REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appela 117 of 2001

RAMJI RATNA & COMPANY LIMITED …….....… APPELLANT

AND

WOOD PRODUCTS (KENYA) LIMITED ….....……RESPONDENT

(An appeal from a judgment of the High Court of Kenya, Milimani Commercial Courts at Nairobi (Hon. Jean W. Gacheche (Miss) Commissioner of Assize) dated 15th February, 2000

in

H.C.C.C. NO. 107 OF 1999)

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JUDGMENT OF THE COURT

This is an appeal by the unsuccessful defendant from the judgment of the superior court (Miss Gacheche - the Commissioner of Assize - as she then was) delivered on 15th February, 2001 in which the learned Commissioner of Assize gave judgment against the appellant.

The respondent herein *WOOD PRODUCTS (KENYA) LIMITED* (as the plaintiff in the superior court) sued the appellant *RAMJI RATNA & COMPANY LIMITED* (the defendant in the superior court). The relevant paragraphs of the plaint filed in the superior court were as follows:-

"1. The plaintiff is a limited liability company incorporated in Kenya having its registered office at Nairobi. Its address for the purposes of this suit is care of OTIENO-OMUGA & OUMA ADVOCATES COMMERCE HOUSE 6TH FLOOR- MOI AVENUE P.O. BOX 69512 NAIROBI.

2. The defendant is also a limited liability company incorporated in Kenya having its registered office at Nairobi. Service through plaintiff's advocates office.

3. The plaintiff's claim against the defendant is for Kshs. 626,707.40 being an amount admitted by the defendant to be due and owing to the plaintiff on account of material supplied, workdone and services rendered by the plaintiff to the defendant at the defendant's Riverside Gardens site in the course of the year 1998, particulars whereof are well known to the defendant.

4. Despite demand made and notice of intention to sue given the defendant has failed refused and/or neglected to pay the plaintiff.

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

WHEREFORE the plaintiff prays for judgment against

the defendant for;

a) Kshs. 626,707.40 with interest thereon at 25% per annum.

b) Costs of the suit."

The respondent reacted to the above by filing a defence in which it was stated:-

"*1. The defendant admits the descriptive parts of the plaint save that its address for service for purposes hereof is care Mohammed Muigai Mboya advocates, Hazina Towers - 10th floor, Monrovia Street, P.O. Box 61323, Nairobi.*

2. The defendant denies the contents of paragraph 3 of the defence and states as follows:-

(a) The plaintiff failed and/or neglected to carry out the works and supply goods in compliance with the agreement.

(b) The plaintiff failed to complete the works in line with the agreement.

(c) The work carried out was not to the same standard as the sample shown.

(d) That on completion of the works as per the agreement the defendant is ready able and willing to pay the plaintiff Kshs. 443,680/= in accordance with the agreement.

3. The defendant avers that the plaintiff's suit is premature, frivolous and an abuse of the Court process.

REASONS WHEREFORE the defendant prays that the plaintiff's suit be dismissed with costs."

The hearing of the suit in the superior court commenced on 16th November, 1999 when Girdawat Singh Bhachu (PW1) a director of the respondent company gave evidence. It was Bhachu's evidence that the works commenced on 24th June, 1998 and were completed on 24th October, 1998. During the period of construction an invoice had been submitted to the appellant. It was in view of this evidence as supported by the relevant invoices that the respondent sought judgment as prayed in the plaint.

After Bhachu had given evidence and had been cross-examined it was the turn for the appellant to lead evidence. Naram Sanji Pindona the Managing Director of the appellant company gave evidence to the effect that the respondent had a problem with the supply of material and for that reason the works were not completed within time as per the agreement between the parties.

The learned Commissioner of Assize then considered the evidence adduced before her and the legal submissions by counsel appearing for the parties. She preferred the respondent's version and rejected the appellant's version. In the course of her judgment the learned Commissioner said:-

"The fact that the defendant wrote to complain that the works were not done to his expectation in December, 2½ months after the invoice was raised would appear to be an after thought. Perhaps, minutes of the site meeting would have been helpful at least to prove that the defendant had complained about the works or even the progress. In the absence of any type of proof, I choose to believe that the

works were completed, and also within the agreed time. This is further supported by the fact that the defendants have not deemed it fit to counterclaim for the damage caused by either the plaintiff's alleged delay or the unsatisfactory works. No evidence was adduced by the defendant that the works were completed by another contractor."

