondent submitted that this point was never raised during hearing of the first appeal and therefore could not be raised at this point. Counsel contended that even if the Court was minded to consider this ground, the appeal was within time as it was filed on the 30th August 2007 which was a month after the delivery of the judgment.

11. Our consideration of this ground of appeal is that it has no merit. It is clear from the record that judgment in the trial court was delivered by Ongeri, PM (as she then was) on the 31st July 2007. The memorandum of appeal, having been filed on 30th August 2007 was filed within the thirty days allowed under section 79G of the Civil Procedure Act which requires that **“every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against...”** This ground of appeal must therefore fail.

12. The appellant is of the opinion that the first appellate court erred when it found that he did not provide any documentary evidence to show how he had arrived at the sum of Kshs. 250,000.00. This sum was the loss that the appellant estimated he had incurred when there was a fire at his house. We have noted, as was correctly pointed out by the appellant, that the trial court did not award this sum of money to him. This amount was not specifically pleaded and proved as is required in law. This ground of appeal therefore fails.

13. Ms. Ntenga submitted that the High Court had erred in finding that the issues of defects had not been raised, yet the defects had been discussed with the respondent before the suit was filed. Counsel further contended that the learned judge failed to consider the evidence led that there was evidence of poor workmanship, and as such, she reached a wrong conclusion. Mr. Mbobu refuted these submissions by stating that at the time of handover, all the defects had been rectified.

14. We have perused the evidence on record and find that there is evidence that all the defects that were reported by the appellant were corrected by the respondent. The evidence of Engineer Samuel Mburu Kariuki, the appellant’s first witness was instructive in this regard. He stated that:

“I noted a few defects.... There were some cracks noted at the backyard and garage area.... The contractors visited the house and repaired the defects.”

15. There was therefore sufficient evidence to lead the first appellate court to consider that the contract works had been completed in accordance with the contract, and that any substantial defects that arose thereafter were made good. This ground of appeal therefore fails as well.

16. For these reasons, we find that the High Court properly directed itself to the evidence on record and reached a correct conclusion. The appeal is devoid of merit, and accordingly, we hereby dismiss it with costs to the respondent. It is so ordered. So ordered.

Dated and delivered at Nairobi this 31st day of July, 2015.

P. KIHARA KARIUKI (PCA)

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JUDGE OF APPEAL

W. KARANJA

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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