



Good Living Properties v Pearl Garden Management Limited (Civil Appeal E353 of 2022) [2024] KEHC 4548 (KLR) (Civ) (2 May 2024) (Judgment)

Neutral citation: [2024] KEHC 4548 (KLR)

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

CIVIL

CIVIL APPEAL E353 OF 2022

REA OUGO, J

MAY 2, 2024

BETWEEN

GOOD LIVING PROPERTIES APPELLANT

AND

PEARL GARDEN MANAGEMENT LIMITED RESPONDENT

(Being an appeal from the decision of the Small Claims Court in Small Claims E126 of 2022 delivered on 27/4/2022 by Hon. V. M. Mochache)

JUDGMENT

1. The respondent sued the appellant at the subordinate court demanding a refund of misappropriated funds in the sum of Kshs 946,859/- which had been received by the appellant in its capacity as the agent of the respondent. The appellant was the respondent's former property manager. The respondent alleged that there were several instances where the appellant invoiced and received payments but never remitted the payments to the concerned service provider. In addition, the appellant inflated bills and requested funds without approval causing the respondent to suffer loss. The respondent particularized its loss as follows:



Land rent 2019, Land Rates 2019 for Nairobi City County and Penalties on land rates for 2019	Kshs 239,085	Appellant processed payments and was paid vide Cheque No 171 in May 2019 a sum of Kshs 211,410 but no payments were remitted to the Ministry of Lands and the County. However, no payments were made as a result of which penalties of Kshs 27,675/- for non-payment was applied
A liability owed to Lavington Security	Kshs 182,000	Our client made payments to you to settle this liability. You failed to do so.
Securex Agencies (K) Ltd (Alarm backup system)	Kshs 102,602	Our client made payments vide cheque number 167 for a sum of Kshs 85,138 and cheque number 169 for a sum of Kshs 17,284 in April 2019. These payments were never remitted to the service provider.
Company Annual returns and CR12 for Pearl Gardens Management Limited	Kshs 61,400	Payment was made vide cheque no 169 in April 2019 for Kshs 43,200 and cheque number 1/1 in May 2019 for Kshs 18,200. Records at the Registrar of Companies confirm that no payment was remitted and the returns remain unpaid.
Pool Chemicals (June)	Kshs 23,886	Payments made in June 2019 vide cheque No 2 were fraudulently processed using the quotation number EK/Q/SR/112379 which had been used to process the same payment in April 2019.
Pool Chemicals (August)	Kshs 15,000	Payments made through cheque No 006. Upon scrutiny, the invoice was submitted twice having



		processed a similar payment in July 2019.
Electric Fence Rehabilitation	Kshs 175,388	Payments processes through cheque No 168 of Kshs 247,388 instead of the approved amount of Kshs 102,000/. Notwithstanding the excess amount, the fence was not repaired and still requires a further sum of Kshs 30,000
Lawyer's fees incurred in August 2019	Kshs 105,000	Payments were processed before they had been approved by the management
Intended drainage repair	Kshs 57.100	The payment was processed through cheque number 006x. No repairs were undertaken
	Total Kshs 946,859	

2. The suit was opposed by the appellant who filed his response to the statement of claim. It was averred that it is the respondent who owes the appellant a sum of Kshs 174,046 on account of fees paid to Nairobi Water of a sum of Kshs 92,846 by the appellant on its behalf and management fees owing of a sum of Kshs 81,200. The appellant in his counterclaim sought to have judgment be entered in favour of the appellant against the respondent in the sum of Kshs 174,046.
3. The matter was set down for hearing and the respondent called one witness. Nancy Nekesa Mzee (CW1) testified that she works as the respondent's manager. She produced invoices relating to monies that were not remitted to the service providers. She explained that the respondent used to issue a single cheque to the appellant who was to pay the service providers. The appellant was the respondent's agent from August 2018 – October 2019. The appellant was to ensure that common areas were maintained and deal with issues of security among other duties. They paid the appellant his fee for the entire period. After the appellant stopped acting as the agent of the respondent, some of the service providers came and requested payments.
4. The respondent did not call any witnesses. At the end of the hearing the subordinate entered judgment in favour of the respondent:
 - “ 8. I have perused the documents filed by the claimant. The court is satisfied that each of the claims was supported by way of documentary evidence and testimony. The documents were adduced in evidence without any challenge from the respondent. In absence of evidence to contradict, the court finds that the claimant has proved the claim on a balance of probabilities.



