IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: OMOLO, BOSIRE & O'KUBASU JJ.A)
CIVIL APPEAL NO.22 OF 2000

BETWEEN

KORA CONSTRUCTION COMPANY LTD..... APPELLANT

AND

MUMIAS SUGAR COMPANY LTD..... RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya at Kakamega (Justice B.K. Tanui) delivered on the 14th day of May, 1999

in

H.C.C.C. NO.207 of 1996)
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JUDGMENT OF THE COURT

By its plaint dated 13th November, 1996, Kora Construction Company Ltd, the appellant, impleaded Mumias Sugar Company Limited, the respondent, for a liquidated sum of Kshs.1,808,227, as the balance of the agreed price for construction works of a sewage system at the respondent's sugar factory at Mumias, and general damages for breach of contract. The respondent denied the claim in a written statement of defence. The suit was heard by Tanui J. who found as fact that the parties indeed entered into a written contract whereby the appellant agreed to construct a sewage system at the respondent's sugar factory at an agreed price. The works were to be completed within a period of two months but which period could be extended by mutual agreement if completion within that period was impeded by "a force majeure e.g heavy rains etc." The learned Judge also found as fact that the works were not completed within the contractual period, and that the contract period was not mutually extended. Consequently he held that the appellant had not established its claim and dismissed it with costs and thereby provoked this appeal.

There are eight grounds of appeal, but which when looked at minutely may be condensed to two broad grounds. First, that the learned trial Judge erred in failing to find that the respondent made it impossible for the appellant to complete the contracted works in time. Second, that due to bad weather and the nature of the soil at Mumias, it was not possible to complete the works within the agreed period, a fact the learned trial Judge failed to appreciate.

It was common ground that the appellant and the respondent indeed entered into a written contract for the former to construct a sewerage system at the latter's sugar factory at Mumias. It was also common ground that the time for completion was agreed upon and that the appellant did not complete the works within that period. Besides, it was common ground that notwithstanding the fact that the contract period

expired before the works were completed, the respondent did not terminate the contract immediately but waited for over eight months thereafter before excluding the appellant from the construction site. It was also common ground that the appellant left the construction site without notifying the respondent and without being asked to do so. Furthermore, it was common ground that prior thereto, the appellant did not seek any extension of the contract period to enable it to complete the works. Nor was there any agreement that the appellant would be paid more than the contract price for the works. In fact clause 8 of the agreement expressly stipulated against any adjustment or alteration of the contract sum unless by mutual agreement in writing. It was on the basis of the foregoing that the learned trial Judge made the findings we earlier alluded to. Whether or not the findings are justified depends on the evidence.

The agreement between the parties was entered into on 27th May 1995. By that date the appellant had already commenced the construction work, but apparently the period prior to the date of the agreement was not taken into account in computing the contract period. Payment for the works was to be made by instalments according to the progress in the works. However, it was mutually agreed that the second and subsequent payments would be made against certificates of satisfactory completion of the various stages of the project. There were other terms, some of which we have mentioned above, which governed the relationship between the parties.

By 21st March, 1996, the works had not been completed. By a letter of even date, a director of the appellant, Mr Jackson M. Lutta, complained to the General Manager of the respondent that the latter had refused to extend the time within which to complete the works. By then only 47% of the works had been done, and 70% of the price had been paid. Before that date the appellant had not raised any issue regarding difficulties in completing the works attributable to the respondent. True, by its letter to the respondent dated 16th February, 1996, the appellant had raised the issue of damage to the sewer line by the employees of the respondent as a result of driving tractors across it. It also complained in the same letter about incidents of theft of ballast, sand and murram by the same employees. Besides he mentioned in passing the fact that the soil around the respondent's factory was difficult to work on. The letter ended with a request in the following terms:-

"We suggest you look for ways and means of assisting us complete the project for both our benefit."

It is noteworthy that the appellant did not complain of any breach of contract by the respondent. Nor did the appellant specifically ask for an extension of the time within which to complete the project.

Clearly the appellant and not the respondent was in breach of the contract by its failure to complete the sewer project as had been agreed upon between the parties. Its argument that the respondent acquiesced in the delay cannot found a cause of action. It is the appellant who went to court to sue for damages for breach of contract, allegedly by the respondent. It not only failed to establish by evidence any breach on the part of the respondent but also to prove loss arising from that breach. The appellant was also unable to prove frustration as the reason for its failure to complete the project. As we stated earlier, the appellant commenced the construction work before signing the contract. It therefore knew the nature of the soil in the area and it should not therefore lie in its mouth to say that the nature of the soil was an unforseen factor.

Mr Kasamani for the appellant also raised the issue of additional works for which payment to the appellant was supposed to be made separately. If there was any agreement for additional works, no evidence in support thereof was adduced. Besides the appellant's plaint is silent on that. What is pleaded are extra expenses allegedly incurred because of damage to the sewer line. But that claim, as we earlier stated, was not supported by evidence. It is trite law that he who avers must prove. The onus was on the appellant to call evidence either to show that the additional works it allegedly executed were part of the contract or that the parties by mutual agreement, after the signing of the original agreement, included the additional works in the contract; and that a specific price was agreed upon for the same.

It is also noteworthy that the appellant concedes it did not complete the works, either within the agreed period or at all. It is doubtful in the circumstances, whether it would be entitled to payment for any works it may have executed but for which payment had not been made. Besides, on the evidence on record, it

cannot possibly be true that there are works which it carried out but for which no payment was made. We earlier alluded to a letter in which it is penned that as at the 21st March, 1996, only about 47% of the contracted works had been certified as satisfactorily completed, but that notwithstanding at least 70% of the price had been paid. This fact was not challenged by the appellant. It then follows that its claim for payment for work carried out but allegedly not paid for, is spurious.

The appellant also made a claim for the retention fees. This is money which in the construction industry is retained after the completion of the construction work to cover any unfinished or poorly finished aspects of the construction which may have been overlooked or which need rectification. The appellant having conceded that it did not complete the construction of the sewer line in the respondent's factory premises, this claim does not arise.

In the result, we come to the conclusion that Tanui J. was right in disallowing the appellant's claim, and we have no hesitation in dismissing this appeal with costs.

Dated and delivered at Nairobi this 6th day of July 2001.

R.S.C. OMOLO
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JUDGE OF APPEAL

S.E.O. BOSIRE
.....

JUDGE OF APPEAL

E.O. O'KUBASU
.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR