Frametech Equipment Limited v Office Dynamics Limited (Commercial Appeal E145 of 2024) [2025] KEHC 8817 (KLR) (Commercial and Tax) (19 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8817 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL APPEAL E145 OF 2024

BK NJOROGE, J

JUNE 19, 2025

BETWEEN

FRAMETECH EQUIPMENT LIMITED ..... APPELLANT

AND

OFFICE DYNAMICS LIMITED ..... RESPONDENT

(Appeal from the decision of Honourable D.S. Aswani, Resident Magistrate/Adjudicator at the Small Claims Court at Nairobi in SCCCOMM No. 9234 of 2023 on the 9th May, 2024)

JUDGMENT

(Appeal from the decision of Honourable D.S. Aswani, Resident Magistrate/Adjudicator at the Small Claims Court at Nairobi in SCCCOMM No. 9234 of 2023 on the 9th May, 2024)

1. The Appellant filed a Memorandum of Appeal dated 28th May 2024 seeking the following orders:
    a. The Appeal be allowed with costs.
    b. The Judgement delivered on 9th May 2024 be set aside and the Honourable court do make its own finding on the amount owed to the Respondent.
    c. Costs of this appeal be awarded to the Appellant.
    d. Any other further relief that this Honourable Court shall deem fit and expedient to grant.
2. The Appeal is premised on the following grounds:
    1. That the Learned Trial Magistrate erred in law and in fact in arriving at the finding that the Appellant owes the Respondent Kshs. 1,000,000/=.

2. That the Learned Trial Magistrate erred in law and in fact in totally disregarding the Appellant's pleadings and the evidence tendered that was uncontroverted and chose to rely solely on the Respondent's evidence.

3. That the Learned Trial Magistrate erred in law and in fact in failing to appreciate the amount already paid by the Appellant and failing to factor in the same in her final finding of debt owed to the Respondent.

4. That the Learned Trial Magistrate erred in law and in fact in failing to consider the Appellant's submissions thus arriving at an erroneous finding or conclusion.

5. That the Learned Trial Magistrate erred in law and in fact in holding that the amount claimed by the Respondent is not disputed which is in total disregard of the Appellants Response to claim and evidence on record which admitted only part of the debt.

6. That the Learned Trial Magistrate erred in law and in fact in failing to consider the admissions by the Respondents with regard to what is owed by the Appellant.

7. That the Learned Trial Magistrate erred in law and fact in aiding the Respondents to argue their case.

8. That the Learned Trial Magistrate erred in law and in fact in failing to consider that the Respondent lodged the lower court suit prematurely while the Appellant was offsetting the balance in the agreed instalments.

Background Facts

3. Through a Statement of Claim dated 22nd day of November, 2023 the Respondent herein sought payment of amounts owed to the Claimant totalling to Kshs. 1,160,654.00 as of 27th February, 2021 for printers/ copiers leased to the Appellant by the Respondent. The Respondent stated that it had an ongoing business Agreement with the Respondent since 2016 up until 2021 for leasing out printers/ copiers. According to the agreement, the Respondent was to cater for servicing and provision of consumables for the printers and subsequently charge the Appellant on a monthly basis based on the number of copies done by the Respondent in a particular month. The Respondent also stated that on or about 31st March, 2020, the Respondent started defaulting on making monthly payments contrary to the terms of Agreement. The monthly defaults led to an accumulated outstanding amount of Kshs. 1,160,654 which remains unsettled up to now. The Respondent also stated that despite demands made and intention to sue intimated the Appellant failed, neglected and/or refused to settle the claimed amount. The Respondent restricted its claim to the extent of the jurisdiction of the Small Claims Court of Kshs. 1,000,000/=.

4. The Appellant filed a response to the Statement of claim and alluded that when the pandemic struck in March 2020, clients were unable to pay and the Respondent communicated the same and sought amnesty with the Respondent. The Appellant also stated that the |Respondent stopped supplying and servicing the Respondent's clients something that affected their operations and businesses. That forced the Appellant to service the client's machines at their own cost. The Appellant also stated that the Respondent however, continued invoicing the Appellant without supplying any goods or servicing any copiers and that the outstanding debt was Kshs. 700,000/=. That the Appellant gave a payment per month reducing the debt to Kshs. 460,654/= which the Respondent acknowledges via a letter dated 24th August, 2023. From that, the Appellant herein averred that the amount that the Respondent was demanding was false and exaggerated.

