



Meditest Diagnostic Services Limited v Mirza t/a Mirmed Healthcare (Commercial Appeal 284 of 2023) [2025] KEHC 3568 (KLR) (Commercial and Tax) (13 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3568 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL 284 OF 2023
CJ KENDAGOR, J
MARCH 13, 2025**

BETWEEN

MEDITEST DIAGNOSTIC SERVICES LIMITED APPELLANT

AND

DR IRUM MIRZA T/A MIRMED HEALTHCARE RESPONDENT

(Being an appeal from the Judgment and order of Hon. Judith Omollo, SRM & Adjudicator, in the Small Claims Court at Nairobi, delivered on 12th October, 2023 in SCCCOMM E566 of 2023)

JUDGMENT

Introduction

1. The Appellant and the Respondent had a business relationship between 2020 and March 2023. However, the terms of their engagement are not clear and the parties dispute the nature of their engagement and their respective responsibilities under the agreement.
2. The Appellant claimed that under the engagement, it was to provide both credit and cash services to the Respondent. For cash services, the Respondent's clients would pay cash for the services offered, while for credit services it involved providing testing services on credit and later billing the Respondent for those services. Both services involved the Respondent earning a commission or cash backs for the referrals.
3. On the other hand, the Respondent claimed that she engaged the Appellants for their services during the said period where she would mostly refer her patient's samples for examination. She claimed that she only referred patients to the Appellant's laboratory for which there was a cut back amount for various tests.



4. A dispute arose regarding the arrangement and the Appellant sued the Respondent seeking to recover Kshs.936,499/= as the outstanding amount of unpaid invoices. It claimed that it offered sample testing services on credit to the Respondent, but the Respondent had failed to settle the invoices. The Respondent filed a Response to the Statement of Claim in which it denied the claim. She argued that she had never received any funds or payments from the referred clients as all the said patients would pay the Appellant directly.
5. The Court delivered the judgment on 12th October 2023 in which it dismissed the Appellant's claim. It held that the Appellant had not proved the claim on a balance of probabilities. It held that the invoices only and the statement of account without any other supporting evidence were insufficient for the Court to find that the Respondent owes the amount claimed.
6. The Appellant was dissatisfied with the judgment of the Court and appealed to this Court vide a Memorandum of Appeal dated 25th October 2023. It listed the following Grounds of Appeal;
 - a. That the learned Magistrate erred in law by misdirecting herself on the issues for determination and determining undisputed issues that were not pleaded by the parties.
 - b. That the learned Magistrate erred in law and misdirected herself in the interpretation and application of the law on the standard of proof in civil disputes.
 - c. That the learned Magistrate applied wrong principles of law on the threshold of the evidence needed to prove the claim as the delivery of the services was not disputed.
 - d. That the learned Magistrate erred in law by failing to consider or appreciate the pleadings, documents and submissions lodged by the Appellant thereby denying the Appellant a right to be heard.
7. The Appellant asked the Court to allow the appeal and set aside the Judgment and Order of the Hon. Judith Omollo, Senior Resident Magistrate & Adjudicator in SCCCOMM E566 of 2023 delivered electronically on 12th October 2023. It also asked the Court to allow the statement of claim dated 27th January, 2023.
8. The Appeal was canvassed by way of written submissions.

Appellant's Written Submissions

9. The Appellant submitted that the lower Court was wrong to dismiss its claim. It argued that it had met the burden and standard of proof in accordance to the law of evidence. It argued that it had proved its case to the required standard because the Respondent did not dispute that the Appellant had offered the services. It also argued that the Respondent did not dispute that she had received the invoices. Lastly, it argued that the lower Court should have utilized the lumpsum invoices it had produced as evidence, because lumpsum invoices are acceptable way of doing business where parties have a lot of business transactions.

The Respondent's Written Submissions

10. The Respondent submitted that the lower Court was right in finding that the Appellant had not proved its claim to the required standards. She argued that the Appellant's excel sheet produced as evidence was insufficient to prove the claim because it was not accompanied by individual receipts/ invoices to ascertain the validity and correctness of the entries in the excel sheet. She submitted that the Appellant should have produced individual receipts and/or invoices which would have ideally captured



with correctness the name, time, date, the invoice number, and particulars of the tests carried out on a patient plus the billing per test.

11. She submitted that the Appellant did not attach any documentary evidence in terms of individual invoices to substantiate the lumpsum claim of Kshs.936,499/=. She argued that an invoice is a very integral part of the accounting process as it assists to identify the nature of good and/or services supplied and being billed for which helps to track any payment that has not been settled. For these reasons, she urged this court to dismiss the appeal and uphold the lower Court's finding and judgment.

