



REPUBLIC OF KENYA

Court of Appeal at Nairobi

Civil Appeal 166 of 2005

KILIMANI JUNIOR ACADEMY LTD APPELLANT

AND

MILDRED MACHANGA T/A LEARN IT RESPONDENT

(An appeal from a Judgment and Decree of the High Court of

Kenya at Nairobi (Mugo, J) dated 27th May, 2005

in

H. C. C. No. 2126 of 2000

JUDGMENT OF THE COURT

- (1) This is an appeal from the judgment and decree of the High Court of Kenya at Nairobi (Mugo, J) dated the 27th May, 2005, by which the learned Judge awarded Mildred Machanga (the respondent) the sum of Kshs.3 million together with interest and costs, in a claim the respondent brought against Kilimani Junior Academy Ltd. (the appellant) for damages for breach of contract.
- (2) By an Agreement in writing entered into between the appellant and the respondent dated the 2nd January, 2000, the respondent agreed to install 12 computers and maintain them in efficient working order at Kilimani Academy, a school operated by the appellant. The agreement was to run for three (3) years from the 10th January, 2000, and terminable by 12 months notice (clause 2). By clause 10 the appellant was to pay the respondent Kshs.400,000/= per school term, payable as to the sum of Kshs.200,000/= on the 15th of the first month of the term, and as to the balance of Kshs.200,000/= on the 15th of the second month of the term. The agreement also provided that the respondent would be at liberty to terminate the agreement summarily in the event that the appellant breached its obligations as to payment (clause 15).
- (3) The programme commenced on the 2nd January, 2000 and the appellant made full payment for the first term (2nd January – 31st March, 2000). At the start of the second term, the appellant issued two (2) postdated cheques for Kshs.200,000/= each. Only one of such cheques was cleared for payment but in respect of the second one, payment was stopped at the instance of the appellant.
- (4) On the 12th June, 2000, the appellant wrote to the respondent stating that because of the prevailing nationwide power rationing, computer classes could not be held during school hours. The appellant said

that because that was a situation over which it had no control, the contract had to be suspended. The respondent was ordered to remove the computers from the school compound immediately. The letter so directing was signed by Mrs. W. Wilding, the Headmistress. On receipt of that letter, the respondent got in touch with Mrs. Motion, the School Director, to find out from her if the decision could be reversed.

(5) The respondent offered to provide alternative sources of power (generator, solar system and inverters) at her own cost. The appellant declined. The respondent also offered to alter the times for computer lessons to coincide with the power rationing schedule as announced by the Kenya Power & Lighting Company Ltd., but this too was rejected by the appellant. The appellant wrote to the respondent to return the dishonoured cheque and expressed the view that the contract was not binding in view of the persistent failure in electric power supply. The appellant also intimated that a new agreement would have to be drawn up once power supply was normalized.

(6) After the appellant repudiated the contract, the respondent accepted the repudiation and filed a suit to recover liquidated damages as provided under the agreement. This claim amounted to Kshs.3 million.

(7) In its defence the appellant pleaded frustration and argued that the computer programme could not continue in the absence of electricity. It was also contended on behalf of the appellant that the agreement was entered into on the assumption that electricity supply would be sustainable throughout the school term. The learned Judge rejected, quite rightly in our respectful view, this submission since the agreement did not restrict the sourcing of power to the Kenya Power & Lighting Co. Ltd. The respondent in order to overcome the difficulty which had arisen offered alternative sources of power which the appellant peremptorily rejected.

(8) The learned Judge found on the evidence that the appellant having refused to budge, the respondent finally removed her computers from the school and then filed suit on the ground that the appellant had repudiated the contract. The learned Judge found as a fact and held that it was the appellant and not the respondent who terminated the contract. She also held that as the respondent had lost the benefit of the contract by reason of breach on the part of the appellant, the respondent was entitled to recover the whole of the contract sum which she could have earned had the contract not been repudiated. The learned Judge rejected the submission by learned counsel for the appellant that the respondent's claim amounted to unjust enrichment.

(9) In its memorandum of appeal, the appellant raised 12 grounds of appeal. We propose to consider them in the order in which they have been presented. In ground one, the complaint is that the learned Judge erred in law and in fact in holding that the availability of electric power was not a fundamental term of the Agreement. As it was proved that alternative power sources were available and the respondent was ready, able and willing to provide them at her own expense, there is no merit in the submission that availability of electric power was a fundamental term of the Agreement. It was clearly not. Nor was it an implied term as contended in ground two of appeal.

