

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2021] SCCA 82
17 December 2021
SCA 26/2019
(Appeal from CC 55/2016)

In the Matter Between

Daniel Marengo
Doris Marengo
(rep. by Mr. Serge Rouillon)

1st Appellant
2nd Appellant

and

Bajrang Builders (Proprietary) Limited
(rep. by Mr. S. Rajasundaram)

Respondent

Neutral Citation: *Marengo & Anor v Bajrang Builders (Proprietary) Ltd* (SCA 26/2019)
[2021] SCCA 82 (Arising in CC 55/2016) 17 December 2021

Before: Twomey JA, Robinson JA, Tibatemwa-Ekirikubinza JA

Summary: Breach of a building contract - damages - proof of loss

Heard: 2 December 2021

Delivered: 17 December 2021

ORDER

- (1) Appeal is dismissed
 - (2) The awards of SCR235,000 and retention money are quashed
 - (3) No order as to costs
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JUDGMENT

ROBINSON, JA (TWOMEY TIBATEMWA-EKIRIKUBINZA concurring)

Background

[1] The Respondent (the Plaintiff then) filed a plaint against the Appellants (the Defendants then) for damages for breach of a building contract, entered into by the Respondent and

the Appellants on the 16 March 2013, under which it had agreed to build a two-bedroom house, gazebo, carport and swimming pool, hereafter the "*Building Contract*". The Building Contract was for nine months commencing on the 1 April 2013, and the Building Contract sum was Seychelles Rupees (SCR) 2,900,000.

- [2] It was undisputed at the hearing that the Appellants terminated the Building Contract "*with immediate effect*" on the 1 October 2014, exhibit P3.
- [3] The Respondent claimed damages for the loss it has sustained in the total sum of SCR413,000 particularised as follows (1) SCR307,444 representing the balance due on works carried out by the Respondent under the Building Contract, (2) SCR56,000 for expenses, and (3) SCR50,000 as moral damages.
- [4] In its plaint, the Respondent stated that the Appellants asked for some extra work, which did not fall under the Building Contract. The Respondent charged SCR10,619 for the extra work.
- [5] After denying the Respondent's claims, the Appellants set up a counter-claim in the Respondent's action claiming damages for breach of contract. The Appellants claimed damages due to them for the loss they had sustained in the amount of SCR622,541 representing expenses incurred for completing the works, particularised as follows —

"1. New timber to redo decking of 70sqm – R46,900/-

2. Cost of shipment of materials – R13,500/-

3. Cost of fixing of timber floor, oiling and varnishing – R26,800/-

4. Electrical works including materials and labour – R45,650/-

5. Completion of swimming pool – R62,000/-

6. Balustrade – R28,726/-

7. Provisional cost – R175,000/-

8. Water reconnection fee – R23,875.40

SUB TOTAL: R422,451.40

Plus moral damage as specified in the counter-claim R200,000".

[6] After considering the evidence, the learned Judge found that the Respondent was entitled to SCR235,000 under the Building Contract and retention money. He entered judgment for the Respondent for SCR235,000 and retention money.

[7] We pause here to state that the Respondent did not claim retention money. Moreover, there was no relief pleaded for. In this connection, the evidence of Mr Bhupesh Dhenjee Hirani, PW-1, a director of the Respondent, with respect to the question of retention money, fell outside of the pleadings. The Court of Appeal in *Marie-Ange Pirame v Armano Peri* SCA 16 of 2005 (unreported) held —

"this Court did state in (CA 8/97) inter alia that evidence outside the pleadings although not objected to and the relief not pleaded for ..., cannot and does not have the effect of translating the said issues into the pleadings or evidence. Indeed we should reiterate here that the above-quoted views of this Court still remain good law".

[8] Accordingly, we hold that the learned Judge was wrong to order that the Respondent was entitled to retention money and quash the award made for retention money.

The Appeal

[9] The Appellants have filed fourteen grounds of appeal, as follows —

"1. The learned Judge erred in law and in fact in failing to consider any law at all in deciding the dispute between the parties, especially the breach of the agreement by the Respondent.

2. The learned Judge erred in law and showed a total lack of application to the contract between the parties including the time limit for completion of the project, no details of completed works and the quality of workmanship proved to the Court.

3. The learned Judge erred in fact and law in making his decision on an erroneous report of a quantity surveyor based on estimates of work done well after the Appellants had moved in and lived in their house and made improvements to their property.

4. *The learned Judge erred in law by not taking into account the lack of detailed quantifiable evidence of work done by the Respondent, no site book or bill of quantities to prove its claim to show the extent of the works completed and any breakdown of the work schedule.*

5. *The learned Judge erred in law in failing to make any findings on the claims of the Appellants in the suit or to take into consideration that works under the contract were not completed or not completed to a reasonable standard.*

6. *The learned Judge erred in law in failing to be impartial in this suit and penalizing the Appellants in his final judgment including his order for them to pay costs of the suit.*

7. *The learned Judge erred in law and showed his partiality by requesting a Quantity Surveyor report after parties had closed their cases and made written submissions to essentially make up the deficiencies in the Respondent's evidence.*

8. *The learned Judge erred in law in not considering the evidence of the witnesses of the parties especially the Appellants witnesses concerning works under the contract remaining to be completed, including concerning defective electrical results.*

9. *The learned Judge erred in law in failing to consider the delayed performance of the Respondent that forced the Appellants to live in alternative accommodation where they incurred extra costs and were finally forced to move out.*

10. *The learned Judge erred in law and fact by not considering that the Respondent made short cuts in the work and did not follow engineers' plans for the building claiming that this would cut down on costs which affected the quality of the works and the finish of the total project.*

11. *The learned Judge erred in the facts and law and ignored issues relating to the swimming pool and surrounding decking being defective and never completed.*

12. *The learned Judge erred in the facts and law when photographs showed electrical works not been carried out to the required standard and generally defective and hazardous and the Appellants at the time of the commencement of the suit still on a temporary supply from the PUC.*

13. *The learned Judge erred in fact and law when he ignored the water bill during construction was not paid by the Respondent as agreed by the parties, which led to the disconnection of the water to the premises causing the Appellants to suffer more inconvenience and disturbance to their peaceful enjoyment of their new home.*

14. The learned Judge has completely failed to apply himself to all the issues in the case and has simply settled for a figure in the report made by the Quantity surveyor based on guesswork and well after the breach period."