Issues for Determination

12. Have considered the Grounds of Appeal and submissions by both counsels for the parties, I am of the view that there is only one issue for determination;
 - a. Whether the Appellant proved its claim for Kshs.936,499/= on a balance of probabilities.
13. It is trite law that the duty of the first appellate Court is to re-evaluate the evidence in the subordinate Court both on points of law and facts and come up with its findings and conclusions. As the Court is re-evaluating the evidence, it is required to bear in mind that it had neither seen nor heard the witnesses. This principle was set out in *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123:

“...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 ...”

Whether the Appellant proved its claim for Kshs.936,499/= on a balance of probabilities

14. The Appellant claimed that it offered sample testing services on credit to the Respondent, but the Respondent had failed to settle the invoices totaling Kshs.936,499/=. The Respondent denied the claim. This Court is being invited to determine whether Appellant proved its claim for Kshs.936,499/= on a balance of probabilities.
15. The main issue in this appeal is whether the Appellant had discharged its burden of proving the debt and unpaid invoices. It was the burden of the Appellant to satisfy Court on that issue. As a general proposition, 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 (1) of the *Evidence Act* (Chapter 80 of the Laws of Kenya) provides:
 107.
 - (1) 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.
16. In addition, Section 109 and 112 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) provides;
 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.



112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.
17. The Court of Appeal in *Jennifer Nyambura Kamau v Humphrey Mbaka Nandi* NYR CA Civil Appeal No. 342 of 2010[2013] eKLR expounded the principle that “he who asserts must prove” in the following terms;
- “We have considered the rival submissions on this point and state that section 107 and 109 of the *Evidence Act* places the evidential burden upon the appellant to prove that the signature on these forms belong to the Respondent. Section 107 of the *Evidence Act* 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.” Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the *Evidence Act* provides, the burden lies on that person who would fail if no evidence at all were given on either side”.
18. In applying the above legal provisions and authorities to the facts of this case, I find that the Appellant had the evidential burden to prove the existence of a contractual agreement between it and the Respondent, as well as the terms of the said engagement. In addition, the Appellant had the evidential burden to prove that it provided sample testing services to the Respondent on credit and that the Respondent had failed to settle the invoices.
19. I have reviewed the evidence before the lower Court to ascertain the existence of the contractual agreement as well as its terms. It is not in dispute that the parties had a working relationship under which the Respondent would refer clients to the Appellant and get a commission. This is because the parties agree that the Respondent was to refer clients to the Appellant and get cash back as the consideration.
20. However, one of the alleged terms of the working agreement was highly contested by the Respondent. The Appellant claimed that one of the terms of the agreement required the Appellant was to provide testing services on credit to the Respondent, and later invoice the Respondent. The Respondent denied the existence of such a term of the agreement and maintained that all the referred clients were to pay for the said tests directly to the Appellant. She argued that she had never received any funds or payments from the referred clients as all the said patients would pay the Appellant directly.
21. I note that the Appellant based a substantial part of its claim on this disputed term of the agreement. It was upon the Appellant to prove that there was such an agreement on which it would base the claim for the unpaid invoices. In my view, the Appellant failed to discharge his evidential burden and thus did not satisfy court on this issue- and particularly on the existence of the said term. He did not prove that one of the terms allowed it to provide testing services to the Respondent on credit and later invoice the Respondent.
22. I have nonetheless relooked at the evidence adduced by the Appellant before the lower Court to re-evaluate and determine whether it was sufficient to prove the claim. The Appellant produced an excel sheet prepared by its personnel using a computer-generated system. However, it did not produce individual invoices for each particular client to substantiate the entries in the excel sheet and the lumpsum claim for Kshs.936,499/=.



23. This issue was raised during the hearing and the Appellant's witness was cross-examined on it at length. According to the record, the witness admitted that the Appellant issues individual invoices for each patient that visits its clinic. She also admitted that she did not produce the said individual invoices to the Court. In totality of the evidence adduced in Court, the Appellant did not adduce documentary proof to show that the patients named in the excel sheet attended the facility or that the Appellant conducted the tests stated against each patient in the excel sheet.
24. Based on the above analysis, I cannot fault the lower Court for dismissing the Appellant's suit. The Appellant ought to have appreciated the fact that the terms of their business arrangement with the Respondent were highly contested, especially the part on the provision of testing services on credit terms. With this background, the Appellant ought to have supplied individual invoices for each of the patients to substantiate the entries in the excel sheet, and demonstrate how it had arrived at the claim for Kshs.936,499/=.

Disposition

25. The Appeal fails and is hereby dismissed with no order as to costs.

26. It is so ordered.

**DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS
ONLINE PLATFORM ON THIS 13TH DAY OF MARCH, 2025.**

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C.KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Mr. Njoroge Advocate for the Appellants

Mr. Kyalo h/b for Ms. Mureithi Advocate for the Respondent

