Wachira t/a Biotech Electrical Enterprises v Muthiora & another (Civil Appeal E082 of 2024) [2025] KEHC 30 (KLR) (Civ) (13 January 2025) (Judgment)

Neutral citation: [2025] KEHC 30 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E082 OF 2024

RC RUTTO, J

JANUARY 13, 2025

BETWEEN

JAMES WACHIRA T/A BIOTECH ELECTRICAL ENTERPRISES . APPELLANT

AND

DAVID MUGO MUTHIORA .... 1ST RESPONDENT

SAMWEL MUGWANJA .... 2ND RESPONDENT

(An appeal from the judgment and decree of the Small Claims Court at Nairobi (G. Simatwo, RM/Adjudicator) delivered on 19th December 2023 in SCCCOMM No. E5944 of 2023)

JUDGMENT

1. This is an appeal from the Small Claims Court. By a Statement of Claim dated 8th August 2023, the 1st respondent averred that he entered into a verbal agreement with the appellant for the supply of electrical materials to light his compound. Subsequently, the 1st respondent paid the appellant the sum of Kshs. 730,000.00 in exchange for those materials. However, the appellant failed to deliver those materials. He thus sought judgment on that liquidated sum.

2. The appellant entered appearance and filed his statement of response dated 25th August 2023. In it, the appellant denied the allegations set out in the statement of claim. In addition, by application dated 31st August 2023, the appellant sought leave to join the 2nd respondent as a third party to the proceedings. That application was allowed on 20th September 2023 and third party proceedings instituted. However, despite service, the 2nd respondent neither entered appearance nor filed his statement of defence.

3. Upon analyzing the facts and evidence adduced, the adjudicator, in a judgment dated 19th December 2023 found the 1st respondent's claim merited. Consequently, judgment was entered in favor of the 1st respondent against the appellant for a sum of Kshs. 730,000.00 together with interest from the date of

filing the claim till payment in full. The 1st respondent was also awarded costs of the suit. The trial court further ordered the appellant to be indemnified by the 2nd respondent in respect of the award, interest and costs awarded to the 1st respondent together with the appellant's costs in defending the suit.

4. The appellant, being dissatisfied with the findings of the adjudicator, lodged this appeal. In its amended memorandum of appeal dated 29th May 2024, the appellant raised seven grounds summarized as follows: the trial court allowed a foreign claim that was never pleaded leading to a violation of the appellant's right to a fair hearing; the trial court considered extraneous evidence not captured in the pleadings; the adjudicator improperly found that there existed an oral agreement between the appellant and the 1st respondent; the trial court lacked jurisdiction to entertain the matter upon the lapse of 60 days by dint of section 34 (1) of the *Small Claims Court Act*; the trial court failed to dismiss the claim under section 3 (i) and (ii) of the *Law of Contract Act*; and that the contract was founded upon an illegality.

5. In view of the grounds of appeal, the appellant urged this court to allow the appeal, set aside the judgment of the adjudicator dated 19th December 2023 and that the appellant be awarded costs of the appeal.

6. The appeal was disposed of by way of written submissions. The appellant filed his written submissions dated 3rd June 2024. He reiterated the contents of his amended memorandum of appeal. He submitted that parties are bound by their pleadings and it was unjust to go beyond the pleadings. That the court violated his constitutional right to fair hearing when it adopted evidence not averred in the pleadings. He added that the decision of the trial court was a nullity since it was delivered after the statutory period for determining disputes under section 34(1) of the *Small Claims Court Act*. Finally, that by dint of the doctrine of privity of contract, a contract cannot confer rights or impose obligations on any person other than the parties to the contract hence there was no nexus created between the appellant and the 1st respondent as to justify the award. Consequently, he urged this court to allow the appeal since the court cannot rewrite contracts and imply that parties were privy to the contract.

7. The 1st respondent relied on his written submissions dated 19th June 2024 to urge that the appeal be dismissed since it was premised on a non-existent ruling. That upon the discovery of the anomaly, that is nonexistence of the ruling, the appellant filed an amended memorandum of appeal without leave of this court. The 1st respondent urged this court to disregard the amended memorandum of appeal and uphold the findings of the trial court since the appellant had filed third party proceedings and got a judgment against the third party and hence, he had no reason to appeal. He prayed that the appeal be dismissed with costs for the reason that no cogent reasons had been advanced to warrant an interference with the findings of the adjudicator.

