



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA PEAL AT NAKURU**

Civil Appeal 260 of 2002

GAJIPARA BUILDERS APPELLANT

AND

JEDIDA NDEGWA RESPONDENT

*(Appeal from a judgment of the High Court of Kenya kuru (Rimita, J.) dated 3rd May, 1999 in
H.C.C.C. NO. 311 OF 1990)*

JUDGMENT OF THE COURT

This is an appeal from the judgment of the superior court (Rimita, J.) delivered at Nakuru on 3rd May, 1999.

This appeal has its origin in *High Court Civil Case No. 311 of 1990* at Nakuru in which the appellant herein, *Gajipara Builders, (as the plaintiff)* sued the respondent, *Mrs. J. Ndegwa (as the defendant)*. The appellant's claim against the respondent was for the sum of *Shs.401,680/=* being in respect of work done, material supplied and services rendered by the appellant to the respondent namely construction of the defendant's school and toilets at *plot No. 2/490 Nakuru* in the year *1987/88*. The pertinent paragraphs of the plaint stated as follows:-

“3. The Plaintiff(s) claim against the defendant(s) is for the sum of Shs.401,680/=being in respect of work done, material supplied and services rendered by the plaintiff to the defendant namely construction of the defendant school and toilets premises at Plot No. 2/490 Nakuru in the years 1987/1988 particulars whereof have prior to the date hereof been given by the plaintiff(s) to the defendant(s).

4. The amount claimed has been demaned (sic) and notice of intention to sue has been given by the plaintiff(s) to the defendant(s).

5. The cause of action arose at Nakuru within the jurisdiction of this Honourable Court.

6. WHEREFORE the plaintiff(s) pray judgment for:-

(a) the said sum of Shs.401,680/=.

- (b) Interest thereon at Court rates.
- (c) Costs of this suit.”

In answer to the foregoing, the respondent filed a statement of defence in which she stated: -

“2. The defendant denies that she is indebted to the plaintiff in the sum of Shs.401,680/= or any portion thereof as alleged in paragraph 3 of the Plaint or at all and she puts the plaintiff to strict proof.

3. The defendant states that the plaintiff in breach of the contract entered into between it and the defendant failed to do the work to the requisite standard as a result of which the defendant’s application for occupation permit was rejected by the Municipal Council of Nakuru whereupon the plaintiff abandoned the work and disappeared necessitating the engagement of another contractor and thereby occasioning the defendant loss and damage for which the defendant reserves the right to file a counterclaim.

4. Save for what is expressly admitted herein the defendant denies each and every allegation made and contained in the plaint as if the same were set out and traversed seriatim.”

The advocates for both parties filed a statement of agreed issues which were as follows:-

“STATEMENT OF AGREED ISSUES

- 1. Is the defendant indebted to the plaintiff in the sum of Kshs.401,680/= or any part thereof, on account of work done, materials supplied and service rendered by the plaintiff to the defendant by constructing a school and toilets at Plot No. 2/490 Nakuru on or about 1987 and 1988?**
- 2. Was there a contract between the plaintiff and defendant to construct a school and toilets? If so what were its terms?**
- 3. Which party breached the said agreement and in what way and under what circumstances?**
- 4. Did the plaintiff do its work perfectly and to what extent?**
- 5. Is the plaintiff entitled to payment for work done and to services rendered? If so to what extent?**
- 6. Did the defendant suffer any loss or damage? If so how and to what extent. Is the defendant entitled to a counter-claim?**
- 7. Who should pay costs of this suit?”**

We must add here that before the commencement of the hearing of the suit, the respondent filed an Amended Statement of Defence and counter-claim but this did not change anything material from the statement of defence which had been earlier filed. Suffice it to say that, the counter-claim was in respect of *“general damages for breach of contract and a refund of all monies used by the defendant in the re-construction and finalisation of the project which had been abandoned by the plaintiff”*.