5. The Appellant submitted that the Respondent failed to prove his claim for Kshs. 1,000,000/= against the Respondent as was required under Section 107 (1) of the *Evidence Act* (Cap 80). That by the admission of the Respondent, the Appellant owe Kshs. 460,000/=.

6. The Respondent submitted that the Appellant failed to discharge its burden of proof in proving that it ever made any partial payment of the outstanding amount owed to the Respondent. Reliance was placed on the case of Housing Finance Company of Kenya Limited v Scholarstica Nyaguthii Muturi & anor [2020] eKLR. The Respondent also submitted that Appellant's claim in the Counter-claim lacked any factual or legal basis and prayed that it be dismissed.

Issues for determination

8. The Court having perused the Memorandum of Appeal, the Record of Appeal and the submissions filed herein, frames a single issue for determination as follows;

   (a) Whether the Respondent, having waived a debt could subsequently and unilaterally reinstate the same in contravention of that agreement.

   Analysis

   The jurisdiction of the Small Claims Court is set out in the *Small Claims Court Act*. Ipso facto, there is only one chance of Appeal to this court. It is an Appeal on points of law. In view of the provisions of section 38 of the *Small Claims Court Act*, which states as follow:-

   > " 38. Appeals
   >
   > (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."

9. In the case of Mwita v Woodventure (K) Limited & another (Civil Appeal 58 of 2017) [2022] KECA 628 (KLR) (8 July 2022) (Judgment), the Court of Appeal while referring to a second Appeal, which is essentially on points of law and thus similar to the duty of the Court under section 38 of the Small Claims Court, stated as follows: -

   > " This is a second appeal. Accordingly, the jurisdiction of this Court is limited to consideration of matters of law. As was held in the case of Stanley N. Muriithi & Another v Bernard Munene Ithiga [2016] eKLR, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the court below considered matters it should not have considered, or failed to consider matters it should have considered, or looking at the entire decision, it is perverse. See also Kenya Breweries Limited v Godfrey Odoyo [2010] eKLR in which it was held that: "In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse."

10. A cursory glance at the Grounds of Appeal in the Appellant's Memorandum of Appeal shows that they relate primarily to questions of fact. The Small Claims Court is the queen when it comes to evidence. Applying the above decisions to the instant appeal, it is therefore clear that when dealing with this

Appeal, this Court will only confine itself to the issues of law as raised in the Memorandum of Appeal. That the findings of the Trial Court are to be accepted, unless it becomes apparent, on evidence, that the conclusions on facts reached by the Trial Court, are so unreasonable that no reasonable Court or Tribunal could arrive at the same conclusion. As such, I will limit only to the single issue of law identified by the Appellant herein being the admission of debt and finality of the concession.

Whether the Respondent, having waived a debt could subsequently and unilaterally reinstate the same in contravention of that agreement

11. The impugned letter dated 24th August 2023 does not constitute an offer to waive any portion of the outstanding debt. Rather, it operates as a formal demand for payment, outlining the current balance due and the creditor's intended course of action to recover the amount. The contents are reproduced forth as: -

> " Outstanding Amount, Shs 460,654.00
>
> We refer to your above mentioned debt. This amount was arrived at after considering the concession of Shs 700,000.00 that was granted to you by our former debt collector.
>
> We have appointed Nopelofs Africa Ltd to collect the debt on our behalf.
>
> We hope that this letter will enable you to clear the outstanding debt and finally bring this long outstanding matter to a conclusive end."

12. Specifically, the letter acknowledges that a prior concession was extended, reducing the original indebtedness to Kshs 460,654.00 this adjustment appears to have been effected through a previous arrangement facilitated by the creditor's former debt collection agent.

13. The correspondence further communicates that the sum of Kshs 460,654.00 remains outstanding and that Nopelofs Africa Ltd has been duly appointed to act on behalf of the creditor in pursuing recovery of the debt. The letter encourages settlement of the outstanding balance with a view to resolving the matter in full. It does not introduce any new terms of settlement or propose a further reduction of the debt. The only concession referenced is one that was previously granted and is already reflected in the current amount claimed.

