



King David Hospital & another v Mayver Enterprise Limited (Civil Appeal E074 of 2022) [2024] KEHC 10009 (KLR) (6 June 2024) (Judgment)

Neutral citation: [2024] KEHC 10009 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL APPEAL E074 OF 2022
SN MUTUKU, J
JUNE 6, 2024**

BETWEEN

KING DAVID HOSPITAL 1ST APPELLANT

DAVID NTHONYE 2ND APPELLANT

AND

MAYVER ENTERPRISE LIMITED RESPONDENT

(Being an Appeal from the Judgement and Decree of the Chief Magistrates Court at Ngong by the Honourable Ruguru N (P.M) delivered on 31st August, 2022)

JUDGMENT

1. In a Memorandum of Appeal dated 14th September 2022, the Appellants are challenging the whole of Judgment and Decree of Hon. Ruguru N. (Principal Magistrate) dated 31st August 2022 and raise the following grounds:
 - i. That the Learned Magistrate erred in law and fact by failing to put into consideration the testimonies of the Appellants witness which proved that the oxygen plant installed by the Respondent was not fit for the purpose intended.
 - ii. That the Learned Magistrate erred in law and fact in failing to consider the fact that the oxygen plant installed by the Respondent did not match the specifications of the one ordered by the Appellants.
 - iii. That the Learned Magistrate erred in law and in fact by failing to have due regard and take into account the Appellant’s defence on record which raised several triable issues and counterclaim which ought to have been considered in trial.



- iv. That the Learned Magistrate erred in law and in fact by finding that the Appellants were liable to pay to the Respondent the sum of Kshs 3,000,000/- plus interest and costs of the suit despite immense evidence by the Appellants that the Respondents delivered and installed a faulty non-functional, subserviced and unguaranteed machine.
 - v. That the Learned Magistrate erred in law and in fact by dismissing the Appellants counter – claim despite the evidence tendered in court by the 3 Defence witnesses that the oxygen plant installed did not match the specifications required and that the Respondents was in breach of the contract entered between the parties.
2. The Appellants are asking this court to allow the appeal, set aside/vacate the judgment delivered in Ngong SPMCC No 231 of 2021 on 31st August, 2022 and award the costs of this appeal to the Appellants.
 3. The appeal was canvassed by way of written submissions.

Appellant’s submissions

4. The Appellants’ submissions are dated 18th December, 2023. They have addressed each ground of appeal. On ground 1, the Appellants have relied on Section 16 of the [Sales of Goods Act](#) on fitness for purpose in a sale agreement. They stated that the issue for determination is whether the contract falls within the listed exceptions in that section. It is their case that the contract in respect of this case falls within the exceptions.
5. They submitted that the evidence of DW2 showed that the Respondent approached them with an offer to sell the oxygen plant which the Respondent stated would supply 250 litres of oxygen per minute. That they sent their agents to inspect the machine and that it was confirmed to them that the machine fitted the requirements. They submitted that it is clear from the evidence that there was a specified description of the machine that they wished to purchase and that the sample machine was viewed by their agents.
6. They submitted that the contract for sale was a hybrid of both a sale by description and a sale by sample; that from the evidence adduced, the ordinary course of business of the Respondent was supply of medical equipment; that they had given the requirement of what they needed and had sent their agent to inspect and confirm the machine matched the description; that they indeed indicated the purpose of the machine and the Respondents via their visit to the Appellants premises were aware of the purpose of the machine and that it is clear therefore the contract falls within the 1st exception that there was an implied condition that the oxygen plant shall be reasonably fit for the purpose for which it was intended.
7. They submitted that the oxygen plant was not fit for the purpose it was intended; that what they required was an oxygen plant that would supply 250litres of oxygen per minute; that an expert was hired who confirmed that the plant was small and was not for medical use in a hospital; that a report was produced to this effect that the needs of the hospital is way above the supply from the plant which shuts down when stretched to capacity and hence the plant is unable to sustain the hospital due to low production. They relied on [Vivid Printing Equipment Solutions Limited Monicah Ng’ong’oo t/a Identity Partner](#) [2019] eKLR and [Wood Products Limited v Rufus Kithela Kobia](#) [2019] eKLR.
8. In addressing grounds 2 and 5, the Appellants submitted that the evidence of DW1 in cross examination was to the effect that the Respondent confirmed that the machine was fit for the purpose and specifications and that it was for 250 liters per minute. Further, PW1 stated, during cross examination, that he gave a quotation to the Appellants after which they told him to supply the



equipment; that PW1 stated further that a proforma invoice was sent to the Appellants via WhatsApp and produced the screenshot of the WhatsApp conversation as Pexh 9; that the said screen shot being an electronic device was not accompanied by the certificate verifying the authenticity as per section 106B of the *Evidence Act* and that there was no evidence showing that the recipient shown on the screen shot was indeed the Appellants.

