



**Ouko v Tolo (Civil Appeal E1292 of 2023)  
[2024] KEHC 12210 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 12210 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL APPEAL E1292 OF 2023  
MA OTIENO, J  
SEPTEMBER 26, 2024**

**BETWEEN**

**DAVID OOKO OUKO ..... APPELLANT**

**AND**

**JACOB TOLO ..... RESPONDENT**

*(Being an Appeal arising from part of the Judgment of the Small  
Claims Court at Nairobi, (Hon. O. A. Nyandusi) dated 23rd November  
2023 in SCCCOMM/E5031/2023; David Ooko Ouko vs. Jacob Tolo)*

**JUDGMENT**

**Background**

1. This is an Appeal from the decision of the Small Claims Court delivered on 23<sup>rd</sup> November 2023 in the Milimani SCCCOMM/E5031/2023 in which the Appellant had sued the Respondent seeking to enforce an agreement dated 15<sup>th</sup> February 2019 for payment of a debt of Kshs. 430,000/-.
2. The Appellant's claim at the lower court was that by the said agreement of 15<sup>th</sup> February 2019, the Respondent had undertaken to start paying the debt after four years from the date of the agreement. However, the Respondent only paid Kshs. 50,000/- and thereafter defaulted, leaving a balance of Kshs. 380,000/- unpaid. It is this balance which the Appellant sought to recover in the suit.
3. In response to the Appellant's claim, the Respondent filed his response generally denying ever receiving any money from the Appellant. According to the Respondent, the Appellant had invested in a business venture which did not materialize and consequently, no monies were owing from him to the Appellant.
4. On 23<sup>rd</sup> November 2023, the trial court rendered its judgment in the dispute in favour of Appellant. The court however found that out of the total Kshs. 430,000/- claimed by the Appellant, only Kshs. 200,000/- had been proved by way of evidence.



## The Appeal

5. Aggrieved by the trial court's decision of awarding a sum of Kshs. 200,000/- only instead of the Kshs. 430,000 claimed, the Appellant lodged an appeal to this court vide his Memorandum of Appeal dated 27<sup>th</sup> November 2023.

## Submissions

6. The appeal was canvassed by way of written submissions. Both parties complied and filed their respective submissions as per the directions.
7. In his submissions, the Appellant identified the following two issues which in his opinion required a determination of this court; -
  - a. Whether the learned trial Adjudicator erred in law by failing to award the Appellant the contractual amount despite holding that there was a binding agreement between the parties and therefore inadvertently rewriting the Agreement between the parties.
  - b. What are the appropriate remedies in the circumstances.
8. On the first issue, the Appellant submitted that the trial court having found in its judgement that there was a valid debt acknowledgement agreement for Kshs. 430,000/- between the parties, the court committed an error in its finding that only a sum of Kshs. 200,000/- had been proved in evidence by the Appellant.
9. According to the Appellant, the Agreement dated 15<sup>th</sup> February 2019 which the trial court considered valid amounts to a clear admission of the indebtedness and therefore awarding an amount other than the amount indicated in the agreement, as the trial court did, amounted to the court re-writing the agreement between the parties. The Appellant emphasized that the agreement was clear that the amount owed thereunder was Kshs. 430,000/- and not the Kshs. 200,000/- awarded by the trial court.
10. The Appellant further submitted that the finding by the trial court was against the evidence on record and that unlike the Appellant who produced the agreement between the parties and documents in support thereof, the Respondent did not lead any evidence to contest his indebtedness to the Appellant.
11. Citing the Court of Appeal decision in the case of National Bank of Kenya Ltd vs. Pipe Plastic Samkolit (K) Ltd (2002) 2 E.A. 503, (2011) eKLR the respondent asserted that parties to a contract are bound by the terms and conditions thereof and that it is not the business of the Courts to rewrite such contracts unless coercion, fraud or undue influence are pleaded and proved.
12. In the premises, the Appellant prayed that the appeal be allowed and the trial court's finding that only Kshs. 200,000/- was owing under the contract be reversed and in its place, a judgement be entered in favour of the Appellant against the Respondent for a sum of Kshs. 380,000/-, the Respondent having repaid the sum of Kshs. 50,000/-.
13. On his part, the Respondent supported the finding by the trial court and submitted that the finding by the trial court was reasonable and in accordance with the evidence submitted at trial by both parties. The Respondent maintained that the Appellant did not prove that he owed him Kshs. 430,000/- as had been alleged in the statement of claim to the standards required under Section 107 of the [evidence Act](#).
14. Citing the decision in [Bwire v Wayo Sailoki \(Civil Appeal 032 of 2021\)](#) [2022] KEHC 7 9KLR0 (24 January 2022 (Judgment)) the Respondent asserted that the Appellant did not prove their case on a balance of probability since there was no eye witness who witnessed the accident.



