



REPUBLIC OF KENYA



KENYA LAW
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**E-Cart Services t/a Jumia Kenya Ltd v Mugendi (Civil Appeal E095 of 2023)
[2023] KEHC 24194 (KLR) (Civ) (27 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24194 (KLR)

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

**CIVIL
CIVIL APPEAL E095 OF 2023**

**AN ONGERI, J
OCTOBER 27, 2023**

BETWEEN

E-CART SERVICES T/A JUMIA KENYA LTD APPELLANT

AND

ENOS RIUNGU MUGENDI RESPONDENT

*(Being an appeal from the ruling and order of Hon. C. A. Okumu
(RM) in Milimani SCCC No. 4808 of 2022 delivered on 20/1/2023)*

JUDGMENT

1. The respondent in this appeal was the claimant in Milimani SCCC no. 4808 against the appellant vide a claim dated 4/8/2022 seeking commission for the months of February and March 2019 in the sum of 346,082 in respect of services rendered by the respondent.
2. The trial court found that the respondent proved that he was entitled to commission in the sum of kshs.346,082 and entered judgment in favour of the respondent against the appellant in the sum of kshs.346,082 together with costs and interest from the date of filing suit until payment in full.
3. The appellant has appealed against the said judgment on the following grounds;
 - a. That the learned magistrate erred in law and in fact in entering judgement against the appellant for the respondent in the sum of Kshs. 346,082 together with costs of the claim and interest from date of filing until payment in full;
 - b. That the learned magistrate erred in law and in fact in finding that the respondent had proved its claim on a balance of probabilities as envisaged under section 107 and section 109 of the [*evidence act*](#);



- c. That the learned magistrate erred in law and in fact by failing to consider the appellants response to the statement of claim by finding that the issue of the television sets was raised on the basis of a counter-claim that was thrown out;
 - d. That the learned magistrate erred in law and in fact by failing to consider the appellants right to set off against the respondent's claim as envisaged in the agreement therein.
 - e. That the learned magistrate erred in law and in fact by finding that the respondent is entitled to the commission as sought.
4. The parties filed submissions as follows; the appellant submitted that the respondent was not entitled to the commission sought. The Appellant withheld the Respondent's commissions owing to his failure to remit the funds owed for the TVs that he had ordered on 12/2/2019 collected on 26/2/2019. The appellant argued that it did not deny that it withheld funds owing to the respondent however the trial court failed to determine whether the respondent failed to remit funds and therefore they were condemned unheard.
5. In support the appellant cited Kenya Oil Company Ltd vs Kenya Ports Authority [2009] eKLR, Kimaru, J. stated that:

“It cannot be said that where the plaintiff has established its claim by providing documentary evidence, then the counterclaim and set off by the defendant should be tried separately and judgment be entered for the plaintiff as against the defendant. I think it would be a travesty of justice if the court were to discount a set-off raised by the defendant in its defence on the sole ground that the transaction that resulted in the defendant's claim in the set off is a separate cause of action from the set of facts that prompted the plaintiff to file suit against the defendant. The authors of Atkin's Encyclopaedia of Court Forms in Civil Proceedings, 2nd Edition volume I, 1978 Issue, aptly set out the import of a set-off in a defence:

“59. Set-off. Where a claim by a defendant to a sum of money (whether of an ascertained amount or not) is relied on as a defence to the whole or part of a claim made by the plaintiff it may be included in the defence and set off against the plaintiff's claim, whether or not it is also added as a counterclaim (h). A set-off is in its nature a defence rather than a cross-claim (j). A right of set-off normally arises where the plaintiff's claim is a debt or liquidated demand and the defendant has cross-claim for a debt or liquidated demand which, if established, will extinguish or reduce the plaintiff's money claim (k), and should be pleaded as such.”

6. That further, 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. In National Bank of Kenya Ltd vs. Pipe Plastic Samkolit (K) Ltd (2002) 2 E.A. 503, (2011) eKLR the Court of Appeal stated that: -

“A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”

7. The respondent submitted that he filed and produced an email dated 12th March 2019 giving a breakdown of the commission for sales made in February 2019 and another email dated 16th April 2019 tabulating commission for sales made in the month of March 2019. In response the appellant denied owing the respondent any money and alleged that the respondent stole 37 Samsung televisions all valued at Kshs. 3,000,000 after he deceived the dispatch operator that he had paid for the same.



8. The respondent argued that he was arrested and charged with the offence of stealing and was discharged of the said offence. That it is trite law that he who alleges must prove as per section 108 of the [Evidence Act](#). The appellant did not discharge the burden of proving why the respondent was/should be denied his commission and therefore the respondent proved his case on a balance of probability.
9. The appellant's witness explained the procedure of making orders and collecting items after payment. There was no credit policy and there was no way the respondent could cart away goods without showing proof of payment. Any ordered item was released by the appellant's employee after confirmation of payment. The respondent further argued that the appellant did not plead set-off in its response dated 30/8/2023 and that it is trite law that parties are bound by their pleadings.
10. This being a first appeal, the duty of the first appellate court is to re-evaluate the evidence before the trial court and to arrive at its own conclusion whether or not to support the findings of the trial court while bearing in mind that the trial court had the opportunity to see the witnesses.
11. In *Selle –Vs- Associated Motor Boat Co.* [1968] EA 123 it was held in the following terms: -

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”
12. The issues for determination are as follows;
 - i. whether the Trial court had the jurisdiction to hear this case.
 - ii. Whether the trial court was right in throwing out the counter claim.
 - iii. Who pays the costs of this appeal?
13. On the issue as to whether the Trial court had the jurisdiction to hear this case, I find that the Appellant raised a preliminary objection on the basis that they had a counterclaim and set off amounting to Kshs, 3,000,000.
14. The appellant did not deny the services. The reason for declining to pay the commission was that the Appellant was seeking a set off for television sets they alleged the Respondent had taken and had not paid for amounting to Kshs. 3,000,000.
15. The appellant's counterclaim was dismissed without according the Appellant an opportunity to be heard.
16. I find that it is in the interest of justice that the Appellant be granted a chance to be heard on his counterclaim.



17. On the issue as to whether the trial court was right in throwing out the counter claim, I find that the Trial court did not have the pecuniary jurisdiction to entertain the counterclaim.
18. The trial court was not right in throwing out the counterclaim without a hearing. The duty of the court is to grant both parties a fair hearing before reaching a determination.
19. I find that the Trial court delivered a ruling dated 21/10/2022 on the issue of the Appellant's counterclaim and said that the counterclaim exceeded the pecuniary jurisdiction of the Small Claim's Court.
20. The Appellant did not abandon any part of the counterclaim in excess of Kshs.200,000 in accordance with the provisions of Rules 13 and 14 of the SCC's Rules.
21. The Trial court should have downed its tools on the basis that the amount of the counterclaim exceeded its pecuniary jurisdiction since the Appellant did not abandon any part of the counterclaim.
22. I find that the Trial court did not have the jurisdiction to entertain the counterclaim in view of the amount of the Appellants were claiming.
23. I allow the appeal and set aside the judgment of the Trial court and instead dismiss the Respondent's case with no orders as to costs.
24. The Appellant is at liberty to file a separate claim in the magistrate's court to recover the alleged amount counterclaimed and both parties will have a chance be heard and the suit determined on merit.
25. I direct that each party bears its own costs of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 27TH DAY OF OCTOBER, 2023.

.....
A. N. ONGERI

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent

