



REPUBLIC OF KENYA



KENYA LAW
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**Nyaoro v Kavila (Civil Appeal 445 of 2023)
[2025] KEHC 4409 (KLR) (Civ) (3 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4409 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 445 OF 2023

TW OUYA, J

APRIL 3, 2025

BETWEEN

GEORGE OLILO NYAORO APPELLANT

AND

EVANS MASAI MUTUKU KAVILA RESPONDENT

(An appeal from the Judgement of the Small Claims Court of Kenya at Nairobi by Hon. D. S. Aswani delivered on 4th May 2023 in Nairobi SCCCOM No. E 7069 OF 2023)

JUDGMENT

Background

1. This matter emanates from the judgement of the Nairobi Small Claims Court delivered on 4th May 2023 in Nairobi SCCCOM No. E7069 of 2023. The Claim was initiated in the Lower Court by Evans Masai Kavila Mutuku (respondent herein) vide statement of claim dated 14th December 2022 against George Nyaoro (Appellant herein) and Jane Akinyi Nyaoro (2nd Respondent in the trial court and non-Party in this appeal). The claim relates to monies allegedly owed to the respondent by the appellant arising from motor vehicle spare parts and repair services rendered on MV 2011 Mercedes Benz C200 Registration Number KCT 453M on 21st May 2021 at the Appellant's behest.
2. The subject motor vehicle was registered in the name of Jane Akinyi Nyaoro (2nd respondent in the Lowr Court). Upon release of the vehicle, the respondent sent an invoice to the appellant who acknowledged and made a commitment to pay for the services at the fee of kshs.178,500. The Appellant made a partial payment of kshs.70, 000 leaving a balance of kshs.108, 500 which he promised to settle before 31st October 2021. The Appellant failed to pay that balance causing the respondent to incur kshs.550 to conduct motor vehicle search at NTSA.



3. The Appellant failed to make good his promise despite several demands prompting the respondent to file this claim in court seeking judgement in the sum of kshs.109,050, interest on the above sum at court rates and costs of the claim. The matter proceeded for full trial and submissions by counsel for the parties and the trial court at the end of which the trial court found in favor of the respondent as follows:
 - a. Judgement is entered for Kshs. 109,050
 - b. Interest on (a) above at court rates from the date of filing the claim until date of payment.
 - c. The claim against the 2nd Respondent is dismissed with costs to be borne by the claimant
 - d. Costs of this suit shall be for the claimant
 - e. 30 days stay of execution.
4. The appellant being dissatisfied with the finding of the trial court has proffered this appeal citing 20 grounds of appeal which are summarized as mainly focusing on the trial court's heavy reliance on the excerpts of the watsApp conversation between the parties to deduce the existence of a valid contract, failure to consider the appellant's evidence and submissions, relying on contradictory evidence by the claimant amongst others.
5. The Appellants pray for orders that:
 - i. The appeal herein be allowed and judgement delivered on 4th May 2023 together with decree therein in SCCCOMM No. E7069 of 2022 be set aside.
 - ii. This Honourable court to award judgement in SCCCOMM No. E7069 of 2022 in favour of the appellant.
 - iii. In the alternative this Honourable Court to order for retrial in SCCCOMM No. E7069 of 2022.
 - iv. Costs and interests of this suit be borne by the respondent.

Submissions

6. The matter was canvassed by way of written submissions by counsel for the rival parties. Counsel for appellant has drawn the attention of the court to three main issues the first them being, whether the watsApp messages between the parties proved the existence of a contract. The appellant argues that the learned Adjudicator erred in law and in fact in heavily relying on the evidence of watsApp conversation which did not amount to a contract. Counsel bases her argument on reasons that the watsApp conversation was made after the performance of the alleged agreement and that the conversation excerpts do not meet the essential ingredients of a contract. She submits that that it is trite law that performance of a contract or agreement cannot precede formation of such agreement. That there must be a valid contract in place followed by performance. Counsel relies on the case of Joseph Kiprotich Chelule v Isaac Kiprop Lagat(2019)eklr where the High Court in Eldoret held that a commitment agreement to repair a tractor several months later cannot be held to be a basis upon which a court can make a finding that there existed a contract between the appellant and the respondent.
7. Counsel raised the second issue as to whether the learned Adjudicator attempted to rewrite a contract for the parties. Counsel reasons that no terms and conditions were availed in evidence with regard to the watsapp conversation which the trial court relied on as the agreement between the appellant and the respondent. That then the conversation relied upon, the appellant did not agree or accept in clear and unequivocal terms to having an agreement with the respondent for which he was obligated to



pay the respondent KShs. 108,500 as determined by the trial court. Counsel relies on the authority of *NIC Bank Limited v Victor Ochieng Oloo*(2018)eklr where the court quoted *Fidelity Bank Limited v Kenya Grange Vehicle Industries Limited*(2017) where the court held that for there to be a contract there has to be an unconditional, unequivocal and absolute acceptance of an offer on the same terms as the offer. Counsel submits that the Adjudicator erred in trying to re-write a contract for the parties because none existed.