15. The Respondents therefore urged this court to dismiss the appeal and uphold the trial court's Judgment.

### **Analysis and determination**

16. This is an appeal from the Small Claims Court pursuant to section 38 of the *Small Claims Court Act* which provides as follows; -

- “(1) A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.
- (2) An appeal from any decision or order referred to in subsection (1) shall be final.”

17. It therefore follows that in appeals originating from the Small Claims Court, this court can only entertain an appeal limited only to points of law in terms of Section 38(1) of the Small Claims Act. Consequently, the trial court's findings on factual issues are to be accepted by this court unless it is demonstrated to this court that the trial court's conclusions on those facts are so perverse as to warrant the attention of this court, exercising its appellate jurisdiction under the Act.

18. It is noteworthy that the duty of this court when dealing with an appeal from the Small Claims Court under Section 38 of the Act is comparable to that of the Court of Appeal when dealing with a matter on a second appeal. In *Kenya Breweries Ltd v Godfrey Odoyo* [2010] eKLR the Court of Appeal distinguished between matters of law and matters of fact as follows: -

“First, this is a second appeal. In a first appeal the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyse it, evaluate it and come to its own independent conclusion. In other words, a first appeal is by way of a retrial and facts must be revisited and analysed a fresh, - see *Selle and Another vs. Associated Motor Boat Company Ltd and Others* (1968) EA 123. In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.” [Empasis added]

19. Again, in *Charles Kipkoech Leting v Express (K) Ltd & another* [2018] eKLR the Court of Appeal further clarified that where a right of appeal is confined to questions of law only, an appellate court is duty bound to accept the findings of fact by the lower court. That the court should not interfere with the findings of the trial on the factual issues unless it is apparent that, based on the evidence on record, no reasonable tribunal or court could have reached the same conclusion, in which case, the holding or decision would be bad in law and therefore qualify to be reviewed on a second appeal. The court stated that; -

“This is a second appeal. Our mandate is as has been enunciated in a long line of cases decided by the Court. See *Maina versus Mugiria* [1983] KLR 78, *Kenya Breweries Ltd versus Godfrey Odongo*, Civil Appeal No. 127 of 2007, and *Stanley N. Muriithi & Another versus Bernard Munene Ithiga* [2016] eKLR, for the holdings inter alia that, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the Courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. See also the English case of



Martin versus Glywed Distributors Ltd (t/a MBS Fastenings) 1983 ICR 511 where in, it was held inter alia that, where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.”