Having considered the issue relating to agreed price to be charged per sq. ft. the learned Commissioner entered judgment against the appellant by stating:-

"*In view of the above findings I am of the opinion that the plaintiff's suit is not premature, nor is it frivolous or an abuse of the court process, and judgment is hereby entered against the defendant in the following sums, together with interest thereon at 25% p.a. until payment in full:*

For the apartment whose

sq. area of 2265 sq. ft. was

arrived at after re-measurements

at Shs. 225 per sq. ft. ……..Kshs. 509,625.00

For the flat ……...Kshs. 19,840.00

Add VAT at 16% ……Kshs. 84,714.00

Kshs. 614,179.00

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No orders as to damages shall be made as neither party pleaded any damages."

Being aggrieved by the foregoing, the appellant, through its counsel, filed this appeal citing the following four grounds of appeal:-

"*1. The honourable commissioner erred in law and in fact in finding as she did that the works were completed satisfactorily without any evidence to warrant such a finding.*

2. The honourable commissioner erred in law and in fact in relying on the hearsay evidence of the plaintiff's first witness to determine the terms of the oral contract.

3. The honourable commissioner erred in law and in fact in disregarding or in failing to give proper regard to the evidence of the defendant's witness.

4. The honourable commissioner erred in law and in fact when she found that rate to be charged for the works on the apartment was Kshs. 225 per square foot, exclusive of Value Added Tax."

When the appeal came up for hearing before us on 17th September, 2007, Mr. P. Saende appeared for the appellant while Mr. M. O. Omuga appeared for the respondent. In his submissions Mr. Saende argued that the superior court relied on hearsay evidence to construe an oral contract. It was Mr. Saende's contention that payment was on condition that the work was satisfactorily completed.

On his part, Mr. Omuga started his submissions by informing us that decretal amount was paid in 2002 and that this appeal lacked merit. He went on to submit that the statement of accounts was not disputed and that the complaints raised by the appellant were indeed an after-thought. In concluding his submissions Mr. Omuga stated that the findings of the learned Commissioner were on facts as per evidence, of the witnesses who appeared before her. He therefore, asked us to dismiss this appeal.

This is a first appeal and so this Court is obliged to reconsider the evidence assess it and make appropriate conclusions on such evidence, but always remembering that we have neither seen nor heard the witnesses – see *PETERS VS SUNDAY POST LTD [1958] E.A 424*, *SELLE & ANOTHER VS ASSOCIATED MOTOR BOAT CO. LTD & OTHERS [1968] E.A 12*3 and *EPHANTUS MWANGI & ANOTHER VS DUNCAN MWANGI WAMBUGU [1982-88] 1 KAR 278*. In the last case HANCOX JA put it thus at p. 292 of the Report:

"*A Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the findings he did."*

The first holding in that case is also relevant, namely that:-

"*The Court of Appeal would hesitate before reversing the decision of a trial Judge on his findings of fact and would only do so if (a) it appeared that he had failed to take account of particular circumstances or probabilities material to an estimate of the evidence or (b) that his impression based on the demeanor of material witness was inconsistent with evidence in the case generally"*

We must bear these injunctions in mind as we deal with the grounds of appeal raised by the appellant in its memorandum of appeal.

The dispute between the parties herein concerned payment of Kshs. 626,707/40 (as per the plaint). The respondent demanded this money from the appellant on account of materials supplied, work done and services rendered by the respondent to the appellant at the appellant's Riverside Garden site in the year 1998. Each side gave evidence through a single witness. To prove its case the respondent called its Director Bhachu (PW1) to testify. And the appellant on its part called its Managing Director Pindona (DW1. It was the evidence of these witnesses that the learned Commissioner considered and came to the conclusion that the respondent's version of what transpired was the more credible. We have on our part considered the recorded evidence of these two witnesses and have come to the same conclusion as did the learned Commissioner that the respondent had proved its case on the balance of probabilities.

As can be seen from the grounds of appeal, the appellant's main challenge is that the learned Commissioner was wrong in her findings of facts. We have carefully considered these grounds of appeal (all on findings of facts) but found no merit in any of them. We are satisfied that the learned Commissioner acted on correct principles in reaching her decision. We have no reason to interfere with her findings and the final decision.

In view of the foregoing, we find no merit in any of the four grounds set out by the appellant in its memorandum of appeal. We reject all these grounds and the consequence of all that must be that all the grounds argued before us must fail. The upshot of that must be that this appeal fails and we order that it be and is hereby dismissed with costs thereof to the respondent. Those shall be the orders of this Court.

Dated and delivered at Nairobi this 12th day of October, 2007.

P.K. TUNOI

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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