Edward Mong'are Osindi t/a Edross Construction Limited v Orito (Civil Appeal E154 of 2024) [2025] KEHC 2834 (KLR) (3 March 2025) (Judgment)

Neutral citation: [2025] KEHC 2834 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E154 OF 2024

DKN MAGARE, J

MARCH 3, 2025

BETWEEN

EDWARD MONG'ARE OSINDI T/A EDROSS CONSTRUCTION LIMITED .... APPELLANT

AND

ELASTO MWEBI ORITO .... RESPONDENT

JUDGMENT

1. This appeal arises from the Judgment and decree of trial court delivered on 23.7.2024 by Hon. C.C. Rono (RM) in Kisii CMCC No. E576 of 2023.
2. The Memorandum of Appeal dated 20.8.2024 raises three grounds as follows:
    a. The learned magistrate erred in law and fact in ignoring the Appellant's evidence.
    b. The learned magistrate erred in law and fact in failing to consider that the Respondent admitted owing the Plaintiff money.
    c. The learned magistrate erred in law and fact in failing to find that the Appellant proved his case on a balance of probabilities.

Pleadings

3. Vide the Plaint dated 6.6.2023, the Appellant sought judgment for Ksh. 1,030,000/- against the Respondent. It was pleaded in the said plaint that the Appellant supplied the Respondent with building material sometime in September 2016. The Respondent allegedly approached the Appellant, and the Appellant agreed to supply the materials, but the Respondent declined to pay, hence the claim.

Evidence

4. During the hearing, the Appellant relied on his witness statement dated 20.6.2023 and a bundle of documents of the same date, which he produced in evidence. In his case, sometime in 2016, the Respondent approached him to supply materials for construction. He wrote to the National Construction Authority and they approved the construction by the Respondent vide their letter dated 8.9.2018. The residential houses started being constructed in 2018. He supplied the pleaded material, but the Respondent declined to pay. On cross-examination, he stated the letter from NCA was issued when they entered into the contract. He stated that the invoice of 20.3.2017 was for the fence. However, the claim was for all invoices.

5. The Respondent also testified that he agreed he was to give Appellant work. He gave the Appellant the design of the house and instructed him. His witness statement was dated 31.8.2023, and he relied on it. It was his admitted case that he would pay the Appellant Ksh. 400,000/= out of the agreed amount of Ksh. 600,000/=. On cross-examination, he admitted that he had already paid Kshs. 400,000/= to the Appellant and would pay the balance. The Appellant claimed 350,000/=, but he would give him Ksh. 200,000/=.

6. DW2 was Jacklyne Nyaboke Mwebi. She relied on her witness statement dated 23.4.20234. She testified that she was the spouse of the Respondent. According to her, the Appellant did not buy any materials. The Appellant was to be paid after finishing the construction.

7. The court considered the case and rendered its judgment on 5/11/2021. In the Judgment, the court held that the Appellant had not proved his claim against the Respondent to the required standard and dismissed it. Aggrieved, the Appellant lodged a Memorandum of Appeal hence this appeal.

Submissions

8. The Appellant filed submissions on 18.12.2024. He relied on Gospel Assembly Church Academy of Music & Another v Munene Ngotho (2005) eKLR to submit that the produced receipts and invoices justified that the Appellant supplied materials to the Respondent. He also relied on Paul Oganga Ogada v Naran Nanji Karsan Patel & Another (2015) eKLR to submit that there was an enforceable oral agreement between the parties.

9. The Respondent submitted that the Appellant failed to prove his case and that the lower court was correct in its finding.

Analysis

10. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, remember that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first-hand.

11. In the case of Mbogo and Another vs. Shah [1968] EA 93 the Court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

12. The court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

13. In the case of Peters vs Sunday Post Limited [1958] EA 424, court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses…But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion…"

14. The learned magistrate established that the Appellant had not proved that neither the construction materials delivered to the Respondent nor the house was completed without evidence of delivery notes. The court dismissed the suit.

15. Therefore, with special damages, the rule is strict and somewhat mathematical. The court has to discern the pleaded damages and proceed to find proof. It is not based on estimates. The Court of Appeal in Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd [1992] KLR 177 stated that:

> " The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded."

16. The Appellant prayed for a liquidated amount of Ksh. 1,030,000/-. Special damages are very specific and constitute a liquidated claim, which must be pleaded and proved. This court's task thus entails whether the trial court failed to award special damages that were pleaded and proved. In Joseph Kipkorir Rono vs. Kenya Breweries Limited & Another Kericho HCCA No. 45 of 2003, Kimaru, J held that:

> " In current usage, special damage or special damages relate to part pecuniary loss calculable at the date of the trial, whilst general damages relate to all other items of damage whether pecuniary or non-pecuniary. If damages are special damages they must be specifically pleaded and proved as required by law. For a loss to be calculable at the date of trial it must be a sum that has actually been spent or loss that has already been incurred…Special damages and general damages are used in corresponding senses. Thus in personal injury claims, 'special damages' refers to past expenses and lost earnings, whilst 'general damages' will include anticipated loss as well as damages for pain and suffering and loss of amenities… Special damage is in the nature of past pecuniary losses or expenses while general damage is futuristic pecuniary loss or expenses. Therefore in the instant case the loss of income as a direct consequence of this fraud would be both a general damage as well as a special damage. General damages particularly extent thereof would be unknown at the time of the trial and must await the conclusion of the case so that they may be assessed. Special damages on the other hand consist of those losses that could be calculated at the time of the trial. Special damages must be pleaded, but so must future pecuniary loss if it may lead to surprise. Non-pecuniary damage must not be quantified in a pleading…There ought to be a distinction