20. I have considered memorandum of appeal, the evidence on record and the rival submissions by the parties and note that the instant appeal is solely on the issue of trial court’s finding that the amount owed to the Appellant by the Respondent was Kshs. 200,000/- as opposed to the Kshs. 430,000/- claimed in the suit at the trial court.
21. The first duty of this court therefore is to determine whether the issues raised by the Appellant in the memorandum of appeal are issues of law, to which this court will have jurisdiction, or one of fact, to which this court will be bound by the finding of the trial court and therefore refrain from handling in its appellate jurisdiction under the Act.
22. From the proceedings and evidence on record, it is clear that in reaching its conclusion on the extent of the Respondent’s indebtedness to the Appellant, the trial court considered purely factual issues. The trial court considered the evidence tendered by the Appellant and came to the conclusion that the Appellant had not proved to the required standards that he was owed Kshs. 430,000/- by the Respondent.
23. Having established that the determination by the trial court was purely on factual basis, the next step for this court is to examine and determine whether the trial court’s finding on those factual issues, based on the evidence on record, are so unreasonable within the principles set out by the Court of Appeal in the case of Kenya Breweries Ltd v Godfrey Odoyo (supra) to warrant the attention of this court, exercising its appellate jurisdiction under section 38(1) of the *Small Claims Court Act*.
24. This court notes that in arriving at its conclusion that only a sum of Kshs. 200,000/- had been proved by the Appellant to the standards required under Section 107 of the *Evidence Act*, the trial court stated that the Appellant had failed to produce in evidence any document such as bank slip or M-pesa statement demonstrating that the amount claimed of Kshs. 430,000/- had actually moved from the Appellant to the Respondent.
25. The trial court concluded in its decision by stating that after considering the evidence submitted by the Appellant, particularly the WhatsApp communication between the parties, the only amount that had been proved by the Appellant to be owing from the Respondent under the agreement was a sum of Kshs. 200,000/-. The court then proceeded to enter judgment for this amount, less the Kshs. 50,000/- which had been repaid by the Respondent.
26. From the proceedings at the trial court, I note that the matter proceeded by way of documents pursuant to the provisions of section 30 of the *Small Claims Court Act*. The Appellant produced in evidence what was obviously a debt acknowledgement agreement dated 15<sup>th</sup> February 2019 between the parties wherein the Respondent committed to the repayment of Kshs. 430,000, then owing from to the Appellant.
27. I further note that both the Appellant and the Respondent signed the agreement and endorsed thereon their respective telephone and national identity card numbers. The agreement was witnessed by one Augustin Raila Odhiambo who also recorded thereat his telephone and national identification card number.



28. Additionally, the Respondent produced in evidence extracts of WhatsApp communication between the parties concerning the debt in question. I note that in one instance, the Respondent wrote to the Appellant on WhatsApp and stated as follows; -

“There has not been any breach of the contract so far I have with you. Our initial agreement is still in force and alive. No need for another fresh one and I haven’t defaulted on paying you since even July which I requested you on has not come and elapsed. I am on course with the agreement, Thank you”

29. In coming to its conclusion that only Kshs. 200,000/- had been proven by the Appellant to be owing from the Respondent, I note that the trial court relied on the WhatsApp conversation between the parties. However, perusing through the said WhatsApp communication, what is apparent is that at one point, the Appellant, in a bid to have quick closure to the issue, had given the Respondent an offer to have the whole debt settled at a full and final cash payment of Kshs. 200,000/-. The Appellant wrote to the Respondent on WhatsApp in this regard and stated as follows; -

“It is well in the Lord bro. I understood. Shalom.

It’s still my prayers that the Lord open doors for you so that if you can get me 200k cash we settle this matter. On brotherly love.”

30. It is also apparent from the evidence on record that the aforesaid offer by the Appellant was not acted upon by the Respondent and was consequently withdrawn. In fact, evidence on record reveals that the Respondent at one point still wanted to take advantage the Appellant’s offer for a cash payment of Kshs. 200,000/- as a full and final settlement of the whole debt but the Appellant flatly declined stating that the offer had been overtaken by events, the Respondent having failed to take up the opportunity. The Respondent in WhatsApp message to the Appellant, in this regard wrote and stated that; -

“You remember what you had told me about 150k...I had been thinking about it. Could we wait for what will be possible next month if I may raise even 50k as I work on the 150k as you told me. You remember about this bro.?”

Sorry, it was Ksh. 200k you said I have confirmed it from your text message.”

31. In response to the Respondent’s request in this regard, evidence on record reveals that the Appellant wrote to the Respondent on WhatsApp and stated that; -

“I had given you an easy option not once but you were not able to commit yourself to it and that was taken by events. So you can make arrangements with my lawyer I’m sure she will sort you out.”

32. From the above, it is evident that the amount of Kshs. 200,000/- referred to in the WhatsApp communication was merely an early cash settlement offer by the Appellant to the Respondent. An offer which was not acted upon by the Respondent.

