



REPUBLIC OF KENYA



**Kartar Singh Dhupar & Co. Limited v Mau West & Co. Limited (Civil Appeal E124 of 2020) [2024] KEHC 5364 (KLR) (Appeals) (17 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5364 (KLR)

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

**APPEALS**

**CIVIL APPEAL E124 OF 2020**

**HI ONG'UDI, J**

**MAY 17, 2024**

**BETWEEN**

**KARTAR SINGH DHUPAR & CO. LIMITED ..... APPELLANT**

**AND**

**MAU WEST & CO. LIMITED ..... RESPONDENT**

*(Being an appeal from the Judgment of Mrs G. A Mmasi Senior Principal Magistrate in Nairobi CMCC No. 5982 of 2009, delivered on 13th February 2020)*

**JUDGMENT**

1. This appeal arises from a judgment and Orders issued in Nairobi Chief Magistrate's Civil Suit No. 5982 of 2009. In the said suit, the respondent (who was the plaintiff) sued the appellant (who was the defendant) for payment of a principal sum of Kshs. 299,264/= plus interest at court rates. The claim was the balance owing for the services rendered to the appellant in the period 2005 to year 2006. Additionally, the respondent prayed for costs of the suit plus interests and any other relief the court deemed fit.
2. The respondent stated in the plaint that despite a written demand and notice of intention to sue having been issued the appellant had refused neglected and or failed to settle the aforementioned amount in full thus rendering the institution of these proceedings necessary.
3. The matter was fully heard and the trial magistrate delivered Judgment on 13<sup>th</sup> February,2020 in favour of the respondent as prayed.
4. Being aggrieved by the judgment the appellant lodged the appeal dated 10<sup>th</sup> March,2020 on the following grounds:



- i. The SPM ignored the evidence tendered by the Plaintiff confirming the fact that Kshs. 381,752 had been paid to it by the Defendant for swimming pool water proofing and concrete works proofing, and erroneously awarded the Respondent the sum of Kshs, 299,264/= despite the Respondent expressly admitting receipt of Kshs. 281,752/=.
  - ii. The SPM, ignored the appellants' submissions totally, and the evidence of receipt of Kshs. 281,752/= by the respondent in an effort aimed at circumventing justice in order to erroneously award the appellant Kshs. 299,264/=.
  - iii. The rationale for the decision in the Judgement is flawed. The duration cases take to be determined by the courts is not legal justification to decide irrationally, and inconsistent with evidence.
  - iv. The SPM illegally and illogically awarded interest on the sum of Kshs. 299,264/= from the date of the Judgement which is 13<sup>th</sup> February 2020 but the respondents' advocates are fraudulently trying to concoct the interest element of the Judgement by calculating it from the date of the filing of the suit, which was 10<sup>th</sup> September 2009 to 29<sup>th</sup> February 2020, thereby arriving at erroneous fraudulent figure of Ksh. 377,072.64/=.
  - v. The Judgement of 13<sup>th</sup> February 2020 comprises an error of facts and law and is unjust and an abrogation of the principles of justice.
5. The appellant urged the court to set aside the judgment delivered on 13<sup>th</sup> February 2020 and proceed to dismiss the respondent's lower court suit. He prayed for the costs of the appeal.
  6. The Appeal was canvassed through written submissions.

### **Appellant's Submissions**

7. The appellant's submissions were filed by Koki Mbulu advocates and are dated 1<sup>st</sup> March, 2024. Counsel identified two issues for determination by this court.
8. The first issue is whether the honourable SPM erroneously awarded the respondent the sum of Kshs. 299,264/=. Counsel submitted that the appellant could not be ordered to pay an unexplained and an unsubstantiated amount of Kshs. 299, 264/=. That there was a written contract clearly evidencing a mutually agreed contract sum for works and services which was not presented to it. Further, that the respondent's testimony at trial was that Kshs. 281,752/= was paid to them by the appellant for works pertaining to water proofing of walls and the swimming pool at Peers Parks Apartments in Kileleshwa.
9. She added that the specific cheques for the aforesaid amount as provided in the respondent's bundle include; Cheque Number 103727 for the sum of Kshs. 50,000/= paid to Mau West Limited from Khartar Singh Dhupar dated 23<sup>rd</sup> May 2008, Cheque Number 102xxx for the sum of Kshs. 50,000/= paid to Mau West Limited Limited from Khartar Singh Dhupar dated 26<sup>th</sup> May 2008 and Bankings for Kshs. 81,752/= paid to Mau West Limited from Khartar Singh Dhupar dated 6<sup>th</sup> January, 2006 and Kshs. 100,000/= paid to Mau West Limited from Khartar Singh Dhupar dated 7<sup>th</sup> August, 2006.
10. Counsel submitted further that the honourable magistrate erroneously awarded the respondent herein the sum of Kshs. 299,264/= as their admission of receiving Kshs. 281,752/= from the appellants



was clear and unequivocal. The court's attention was drawn to the case of *Synergy Industrial Credit Limited vs Oxyplus International Limited & 2 Others* [202] eKLR Justice Mativo opined that:

“A clear and unequivocal admission of fact is conclusive, rendering it unnecessary for the one party (in whose favour the admission was made) to adduce evidence to prove the admitted fact, and incompetent for the other party, making the admission evidence to contradict it. ...admissions made either in pleadings or otherwise are binding on the party who makes the admission and no further evidence need to be adduced by the other party in respect of those facts admitted and the court can (and should) make an order purely based on those admissions.”