between past pecuniary losses or expenses already incurred and could easily be calculated by say reference to receipts obtained and anticipated future pecuniary loss or expenses which is continuing and which though one may know the multiplicand you will not normally know how long the loss will take. Such an anticipated loss is general damage, which must of necessity await the completion of the suit to be assessed by the Court. Special damages on the other hand is calculable at the date of the trial out of which a round figure will be obtained. General damages are such as the law will presume to be the direct natural or probable consequences of the action complained of. Special damages on the other hand, are such as the law will infer, from the nature of the act. They do not follow in the ordinary course but are exceptional in their character and, therefore, they must be claimed specifically and proved strictly…Specific loss of profits consequential upon the loss of use of an article for a specific period to the date of the plaint is special damage, which must be pleaded. However, in certain circumstances loss of profits could be included within a claim for general damages… General damages consist of the nature of prospective loss of income while special damages consist of out of pocket expenses and loss of earnings or income incurred down to the date of trial and is generally capable of substantially exact calculation. Where damages has become crystallised and concrete since the wrong the defendant could be surprised at the trial by the detail of its amount."

17. Regarding proof of loss, while it is true that it is trite law that special damages must not only be specifically pleaded but also strictly proved, what amounts to strict proof must depend on the circumstances, that is to say, the character of the acts producing damage, and the circumstances under which those acts were done. See Nizar Virani T/A Kisumu Beach Resort vs. Phoenix of East Africa Assurance Company Limited Civil Appeal No. 88 of 2002 [2004] 2 KLR 269, Gulhamid Mohamedali Jivanji vs. Sanyo Electrical Company Limited Civil Appeal No. 225 of 2001 [2003] KLR 425; [2003] 1 EA 98, Coast Bus Service Ltd vs. Sisco E. Murunga Ndanyi & 2 Others Civil Appeal No. 192 of 1992.

18. In the case of David Bagine Vs Martin Bundi [1997] eKLR, the Court of Appeal stated as follows: -

" It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684: "….special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177 thus:

"Plaintiffs must understand that if they bring actions for damages it is for thm to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it"

19. The evidence relied upon to prove Kshs. 1,030,500/= is contained in the invoices. The documents are not receipts. They are invoices. There are no delivery notes or evidence that the alleged materials were delivered to the Respondent. The documents, therefore, establish that building materials were costed but do not prove the cost was paid. While dealing with the same issue in EP Communications Limited v East African Courier Services Ltd (2019) eKLR, Gikonyo, J stated as follows:

The evidence shows that a business relationship existed between the parties herein. There is also evidence that goods were supplied to the Respondent during the business relationship on credit. However, two issues abound: were the goods alleged to have been supplied actually supplied and received? And were they paid for by the Respondent? The Appellant produced LPOs, and delivery

notes. The purpose of an invoice is that it is issued by a seller to request for payment for purchase….a delivery note is prove of delivery of goods…

20. Therefore, the Appellant had the burden to prove the allegations in the plaint. On this subject, Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

> Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

21. In Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, the Court of Appeal held that:

> " As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

22. It follows that the initial burden of proof lies on the Plaintiff, but the same may shift to the Defendant, depending on the circumstances of the case. In Evans Nyakwana –vs- Cleophas Bwana Ongaro [2015] eKLR it was held that:

> " As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden… is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person…The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail fi no evidence at all were given as either side."

23. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in William Kabogo Gitau –vs- George Thuo & 2 Others [2010] 1 KLE 526 stated that:

> " In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely that not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

24. Similarly, Lord Nicholls of Birkenhead in Re H and Others (Minors) [1996] AC 563, 586 held that;

> " The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability….."

25. Furthermore in Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR, the Judges of Appeal held that:

> " Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-
>
> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
>
> This burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

26. Consequently, in my reevaluation, I find no basis to interfere with the finding of the lower court. The Appellant did not support his case with the requisite evidence. The court also dismisses the Appellant's case that the Respondent admitted in his testimony receiving some monies from the Appellant. The Statement of Defence dated 31.8.2023 contained no such admissions. A testimony or evidence cannot substantiate pleadings. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, Justice A C Mrima stated as doth: -

> "
>
> " 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
>
> ".....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded......
>
> ...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

27. There was no evidence filed by either party to prove that some money were exchanged between the parties. The court cannot act on surmise and conjecture without fact and proof thereof. The Court

of Appeal cited the judgment by Lord Goddard CJ. in Bonham Carter v Hyde Park Hotel Limited (1948) 64 TLR 177), that:

> [The] Plaintiffs must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and, so to speak, throw them at the head of the court saying 'this is what I have lost', I ask you to give me these damages; they have to prove it.
>
> in Attorney General of Jamaica v Clerke (Tanya) (nee Tyrell), Cooke, J.A. delivering the judgment of the court stated that special damages must be strictly proved; the court should be very wary to relax this principle; that what amounts to strict proof is to be determined by the court in the particular circumstance of the case and the court may consider the concept of reasonableness.

28. I therefore find no basis to disturb the finding of the lower court. The same is upheld.

29. Costs follow the event. Section 27(1) of the *Civil Procedure Act* provides as doth:

> Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:
>
> Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
>
> (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

30. The determination of costs payable to the successful party is also a judiciously-exercised discretion of the court, accommodating the special circumstances of the case, while being guided by ends of justice. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law,

constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

31. The Respondent is entitled to costs which I assess at Ksh. 85,000/-.

Determination

32. In the circumstances, I make the following orders:

a. The appeal is dismissed.

b. The Respondent shall have costs of the appeal assessed at Kshs. 85,000/-.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 3RD DAY OF MARCH, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for parties

Court Assistant – Michael