REPUBLIC OF KENYA

Court of Appeal at Kisumu

Civil Appeal 157 of 2006

1. **SEVENTH DAY ADVENTIST CHURCH EAST AFRICA LTD.**

2. **PASTOR R.M. NYAKEGO**

3. **E.N. ADUKE …..... …….APPELLANTS**

AND

MASOSA CONSTRUCTION COMPANY LIMITED …… RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya at Kisii (Wambilyangah, J.) dated 15th September, 2003

in

H.C.C.C. NO. 6 OF 2002)

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JUDGMENT OF THE COURT

By a plaint dated and filed on 10th January, 2002, ***Masosa Construction Co. Ltd*** (Masosa) filed a suit in the High Court of Kenya at Kisumu seeking an order for the payment of Shs.5,177,688/= plus costs and interest at 35% per annum jointly and severally from the three respondents, ***Seventh-day Adventist Church E.A. Ltd*** (the Church), ***Pastor R.M. Nyakego*** (executive director) and ***E.N. Aduke*** (the architect) who were respectively the 1st, 2nd and 3rd defendants in the suit.

Masosa's claim arose from the construction of a conference centre for the church. In February, 1995 the church wanted a conference centre built at its Nyamira church, and advertised the same by way of a tender. Masosa was the successful bidder, and was awarded the tender on 24th March, 1995. Mr. E.N. Aduke, the 3rd appellant, was appointed the project architect, while Pastor R.M. Nyakego, the executive director of the church, co-ordinated the project on behalf of the church.

Masosa's tender for the entire project, amounting to Shs.17,102,152/20 was initially accepted by the church. Subsequently, however, the church scaled down the project, by constructing only one instead of two floors, at a cost of Shs.10,600,00/=. Thereafter, the church again had second thoughts, and reverted to the original contract, at the agreed price of Shs.17,102,152/20. The parties agreed that the construction period would be 72 weeks, and Masosa began construction in earnest. However, because of occasional

stoppages of construction work, arising mainly from the delays in paying Masosa, the construction period actually took 176 weeks, more than 100% increase in duration, resulting in the escalation of the eventual cost of construction to Shs.19,064,160/=. Of this amount, Masosa was paid Shs.13,886/472/=, leaving a balance of Shs.5,177,688/= which the church refused to pay, and in respect of which, Masosa filed action in the High Court.

In a judgment delivered on 15th September, 2003, Wambilyangah, J. found for the respondent, and entered judgment for it for Shs.5,177,688/= together with interest at court rates and costs.

Aggrieved by that decision, the appellants filed this appeal citing the following 11 grounds of appeal: -

"1. The learned Judge erred in law on the Rule of Departure in that he failed to find that the Respondent's pleadings were at complete or substantial variance with the evidence preferred on the Respondent's behalf.

2. The learned Judge erred in law and fact in that he upheld or otherwise failed to find misjoinder in favour of the 2nd Appellant, pastor R.M. Nyakego.

3. The learned Judge erred in law and fact in finding that the 2nd Appellant was jointly and severally liable with the other appellants despite there being no evidence on record attaching liability to him personally.

4. The learned Judge erred in law and fact in failing to substantively analyse or consider the Defence case (pleading, evidence and submission) in the judgment, and in particular the evidence of DW3 (MR. GETUI), and thus holding that the defense was "a mere denial"and that "it did not meaningfully traverse the Plaintiff's stated claim"

5. *The learned Judge erred in law and fact, in holding that "whole defense…..was certainly based on a false and untenable premise."*

6. The learned Judge erred in law and fact, in holding that "obviously the original contract was varied by an oral one…."Thus breaching a basic rule of the law of contract.

7. The learned Judge erred in law and facts as to the agreed contractual sum and/or any variation to it, thus holding that it was Kshs.19,064,160/= when the agreed contractual sum was Kshs.10,600,000/=.

8. The learned Judge erred in law and on facts in his finding or non-finding on the issue of interest.

9. The learned Judge erred on facts in his finding on the extent of the construction, where he ruled that there was a 2-storey building whereas the overwhelming evidence was that in fact it was a 1-storey building.

10. The learned Judge erred in law and fact in that he failed or refused to allow the production of an evidentiary document by procedural miscarriage (Record of proceedings).

11. The learned Judge erred in law and misdirected himself in not believing and upholding the Appellants' case which was clear, cogent and consistent as against the Respondent's case which was tainted with a lot of contradictions and inconsistencies."