11. The second issue is whether the honourable magistrate ignored the appellant's Submissions condemning him unheard. Counsel submitted that in his submissions dated 27<sup>th</sup> September, 2019, the appellant had clearly demonstrated that a sum of Kshs, 281,752/= was paid to the respondent. She added that the appellant had to incur a sum of Kshs. 490,000/= as the respondent did not satisfactorily conclude the job and the workmanship was so poor as confirmed by Peers Holdings Limited via their letter dated 28<sup>th</sup> February, 2008.
12. The third issue was whether the judgment dated 13<sup>th</sup> February, 2020 comprises an error of facts and law and whether it is an abrogation of the principles of justice. Counsel submitted that the Judgment by the trial court was unfair as the decision did not consider the documentary evidence of the appellant. She relied on the case of *Justice Amraphael Mgogholi Msagha vs. Chief Justice & 7 Others* Nairobi HCMCA No. 1062 of 2004 where the court held that:

“A decision is unfair if the decision-maker deprives himself of the views of the person who will be affected by the decision. If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision...”

13. She urged the court set aside the trial court's judgment and the suit CMCC No. 5982 of 2009 be dismissed.

### **Respondent's Submissions**

14. The respondent's submissions were filed by Kamere advocates and are dated 18<sup>th</sup> March, 2024. Counsel submitted that there was a letter of offer followed by a quotation. That the appellant accepted it and that it had satisfactorily completed the work. Further, that the first quotation was dated 12<sup>th</sup> October 2005, the second quotation was dated 16<sup>th</sup> May 2006.
15. She submitted further that in the performance of the work assigned by the appellant there arose more duties which included water proofing to top cover slab for underground concrete water tank which were not included in the earlier quotations. That the same was agreed upon mutually by the parties whereof performance of the same by the respondent was satisfactorily done. She added that upon completion of the said additional duty, the respondent properly invoiced the appellant for payment for that piece of work which amounted to Kshs 41,760/=.
16. Counsel went on to submit that the appellant had not paid any other amount to the respondents save for Kshs. 50,000/= paid through the cheque No.103xxx dated May 2008. Further, that the argument by the appellant that the respondent was paid Kshs. 281,752/= was unfounded. They did not provide any proof of how these monies were paid if at all save for the abovementioned cheque produced by the



respondent as the only amount ever paid to them by the appellant for the work done. She added that the respondent claim for Kshs. 299,264/= was strictly proven and duly owed to them by the appellant.

17. In support of this position she relied on the case of *Evans Nyakwana v Cleophas Bwana Ongaro* [2015] eKLR where the court held as follows;

“As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden...is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side.”

18. In conclusion, counsel submitted that the respondent had tendered both documentary and oral evidence to prove the required standards that they are entitled to the prayers sought in the plaint and the judgment of the trial Court should remain undisturbed. She urged the Court to uphold the Judgment of the trial Court and dismiss the appellant’s Appeal with costs.

### **Analysis and Determination**

19. This being a first appeal, this court has a duty to re-evaluate and re-consider the evidence that was tendered before the trial court, assess it and make its own conclusions in the circumstances. It must bear in mind that it did not see nor hear the witnesses testify, and must give an allowance for that.
20. In the classic case of in *Selle & Another v Associated Motor Boat Co. Ltd. & Others* (1968) EA 123 the Court of Appeal stated as follows on the duty of the first appellate court:

“I accept counsel for the Respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif v Ali Mohamed Sholan* (1955), 22 EACA 270). [emphasis added].

Also see *Kamau v Mungai & another* [2016] IKLR 150.

21. Having considered the record of appeal, grounds of appeal the parties’ submissions and the authorities relied on by the respective parties. I opine that the one issue arising for determination is; whether the respondent proved his claim for a principal sum of Kshs. 299,264/=.
22. The appellant through its counsel argued that it could not be ordered to pay an unexplained and unsubstantiated amount of Kshs. 299, 264/= . That there was a written contract clearly evidencing a mutually agreed contract sum for works and services which was not presented to it. Further, that it was the respondent’s testimony at the trial that Kshs. 281,752/= was paid to it by the appellant for works pertaining to water proofing of walls and the swimming pool at Peers Parks Apartments in Kileleshwa.