33. From the above analysis, it is therefore not clear how the trial court came to the conclusion that from the WhatsApp correspondence, the Appellant had proved that only a sum of Kshs. 200,000/- was owing from the Respondent.

34. In my view, this is a clear case where the trial court considered matters it should not have considered thereby rendering the court’s decision perverse in terms of the Court of Appeal decision in Charles



Kipkoech Leting v Express (K) Ltd & another (supra) as to warrant the attention of this court, exercising its appellate jurisdiction under section 38 of the Small Claims Act.

35. It is an established principle of law that whoever lays a claim before the court against another has the burden to prove it. Sections 107, 108 and 109 of the *Evidence Act* are unequivocal on this and provide as follows: -

“ 107. Burden of proof.

1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist
2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person

108. Incidence of burden.

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.

109. Proof of a particular fact.

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.”

36. In this case, the initial burden to prove that monies owed had not been paid lay squarely with the Appellant. It is only after the Appellant discharged that burden, the legal burden, to the required standards, that the Respondent would be called upon to rebut the same by way of evidence.

37. The Court of Appeal in *Mbuthia Macharia v Annah Mutua & Another* [2017] eKLR stated the following regarding the burden of proof: -

“The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced.

38. The Halsbury’s Laws of England, 4<sup>th</sup> edition, Volume 17 at paras 13 and 14 discusses the burden of proof as follows; -

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he had failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues. The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may



shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence.

39. I have reviewed the pleadings and the proceedings in this matter. I note that in support of his claim, the Appellant produced in evidence the agreement dated 15<sup>th</sup> February 2019 between the parties wherein the Respondent committed to the repayment of Kshs. 430,000 then due. The Appellant further produced in evidence MPESA statement showing that out of the disputed amount, a sum of Kshs. 50,000/- had been paid by the Respondent, leaving a balance of Kshs. 380,000/-.
40. The Appellant also produced in evidence at the trial extracts of WhatsApp correspondence between the parties demonstrating parties' conversation and understanding of the subject debt.
41. In my view, the debt acknowledgment agreement between the parties, the MPESA Statement and the evidence of the WhatsApp correspondence between the parties, all taken together, demonstrates, on a balance of probabilities, that a sum of Kshs. 380,000/- was due and owing from the Respondent under the agreement. Consequently, the burden then ought to have shifted to the Respondent to adduce evidence to dislodge the Appellant's claim.
42. It is evident from the record of appeal that apart from the general denials in his defence denying liability, the Respondent did not file any document in support of his case and therefore did not lead any evidence to challenge the Appellant's case of the debt amount.
43. In *Moses Gichigi Githiru v Paddy Distributors Limited & another* [2021] eKLR when faced with a substantially similar appeal on the issue of liability, the court stated as follows; -
  - “ 20. There was no evidence from the respondents to the contrary. There was therefore no reason to doubt what the appellant was stating to the court. Mere denial in the statement of defence is not sufficient. It must be followed by hard evidence.....
44. Accordingly, I find that the holding by the trial court that only a sum of Kshs. 200,000/- had been proved in evidence to be owing from the Respondent to the Appellant to be erroneous in law and against the evidence on record.
45. For the reasons set out above, the appeal herein succeeds.
46. Consequently, the trial court's Judgment of 23<sup>rd</sup> November 2023 is hereby set aside in its entirety and substituted with a judgment and order of this court finding and holding that the amount due from the Respondent to the Appellant under the agreement dated 15<sup>th</sup> February 2019 between the parties is a sum of Kshs. 430,000/- less Kshs. 50,000 already paid.
47. Interest shall be at court rates from the date of the Judgment.
48. The Appellant shall have cost of this appeal which is hereby assessed at Kshs. 50,000/=
49. It so ordered.

**SIGNED DATED and DELIVERED IN VIRTUAL COURT THIS 26<sup>TH</sup> DAY OF SEPTEMBER 2024**

**ADO MOSES**

**JUDGE**

**In the presence of:**



Moses – Court Assistant

Minoo..... for the Appellant.

Okwaro..... for the Respondent.