Analysis of the Parties respective contentions

Grounds 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 14 of the grounds of appeal

[10] It is not clear why Counsel for the Appellants, a Senior Counsel, has framed grounds of appeal in this manner. We state no more about the grounds of appeal as framed.

[11] We also observed that Counsel for the Appellants had combined by and large all the grounds of appeal together in the skeleton heads of argument. The heads of argument are unclear and not succinct and contain unnecessary elaboration. Such heads of argument run afoul rule 24 of the Seychelles Court of Appeal Rules, 2005, as amended. In the case of *Freslon v Patel* (SCA 20/2018) [2020] SCCA 43 (delivered on 18 December 2020), the Court of Appeal expressed its disapproval concerning such practice and gave reasons why Counsel should not follow it.

[12] We strongly urge Counsel to formulate grounds of appeal and skeleton heads of argument diligently.

[13] We consider grounds 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 14 together. As we understand it, these grounds challenged in the main (1) the learned Judge's finding that the Appellants had breached the Building Contract and the award of damages, and (2) the failure of the learned Judge to make any finding concerning the Appellants' claims.

[14] After considering the whole record of this case and the written and oral submissions offered on behalf of the Appellants and the Respondent, we conclude that all these grounds of appeal are misconceived. We give reasons for this finding.

[15] Fundamentally, the evidence adduced on behalf of the Appellants and the Respondent did not include any expert report on the valuation of the alleged completed building works, uncompleted building works, and the alleged defects and repair works.

[16] The record revealed that the learned Judge *proprio motu* took the extraordinary step of suggesting and ordering that a quantity surveyor be appointed to assist him in findings of breaches of the agreements and the amounts to be paid (if any) by the Respondent and the Appellants after they had closed their respective case.

[17] We reproduce the pertinent paragraphs of the learned Judge's judgment —

"[55] Finally in the course of the hearing of this case a quantity surveyor, namely Mr Jacques Renaud was appointed on the 1st of June 2018 by the court with the consent of both parties. Mr Renaud was required to make a report setting out the monetary values of the works done by the Plaintiff and also the amount payable to the Defendants for works not completed and for the cost of remedying the defects in the said residential building.

[56] The plaintiff's claim was for a total sum of SCR 307,444.00, on the contract of construction, for work executed, and a sum of SCR 56,000.00 for expenses incurred and SCR 50,000.00 for moral damages.

[57] The Defendants have claimed the sum of SR 422,000 for various items; as well as SR 200,000.00 for moral damages.

It is to be noted that at the end of the case the parties agreed to appoint a quantity surveyor to assess the value of the works done and works left undone, who would decide as to any payment due to either side. Mr Jacques Renaud was therefore appointed with the consent of the parties and each party agreed to contribute equally towards his fees. The court is now in presence of his report made on the basis of visit to the site, interviews with the parties and scrutiny of documents made available to him. Mr Renaud has computed the total sum of SCR 3,135,558 as being the sum payable to the plaintiff originally. He has also computed the sum already paid at SCR 2,900,000.00. As per his calculation an amount of SCR 235,000.00 is to be paid by the Defendants to the plaintiff.

In the light of the above report the Court therefore orders the Defendants to pay sum of SCR 235,000.00 along with the retention money."

Verbatim

[18] It would be a futile exercise to consider whether or not the learned Judge was correct in law in requiring the Respondent and the Appellants to submit a joint quantity surveying report after the close of their respective case. For this case, it suffices to state that the learned Judge fell into error in relying on a quantity surveying report, which did not form part of the evidence to make findings in favour of the Respondent. Based on the same reasoning, we conclude that the learned Judge would have fallen into error had he made any finding concerning the alleged claims of the Appellants.

[19] For the reasons stated above, we conclude that the learned Judge was wrong to conclude that the Respondent was entitled to the sum of SCR235,000. Accordingly, we quash the orders of the learned Judge awarding the Respondent the sum of SCR235,000.

[20] In the final analysis, grounds 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 14 stand dismissed.

Ground 13 of the grounds of appeal

[21] Under this ground of appeal, the Appellants contended that the learned Judge erred in not considering that they had paid a water bill, which the Respondent was responsible for paying. The Second Appellant explained in her evidence that she connected to Public Utilities Corporation water during the construction as the stream from which the Respondent was previously getting water had dried up due to the drought.

[22] It is not clear on what ground we are to fault the learned Judge in not finding that the Respondent was liable to pay the water bill. The sketchy Building Contract did not provide that the Respondent shall be liable to pay any water bill. Moreover, the skeleton heads of argument offered on behalf of the Appellants other than repeating this ground of appeal do not address it.

[23] For the reasons stated above, we conclude that ground 13 is without merit and stands dismissed.

Decision

[24] For the reasons stated above, the appeal is dismissed in its entirety.

[25] We quash the orders of the learned Judge awarding the Respondent the sum of SCR235,000 and retention money.

[26] We make no order as to costs.

F. Robinson, JA

I concur

M. Twomey, JA

I concur

L. Tibatemwa-Ekirikubinza, JA

Signed, dated and delivered at Ile du Port on 17 December 2021.