23. The respondent's witness DW1 testified that he paid Kshs. 281,752/= and he produced documents for the payment of Kshs. 119,364/= and the same was marked as Dexh 2. He testified further that the second contract was a continuation of the first contract and its cost was Kshs. 196,620/=. He testified that there were only two quotations for Kshs. 119,364 and Kshs. 196,620/= which were paid. He admitted to having given the swimming pool job to the respondent.
24. In cross examination he confirmed he had joined the company in 2008 and that he was not aware of the job done at industrial area. He added that it was his father and brother who gave the respondent work. He confirmed that the issue of workmanship was not indicated in his statement.
25. The respondent on the other hand argued that the appellant had not paid any other amount to it save for Kshs. 50,000/= paid through the cheque No.103xxx. Further, that the appellant had not adduced any evidence showing the payment of Kshs. 281,752/= to the respondent as it alleged.
26. The respondent's witness PW1 testified that the appellant did not complain about the workmanship in their documents and that they had no dealings with Peers limited. In cross examination she confirmed that in their documents she had exhibited that the appellant had paid Kshs. 281,752/=. She confirmed further that there was no signed contract for additional jobs and that they had no certificate to show that they satisfactorily completed the work.
27. In re-examination, PW1 testified that all contracts with the appellant were verbal since they had worked with them before. She added that they had done three jobs amounting to Kshs. 119,364/=: 196,620/= and Kshs. 41,760/= respectively. That they also did water proof cover totalling the amount to Kshs. 349,364/= and the appellant had only paid Kshs. 50,000/= leaving a balance of Kshs. 299,264/=.
28. The trial magistrate in her judgment noted that there was a legal binding contract between the appellant and the respondent. She noted further that the appellant had only paid Kshs. 50,000/= to the respondent and the balance was Kshs. 299,264/=. This was after it had satisfactorily completed its work and the appellant acknowledged the same.
29. In view of the above, it is not disputed that the appellant had a working relationship with the respondent and that the respondent was contracted to do waterproofing for an apartment in Kikambala for Kshs. 119,364/=: swimming pool and water tank in the said apartments for Kshs.196,620/= and water proofing to top cover for underground water tank for Peer Park apartments for Kshs. 41,760/= (amount is disputed by the appellant). The appellant's witness in his witness statement stated that they had paid Kshs. 231, 752/= to the respondent. However, in his evidence in the chief he testified that the amount paid to the respondent was Kshs. 281,752/=.
30. Upon perusal of the evidence tendered before the trial court, this court notes that the respondent in list of documents (plaintiff list of documents filed on 13<sup>th</sup> May 2019), annexed a cheque for payment of Kshs. 50,000/=: invoices number MW/1573, 1697, 1721 and 1497 all amounting to Kshs. 499,264/=:.
31. The evidence of payments made to the respondent as listed in its list of documents (plaintiff's list of documents) which was produced as exhibit 1 to 10, is Kshs. 50,000/=: Kshs. 81,752/= and Kshs.100,000/= all amounting to Kshs. 231,752/=: This is the amount which the appellant initially claimed to have paid the respondent before the same was rectified during hearing to 281,752/=:.
32. In view of the foregoing, it is evident that the appellant paid the respondent a total of Kshs. 231,752 =. No evidence of the alleged Kshs. 281,752/= as alleged by the appellant was adduced or an affidavit sworn to the effect of the amount Kshs.231,752/= being an error. The respondent annexed in its lists of documents a letter dated 16<sup>th</sup> May 2006 and several invoices for the services rendered to the appellant but none showed how the amount of Kshs.299,264 was arrived at. The respondent does not expect the



court to award an amount not justified or proved. Further, during cross examination the respondent's witness confirmed that her documents exhibited that the appellant had paid them Kshs.281,752/=. This court upon perusal of the respondent's documents produced in the trial court does not trace the exhibits for the said amount. There is clearly a contradiction from both parties on what was paid and what was not paid.

33. The services rendered plus the sums paid are this:

Waterproof for Kikambala apartment Ksh 119,364/=, swimming pool plus water tank in the said apartments Ksh 196,620/=; Water proofing to top cover for underground water tank for Peer Park apartments Ksh 41,760/= Total = Ksh 357,744/= less amount admittedly paid and received (Ksh 231,752/=) Balance = Ksh 125, 992/=.

This balance is what is due to the respondent and not Ksh 299,264/=.

34. I therefore find merit in the Appeal which I hereby allow and issue the following orders

- i. The trial court's Judgment is hereby set aside and substituted with one for Ksh 125,992/= in favour of the respondent.
- ii. Interest on the said amount at court rates from the date of Judgment.
- iii. The respondent will get half costs in both the lower court and the high court.

35. Orders accordingly.

**DELIVERED VIRTUALLY, DATED AND SIGNED THIS 17<sup>TH</sup> DAY OF MAY, 2024 IN OPEN COURT AT NAKURU.**

**H. I. ONG'UDI**

**JUDGE**

