



REPUBLIC OF KENYA



**Olivine Investments Limited v Devkenn Investments Limited (Civil Appeal  
E020 of 2021) [2025] KEHC 12154 (KLR) (22 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 12154 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E020 OF 2021**

**F WANGARI, J**

**MAY 22, 2025**

**BETWEEN**

**OLIVINE INVESTMENTS LIMITED ..... APPELLANT**

**AND**

**DEVKENN INVESTMENTS LIMITED ..... RESPONDENT**

*(Being an Appeal from the Judgement of Honourable F. Kyambia delivered  
on 29th January 2021 in Mombasa CMCC No. 1080 of 2018, Mombasa)*

**JUDGMENT**

1. This is an appeal from the judgement of the Learned Magistrate Hon. F. Kyambia, CM in Mombasa CMMC 1080 of 2018. given on 7<sup>th</sup> February, 2020. The Plaintiff had filed the suit vide the Plaint dated 23/05 2018 seeking for the sum of Kshs. 2,341,800 being the balance payable by the Defendant.
2. The Plaintiff claimed that he had been engaged by the Defendant to undertake civil works specifically paving of a school compound in Nyali. Total cost for the works was Kshs. 2,491,800/=. The payment would be effected immediately after the completion of the works agreed upon.
3. The Defendant paid Kshs. 150,000/= leaving a balance of Kshs. 2,341,800/=. The Defendant is said to have issued 3 postdated cheques amounting to Kshs. 180,000/= which upon banking were dishonored. Despite several demands to pay, the Defendant refused to do so thus necessitating the filing of the suit.
4. In the Statement of Defence dated 11/01/2018, the Defendant denied all the allegations in the Plaint and put the Plaintiff to strict proof thereof. Only the Plaintiff gave evidence. The Defence did not call any witness. The parties filed their respective submissions. The court rendered its judgment in favour of the Plaintiff as prayed in the Plaint.
5. The Appellant being dissatisfied with the said judgement preferred the present appeal. The trail court was faulted for finding in favour of the Plaintiff yet there was no evidence in support of the claim. The



Appellant thus prayed that the judgement by Hon. Kyambia delivered on 29/01/2021 be set aside and the suit be dismissed with costs to the Appellant.

6. This being a first appeal, this court is under a duty to re-evaluate and re-assess the evidence and make its own conclusions. It must, however, keep in mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand. (*Selle vs Associated Motor Boat Company Ltd* [1968] EA 123 and *Peters vs Sunday Post Limited* [1985] EA 424)
7. The appeal was canvassed by way of written submissions. Both parties complied by filing their rival submissions.

### **Analysis and Determination**

8. I have considered the appeal lodged, the submissions filed both for and against which I have summarized as above, the authorities cited as well as the law and I discern the following issues for determination: -
  - a. Whether the Trial Magistrate erred in entering judgement for the Respondent;
  - b. If the answer to (a) is in the affirmative, what orders should issue?
  - c. Who bears the costs?
9. The Plaintiff gave evidence through the Managing Director adopted the witness statement dated 23/05/2018 as the evidence in chief. He also produced the documents relied on as his exhibits. It was the Plaintiff's case that there was an oral contract between the Plaintiff and the Defendant to have civil works done at an agreed price of Kshs. 2,491,800/=. Only Kshs 150,000/= was paid leaving a balance of Kshs. 2,341,800/= which was subsequently awarded by the trial court.
10. In its submissions on appeal dated 31/05/2024, the Plaintiff/ Respondent submitted that the fact that the contract was not reduced into writing, did not make it void and unenforceable. The oral contract was confirmed by the Defendant/ Appellant when it issued postdated cheques, which were not honored. It was submitted that the Respondent had proved its case on a balance of probabilities. It was prayed that the appeal be dismissed with costs to the Respondent.
11. On the other hand, the defendant did not testify in the lower court. Through the submissions on appeal dated 16/03/2024, it was submitted that the Plaintiff's case was based on allegations that were not supported by any evidence. The documents relied on which includes the cheques which had no accompanying documents, and the quotation which was not signed, do not amount to an existing contract between the parties. It was prayed that the appeal be allowed with costs to the Appellant.
12. I have perused through the documents produced by the Plaintiff in support of its case. The quotation dated 10/07/2015 addressed to 'Olive' prepared by 'Elijah N.N.' has not been signed. However, the cheques dated 18/04/2016, 29/04/2016 and 31/05/2016, all drawn in favour of Davkenn Investments Ltd (Respondent) by Olivine Investments Ltd (Appellant) totaling to Kshs. 1,800,000/=.
13. The Plaintiff gave evidence that the above amount was in respect to the balance payable to the Plaintiff, but the cheques were dishonored. The Defendant in the Statement of defence was just a mere denial of the fact and put the Plaintiff to strict proof thereof. No evidence was adduced to challenge the Plaintiff's evidence.



14. It has been held by the courts that oral contracts are recognized and enforceable in law unless the law requires of a written contract. In *Patrick Njuguna Kimondo v Geoffrey Vamba Mbuti* [2019] eKLR it was held as follows;

“I am of the opinion that oral agreements supported by credible evidence can be and are enforceable. All what the law requires is that certain contracts be in writing – Section (3) (3); Short of that, it would be a travesty of justice as most people either knowingly or otherwise transact their businesses upon oral agreements.”

15. Section 3 (3) of the Law of Contract provides for a mandatory written contracts in respect to contracts for disposition of an interest in land. In this case, the alleged contract was not in respect to disposition of land but for civil works. The onus was now upon the Plaintiff to proof that there was existence of an oral contract between the parties.

16. In section 107 and section 109 of the *Evidence Act*, it provides as follows;

Burden of proof

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(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.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Proof of particular fact

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

17. The Plaintiff gave evidence that after he completed the civil works as agreed, the Defendant drew 3 cheques amounting to Kshs. 1,800,000/= which were all dishonored. The cheques produced as exhibits supported the allegation. The Defendant did not challenge the evidence by the Plaintiff save for the Statement of Defence which was just but mere denial of the facts which were not substantiated by clear and convincing evidence, thus it lacked the weight in law. (See *Republic v Karunja* [2006] eKLR).

18. I find that the mere denial by the Defendant was insufficient to refute the plaintiff's claim. The appeal therefore lacks merits and the judgment of the lower court is hereby upheld.

19. On the issue of costs, a careful reading of Section 27 of the *Civil Procedure Act* indicates that it is trite law that they follow the cause or event unless the court, for some good reasons, orders otherwise. The import is that a successful party is entitled to costs unless he or she is guilty of any misconduct or there exist some other good reasons and or cause for not awarding costs to the successful party.

20. However, the court retains discretion whether to grant them or not. Furthermore, this discretion must be exercised judiciously and courts should not deprive a plaintiff/defendant of his or her costs unless it can be shown that they acted unreasonably. The Respondent being the successful party, I award it the costs of the appeal.

21. Flowing from the above, I proceed to make the following disposition: -

a. The appeal lacks merit and the same is hereby dismissed;



- b. The Respondent is awarded costs of the appeal;
  - c. The file is hereby closed.
- It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 22<sup>ND</sup> DAY OF MAY, 2024.**

.....

**F. WANGARI**

**JUDGE**

In the presence of:

Mr. Tindika Advocate for the Appellant

Mr. Kayata Advocate for the Respondent

M/S Norah, Court Assistant

