



Kendracom Holdings Limited v Musaka Constructions & Supply Limited (Civil Appeal E950 of 2023) [2024] KEHC 16295 (KLR) (Civ) (18 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16295 (KLR)

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

**CIVIL
CIVIL APPEAL E950 OF 2023**

**H NAMISI, J
DECEMBER 18, 2024**

BETWEEN

KENDRACOM HOLDINGS LIMITED APPELLANT

AND

MUSAKA CONSTRUCTIONS & SUPPLY LIMITED RESPONDENT

(Being an Appeal against the Judgement of Hon. B. J. Ofisi, Senior Resident Magistrate delivered on 8 September 2023 in SCCC No. E3425 of 2023)

JUDGMENT

1. This appeal arises from a suit in the Small Claims Court filed by the Appellant, seeking the following reliefs:
 - i. Judgement in the sum of Kshs 879,000/=;
 - ii. Interest from the date when the debt arose on 29 June 2021 till payment
 - iii. Costs of the claim;
 - iv. Any other appropriate relief that the court deems fit
2. The suit was in respect of road construction material that was supplied by the Appellant to the Respondent on 29 June 2021 for the construction along Mwiki – Saika and Ruai areas. It was the Appellant’s case that the delivery of the consignment was acknowledged by the Respondent, who executed the Delivery Note on 29 June 2021. The Appellant also raised invoice Number KHL213002. The Respondent failed, neglected and/or refused to settle the amount owing to the Appellant.
3. The Respondent entered appearance and filed a response to the Claim, denying that any monies were owed to the Appellant. In the Witness Statement by Moses Muiruri Kihuyu, a director of the company,



the Respondent denied ever contracting the Appellant to supply the goods. The Respondent averred that the goods were received by one Christopher Senkai, who was not authorised nor contracted to receive any goods on behalf of the company.

4. Parties proceeded with the claim by way of written submissions.
5. In its judgement, the trial court identified two (2) issues for determination:
 - i. Whether there was a contractual relationship between the parties herein;
 - ii. If (i) is determined in the affirmative, whether the Claimant is entitled to the amount pleaded
6. In determining the existence of a contractual relationship, the trial court relied on the case of RTS Flexible Systems Ltd -vs- Molkerei Alois Muller GmbH & Co KG (UK Production) [2010] UKSC14 [45] as well as the Court of Appeal decision in Anne Wambui Ndiritu -vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334.
7. In dismissing the claim, the trial court opined thus:

“I have perused the bank statement adduced in evidence by the claimant from 1 July 2021 to 10 July 2021, Kshs 1,841,680/= was credited by the Respondent into the Claimant’s account on 9 July 2021. The invoice and delivery note dated 29 June 2021 are not sufficient evidence to prove that the Respondent owes the Claimant Kshs 879,000/= for materials supplied. In light of the foregoing, i find that the Claimant has failed to prove its claim to the required standard.”
8. Being aggrieved by the judgment of the trial court, the Appellant lodged an appeal on the following grounds:
 - i. That the learned Magistrate erred in law and in fact in finding that the Appellant’s documentary evidence of both the invoice and delivery notes presented were not sufficient evidence to prove Respondent owed the Claimant Kshs 879,000/=;
 - ii. That the learned Magistrate reached a wrong decision in law and fact contrary to the weight of evidence before her;
 - iii. That the learned Magistrate erred in law and in fact in finding that there existed no legal relationship between the parties for supply of materials without considering the evidence presented before her and thus reached at a wrong decision;
 - iv. That the learned Magistrate erred in law and practice in issuing a decision which is contrary to the evidence presented and considering other factors which were not controverted or placed before her on a balance of probability. In effect the learned trial Magistrate reached a wrong decision;
 - v. That the learned Magistrate erred in law in that if she was in doubt of whether the material were supplied by the Appellant which fact was not denied by the Respondent, then she would have relied on the documentary evidence presented before her to reach a partial decision;
 - vi. That the learned Magistrate erred in law and in fact by misdirecting herself and acting on a wrong principle of law in determining the case before her and more so relying on matters that were not before her and thus reached a wrong conclusion.
9. Parties were directed to file written submissions. The Appellant filed submissions dated 24 May 2024. By the time of writing this judgement, the Respondent had not filed any submissions.



Analysis & Determination

10. Section 38 of the [Small Claims Court Act](#) provides as follows:
 1. A person aggrieved by the decision or an order of the Court may appeal against that decision or an order to the High Court on matters of law;
 2. An appeal from any decision or order referred to in sub section (1) shall be final.
11. In the case of *Otieno, Ragot & Company Advocates -vs- National Bank Kenya Ltd* [2020] eKLR, the Court of Appeal addressed the duty of a court considering points of law.