8. The third limb is whether the respondent was entitled to the awards issued by the trial court. Counsel holds that the learned Adjudicator erred in law and fact in believing the evidence and pleadings of the respondent despite the same being mere allegations without proof. Counsel points out that the respondent would have called at least one witness to support his claim despite failing to prove the existence of any contract or agreement. Counsel relies on section 107 of the *Evidence Act* which provides that whoever desires court to give judgement as to any legal right or liability dependent on the existence of facts must prove that those facts exist. Counsel therefore submits that the trial court misdirected itself by holding that the respondent was entitled to the awards without establishing the truth and misinterpreting evidence and exhibits adduced by the appellant.
9. The respondent on the other hand focusses on two issues, the first of which is whether the appeal has merit. Counsel argues that the law governing the instant appeal Act is set out under section 38(1) of the Small Claims Act that appeals emanating from the small claims court to the high court must be based on matters of law. Counsel relies on the authority of *Uniglobe Northline Travel Limited v Maverick Picture Works Limited* (Civil Appeal E045 of 2022) that court is not permitted to substitute the subordinate court's decision with its own conclusions based on its own analysis of facts unless the findings are so perverse that no reasonable tribunal would have arrived at them. The respondent submits that the appellant ought to restrict his grounds on matters of law only and not facts. Counsel argues that on the contrary, the memorandum of appeal and the appellant's submissions do not raise any issues of law or interpretation of *the constitution*. He urges the court to find that the decision and reasoning of the lower court is sound and reasonable and based on law and evidence and should not be disturbed.
10. On the issue of whether a valid contract can be inferred from the WhatsApp conversation between the parties, counsel contends that the trial court analyzed the evidence and found that there existed an oral contract between the parties. He relies on the case of *Ali Abdi Mohamed v Kenya Shell & Company Limited*(2017)eklr where the court of appeal stated 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”
11. Counsel points out that the appellant admitted in his testimony upon cross examination that he knew the respondent, that they entered into an agreement for repair and that he received a breakdown of the cost. He argues further that there is no provision of law with a requisite number of witnesses, and relies on the case of *MTG v Republic* (Criminal Appeal E067 of 2021).
12. Counsel also states that the appellant's submissions are predominantly repetitive and dwell on matters of fact rather than the statutory threshold for appeals to this court from the Small Claims Court. He submits that the respondent is entitled to the awards granted by the trial court based on his pleadings and evidence adduced including the testimony during the hearing.
13. The respondent urges the court to dismiss the instant appeal and award him costs of the same based on the principle that costs follow the event.



Analysis

14. The Court has considered the memorandum of appeal, the record of appeal; original lower court record and submissions by counsel for both parties. It would be apt to observe at this juncture that this is a first appeal and specifically one from the Small Claims Court. Section 38 of the [Small Claims Court Act](#) prescribes the nature of appeals that lie from the said Court to the High Court by providing that; -
- “(1) A person aggrieved by the decision or an order 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.”
15. In ordinary appeals, the first appellate court will only interfere with a finding of fact made by a trial court when such finding was based on no evidence, or if it is demonstrated that the Court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & Another vs Duncan Mwangi Wambugu* (1982 – 1988) 1 KAR 278. Nevertheless, by dint of Section 38 of the [Small Claims Court Act](#) this is no ordinary first appeal and it would be remiss if this Court were not at the outset, satisfy itself that the appeal before it falls within the purview of Section 38 of the [Small Claims Court Act](#). Black’s Law Dictionary, 9th Ed. Pg. 1067 defines:
- “Matter of fact as: A matter involving a judicial inquiry into the truth of alleged facts and
Matter of law as: A matter involving a judicial inquiry into the applicable law.”
16. Based on the above, this court will not delve into analysis of the evidence adduced at the trial. However, it is apparent that the gist of this appeal revolves around the existence of a valid agreement between the parties. This court will therefore address the issue as to whether the trial court finding that there was a valid contract between the appellant and the respondent was sound. It is trite law that a valid contract can be inferred from the conduct of parties as posited in the cases here below:
17. In *RTS Flexible Systems Ltd vs. Molkerel Alois Muller GmbH & Co, KG (UK Production)* (2010) UKSC14, [45] the Supreme Court of the United Kingdom stated that: -
- “...The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement.”
18. In *Rose and Frank Co. vs. J R Crompton & Bros Ltd* (1923) 2 KB it was held that: -
- To create a contract there must be a common intention of the parties to enter into legal obligations, mutually communicated expressly or impliedly.