8. As at the time of writing this judgment the 2nd respondent, had not filed any written submissions.

9. I have done a thorough examination of the grounds of appeal as they appear in the Amended Memorandum of Appeal dated 29th May, 2024, the Record of Appeal and the submissions by parties. To begin with, the duty of this court as the appellate court is well prescribed under Section 38 of the *Small Claims Court Act* (the Act) which limits the jurisdiction of this court to matters of law only. Section 38 of the Act provides that:

38.

(1) A person aggrieved by the decision or an order Appeals. 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."

10. What constitutes a point of law has been settled. 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.
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> 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."

11. However, before delving into the issues of law raised, it is incumbent upon me to first address the preliminary issues as raised by the parties;

12. First, the 1st respondent in his submissions urged this court to disregard the amended memorandum of appeal dated 29th May 2024 on grounds that it was filed without leave of this court. This court takes note that the only change in the amended memorandum of appeal save for the date is the replacement of the word "Ruling" with "Judgment", everything else remains the same. Further, while the 1st respondent faults the appellant for not seeking leave to file the amended memorandum of appeal, they too have raised the issue in their submissions and thus not according the appellant an opportunity to respond.

13. The court also notes that this appeal arises from the Small Claims Court which grants parties the advantage of prosecuting their respective claims within simple rules where of utmost important is the adherence to the principle of natural justice. Thus, bearing this in mind and taking into account the provisions of Article 159 (2) (d) of *the Constitution*, justice should be administered without undue regard to procedural technicalities. In my view, it is evident that there was no ruling made on 19th December 2023 capable of being appealed from but a judgment delivered on the said date. Moreover, the purpose of a memorandum of appeal is to notify the respondent of the appellant's intention to appeal against the decision specifying the grounds thereon. As can be gleaned from the initial grounds of appeal that have been maintained in the Amended Memorandum of Appeal, the appellant's grievance is with the judgment of the adjudicator. In my considered view, the interests of justice dictate that the appeal be considered on the basis of the amended memorandum of appeal rather than it being struck out. In any event, no prejudice has been occasioned on the 1st respondent who has considerably responded to those grounds of appeal in his written submissions. Consequently, I will allow and consider that amended memorandum of appeal on its merits.

14. Secondly, the appellant submitted that the decision was per incuriam since the judgment was delivered beyond the statutory period of 60 days by dint of section 34 (1) of the *Small Claims Court Act*. The said provision provides as follows:

> " All proceedings before the Court on any particular day so far as is practicable shall be heard and determined on the same day or on a day to day basis until final determination of the matter which shall be within sixty days from the date of filing the claim."

15. The claim was filed on 10th August 2023. Judgment was entered on 19th December 2023. Arithmetically, the suit was indeed finally determined beyond the 60-day limit as provided in statute. It is trite law that the Small Claims Court derives its jurisdiction purely from the provisions of the Small Claims Act which prescribes a 60day period to determine a dispute. The effect of failing to adhere to the statutory 60day period was addressed in the case of Biosystems Consultants vs. Nyali Links Arcade [2023] KEHC 21068 (KLR) where the court in interpreting section 34 of the Small Claims Act stated as follows:

> "The purpose of the *Small Claims Court Act* was to facilitate expeditious disposal of the disputes while at the same time respecting the right to be heard. The net result was that balancing the two may result at times to overshooting the 60 days. The 60 days did not have penal consequences for good reason. They were aspirational. That was part of having access to justice over amounts that needed not be in the normal system. Allowing the application would open floodgates that would eventually defeat the purpose of the Act.
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> The non-compliance went to the court's performance and was answerable internally. It could not affect parties who were in court and ready to be heard. Defendants used various gimmicks to have matters adjourned and thereafter turned around to say, 60 days were over. The parties had wasted a full month arguing in the court and with preliminary objections that were much ado about nothing."

16. This court takes the same approach. I would therefore not hesitate to find that the same does not vitiate the judgment of the lower court and its validity. While I appreciate that some courts have taken a separate path and adopted a strict application of the 60-day rule, I add that with the success occasioned by the Small Claims Court in resolving disputes before it, there have been the unintended consequences resulting in an overwhelming number of cases before any given adjudicators across the courts such as Milimani Small Claims Court, where the appeal emanates from. This has made it humanly impossible to conclude the cases within the 60-day contemplated in the Act. My view is that sight should not be lost on the need for timeous resolution of small claims by the adjudicators with the emerging challenges of adhering to the prescribed timelines being something that can be taken up both administratively and if necessary through statutory reforms. Allowing the strict application of the 60 day rule in my view has the effect of allowing greater injustice.

