



Ainushamsi Construction & Transporters Company Limited v County Government of Vihiga (Civil Appeal E003 of 2022) [2024] KEHC 3288 (KLR) (20 March 2024) (Judgment)

Neutral citation: [2024] KEHC 3288 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CIVIL APPEAL E003 OF 2022
JN KAMAU, J
MARCH 20, 2024**

BETWEEN

**AINUSHAMSI CONSTRUCTION & TRANSPORTERS COMPANY
LIMITED APPELLANT**

AND

COUNTY GOVERNMENT OF VIHIGA RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. S.O. Ongeru (SPM) delivered at Vihiga in Senior Principal Magistrate's Court Case No 152 of 2020 on 1st March 2022)

JUDGMENT

Introduction

1. In his decision of 1st March 2022, the Learned Trial Magistrate, Hon S. O. Ongeru, Senior Principal Magistrate, dismissed the Appellant's suit against the Respondent and awarded costs of the suit to the Respondent.
2. Being aggrieved by the said decision, on 28th March 2022, the Appellant filed a Memorandum of Appeal dated 25th March 2022. It relied on ten (10) grounds of appeal.
3. Its Written Submissions were dated 10th July 2023 and filed on 26th September 2023 while those of the Respondent were dated 30th January 2024 and filed on 30th January 2024. The Judgment herein is based on the said Written Submissions which the parties relied upon in their entirety.

Legal Analysis

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.



5. This was aptly stated in the case of *Selle & Another vs. Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.
6. Having looked at the Grounds of Appeal and the respective parties' Written Submissions, it appeared to this court that the Appellant focused on only two (2) grounds of appeal out of the initial ten (10) issues that had been placed before it to consider. These were:-
 - a. Whether or not the Learned Trial Magistrate erred in law and fact when he failed to consider the compelling evidence tendered by the Appellant in prosecuting the claim against the Respondents
 - b. Whether or not the Learned Trial Magistrate erred in law and fact when he relied on facts not pleaded and issues not raised by the parties in arriving at his decision
7. The issues were interlinked and hence this court dealt with all the Grounds of Appeal together as they were all related.
8. The Appellant placed reliance on the cases of *Oluoch Eric Gogo vs Universal Corporation Limited* [2015] eKLR and *Selle vs Associated Motor Boat Co* [1968] EA 123 where the common thread was that the duty of an appellate court was to reconsider the evidence that was adduced before the trial court and re-evaluate it to draw its own conclusions and to satisfy itself that the conclusions reached by the trial judge were consistent with the evidence.
9. It invoked Section 107 of the *Evidence Act* and submitted that the cardinal rule was that he who alleges must prove. It argued that during trial, it produced a Notification of Award Letter dated 4th December 2012 issued by Vihiga County Government which informed it that it was awarded tender number RFQ/VC/222/2014-2015 for the construction of the Gisambai-Majengo water project, specifying the conditions to be fulfilled. These were acknowledgment of the notification, signing of the contract by both parties before execution of the service and execution of full service of the quoted price of Kshs 18,398,831/=.
10. It added that it also produced Contract dated 9th December 2014 which it duly entered into with the Respondent herein pursuant to the tender award.
11. It was categorical that Paragraph 8 of the Contract stated that in the event of default by either party in meeting their obligations, legal redress was to be sought. It asserted that it successfully completed the construction of the Gisambai-Majengo water project within the stipulated six (6) months-timeframe whereupon the Respondent made partial payments of Kshs 808,275.85 on 19th January, 2016, Kshs 4,502,544.65 on 23rd June, 2017, and Kshs 3,273,103.45 to its Account No 0580298444375 as was evidenced by Bank Statement that it produced and tendered as evidence during trial.
12. It pointed out that the Respondent defaulted in settling the outstanding balance of Kshs 9,735,106/= which prompted it to file the suit at the lower court to recover the said sum from the Respondent herein.
13. It was emphatic that it had proved its case on a balance of probabilities and urged the court to take cognisance of the fact that the Trial Court's disregarded the evidence it tendered in support of its claim against the Respondent herein.



14. It argued that even though the Respondent filed a Statement of Defence on 23rd April 2021, it failed to present any witness to substantiate its Defence and/or case or to challenge the veracity of its Amended Plaintiff dated 10th February 2021. In this regard, he relied on several cases among them the cases of Trust Bank Ltd vs Paramount Universal Bank Limited & 2 Others [2009] eKLR and Edward Muriga through Stanely Mobisa Mariga vs Nathaniel David Schulter & Another [1997] eKLR where the common thread was that where a party fails to call any evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings.
15. It pointed out that the Respondent's Amended Statement of Defence merely stated facts without providing any supporting evidence and that the Trial Court would have solely relied on its pleadings when determining the validity of the prayers it sought.
16. It blamed the Learned Trial Magistrate for having disregarded the legal authorities upon which it presented its case. It further asserted that the Contract Agreement did not stipulate the requirement for it to submit Certificates of Inspection and Acceptance which would demonstrate the completion of specific works and outstanding payments.
17. It contended that the Respondent did not file a counter-claim against it for the alleged failure to complete the construction of the project and that had such a counter-claim been filed, it would have imposed an obligation on it to provide evidence regarding the percentage of completed work. It added that during the hearing of its suit, the Respondent had the opportunity to bring to the court's attention any purported requirement for the submission of certificates upon project completion but it failed to do so and hence, it should not be allowed to raise the issue at this stage before the court.
18. It was emphatic that the Respondent had the burden to chart its own case which would then bind the court and that the Learned Trial Magistrate should not have attempted to introduce new issues on behalf of the Respondent as the same was tantamount to a judicial officer joining the arena of litigation. In that regard, it cited the cases of Francis Omondi Odhiambo vs Hippolitus Omondi Ochieng [2022] eKLR and Malawi Railways Ltd vs Nyasulu [1988]MWSC 3 where the common thread was that courts are bound by pleadings presented before it by the parties and it cannot enter the arena of litigation.
19. It further submitted that costs follow events and are at the discretion of the court. It urged this court to allow this appeal and order that costs of this appeal and that of the Trial Court suit be borne by the Respondent.
20. On its part, the Respondent submitted that even though the Appellant claimed that it adduced evidence regarding the construction of the aforesaid project, it did not produce a Completion Certificate to confirm that it had completed the works within the stipulated time frame which was what formed the basis of the Trial Court dismissing its claim. It pointed out that the Appellant failed to provide any compelling evidence at all and as such his appeal must fail.
21. It added that the provision of an inspection and completion certificates was well captured as per the 1st Schedule of the Public Procurement and Disposal Regulations of 2006 which was the law governing the contract then. It was its contention that the same needed to be captured verbatim in the contract for it to be implemented as it was the law as far as construction contracts was concerned. It argued that the Appellant's ignorance of the law could not be a defence.
22. It further submitted that the fact that a defence was held to be mere allegations in no way lessened the burden on the Appellant to prove its case. To buttress its point, it relied on the cases of Daniel Toroitich Arap Moi vs Mwangi Stephen Muriithi & Another [2014] eKLR and Kenya Power and Lighting Company Limited vs Nathan Karanja Gachoka & Another [2016] eKLR where the common