9. Turning to the Counterclaim, the claimant failed to call any evidence to support the counterclaim...I have no hesitation to find that the respondent failed to discharge its legal burden.”
5. Appellant, is dissatisfied with the judgment of the subordinate court and has preferred this appeal on the following grounds:
1. That Learned Trial Adjudicator erred in law and in conducting proceedings over the subject complaint beyond the statutory prescribed timeline of sixty (60) days as prescribed under section 34 (1) of the *Small Claims Court Act* 2022.
 2. That Learned Trial Adjudicator erred in law by delivering a judgment beyond the statutory prescribed timeline of sixty (60) days as prescribed under section 34 (1) of the *Small Claims Court Act* 2022.
 3. That Learned Trial Adjudicator erred in law in entertain proceedings in the subject complaint despite it being brought to her attention that the court lacked jurisdiction due to effluxion of time on 14th March 2022.
 4. That Learned Trial Adjudicator erred in law in finding the appellant indebted to a tune of Kshs 946,859.
 5. That Learned Trial Adjudicator erred in law in awarding special damages in its judgment in where special damages were not strictly proved.
 6. That Learned Trial Adjudicator erred in law by failing to make an analysis of the pleadings and evidence on record.
 7. That Learned Trial Adjudicator erred in law by taking into account extraneous matters and failed to take into account relevant matters in arriving at her decision.
 8. That Learned Trial Adjudicator erred, misdirected herself, misapprehended and misconstrued the legal principles in the case before her and by reason thereof came to a wrong conclusion.
 9. That Learned Trial Adjudicator erred misdirected herself outside the prescribed window of three days from the date of hearing.

Analysis and Determination

6. I have considered the grounds contained in the memorandum of appeal and the rival submissions by the parties. There were no submissions filed by the parties. The appeal from the small claims court is on issues of law only. Section 38 of the *Small Claims Court* provides that:

“38.

- (1) A person aggrieved by the decision or an order Appeals. 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.”
7. The appellant in this appeal contends that the court lacked the jurisdiction to entertain the claim before it as the matter was finalized outside the 60-day statutory timeline. On this issue, I agree with



the holding of the court in *Biosystems Consultants v Nyali Links Arcade* (Civil Appeal E185 of 2023) [2023] KEHC 21068 (KLR) (31 July 2023) (Ruling) that the 60-day timeline in the Act is merely aspirational and does not have penal consequences. The court in *Biosystems Consultants* (supra) stated:

“The legislative intent of section 34 of the *Small Claims Court Act* was not to impose unnecessary bottlenecks. Even tax statutes had timelines for paying or declaring taxes. It was never that non-payment made those taxes void. There should be consequences. In the *Income Tax Act*, the non-compliance with deadlines did not vitiate the taxes. It attracted known penalties. What were the consequences under section 34 of the small claims court?
... A purposive interpretation should be given to statutes so as to reveal the intention of the statute. The purpose of the *Small Claims Court Act* was to facilitate expeditious disposal of the disputes while at the same time respecting the right to be heard. The net result was that balancing the two may result at times to overshooting the 60 days. The 60 days did not have penal consequences for good reason. They were aspirational. That was part of having access to justice over amounts that needed not be in the normal system. Allowing the application would open floodgates that would eventually defeat the purpose of the Act.”