17. Turning to the substratum of the appeal, and in determining the issue of law to wit; whether the adjudicator erred in failing to dismiss the claim under section 3(1) and (2) of the Law of Contract. In the instant case, the summary of the facts as discerned from the record are as follows: the 1st respondent's testimony was that he entered into a verbal agreement with the appellant, through the 2nd respondent, who were in the business of supplying electric and electrical equipment. The parties agreed that the appellant would supply the said materials to the 1st respondent. He clarified that the 2nd respondent represented himself as a proprietor of Biotech Electrical Enterprises and it was based on this mutual trust that the agreement was entered into. That his interactions were with the 2nd respondent as he had never met the appellant but was under the impression that the appellant and the 2nd respondent were business partners. It was agreed that the total costs, including those of installation, was Kshs. 800,000.00. The 1st respondent paid Kshs. 730,000.00 via cheque drawn in favor of the Biotech Electrical Enterprises on 22nd August 2019. However, the appellant was yet to deliver the said equipment.

18. On his part, the appellant's testimony was that the 1st respondent was a stranger to him. That he had never interacted with him and had never entered into any agreement with him. Consequently, he did

not supply any electrical equipment to the 1st respondent. He added that he was paid Kshs. 730,000.00 for supply of street lights by the 2nd respondent via cheque drawn by the 1st respondent. He established that Biotech Electrical Enterprises is his sole business and the 2nd respondent is neither his employee nor his business partner. He was exclusively in a business engagement with the 2nd respondent and did not have any other subsequent business interactions with the 2nd respondent. He added that if there was any valid claim as determined by the court, then the same ought to be met by the 2nd respondent as per the third-party notice.

19. It is not in dispute that the 1st respondent was in communication with the 2nd respondent for the supply of electrical equipment from Biotech Electrical Enterprises. It is also not denied that the appellant received Kshs. 730,000.00 from the 1st respondent but through the 2nd respondent. It is therefore apparent that the 2nd respondent represented himself as a partner, associate or anyway whatsoever a link to Biotech Electrical Enterprises.

20. In the case of Ali Abid Mohammed versus Kenya Shell & Company Limited [2017] eKLR the Court of Appeal held that

> " It therefore follows that a contract can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded. See Timoney and King v King 1920 AD 133 at 141. In the circumstances of the instant case, there existed an enforceable contract between the parties by reason of Conduct. Indeed, it was not disputed by the respondent that it supplied petroleum products to the appellant at a specific amount per litre and for a certain period of time"

21. From the conduct of the parties, and guided by the authority, it can be deduced that an oral contract existed between the respondents and which bound the parties the appellant included. That contract needed not be reduced into writing. The appellant cannot therefore avoid liability. Certainly, if the goods were not delivered, then he ought to refund the 1st respondent. After all, it was the appellant that was the beneficiary of the sum of Kshs. 730,000.00.

22. While sections 3(1) and (2) of the *Law of Contract Act* relate to contracts being in writing, the same cannot be looked at in isolation. There exist other statutes that regulate sale of goods such as the *Sale of Goods Act* which appreciate that a contract can be oral or proved by performance or delivery of goods against payment.

23. The appellant's insistence on privity of contract between him and the 1st respondent is disingenuous in several respects. For instance, the appellant is not a stranger to the 2nd respondent for it is through him that the appellant received the payments from the 1st respondent. Further, upon filing the claim, it is the appellant who instituted third party proceedings seeking indemnity as against the 2nd respondent. Moreover, it only follows that there was a transaction beyond the 2nd respondent in favour of the appellant for which the payment related to. Consideration remains a fundamental element of any contract. In this case, the payment was made by the 1st respondent to the appellant. Whether the payment was for electricity lights as claimed by the appellant on information from the 2nd respondent or for supply of lighting materials to the 1st respondent, that is an issue that is best left between the appellant and the 2nd respondent.

24. Taking cue from the above, I therefore find that the learned magistrate properly found that the 2nd respondent was obligated by law to indemnify the appellant. That was the nature of the orders sought by the appellant in his third-party application in any event and he cannot renege from it. I am not satisfied that there was any illegality in the contract, foreign claim or extraneous evidence that was

beyond the appellant's knowledge as to violate his right to fair hearing as per the other grounds of appeal comprised in the Amended Memorandum of Hearing.

25. Consequently, I find that the appeal lacks merit. It is hereby dismissed with costs to the 1st respondent.

It is so ordered.

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 13TH DAY OF JANUARY 2025

For Appellant:

For Respondent:

Court Assistant: