



**Biomax Africa Limited v Homa Bay County (Civil Appeal
E036 of 2021) [2022] KEHC 10956 (KLR) (21 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 10956 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL E036 OF 2021**

**KW KIARIE, J
JUNE 21, 2022**

BETWEEN

BIOMAX AFRICA LIMITED APPELLANT

AND

HOMA BAY COUNTY RESPONDENT

*(Being an Appeal from the judgment and decree in Homa Bay Chief Magistrate's
CMCC No. 59 of 2018 by Hon. Tom Mark Olando –Principal Magistrate)*

JUDGMENT

1. The appellant herein was the plaintiff in Homa Bay Chief Magistrate's CMCC No. 59 of 2018. This was a claim was for a sum of Kshs. 12,814,000.00 for services rendered. The learned trial magistrate delivered judgment dated May 5, 2021 where the claim was dismissed.
2. The appellant was aggrieved by the said judgment and filed this appeal through the firm of Wandai Matheka & Company Advocates. The appellant raised the following grounds of appeal:
 - a) The learned trial magistrate erred in law and in fact by totally ignoring and/or superficially analyzing the pleadings, evidence and written submissions of the appellant herein and consequently coming to wrong conclusion on the same.
 - b) The learned trial magistrate misdirected himself by applying wrong principles of law (if any) and totally ignoring the unrebutted and/or uncontroverted evidence by the appellant and its witnesses and therefore coming to a wrong conclusion of the same.
 - c) The learned trial magistrate erred in law and fact by applying a standard of beyond reasonable doubt when it should have applied a balance of probability and that it went ahead to erroneously dismiss the appellant's suit in Homa Bay SPMCC No.59 of 2018.



- d) The learned trial magistrate misdirected himself in ignoring the principles applicable and the relevant authorities cited in the unrebutted written submissions presented and filed by the appellant.
 - e) The learned trial magistrate misdirected himself in not sufficiently taking into account all the evidence presented before him in totality and in particular the evidence presented on behalf of the appellant.
 - f) The learned trial magistrate erred in law and fact by failing to advise the appellant on its right of appeal.
 - g) The learned trial magistrate failed to apply judicially and to adequately evaluate the evidence and exhibits tendered and thereby arrived at a decision unsustainable in law.
3. The respondent was represented by the firm of Nyauke & Company, Advocates. It was contended that the appeal lacked merit and the following grounds raised:
- a) That there was no notification of award of a tender.
 - b) That there was no procurement contract.
4. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of *Selle v Associated Motor Boat Co. Ltd.* [1965] EA 123, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.
5. The appellant pleaded and called evidence that they were contracted via tender number HB/CTY/E&NR/09/2015-2016 to supply, install test and commission 43 solar lights in the greater Homa Bay region within Homa Bay County. The notification of the award of the tender is at page 12 of the record of appeal.
6. On November 10, 2016 the respondent issued an acknowledgment of completion of the works and the gist of the letter written the County engineer, Energy and Natural Resources, Homa Bay County (Eng. Dennis Onyango Otieno) was that an inspection committee was to be set up as soon as possible to facilitate the issuance of certificate of works. This letter is at page 13 of the record of appeal.
7. The appellant called Francis Shirandula (PW1) and Machume Mocheche (PW2). It was acknowledged by these witnesses that out of the money demanded, Kshs 2, 000,000.00 had been paid. A bank statement to that effect was produced.
8. Other than denial in the pleadings, the respondent did not call any evidence. It is trite law that pleadings are not evidence. In *CMC Aviation Ltd v Cruise Air Ltd (1)* [1978] KLR 103, Madan – J. stated:
- “Pleadings contain averments of the three concerned until they are proved or disproved, or there is admission of them or any of them by the Parties they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence.”
- In the instant case, the evidence of the appellant was therefore not challenged. The finding of the learned trial magistrate was not supported by the evidence on record.
9. From the foregoing analysis of the evidence on record, I find that the trial court’s decision cannot stand. I set it aside and substitute it with judgment in favour of the appellant for Kshs 12,814,000.00 less the amount of Kshs.2, 000,000.00 that has been acknowledged as having been paid.



10. The appeal therefore succeed with costs in this and the trial court.

DELIVERED AND SIGNED AT HOMA BAY THIS 21ST DAY OF JUNE, 2022

KIARIE WAWERU KIARIE

JUDGE

