



REPUBLIC OF KENYA



**Kamrudin & another v Mark Odende Onyango t/a Maonde Construction (Civil Appeal 236 of 2019) [2024] KEHC 2013 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 2013 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL 236 OF 2019  
HK CHEMITEI, J  
FEBRUARY 29, 2024**

**BETWEEN**

**ZAKIR KAMRUDIN ..... 1<sup>ST</sup> APPELLANT**

**FACHRUDIN KAMRUDIN ..... 2<sup>ND</sup> APPELLANT**

**AND**

**MARK ODEDE ONYANGO T/A MAONDE  
CONSTRUCTION ..... RESPONDENT**

***(BEING AN APPEAL FROM THE JUDGEMENT OF HON.  
KYAMBIA (PM) DATED 25.10.2019 IN CMCC NO 1380 OF 2010)***

**JUDGMENT**

1. The appellants and the respondent entered into some agreement where the respondent was to construct a house for the respondents situate in land parcel number 553 in Mariakani. The said understanding was in the year December 2009.
2. It was the respondent's case at the trial court that he did part of the work and in the cause of time the appellants decided to expand the work by adding another floor.
3. He claimed that this was not however paid for and it forced him to abandoned the site. He thereafter sued for the work already done and demanded that a quantity surveyor undertakes a valuation so as to ascertain what had been done prior to leaving the site.
4. The appellants on their part agreed that the said construction was indeed undertaken by the respondent but left the work midway forcing them to get services from another contractor. They claimed that the respondent had in fact been overpaid.



5. Before the matter went for trial the parties agreed to have independent valuers or quantity surveyors carry out the assessment of the work already done by the respondent. Their evidence was later presented before the trial court.
6. The respondent testified and called his quantity surveyor whereas the appellants called a single witness.
7. The trial court after hearing the parties found for the respondent and awarded him kshs 4,158,579 being the balance of the amount due from the appellants as per the report of the quantity surveyor appointed by the respondent.
8. The said award provoked this appeal. The appellants have raised 6 grounds in their Memorandum of Appeal although basically the same boiled down to the award of general damages.
9. When the matter came up for hearing the court directed that parties file written submissions which they have complied.

### **Appellants submissions**

10. The main issue taken up by the appellants was whether or not the trial court was right in awarding general damages to the respondent seeing that the same was unpleaded.
11. It was their submissions that the respondent was paid for the work done in full and in fact overpaid by kshs 1,735,000. It was, according to them the respondent who terminated the contract by abandoning the site and the respondents had no other options but to get services of another contractor.
12. While arguing that the respondent was not entitled to the general damages, the appellants relied on the case of *Shabeebal Limited v. County Government of Machakos* (2018) eKLR among others. They submitted that the same was not pleaded by the respondent.
13. The appellants submitted that the award was excessive in the circumstances and the trial court considered irrelevant factors and applied wrong principles in law. They therefore prayed that the appeal be allowed.

### **Respondents submissions.**

14. The respondent on his part agreed with the findings of the trial court. He submitted that the award was genuine and legal for the reason that a proper valuation was undertaken by the quantity surveyor and arrived at an accurate figures based on the work done.
15. He went on to submit that the appellant's valuation was done after the construction had been completed as opposed to his which was undertaken before the house was completed.
16. The respondent relied on the case of *Kenya Industrial Estates Ltd v. Ice Enterprises Ltd* C A NO 54 of 2004 and prayed for the appeal to be dismissed.

### **Analysis and determination**

17. This court is aware that it shall only interfere with the findings of the trial court if it arrived at its decision by considering irrelevant factors or left out relevant factors or the award was inordinately high or low and or excessive in the circumstances. See *Kemfro Africa Ltd* case (1985) eKLR.
18. What is not disputed herein is that there was no formal contract produced between the appellants and the respondent despite the respondent testifying about it. This was not however rebutted by the appellants.



19. What was undertaken in terms of construction of the house by the respondent was not disputed. What the appellants paid to the respondent and signed in whatever format was produced without much objection from the respondents.
20. At the same time, it was not disputed that the respondent left site before the full completion of the work. It appears from the oral evidence that some work was added by the appellants from the original work agreed upon. There was no formal contract produced again in respect to the said extra work.
21. The abandonment of the site it appears forced the appellants to get another contractor to complete the work. The appellant did not dispute the payments he received from the appellants as he signed for it whether in person or through another representative.
22. What appears from the signed booklet when he was receiving the payments suggest that the amount was for the materials as well as the costs of labour.
23. It was therefore in my view right for the parties to have agreed by consent on 4<sup>th</sup> June 2010 to have professional assessment of the work done so far by the respondent before leaving the site.
24. The two reports on record by the quantity surveyors by either of the parties is on record. The same were admitted and the trial court referred to them.
25. The only difference appears to show that the report by the appellants was undertaken after the completion of the work as can be seen from the photos attached to it. The one by the respondent was carried out after the consent and before the appellants carried out further construction and subsequent completion of the project.
26. The trial court rightfully in my view relied on the report by the expert contracted by the respondent as it showed the proper position. The appellants report came late in the day and in particular in the year 2012 about two years after the consent was entered.
27. Was the court wrong in awarding damages based on the reports by the quantity surveyor simply because it was unpleaded.?
28. I do not think that this line of argument by the appellants is tenable for the simple reason that as at the time of filing the suit the respondent pleaded that an assessment be undertaken and subsequently he be paid for the extra work done and unpaid for.
29. The appellants by agreeing to this through a valid consent acquiesced and they cannot be heard to complain. To allow their line of argument will be narrowing down the main issue, namely, whether the respondent was paid for the work he did for the appellants.
30. There was no counterclaim by the appellants over the sum they alleged to have overpaid the respondent. In the absence of it the trial court was therefore left with no other option but to rightly conclude that the appellants owed the respondent for the work done and had not been paid for.
31. The absence of a formal contract obviously makes the court believe what the parties orally presented including how the respondent left the construction site. The appellants did not produce any evidence to show that they demanded the respondent to come and complete the work or at all.
32. Consequently, and in view of my above observations I do not fault the findings by the trial court. Had the appellant's quantity surveyor undertaken the valuation or assessment work immediately then it would have perhaps challenged the respondent's valuation.



33. In the absence as found above of a counterclaim by the appellants it is presumed that the respondent owes them nothing.

34. In the premises I do not find the appeal meritorious and dismiss it with costs.

**DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAIROBI THIS 29<sup>TH</sup> DAY OF FEBRUARY 2024.**

**H K CHEMITEI**

**JUDGE**