19. In *Abdulkadir Shariff Abdirahim & Another vs. Awo Sharriff Mohammed t/a A. S. Mohammed Investments* (2014) eKLR the Court of Appeal held that: -

“There is no general rule of law that all agreements must be in writing. The numerous advantages of a written agreement notwithstanding, all that the law requires is that certain specific agreements must be in writing or witnessed by some written note or memorandum. Section 3(1) of the *Law of Contract Act* is one such provision.”

20. On implied contracts, the Court of Appeal in *Ali Abdi Mohamed vs. Kenya Shell & Company Limited* (2017) eKLR referred to the following persuasive decisions: -

... In *Lamb v. Evans* [1893]1 Ch 218, Bowen LJ stated:

“The common law, it is true, treats the matter from the point of view of an implied contract, and assumes that there is a promise to do that which is part of the bargain, or which can be fairly implied as part of the good faith which is necessary to make the bargain effectual. What is an implied contract or an implied promise in law? It is that promise which the law implies and authorizes court to infer in order to give the transaction that effect which the parties must have intended it to have, and without which it would be futile.”

21. In the instant case the trial court evaluated the available evidence, both oral and documentary the bulk of which was the WhatsApp conversation and arrived at a conclusion that an inference of a valid contract could be made. This was the basis of the finding that there was indeed an oral agreement for services between the parties giving rise to rights and liabilities. The trial court held in part that:

“The claimant through the conversation excerpts tendered into evidence proves that the parties entered into agreement and on following up with the 1st Respondent, promises to make the payment were made. When a demand for Kshs 108,500/= was made, the 1st Respondent replied that he was working on it. Nothing shows that the amount was disputed, or that the work was incomplete as is now being raised. Further, the conversation excerpts speak to the 1st Respondent working on another way to get money after the insurance company failed to come through on payment. Through the exchange, the averment that the balance was to be cleared by end of October is confirmed. The evidence of the conversations is uncontroverted by the 1st Respondent.”

And:

“The court therefore from the foregoing finds that the claimant has proved to the required standard to have honored his obligations and the Ist respondent owes the amount claimed as proved”

Based on the above, the trial court found that the appellant owed the respondent kshs.109,050 being the balance for the services rendered. This court holds the view that the above finding of the trial court is sound and well within the law.

22. The instances when an appellate court can interfere with trial court’s decision were enunciated in the case of *Attorney General of Kenya V Anyang’ Nyong’o & 10 others* (2010) RC 1 (KLR), that the presiding judge:

- i. Took into accounts some irrelevant factor(s)
- ii. Failed to take into account some irrelevant factor(s)



- iii. Did not apply a correct principle to the issue (such as misdirection on a point of law, or misappropriation of facts)
 - iv. Taking into account all the circumstances of the case, the judge's decision is plainly wrong
23. Similarly, in Mohammed Eltaff & 3 others v Dream Camp Kenya limited (2005) Eklr, it was observed that the appellate court has mandate to interfere where a trial court has left certain issues unresolved.
24. The issue for determination in this matter is whether the appeal has merit. This court is of the view that having confirmed the propriety of the trial court's finding that there was a valid contract inferred from the conduct of the parties, the onus lies on the appellant demonstrate any error or misapprehension of the law on the part of the trial court to warrant disturbance or interference with its finding. Having found none, this court has no option but to find that this appeal lacks in merit. Based on the above, this appeal fails.

Determination

The appeal is dismissed. The judgement of the lower court Nairobi SCCCOM No. E 7069 of 2023 by Hon. D. S. Aswani delivered on May 4, 2023 is hereby upheld with costs of this appeal to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 3RD DAY OF APRIL, 2025.

HON. T. W. OUYA

JUDGE

For Appellant.....Ms Oseko HB Mr Nyakundi

For Respondent.....No appearance

Court Assistant.....Jackline

