



Ochieng t/a Joyrowl Limited v Abuor t/a Planet Technical Solutions Limited (Civil Appeal E122 of 2024) [2025] KEHC 7953 (KLR) (13 February 2025) (Judgment)

Neutral citation: [2025] KEHC 7953 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E122 OF 2024
AB MWAMUYE, J
FEBRUARY 13, 2025**

BETWEEN

JOYCE ANYANGO OCHIENG T/A JOYROWL LIMITED APPELLANT

AND

**FELIX ODHIAMBO ABUOR T/A PLANET TECHNICAL SOLUTIONS
LIMITED RESPONDENT**

JUDGMENT

A. Introduction And Background.

1. The Appellant herein was dissatisfied with the decision of the Honourable Adjudicator at the Small Claims Court at Kisumu in SCCOMM/E494/2023 and therefore brought the present appeal asking this court to overturn the entire judgment of the trial court.
2. In a Statement of Claim dated 16th October 2023, the Respondent herein sought for a judgment in the sum of Kshs. 528,495.80/- plus accrued interest as well as the costs of the claim as against the Appellant.
3. Per the Respondent's Claim before the trial court, he and the Appellant entered into an agreement for him to pay Kshs. 528, 495.80/- as conveyancing fee in a land transaction where the responsibility to pay the fee was incidental on the Appellant but who may not have had the money to settle the sum to allow the transaction to proceed compelling the Respondent to pay the same having agreed that the Appellant would later reimburse.
4. According to the Respondent, as evident in his pleadings before the trial court, the money was to be paid by the end of March 2022. However, that was not forthcoming, as a result whereof the Respondent filed a claim in the Small Claims Court in SCCOMM/E494/2023 to recover the said monies.



5. In a rejoinder, the Appellant filed a Response to the Statement of Claim and Counterclaim. It was the Appellant's contention that she owed the Respondent no monies; and that the Kshs. 528, 495.80/- that was paid to the firm of Owiti, Otieno & Ragot Advocates by the Respondent was not for any conveyancing purpose and denied ever entering into such an agreement. She put the Respondent to strict proof.
6. The matter proceeded to a hearing, and once both parties filed their written submissions, the trial court delivered a judgment dated 1st March 2024. The Appellant raised the following issues for determination:
 - i. That the Learned Adjudicator erred in law and in fact in the manner in which he analysed the submissions of both parties.
 - ii. That the Learned Adjudicator erred in law and in fact by failing to render herself on all issues raised in the claim and in the counterclaim.
 - iii. That the Learned Adjudicator erred in law by failing to consider the evidence adduced during the hearing on the 21st day of February 2024 so as to arrive at a just conclusion.
 - iv. That the Learned Adjudicator erred in law and in fact by failing to consider the material circumstances of the case.

B. Analysis And Determination.

7. Before proceeding further, I deem it important to first go over the duty of this court, as the first appellate court.
8. A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in *Selle & another v Associated Motorboat Co. Ltd. & others*¹ and in *Peters v Sunday Post Limited*.
9. In *Mwangi v Wambugu*, [1984] KLR 453 it was held that:

“A Court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding; and an appellate court is not bound to accept the trial Judge's finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
10. Taking into account all pleadings, the evidence adduced, and the Memorandum of Appeal before me, I am of the view that the issues that need to be determined, to arrive at an independent finding of fact, are as follows:
 - i. Whether on a balance of probability, the Respondent paid the alleged Professional Fees on behalf of the Appellant?
 - ii. Whether on a balance of probability, the Appellant paid to the Respondent a sum of Kshs. 528, 495.80/-



11. Section 107 of the *Evidence Act*, Cap 80, places the duty to prove an allegation on the party that places reliance on it. Section 108 places it on the person that would fail if no evidence at all was given on either side. This position is fortified by the authorities of *Kirugi & Another v Kabiya & 3 Others* [1987] KLR 347 and *Evans Nyakwana v Cleophas Bwana Ongaro* [2015] eKLR.
12. As held in *Mwangi vs. Wambugu* (Supra), for us to disturb the finding by the trial court, we will first need to satisfy ourselves that the impugned finding by the trial court was based on no evidence or was based on a misapprehension of the evidence or that the trial court acted on a wrong principle to reach the finding.
13. The trial court in its judgment noted that the Respondent produced receipts dated 31/01/2012 that showed the money being claimed was actually paid by the Respondent. This in itself would not be enough as there still would be needed to show that the payment was made under the instruction of the Appellant, or that at least the duty to pay the professional fees was incidental on the Appellant.
14. The Trial Court again noted that the Respondent adduced a document showing that he had demanded for the same. I presume it is the letter addressed to the Appellant but that has the drawback of being unsigned by the Appellant. The probative value of the same leaves a lot to be desired. There is also an undated, unsigned, unstamped, unwitnessed Affidavit in the record that suffers similar drawbacks as the previous letter adduced. Once again, alone, these documents would not have sufficed as evidence that is dispositive of the fact of the indebtedness of the Appellant.
15. In *Mugo Mungai & 4 others v Official Receiver & Provisional Liquidator (Capital Finance Limited and Pioneer) & 2 others* [2019] eKLR the court decided that an unsigned document has no probative value as the content's genuineness cannot be proved.
16. However, the Respondent also produced excerpts of WhatsApp correspondence between himself and the Appellant. In the correspondence the Respondent shared the impugned letter to which the Appellant asked what it was and why it was unsigned. But she later backtracked and admitted having recalled after speaking to a third party and apologized for the inconvenience and then promised to address the same the following week.
17. While the impugned letter and affidavit are not admissible as pieces of evidence for the very obvious drawbacks mentioned above, taken together with the correspondence they seem to impute credibility on the Respondent's averment that truly he paid the professional fees on behalf of the Appellant.
18. Section 32 of the *Small Claims Court Act* relieves the Small Claims Court from strict rules of evidence. Section 32(2) of the *Small Claims Court Act* states as follows:

“Without prejudice to the generality of subsection (1), the Court may admit as evidence in any proceedings before it, any oral or written testimony, record or other material that the Court considers credible or trustworthy even though the testimony, record or other material is not admissible as evidence in any other Court under the law of evidence.”
19. At the point of adducing the correspondence, the onus of proof shifted to the Appellant to provide an alternative explanation for the concurrence that seems to have been reached once the letter was received in her WhatsApp inbox.
20. In *Muriungi Kanoru Jeremiah vs. Stephen Ungu M'mwarabua* (2015) EKLR the court contemplated that the burden of proof shifts, and it shifts once the author of an allegation discharges their initial burden of proof on a balance of probability.



21. The Appellant did not provide any veritable explanation for that moment of clarity when she seems to have remembered the allegations contained in the letter sent to her as aforesaid. Therefore, I uphold the trial court's finding that the Respondent proved his case on a balance of probability.
22. On whether the Appellant advanced to the Respondent a sum of Kshs. 528, 495.80/-, I find that there is no document, or testimony, or any other means advanced to prove the same. It is merely an allegation that was raised in the counterclaim, but which was not proved to the required standard.
23. In the upshot, I uphold the trial court's judgment and dismiss this appeal with costs to the Respondent.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 13TH DAY OF FEBRUARY 2025

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BAHATI MWAMUYE

JUDGE

In the Presence of:

Counsel for the Appellant– Ms. Nyaaga H/b for Mr. Okatch

Counsel for the Respondent– Ms. Kado H/b for Mr. Nyanga

Court Assistant – Mr. Guyo