“This is a second appeal. I am alive to my duty as a second appellate court to determine 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: *Stanley N. Muriithi & Another versus Bernard Munene Ithiga* (2016) eKLR).”
12. Similarly in the case of *Mwita v Woodventure (K) Limited & another (Civil Appeal 58 of 2017)* [2022] KECA 628 (KLR) (8 July 2022) (Judgment), the Court of Appeal stated:

-“This is a second appeal. Accordingly, the jurisdiction of this Court is limited to consideration of matters of law. As was held in the case of *Stanley N. Muriithi & Another v Bernard Munene Ithiga* [2016] eKLR, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the court below considered matters it should not have considered, or failed to consider matters it should have considered, or looking at the entire decision, it is perverse. See also *Kenya Breweries Limited v Godfrey Odoyo* [2010] eKLR in which it was held that: “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.”
13. The duty of this Court in this instance is similar to that stated herein above, which is essentially limited to points of law. In the case of *J N & 5 Others -vs- Board of Management, St. G School Nairobi & Another* [2017] eKLR, in addressing a point of law and a point of fact, Justice Mativo stated thus:

“In law, a question of law, also known as a point of law, is a question that must be answered by applying relevant legal principles to interpretation of the law. Such a question is distinct from a question of fact, which must be answered by reference to facts and evidence as well as inferences arising from those facts.

In law, a question of fact, also known as a point of fact, is a question that must be answered by reference to facts and evidence as well as inferences arising from those facts. Such a question is distinct from a question of law, which must be answered by applying relevant legal principles. The answer to a question of fact (a "finding of fact") usually depends on particular circumstances or factual situations.”
14. Turning to the appeal herein, the Appellant’s grounds can be summarised into one point of law; whether or not the Appellant met the standard of proof required in civil proceedings, which is on a balance of probability.



15. In re H C Minors [1996] AC 563 at 586, Lord Nicholls explained balance of probability as follows:

“The balance of probability standard means that a Court is satisfied an event occurred, if the Court considers, that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities, the Court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegations, the less likely it is that the event occurred and, hence, the stronger should be the evidence before the Court concludes that the allegation is established on the balance of probability. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation

16. In the case of William Kabogo Gitau vs George Thuo & 2 Others [2010] 1 KLR 526, Kimaru J addressed what amounts to proof on a balance of probability as follows:

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is [more] probable than not, that the allegations he made occurred.”

17. In the instant case, the Appellant produced documents in support of his claim. The first bundle of documents dated 4 May 2023 contained an Invoice dated 29 June 2021 for Kshs 879,000/=, the basis of the claim against the Respondent. Also produced was a Delivery Note dated June 2021, for delivery of 75 lorries of murrum and base material. The said delivery note was signed by Christopher Kuntai on 29 June 2021.

18. Additionally, the Appellant produced an Invoice dated 15 May 2021 for the supply of murrum, base material and hardcore to the Respondent, amounting to Kshs 1,841,680/=. There was also a Delivery Note dated April 2021 signed by Christopher Kuntai Sankei on 15 May 2021. Further, the Appellant produced Bank Statement indicating a remittance of Kshs 1,841, 680/= by the Respondent into the Appellant’s account on 9 June 2021. This was the exact amount in the invoice raised by the Appellant.

19. In their defence, the Respondent denied contracting the Appellant to supply goods. Further they denied authorising Christopher Senkai to receive goods on behalf of the company.

20. Without a doubt, the evidence presented by the Appellant overwhelmingly proved the existence of contractual relations between the parties. The fact that the Respondent paid to the Appellant the exact sum of money owed as per the invoice dated May 2021 shows that there was a contractual relationship. It is interesting that the Respondent chose to denounce Christopher Senkai, yet they paid against the Delivery Note dated May 2021 which was also signed by him.

21. Needless to say, based on the evidence presented, it is more probable that the transaction occurred as claimed by the Appellant. In short, the Appellant’s version of events is more probable than that of the Respondent.

22. On this basis, I allow the appeal and set aside the judgement of the trial court and substitute the same with the following orders:

- i. Judgement be and is hereby entered in favor of the Claimant in the sum of Kshs 879,000/=;
- ii. Interest on (i) at court rates from 4 May 2023 until payment in full



iii. Costs of the suit and interest thereon at court rates from 8 September 2023 until payment in full

23. The Appellant is also awarded costs of this Appeal assessed at Kshs 40,000/=.

DATED AND DELIVERED AT NAIROBI THIS 18 DAY OF DECEMBER 2024.

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

...Mr. Mwangi..... for the Appellant

Ms. Nganga for the Respondent