8. Therefore, I will turn to consider if the respondent availed sufficient evidence to prove its case before the subordinate court. According to billings for May 2019, the appellant raised a bill for a total of Kshs 728,611/-. According to the billing, the amount for the land rent and rates were Kshs 146,410 and 65,000 respectively. Cumulatively the land rent and rates are Kshs 211,410/-. On 19/6/2019 the appellant was paid Kshs 238,611 as evidenced by the statement from Kenya Commercial Bank. There was no evidence by the appellant that he paid the land rent and rates despite receiving the money to do so. The appellant also availed documents from the Nairobi City County where a penalty of Kshs 24,975 was applied. The claim for Kshs 239,085 for land rents and rates was therefore proved.
9. On the liability owed to Lavington Security, Cw1 conceded that she did not provide an invoice from the security company. They also did not produce any evidence that the amount was remitted to the appellant. They only availed their statement from the security company showing that Kshs 182,000/- was owed between the period of 31/12/2017 to 05/5/2020. However, Cw1 testified that the appellant was an agent from August 2018 to October 2019. In my view, the amount of Kshs 182,000 accrued from 31/12/2017 before the appellant was the respondent’s management agent and after the agency was terminated. There was no evidence that the said Kshs 182,000/- was paid to the appellant over the said period.
10. On the monies paid to cover the respondent’s annual returns, CR12, the bill for May 2019 reveals that Kshs 18,200/- was approved and the money forwarded to the appellant. However, the appellant failed to remit the said amount. With respect to the bill raised by the appellant for the April 2019 bill, Kshs 43,200 was paid to the advocate who prepared the returns. The same was paid vide the cheque No 169 but the appellant did not forward the same to the advocate as evidenced by his invoice.
11. On the payments to Securex Agencies (K) Ltd, the respondent availed its statement from Standard Chartered on page 9 in relation to the expenses raised by the appellant for the month of April 2019. Securex Agencies (K) Ltd was to be paid Kshs 17,284/-. The statement by Securex Agencies (K) Ltd in respect to the respondent’s account shows that no amount was paid by the appellant in the month of April. The bill for Kshs 85,138 was raised and paid by the respondent through cheque No 167 but the same was not remitted to Securex Agencies (K) Ltd.



12. On the payment for pool chemicals twice, Cw1 testified that at page 22 and 23 of their documents shows that the bill was listed twice, however the same is not correct. In any event, the appellant presented the bill to the respondent and the same was approved by the respondent. The bill in question is for the month of April and August. The invoice in question from Davis & Shirtliff reference No EK/Q/SR/112379 was not availed. Considering that Cw1 also testified that the pool was maintained regularly, I find that the respondent did not prove that they were entitled to damages under this claim.
13. On the amount due for the electric rehabilitation, the respondent at page 28 of their documents presented the quote for the electric fence by Lavington Security in the amount of Kshs 247,388/-. This was raised as within the Bill for March 2019 at page 27 in the amount of Kshs 247,388/-. There was no evidence that the approved amount of Kshs 102,000/- or that Kshs 30,000/- was still required for the fence.
14. The respondent remitted to the appellant Kshs 105,000/- vide cheque no 6 for the deposit of legal fees. However, the appellant provided no receipt showing that the money was used for legal fees in August 2019. The respondent is therefore entitled to a refund of the same. Similarly, there was evidence that the appellant was given Kshs 57,100/- for repairs to the drainage and the same was not done. The appellant should reimburse the amount received in that respect.
15. In conclusion , the appeal is partly successful and the judgment by the subordinate court is set aside and substituted with the following orders:
 - a. Refund on Land Rent, Rates and Penalties Kshs 239,085
 - b. Refund on Securex Agencies (K) Ltd -Alarm backup Kshs 102,602
 - c. Refund on Company Annual Returns, CR 12 Kshs 61,400
 - d. Refund on Lawyers fee Kshs 102,000
 - e. Refund on drainage repairs Kshs 57,100Total Kshs 562,187
16. The appellant shall have half the costs of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT BUNGOMA THIS 2ND DAY OF MAY 2024.

R.E. OUGO

JUDGE

In the presence of:

Appellant - Absent

Respondent - Absent

Wilkister -C/AA