- thread was that a plaintiff must prove its case too upon a balance of probabilities whether the evidence was unchallenged or not.
23. It was emphatic that the issue of Completion Certificate arose during PW 1's cross-examination but that the question was not answered satisfactorily despite him having been given an opportunity to respond to it. It asserted that the Appellant's advocate re-examined him on the said question and consequently, it was procedurally fair for the Trial Court to have relied on the same.
24. The degree of proof in civil cases was well enunciated in the case of *Miller vs Minister of Pensions [1947]* which was cited with approval in *D.T. Dobie Company (K) Limited Vs Wanyonyi Wafula Chabukati [2014] eKLR* where the court held:-
- “That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say ‘we think it more probable than not’, thus proof on a balance of probabilities means a win however narrow.”
25. Notably, Section 107(1) of the *Evidence Act* Cap 80 (Laws of Kenya) states that:-
- “Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove that those facts exists.”
26. Section 108 of the *Evidence Act* also stipulates as follows:-
- “The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”
27. Further, Section 109 of the *Evidence Act* stipulates that:-
- The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
28. In addition, Section 110 of the *Evidence Act* provides that:-
- The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.
29. This court considered the evidence of Maulid Khalifi Ali (hereinafter referred to as “PW 1”), the Director of the Appellant against the backdrop of the aforesaid provisions of the law.
30. He produced in evidence the Letter of Authority dated 20th August 2019, Notification of Award dated 4th December 2014, the Contract, the Payment Statement and Demand Letter as exhibits in support of the Appellant's case.
31. He stated that the Appellant was paid a total of Kshs 8, 663,723.95 in three (3) instalments of Kshs 808,275/=-, Kshs 4,582,344.05, and Kshs 3, 273,103.45 that were paid on 19th January 2016, 23rd June 2017 and 4th March 2019 respectively. He asserted that the outstanding balance had been pending for ten (10) years.
32. The question of the Completion Certificate was posed to him when he was cross-examined. He stated that he had the completion certificates. He, however, did not adduce the same as evidence during trial.



- He was not re-examined on this issue. His evidence during re-examination was to the effect that no one ever complained that the monies the Appellant was paid were paid fraudulently.
33. As the issue of Completion Certificate was raised during trial, the Respondent could not therefore be estopped by from raising the said at this appellate stage. The Respondent was also under no obligation to adduce any evidence to counter the Appellant's assertions or assist the Appellant to prove its case.
 34. The fact that the Respondent did not call upon any witness did not lessen the Appellant's burden to prove its case on a balance of probabilities. Instead, the burden lay on the Appellant to prove that the Respondent owed it money and never shifted to the Respondent at any given time.
 35. Notably, the production of procurement plan and the advertisement of the tender by the Appellant was not material in the Appeal herein. This was because it was not in dispute that it was awarded the tender for the construction of the Gisambai-Majengo water project for the quoted price of Kshs 18,398,831/=. It was also not in dispute that it was paid a sum of Kshs 8, 663,723.95. What appeared to have been in dispute was whether or not the Respondent was obligated to pay it the balance of Kshs 9,735,196/=.
 36. A perusal of the 1st Schedule of the aforesaid Regulations indicated that there had to be an Inspection and Acceptance committee that verified the services or works done. The Appellant was therefore required to demonstrate that it was issued with an acceptance certificate or a completion certificate signifying the completed works so as to be entitled to the said balance of Kshs 9,735,196/=. It was immaterial that neither the County nor the National Audit had demanded money from him or complained that he had been fraudulently paid.
 37. After considering the entire evidence that was adduced before the Trial Court, this court was inclined to agree with the finding of the Learned Trial Magistrate that the Appellant failed to prove his case on a balance of probabilities. The burden of proof lay with the Appellant to discharge before the Trial Court as per the provisions of Sections 107, 108 and 109 of the *Evidence Act* which it failed to do and thus weakened its case.

Disposition

38. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 28th March 2022 was not merited and the same be and is hereby dismissed. As the Respondent was the Government and it would be punitive to award costs to a government against its citizen, this court deviated from the general principle that costs follow the event and directs that each party will bear its own costs of the Appeal.
39. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 20TH DAY OF MARCH 2024

J. KAMAU

JUDGE