(10) In ground three, the complaint is that the learned Judge erred in holding that the appellant's failure to provide for *force majeure* in the agreement, precluded the appellant from raising it as a defence to the claim. Force majeure is an unforeseeable cause of events excusing a person from fulfillment of a contract. We are satisfied, on the evidence, that even if that defence was allowed it could not have prevailed in view of credible evidence adduced by the respondent that other sources were available which could have been used to keep the computer classes going. This ground accordingly fails.

(11) The complaint in ground four is that the learned Judge erred in law and in fact in rejecting the appellant's contention that the agreement was signed on the assumption by both parties that electric power would be available throughout the contract period. Power supply at any time is erratic but at the material time there was rationing because of low levels of water in the dams. But even with the rationing, the respondent was still able to provide alternative sources of power supply. This ground of appeal also fails and is dismissed.

(12) The appellant in ground five of its appeal complains that the learned Judge erred in law and in fact in holding that computer lessons could have been accommodated in the rationing schedule of electric power without much difficulty. The evidence of Benjamin Ochieng' Buyu (PW 2) adequately answers this complaint. He has a diploma in IT and was employed by the respondent at Kilimani Junior Academy as computer teacher. His lessons covered both theory and practical. During power rationing he was forced to make some adjustments to harmonise the teaching programme with the power rationing schedules. He initiated the adjustments himself and forwarded his proposals to a Mrs. Wilding who was the school Headmistress.

(13) During cross-examination, Mr. Fred Ngatia, learned counsel for the appellant (Defendant), tried to

discredit this evidence by suggesting that Mrs. Wilding had no power to agree to the revised schedule with Mr. Buyu. In her evidence, Mrs. Wilding did not disown the adjustments she had agreed with Mr. Buyu. Mrs. Motion, the owner of the school, did not testify. The learned Judge was right, in our respectful view, in holding that the lessons could have been accommodated in the rationing schedule of electric power without much difficulty. This ground therefore also fails.

(14) In view of the conclusion we have arrived at in relation to grounds four and five of appeal, like the learned trial Judge, we too also find and hold that the power shortage did not frustrate the contract. There is no substance in ground six.

(15) With regard to ground seven of appeal, our answer to the complaint is simply that the appellant could only prove that the proposals put forward by the respondent were impracticable after allowing the respondent to implement them. As it was, the appellant just dismissed them out of hand. The appellant had nothing to lose by cooperating with the respondent as the respondent had agreed to pay the expenses involved. This ground must also therefore fail.

(16) With regard to ground eight of appeal, we respectfully agree with the learned trial Judge that the reasons given by the appellant for rejecting alternative power sources were flimsy. Looking at the evidence of Mrs. Wilding, one gets the clear impression that the appellant had decided to terminate the contract and was just trying to find a reason to terminate it. We also find and hold, as the learned Judge did, that the appellant's refusal to allow the respondent to install a generator or solar panels to run the computers was unreasonable – ground nine.

(17) There is no substance in ground ten of appeal in view of the fact that the respondent had offered and agreed to install alternative power sources at her own expense. It was not going to cost the appellant a dime. The respondent was ready, able and willing.

(18) With regard to the complaint in ground eleven, we are satisfied as the learned trial Judge was that by reason of the breach of the contract by the appellant, the respondent was entitled to recover as liquidated damages the whole of the contract sum which the respondent would have earned had the appellant not repudiated the agreement. This was clearly provided for under clause 15 of the Agreement and we cannot now re-write the contract between the appellant and the respondent.

(19) We find no substance at all in the complaint in ground twelve that the sum of Kshs.3 million awarded to the respondent as damages was exorbitant or excessive. That was the exact amount payable as liquidated damages payable under terms of the Agreement. The appellant should not be heard to say that the respondent did not render any services because it was the appellant who rejected all efforts by the respondent to keep the Agreement alive and the computer classes going. We reject the submission by learned counsel for the appellant that the respondent was unjustly enriched.

(20) We have considered all the grounds raised by the appellant in this appeal in conjunction with the respective submissions of both learned counsel and the authorities to which they have respectively referred. We are satisfied that there is no substance in any one of such grounds. We can find no misdirection in the judgment of the learned trial Judge.

(21) Accordingly, and for the reasons we have given, this appeal must fail and it is hereby dismissed with costs.

So ordered.

Dated and delivered at Nairobi this 12th day of April, 2013.

P. KIHARA KARIUKI

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JUDGE OF APPEAL

J. W. MWERA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR