



**Advertising Limited v Impact Africa Limited (Civil Appeal E604 of 2021)  
[2023] KEHC 21916 (KLR) (Civ) (18 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21916 (KLR)

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

**CIVIL**

**CIVIL APPEAL E604 OF 2021**

**AN ONGERI, J**

**AUGUST 18, 2023**

**BETWEEN**

**ADVERTISING LIMITED ..... APPELLANT**

**AND**

**IMPACT AFRICA LIMITED ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. E. M. Kagoni (PM)  
in Milimani CMCC no. 987 of 2019 delivered on 31/08/2021)*

**JUDGMENT**

1. The respondent herein filed Milimani CMCC no. 987 of 2019 seeking the following remedies from the appellant
  - i. USD 68,753 being the outstanding invoices unpaid.
  - ii. Interest on (a) at court rates from the date of filing suit together with costs of the suit.
2. The respondent's case was that they did work for the appellant and the appellant did not pay all the outstanding claims.
3. The trial court found that the respondent did work for the appellant to the satisfaction of the appellant.
4. The trial court also found that the respondent was entitled to payment upon producing 3<sup>rd</sup> party invoices.
5. The trial court entered judgment in favour of the respondent by awarding the respondent USD68,753 being the outstanding invoices unpaid upon the respondent tendering the third party invoices which tally with the amount.



6. The trial court also awarded the respondent costs of the suit and interest on the amount awarded at court rates from the date of filing suit until payment in full.
7. The appellant has filed this appeal against the said judgment and decree on the following grounds;
  - i. That the trial magistrate erred in law and in fact in finding that the respondent was entitled to USD.68,753 together with costs, while at the same time holding that the respondent did not prove his case.
  - ii. That the trial court misinterpreted the doctrine of unjust enrichment.
  - iii. That the trial magistrate failed to evaluate the evidence correctly and arrived at incorrect conclusion.
  - iv. That the trial magistrate did not consider the evidence of the appellant.
8. I have considered the submissions filed by the parties. The appellant submitted that the failure to pay the respondents was due to inaccurate invoices submitted.
9. Further that the parties had an oral agreement that the respondent was to offer marketing and advertising services to promote an airline carrier called KLM in East Africa.
10. The procedure for executing the agreement was that the appellant would issue a media order/LPO and the respondent would in turn engage relevant media houses, which would then execute the instructions contained in the media order.
11. Upon execution of the media order, the respondent was mandated to provide the appellant with their invoice supported with proof of advertisement and invoices from the media houses containing the commission payable.
12. The appellant submitted that by trial court awarding USD.68,753 on condition that the respondent provides supporting documents that tally to the awarded amount, the respondent did not prove their case.
13. Further that the respondent did not table any evidence to substantiate their claim.
14. The appellant relied on the case of *David Ombisi vs Joseph Wambugu Nderi* (2004)eKLR where the court underscored the principle of freedom of contract and also the case of *John Njoroge Michuki vs Shell LTD* civil appeal No,227 of 1999 in which it was stated that

“ The courts should give effect to the intention of the parties and not overrule clearly expressed intentions”.
15. The appellants submitted that the burden of proof was upon the respondents to prove their case to the required standard. The appellants referred to Section 107 and 109 of the *Evidence Act*.
16. The appellant further submitted that the trial court did not consider the appellant’s evidence that the respondents did not prove the conditions for payment such as provision for proof of advertisement and invoices from 3rd parties containing the commission payable.



17. The appellant also submitted that the trial court misinterpreted the application of the doctrine of unjust enrichment. He relied on the case of *Bid Insurance Brokers Ltd vs British United Provident Fund* (2016) eKLR where the court said that
  - “the principle literally means restoration to the original position. The remedy of restitution only applies where the defendant has been unjustly enriched and would only apply where the contract has been set aside.”
18. The appellant submitted that it runs the risk of having its right censured and itself subjected to arbitrary costs.
19. The appellant urged the court to set aside the judgement of the trial court
20. The respondent on their part submitted that the appellant breached the terms of their agreement which was reduced to writing via email dated 05/01/2017.
21. The respondents submitted that they did their part of the contract which was to provide advertising services in Uganda, Tanzania and Rwanda.
22. Further that the respondents provided invoices but that the appellant refused to make payments even after the invoices were provided four times and the same amounts to unjust enrichment.
23. The respondents submitted that the idea of unjust enrichment or unjust benefits in this case is intended to prevent the appellant from retaining payment in the sum of USD 68,753 for work done by the respondents.
24. The respondents relied on the Law of Restitution 5th ED, (1998) at pages 11-12 where Lord Goff of Chiveley & Professor Gareth Jones said in their monumental treatise as follows:
  - “Most mature systems of law have found it necessary to provide outside the fields of contract and civil wrongs for restoration of benefits on the grounds of unjust enrichment”
25. The respondents also relied on the case of *Fibrosa Spolka Akevina vs Fairbairn Lawson Combre Babour LTD* (1943) AC 32 at page 61.
26. The respondents urged the court to dismiss the appeal.
 

This being a first appeal, the duty of the first appellate court is to re-evaluate the evidence adduced at the trial court and to arrive at its own conclusion whether to support the findings of the trial court while bearing in mind that the trial court had the opportunity to see the witnesses
8. The issues for determination in this appeal are as follows;
  - i. Whether the respondent proved its case to the required standard in civil cases.
  - ii. Whether the trial court misinterpreted the doctrine of unjust enrichment.
9. On the issue as to whether the respondent proved its case, the applicant’s submission was that the respondent did not adduce sufficient evidence to prove its case.
10. I find that the conditional judgment given shows that the respondent did not establish its case on a balance or probabilities.
11. I find that the respondent did not prove its case in the absence of the 3<sup>rd</sup> party invoices.



12. On the issue as to whether the trial court misinterpreted the doctrine of unjust enrichment, the same occurs when a party confers a benefit upon another party without receiving the proper restitution required by law.
13. In the current case, I find that the Respondent did not prove its case to the required standard and it cannot be claimed that the Appellant unjustly enriched itself.
14. It is not the duty of the court to rewrite contracts between parties.
15. In the case of *Pius Kimaiyo Langat vs. Co-operative Bank of Kenya Ltd* (2017) eKLR the Court of Appeal further stated that: -

“We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties, They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved”.
16. I find that the Respondent did not comply with the condition they had agreed upon before the Appellant would pay.
17. The appeal herein succeeds and I accordingly set aside the judgment and decree of the trial court and I substitute it with an order dismissing the respondent’s claim.
18. On the issue of costs, I order that each party bears its own costs of this suit and of the trial court for reasons that had the respondent produced the third party invoices during the trial of the suit, the judgment would not have been set aside.
19. In the circumstances, I direct that each party bears its own costs of both this appeal and the primary suit.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 18<sup>TH</sup> DAY OF AUGUST, 2023.**

**A. N. ONGERI**

**JUDGE**

**In the presence of:**

.....for the Appellant

..... for the Respondent