In his submissions before us, Mr. J.O. Soire, learned counsel for all the appellants, argued that the learned Judge of the High Court failed to find that Masosa's pleadings were at variance with the evidence led in the court, in that there was no evidence that the contract sum increased from the original Shs.17,102,152/50 to Shs.19,064,160/= and he cited "*the rule against departure*", relying on the cases of **Galaxy Paints Ltd v. Falcon Guards Ltd. (2002) EA 385**, and **N.C.C. v. Chebiti Enterprises Ltd (C.A. No. 264 of 1996** (Nairobi) (unreported). He argued further that a written contract could not be

altered by an oral one; that there was no agreement between the parties to pay interest at 35% p.a; and that the learned Judge failed to consider the appellant's case, relying solely on the evidence of Masosa's quantity surveyor (PW2).

Mr. J.M. Oguttu, learned counsel for Masosa, on the other hand, argued essentially that the contract period was mutually extended to 176 weeks from the original 72 only because of the church's inability to pay the contract sums in time, resulting in the escalation of costs, a fact clearly acknowledged by the church in the undated report issued by Mr. Nelson M. Miyogo, Treasurer of the church (at page 73 of the record).

As the first appellate court, it is our duty to re-evaluate the evidence before the High Court, and to ascertain if the learned Judge came to the correct conclusion in respect of both the facts and the law. With respect, we must agree with Mr. Oguttu that the learned Judge indeed analysed the evidence extensively, and arrived at the correct conclusion when he entered judgment for the respondent. There is clearly no dispute that the duration of the construction period was mutually extended to 176 weeks from the initial 72. This represents a more than 100% extension in terms of time. There is also clear evidence in the record before us that the extension arose because of the church's failure to pay the contractor in time, resulting in the escalation of costs. Here is what the executive director of the church said in cross-examination: -

"The client SDA did not have the necessary funds at the crucial time. I do not remember if Masosa could be to blame for the delay in completing the project."

In our view, Masosa had absolutely nothing to do with the delay, which, we find, fell squarely in the hands of the church.

With regard to the actual cost of the increase from the contract price of Shs.17,102,152/20 to 19,064,160/= we concur with the findings of the learned Judge that the evidence presented by Masosa was more credible to that of the appellants. The learned Judge found that Masosa had to get its own quantity surveyor to determine the actual cost of the increase when Aduke, the architect, refused or neglected to issue the final certificate. Here is how the Judge rendered himself: -

"It is therefore impossible to understand and agree that the plaintiff was the one who was refusing to co-operate in doing the measurements or in availing any documents which the 3rd defendant needed to do the final account. How could he refuse to co-operate but still complain about the 3rd defendant's delay in producing that final account? To my mind the 3rd defendant was in his evidence evasive and unreliable about the real reasons why he failed to produce a final account even if there was an absence of the contractor's in-puts. The 3rd defendant did not show why he even failed to do any measurements of the structure and quantify them so as to manifest the falsity of the plaintiff's claim in the present case? As it is the plaintiff's claim in this case has not at all been factually resisted: there was mere denial of the plaintiff's claim but the denial has not been supported by the relevant data or material."

And he concluded as follows: -

"The evidence of PW2 as reproduced above shows that the plaintiff ultimately produced his own version of a substantial contractual claim when the 3rd defendant utterly failed to prepare a final account. That evidence also shows that the plaintiff's contractual claim which was fully itemized and explained was never challenged or disputed or criticized or resisted by all the defendants. So the 3rd defendant was not truthful when he said (in his evidence) that his failure to prepare the final account was to be ascribed to the plaintiff's lack of co-operation.

The defence was a mere denial. It did not meaningfully traverse the plaintiff's stated claim. Obviously the original contract was varied by an oral one and by the lengthened period for performing it. The 3rd defendant was non-performer in his duties. Accordingly, I reject the whole defence as it was certainly based on a false and untenable premise. I am satisfied that the plaintiff fully proved its case and I hereby

enter judgment for it against the defendants jointly and severally for Shs.5,177,688/= with interest from the date of the plaint at court rates and costs."

Those are findings of fact from which we have no reasons to depart. We uphold the same.

Finally, with respect to the appellants' argument that there was no agreement to pay interest @ 35% per annum, this clearly is a non-issue as the learned Judge never in fact allowed interest at 35% p.a. The Judge awarded interest at court rates, and there is no cross-appeal on this issue.

Accordingly, and for all the reasons outlined above, we find that there is no merit in this appeal, and we dismiss the same with costs to the respondent.

Dated and delivered at Kisumu this 28th day of November, 2012.

J.W. ONYANGO OTIENO
……..
JUDGE OF APPEAL

ALNASHIR VISRAM
…….
JUDGE OF APPEAL

R.N. NAMBUYE
……..……
JUDGE OF APPEAL

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

DEPUTY REGISTRAR