



**Odhungo v Wambugu (Civil Appeal E1027 of 2022)
[2024] KEHC 9951 (KLR) (Civ) (30 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9951 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E1027 OF 2022

JM NANG'EA, J

JULY 30, 2024

BETWEEN

NANCY WANJIRA ODHUNGO APPELLANT

AND

ELIZABETH WANJIKU WAMBUGU RESPONDENT

(Being an appeal from the Judgement of the Resident Magistrate/ Adjudicator of the Small Claim's Court at Nairobi (Hon. M. Mutua- RM) delivered on 31st October 2022.)

JUDGMENT

1. The appellant herein is challenging the said learned trial court's judgement in which he ordered the appellant to refund to the respondent a sum of Kshs.150,000 together with the costs of the suit and interest thereon at court rates.
2. The appellant's Grounds of Appeal as per Memorandum of Appeal dated 15th December 2022 may be condensed as hereunder:
 - a. That the learned trial magistrate erred in law and fact in adjudging the appellant liable to refund the sum in question against the weight of evidence.
 - b. That the learned trial magistrate erred in law and fact by failing to consider the appellant's submissions, particularly in regard to arising issues of agency and contract.
 - c. That the learned trial magistrate erred in law and fact by failing to take into account that the respondent did not come to the court of equity with clean hands.



3. The appellant therefore prays that the appeal be allowed and the trial court's judgement set aside and substituted with an order dismissing the suit with costs to her as incurred in the appeal as well as in the lower court.
4. The summary of the case before the trial court is that the respondent sued the appellant for refund of Kshs.178,500 that had been paid to the latter to facilitate the former's travel to Canada. The appellant was providing through her firm agency services necessary for the travel at a total cost of Kshs.303,000 inclusive of Kshs.3, 000 that was to cater for processing of the respondent's son's Certificate of Birth, according to the respondent. The appellant is alleged to have failed to provide the required travel services despite receiving the said amount of Kshs.303,000 and only refunded Kshs.124,500 while withholding Kshs.178,500. That default provoked the suit before the lower court.
5. The appellant' response to the claim is that the agreement between the parties was for relocation of the respondent to Canada and that the appellant's obligations included securing a work visa, transport and premises in Canada for the respondent. According to the appellant, the arrangement between the parties did not require full payment before the services were rendered save for a sum of Kshs.25,000 designated as "office fees". It is further averred that contrary to the respondent's contentions, failure to procure her child's Certificate of Birth was not wilful but it was a consequence of the respondent misrepresenting the name of the child as Shawn Wambugu while the Registry of Births and Deaths showed that her son was in fact named Sean Gathii.
6. The respondent is accused of causing termination of the contract after she became impatient despite being briefed that the process would take long. The appellant contends that the respondent contributed to the delay to finalize the travel arrangements by providing erroneous information about her and her child. It is admitted that the respondent was only reimbursed Kshs.124,000 with the claimed sum of Kshs.178,500 going towards defraying expenses incurred in the undertaken process. For the stated reasons inter alia the appellant, therefore, denies the allegation that she breached the agreement.
7. Pursuant to the provisions of section 30 of the Small Claims Courts Act, the suit was disposed of on the basis of documentary evidence and written submissions. Upon considering the pleadings, documentary evidence and submissions of the parties, the trial court held that it was in fact the appellant that terminated the contract "to avoid scenes in her office" after the respondent became rowdy. The trial court, however, noted that the respondent's child's Certificate of Birth was procured and thus discounted the sum of Kshs.3,000 that was agreed to meet the cost of obtaining the document. The Court also gave credit to the appellant in respect of the sum of Kshs.25,000 described as office fees. The court deducted these sums from the claimed amount of Kshs.178,500 thereby arriving at the sum of Kshs.150,500 as the refund due to the respondent.
8. The parties filed written submissions vide the court's e-filing platform which I have perused against the record of this appeal.
9. It is trite law that the appellate court can only interfere with the findings and/or award of the trial court if the court misdirects itself on matters of fact and/or law by failing to take relevant factors into account or by considering irrelevant factors and thus arrive at a plainly wrong decision (see the case of [*Ocean Freight Shipping Co. Ltd V. Oakdale Commodities Ltd \(1997\) eKLR Civil Appeal No. 198 of 1995*](#)). The appellate court also has the duty of analyzing and re-assessing the evidence on record and reach an independent decision as observed in the case of *Selle V. Associated Motor Boat Co. (1968) EA 123*.
10. The issues for determination before the trial court were two- fold: whether the appellant breached the agency agreement and, if so, whether the respondent was entitled to refund of the said sum of



Kshs.178,500. The appellant claims that the respondent was in breach for terminating the process of facilitating her travel prematurely while the latter charges that the appellant failed to keep her part of the bargain to facilitate her travel.

11. I have studied the agency agreement dated 21st April 2022 executed by the parties. Clause 6 of the agreement stipulates that “monies paid by the Client (read, the respondent) to reserve the services of the Consultant (read, the appellant), will be accepted as a Down payment fee. If the Client cancels the application process before completion period, the Client will be liable for deduction of up to 50% plus an office fee of Ksh.25,000.

Consultant reserves the right to CANCEL the application process in case improper documentation, incitement, misconduct and criminal activities” (sic).

12. Clause 7 (Liability) provides that “in the unlikely event of the Consultant, being unable to render the service (s) as expected, liability shall be limited to the total cost – or monies already paid by the Client”.
13. As noted by the trial court, it was the appellant who terminated the contract citing the respondent’s misconduct during processing of her travel plans to Canada. The lower court’s assertion in its judgement that the appellant successfully procured a Certificate of Birth for the respondent’s son is not, however, borne out by the record as the respondent has not confirmed the fact. In fact, one of the complaints by the appellant is that the respondent was not co-operative in this regard.
14. Given the contradicting positions of the parties and the fact that oral evidence was not tendered and tested by cross-examination, the court is unable to determine who was in breach of the agreement save that it was terminated by the appellant. As the appellant terminated the agreement, she was obliged to act pursuant to Clause 7 supra. The appellant cannot therefore fault the trial court as it even ordered refund of lesser amount than what the appellant undertook to refund under Clause 7 of the agreement.
15. In the result, the appeal fails on all the grounds. The parties will bear their own costs of the appeal as well as in the lower court.

Judgement accordingly.

JUDGEMENT DELIVERED VIRTUALLY THIS 30TH DAY OF JULY, 2024 IN THE PRESENCE OF:

The Appellant’s Advocate, Mr. Mutembei

The Respondent’s Advocate, Ms Swaka

The Court Assistant, Ruth.

J. M. NANG’EA

JUDGE

