



**Elijah Mugambi t/a Smart Grounds Landscapping v Jakhira (Civil Appeal
E118 of 2023) [2024] KEHC 4876 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 4876 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E118 OF 2023
TW CHERERE, J
MAY 9, 2024**

BETWEEN

ELIJAH MUGAMBI T/A SMART GROUNDS LANDSCAPPING APPELLANT

AND

ALPESH JAKHIRA RESPONDENT

*(Appeal against judgment and decree in Meru SCC NO. E096
of 2023 by Hon. L.W. Maina (RM) on 19th April, 2023)*

JUDGMENT

Background

1. Sometimes in the year 2022, Respondent contracted the Appellant to landscape his compound at an agreed cost of KES. 200,000/-. The terms of the contract and scope of works are contained in the contract of the parties signed on 24th September, 2022.
2. According to the Appellant, he carried out the works and received KES. 125,000/-. He sued for the balance of KES. 75,000/-.
3. Respondent on the other hand claimed that Appellant did not carry out his duties as agreed and counterclaimed for KES. 125,000/- paid to Appellant and KES. 10,000/- paid to his advocate for responding to the demand letter.
4. By judgment dated 19th April, 2023, Appellant's claim was dismissed and judgment was entered for the Respondent for the sum of KES. 125,000/-.

Appeal

5. Appellant has appealed on grounds among others that the trial magistrate misapprehended the evidence on record and relied on pictorial evidence to find in favour of the Respondent.



Analysis and Determination

6. I have considered the appeal in the light of the evidence on record and the submissions filed on behalf of both parties.
7. This being a first appeal this court is by law mandated and obligated to proceed by way of a retrial. In doing so the court has the duty to re-examine and reappraise all the facts on record and the law applicable and find for itself a conclusion without the need to be bound by the findings of the trial court. It should also bear in mind that it did not see nor hear the witnesses and give an allowance for that. See *Selle & another Vs. Associated Motor Boat Co. Ltd & others* (1968) E.A 123; *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR; *Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR.
8. Section 38 of The [Small Claims Court Act](#) Chapter 10A provides
 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.
9. What constitutes, points of law, has been settled. In the case of *Peter Gichuki King'ara v Independent Electoral and Boundaries Commission & 2 others* [2014] eKLR (Civil Appeal 31 of 2013), where *Visram, Koome & Odek, JJA* stated as follows: -

“It was held that it is trite law that the exercise of judicial discretion is a point of law and that the trial court in denying a prayer of scrutiny is exercising judicial discretion. The Court concluded that it would not be feasible for the Court of Appeal to order for a recount and scrutiny as this would involve matters of fact that were within the jurisdiction of the trial court. The court further held that the question of whether the trial judge properly considered and evaluated the evidence and arrived at a correct determination that is supported by law and evidence – with the caveat that the appeal court did not see the witness demeanor – is an issue of law.”.
10. The issues of failure to exercise discretion is equally a point of law. In the case of *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited* [2020] eKLR, the court stated that: -

“This is a second appeal. I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the 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. (See: *Stanley N. Muriithi & Another versus Bernard Munene Ithiga* (2016) eKLR and [Palms Resort Limited V Qureshi & 2 Others \(Civil Appeal E167 of 2022\)](#) [2023] KEHC 23644 (KLR).
11. The issue before the trial court was whether Appellant breached the contract between it and the Respondent.
12. As was rightly put in *Jackline Njeri Kariuki v Moses Njung'e Njau* [2021] eKLR, breach of contract is committed when a party, without lawful excuse, fails or refuses to perform what is due from him under the contract, or performs defectively, or incapacitates himself from performing.
13. In his evidence before the court, Respondent did not deny that the works contracted for were performed but stated that they were not performed to his satisfaction. Of interest to note is that the Respondent did not give details of the particulars of his dissatisfaction vis a vis what was agreed between him and the Appellant.



14. In order to determine if the contract was breached, the trial court was duty bound to consider the works carried out vis a vis the terms of the contract and scope of works contained in the contract of the parties signed on 24th September, 2022.
15. With respect, it was not acceptable for the trial magistrate to disregard the contract and rely on photographs to arrive at the conclusion that the works carried out by the Appellant were shoddy without laying the basis for so finding by clearly pinpointing what scope of the works Appellant failed to carry out or carried them out poorly.
16. From the foregoing analysis, I do not find it difficult to agree with the Appellant that the decision of the trial court was based on misapprehension of the evidence.
17. In the end, I find that the appeal has merit and it is hereby ordered:
 1. The order contained in the judgment dated 19th April, 2023, dismissing the Appellant's claim and allowing the Respondent's counterclaim for KES. 125,000/- is set aside in its entirety and substituted with an order dismissing the counterclaim and entering judgment for the Appellant for KES. 75,000/- (Seventy-five thousand).
 2. Costs of the trial and of the Appeal shall be borne by the Respondent

DELIVERED AT MERU THIS 09TH DAY OF MAY 2024

WAMAE.T. CHERERE

JUDGE

Appearances

Court Assistants - Kinoti/Munrne

For Appellant -Mrs. Mutegi for Mutegi Mugambi & Co. Advocates

For Respondent - Ms. Kerubo for Kiutha Arithi & Co. Advocates