After numerous applications and rulings, the hearing of the suit commenced on 17th November, 1998 when **Jamji H. Gajipara (PW1)** a director of the appellant company gave evidence as to how an agreement was entered into by the parties herein for the construction of school buildings. The parties initially agreed that the respondent would pay **Shs.870,000/=** but this was later reduced to **Shs.800,000/=**. The witness explained what work was done and how the expenses were paid leaving a balance of **Shs.401,680/=**. **Michael Oluoch (PW2)** was the electrician who was contracted to carry out electrical installation while **Dishon Nyotu Mwiru (PW3)** was the mason.

The respondent, **Jedida Wanjiku Ndegwa (DW1)** testified how she entered into an agreement with the

appellant company on the said works at an agreed price of **Shs.800,000/=**. She conceded that the appellant company constructed the school and the toilet block. She went on to state that when the building was inspected by the Municipal Council, it was condemned as it had defects. She said that she had paid a total of **Shs.400,000/=** and was issued with the relevant receipts. It was her evidence that she did not owe the appellant any money but rather it was her who was owed money by the appellant. She however did not state how much the appellant owed her. The respondent called **Gordon Kuogoh Nyateng (DW2)** as a witness. DW2 testified that he designed the school for the respondent. He stated on being cross-examined that he found incomplete construction. **Bonaface Njogu Kiragu (DW3)** testified that he carried out electrical wiring in the respondent's school, and that no electrical installation had been carried out before he was called in to do the work.

The learned judge considered the evidence before him, the submissions by counsel and came to the conclusion that the appellant had not proved its case. Consequently the appellant's claim was dismissed with costs.

Having dismissed the appellant's claim, the learned judge proceeded to consider the respondent's counter-claim. In the end, the learned judge gave judgment for the respondent in the sum of **Shs.496,844/=** plus costs and interest at court rates. In his judgment the learned judge concluded thus:-

“According to the plaintiff in cross-examination only a sum of K.Shs.300,000/= remained to be paid on the building contract. But he claimed material, which were left on the site as well. I was not satisfied that the plaintiff did not take away the said material. The defendant spent a sum of K.Shs.596,844/= to complete the school building. She has to complete the residential house. I was not told how much the house would take to complete. I will only guess. Building has become more expensive but it is for the defendant to establish her claim. I will award a sum of K.Shs.200,000/=. The total the defendant should be reimbursed is K.Shs.766,844/=. But she had K.Shs.300,000/= to pay to the plaintiff had he completed the work.

I find the counter claim proceed (sic). The defendant has to part with K.Shs.496,844/= on top of what she would have spent had the plaintiff not left the site to avoid repeating the works as ordered by the Municipal Chief Health Officer.

Consequently, I give judgment for the defendant against the plaintiff in the sum of 496,844/= plus costs and interest at court rates.”

Being aggrieved by the foregoing, the appellant filed this appeal citing **nine (9) grounds** of appeal.

This being a first appeal, it is our duty to re-evaluate the evidence, assess it and make our own conclusions remembering that we have neither seen nor heard the witnesses and hence due allowance must be made for this – See **SELLE V. ASSOCIATED MOTOR BOAT COMPANY LTD. [1968] E.A. 123 and WILLIAMSON DIAMONDS LTD. V. BROWN [1970] E.A. 1.**

Our perusal of the evidence placed before the learned judge reveals that the parties entered into an agreement in which the appellant was to construct a school for the respondent. It would appear that, as usual, problems arose leading to the appellant abandoning the project incomplete. The parties had agreed on a sum of **Shs.800,000/=**. There was scanty evidence as to how the payments were made but what is clear is that the respondent paid part of the agreed amount before the building was condemned.

Doing the best we can in the circumstances, we are unable to say that the appellant proved its case. We are therefore in agreement with the learned judge that the appellant's case was not proved. He was perfectly entitled to dismiss it.

As regards the counter-claim, we find that the learned judge was in error when he entered judgment on the counter-claim when the same was not specifically pleaded and proved.

For the foregoing reasons, we order that this appeal be allowed, the judgment of the superior court set

aside, the respondent's counter-claim dismissed with costs and we further order that the respondent do bear half the costs of this appeal. These shall be our orders.

Dated and delivered at Nakuru this 30th day of March, 2007.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

W.S. DEVERELL

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR