



**Adeel Khawaja t/a Medina Photocopiers and Stationers v Connect It Limited (Civil Appeal E139 of 2021) [2024] KEHC 3627 (KLR) (Civ) (16 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3627 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL  
CIVIL APPEAL E139 OF 2021  
DAS MAJANJA, J  
APRIL 16, 2024**

**BETWEEN**

**ADEEL KHAWAJA T/A MEDINA PHOTOCOPIERS AND  
STATIONERS ..... APPELLANT**

**AND**

**CONNECT IT LIMITED ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon.B.J. Ofisi, RM dated 13th March 2020 at the Nairobi Magistrates Court, Milimani in Civil Case No. 3478 of 2018)*

**JUDGMENT**

**Introduction and Background**

1. The Appellant's appeal is grounded on his memorandum of appeal dated 17.03.2021. He seeks to set aside the judgment of the Subordinate Court dated 13.03.2020 and substitute it with an order dismissing the Respondent's plaint and allowing its counterclaim.
2. From the record, the facts giving rise to the suit are common ground. At the material time, the parties had a business relationship where the Respondent would supply the Appellant with stationery and allied items. On or around March 2013, the Appellant owed the Respondent Kshs. 783,892.00 being a sum owing from previous supplies. The Respondent filed suit in the subordinate court seeking this sum. In response, the Appellant stated that in as much as it owed the Respondent the claimed sum, he averred that he explained to the Respondent that he was unable to pay and proposed two alternatives being repayment by installments or transfer of the Appellant's customers to the Respondent at a price/goodwill of Kshs. 1,500,000.00. That after the death of the Appellant's partner, the parties agreed to transfer the said business to the Respondent for a consideration of Kshs. 1,500,000.00.



3. The Appellant claimed that the parties agreed that the Respondent would pay the Appellant the difference after the Respondent deducted the said Kshs. 783,892.00 which was Kshs. 716,108.00. The Appellant stated that even though the parties never entered a written agreement on the settlement of their respective dues, that they had various physical meetings on divergent dates and exchanged correspondence including emails and text messages which led to the aforementioned agreement and working relationship making it an oral agreement/contract. The Appellant stated that through the parties' correspondences of 24.10.2017 and 20.11.2017, he was able to remind the Respondent about the oral agreement. The Appellant asserted that the Respondent took over his clients/customers based on their agreement and supplied it with goods and that it benefited by making profits in its business. Thus, the Appellant counterclaimed Kshs. 1,500,000.00 from the Appellant while urging the Subordinate Court to dismiss the suit against him.
4. In response to the counterclaim, the Respondent denied the Appellant's averments and urged the court to dismiss it. It denied that the Appellant transferred his customers to the Respondent's business at a consideration of Kshs. 1,500,000.00 and thus was not liable to pay this amount.
5. At the hearing, the Respondent called its proprietor, Asif Sarofa (PW 1) while the Appellant (DW 1) testified on his own behalf. The trial court delivered the judgment on 13.03.2020. It held that there was evidence that Respondent supplied the Appellant goods and that it produced in evidence a dishonoured cheque which was a clear admission of the debt. The Subordinate Court did not find any evidence to the effect that the Respondent was to take over the Appellant's clients for an agreed sum of Kshs. 1,500,000.00 as goodwill and that the correspondence adduced in evidence did not support this contention.
6. After considering all the material presented, the trial court found that the Respondent had proved its case on a balance of probabilities and thus entered judgment for it against the Appellant for the sum of Kshs. 783,892.00 plus interest. This is the decision that has precipitated this appeal which was canvassed by way of written submissions.

### **Analysis and Determination**

7. Since this is the first appeal, the court is enjoined by the provisions of section 78 of the [Civil Procedure Act](#) to evaluate and examine the subordinate court record and the evidence presented before it in order to arrive at its own conclusion (Selle v Associated Motor Boat Co. Ltd (1968) EA 123).
8. The issue for resolution in this appeal is whether the Subordinate Court arrived at the correct conclusion both in law and fact in finding that the Appellant had admitted indebtedness and that the Respondent had proved its case against the Appellant. While the Appellant submits that the Respondent did not adduce any documentary evidence to show that the Appellant owed him Kshs. 783,892.00 and that in its amended statement of defence it denied owing the Respondent this sum, I note that the Appellant, in his amended witness statement and in his testimony and counterclaim, expressly admitted owing the Respondent Kshs. 783,892.00.
9. The Appellant could not be heard to state in its amended statement of defence that it did not owe the Respondent money and then state otherwise in its witness statement and testimony before court. The Appellant was being somewhat disingenuous as well as cynical in taking two diametrically opposed positions in his pleadings and the Subordinate Court was not wrong to find that there was a clear admission that he owed the Respondent Kshs. 783,892.00.
10. As to whether the Appellant proved that the Respondent owed him Kshs. 1,500,000.00 for introducing his clients/customers to the Respondent, the Subordinate Court did not find any evidence



to prove this contention. The Appellant stated that it had presented correspondences that proved the said agreement. The totality of the correspondence produced consists of request for supplies, orders and demand for payments. I agree with the Subordinate Court that there is nowhere that the Respondent states that he is going to pay the Appellant Kshs. 1,500,000.00 as goodwill. Simply stated there is no evidence of a meeting of minds or intention between the parties that Kshs. 1,500,000.00 was to be paid by the Respondent to the Appellant as goodwill for introducing his clients to the Respondent. It was incumbent upon the Appellant to prove his averments as sections 107 and 108 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) provides that he who asserts must prove and that a person has the burden of proving facts that are peculiarly within its knowledge as provided by section 112 of the *Evidence Act* which states that, “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.”

11. I find and hold that from the evidence, the Respondent proved his case against the Appellant whereas the Appellant failed to prove his case against the Respondent. The trial court therefore arrived at the correct conclusion in finding in favour of the Respondent.

### **Disposition**

12. The appeal is dismissed with costs. The Appellant shall pay costs of the appeal assessed at Kshs. 30,000.00.

**DATED AND DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY OF APRIL 2024.**

**D. S. MAJANJA**

**JUDGE**

Mr Anyoka instructed by Anyoka and Associates Advocates for the Appellant

Ms Akello instructed by Shapley Barret and Company Advocates for the Respondent