14. The Appellant invites this Honourable Court to determine whether the Respondent, having previously waived the debt, could lawfully and unilaterally reinstate the same in contravention of a prior binding agreement. The Appellant submitted that by the admission of the Respondent, the Appellant owe Kshs. 460,000/=. On the other hand, the Respondent submitted that the Appellant failed to discharge its burden of proof in proving that it ever made any partial payment of the outstanding amount owed to the Respondent.

15. Upon review of the pleadings before this Court, it is apparent that the legal principle of waiver was not specifically pleaded by either party. The Court aligns itself with the holding of the Court of Appeal in Habib Bank A.G. Zurich v Rajnikant Khetshi Shah [2018] KECA 774 (KLR), which reaffirmed that in civil litigation, a case must be determined based on the issues as pleaded. Nonetheless, there are exceptional circumstances where issues, though not expressly pleaded, arise from the pleadings and evidence and become central to the dispute. In such instances, and in the interest of justice, the Court is duty-bound to address them. In the present case, it is necessary to do so in order to resolve the underlying dispute and bring finality to the contentious issues between the parties in a manner that meets the ends of justice.

16. The Court of Appeal in Habib Bank A.G. Zurich v Rajnikant Khetshi Shah [2018] KECA 774 (KLR) (supra) stated as follows:

> The learned Judge devoted considerable time in discussing legal principles of laches, delay, estoppel, waiver and acquiescence. These issues were not pleaded. We agree in civil matters a case is decided according to the matters pleaded. Nonetheless there are situations where issues emanating from pleadings become germane and it becomes imperative for the interest of justice to make a determination. See also the case of Odd Jobs vs Mubia, 1970 EA Page 476, where it was held:
>
> "(i) a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision;
>
> (ii) On the facts, the issue had been left for decision by the court as the advocates for the appellant led evidence and addressed the court on it."

17. In the case of Rajnikantkhetshi Shah v Habib Bank A.G. Zurich [2016] KEHC 6740 (KLR), it addressed also waivers of legal rights. it was stated that

> (32) On my part, upon consideration of all relevant material, submission and evidence of the parties, I take this view. In law waiver of a right or relief may be express or implied. Almost no difficult arises where the waiver is made expressly by consent and the party benefiting from it has acted on upon it: that is sufficient consideration. Where waiver is not express and is to be implied from the conduct of the parties, the court has to consider the entire circumstances of the case to establish conduct which is inconsistent with the continuance of the right. See The Laws of England, eds. Viscount Simonds, Vol.14, London: Butterworth & Co. [1956] para 1175.That is the law on waiver.

18. Upon consideration of the letter reproduced above, the Court finds that the Respondent waived the debt to a significant and substantial extent. This constitutes an express waiver by the Respondent. The Appellant, having stood to benefit from the waiver, was obliged to act in accordance with the agreed terms, which would have constituted sufficient consideration. However, the Appellant failed to fulfil this obligation.

19. The Court of Appeal in Habib Bank A.G. Zurich v Rajnikant Khetshi Shah [2018] KECA 774 (KLR) (supra) aptly stated that: -

> Equity follows the law and as the respondent did not pay the loan, we find that the learned Judge fell in error by entering judgment in his favour. He should pay the loan he guaranteed.

20. Notably, there is no evidence that the Appellant made any payments subsequent to the issuance of the said letter. The Trial Court did not find any evidence of such payments after its examination of the evidence on record, including the invoices, payments made, and the timeline of when the Appellant ceased making payments. As such, equity, which follows the law, cannot be applied here to relieve the Appellant of the consequences of its inaction.

21. To invite this Court to delve further than it has is to invite the Court to delve into the realm of facts and evidence which is the preserve of the Learned Adjudicator.

22. The Court is unable to fault the Learned Adjudicator's appreciation of the facts or the application of the relevant laws.

23. The Appeal is found to be without merits and fails.

24. As to costs the same follow the event. There is no reason to deny the successful Respondent the costs of this Appeal.

Determination

25. The upshot of the foregoing is that the Court makes the following orders: -

    a. The Appeal is dismissed in its entirety.

    b. The Respondent is awarded the costs of the Appeal to be paid by the Appellant.

    c. The file is marked as closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 19 TH DAY OF JUNE, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

BENJAMIN K. NJOROGE

JUDGE

In the presence of:

Miss Muthoni for the Appellant.

Mr. Njeru for the Respondent.

Court Assistant Mr. Luyai.