9. They stated that the proforma invoice and quotation was never served on them and therefore the specifications contained in the said documents are not the specifications that were agreed on by the parties. They relied on sections 15 of the *Sale of Goods Act* to the effect that where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and, if the sale is by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.
10. They also relied on section 17 of the said Act and argued that the Respondent made a preposition to sell to the Appellants the oxygen plant which they stated would supply 250litres of oxygen per minute then that was the description of the machine that was to be delivered; that after the machine was shown to their agent and being satisfied with it then there was an implied condition that the machine delivered would correspond with the specification and that the machine did not correspond with the sample previously shown. In support of their case, they relied on the case of *Pradip Enterprises (EA) Limited v Magic Chemicals Inc* [2019] eKLR.
11. They further relied on section 35 of the *Sale of Goods Act* which provides for a buyer's right to examine the goods. It was their case that evidence of DW3 showed that he was the only one present when the goods were delivered and that they were not given a reasonable opportunity to inspect the machine and confirm that it matched the specifications of what was ordered before paying the deposit.
12. On ground 3 they submitted that the trial magistrate did not consider their defence and counter claim and their evidence in support. They submitted that the trial court noted that the machine that was delivered fitted the description and purpose as they paid a huge deposit for it therefore confirming the same; that the learned magistrate erred in failing to consider that the Respondent deliberately failed to call DW1 to inspect the plant upon delivery even after there being an express agreement to do so and that their submissions were not considered by the trial court even after sending the same on email to the registry for filing on 2nd August, 2022.
13. On ground 4 on whether the machine supplied was faulty, non-functional and or defective, they submitted in the affirmative. They quoted sections 16(b) and 17(2)(c) of the *Sale of Goods Act* and submitted that the oxygen plant was not of merchantable quality and without defects. They submitted that they hired an expert who confirmed that the Plant was small and was not for medical use in a hospital; that the evidence of the expert and that of DW1 confirmed that the Respondent had supplied a sub-standard product; that the Respondent did not call any expert witness to discredit this evidence and therefore the evidence that the machine was defective and unfit for medical use remains uncontroverted and that they are entitled to rescind the contract and claim for refund of the deposit of purchase price. They relied on a number of cases on the face of their submissions including the case of *James Watenga Kamau v CMC Motors Group Limited* [2020] eKLR.
14. On the issue of costs, they submitted that it is trite law that costs follow the event. They stated that they have proved their case to the required standard and this court should allow the appeal with costs and set aside the lower court judgement.



Respondent's submissions

15. The Respondent's submissions are dated 13th December, 2023. The Respondent has condensed the grounds for appeal into two issues for determination:
- i. Whether the Learned Magistrate erred in law and fact in failing to put into consideration the testimonies of the appellants witnesses which proved that the oxygen plant installed by the respondent was not fit for purpose intended.
 - ii. Whether the trial court erred in law and in fact by dismissing the Appellants' counter-claim despite the evidence tendered in court by 3 defence witnesses that the oxygen plant installed did not match the specifications required and that the Respondents was in breach of contract entered between the parties.
16. The Respondent submitted on the duty of the first appellate court to re-evaluate, re-assess, and re-analyze the evidence on record and make its own independent decision.
17. On the first issue, it is the Respondent's case that the defence witnesses testified to the fact that the machine was fit for the purpose and specification; that DW2, the 2nd Appellant's agent on cross - examination, testified that the name plate embodied on the machine and the quotation had the same specifications; that the Appellants are still in possession of the machine; that the trial court considered the defence and stated that the Appellants were aware of what was being delivered and were aware that the machine fitted the description and purpose, otherwise they would not have paid such a huge amount of deposit before confirming the same and that it is not in dispute that a contract between the parties herein existed. The Respondent relied on the case of *Samuel Kamau Macharia v Daima Bank Limited* [2008] eKLR which cited the case of *National Bank of Kenya Ltdv Pipeplastic Samkolit (K) Ltd and another* [2011] KLR 112 at page 118, where the Court said that:
- “A court of Law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the contract.”
18. It was submitted that the Appellants in this matter have not alluded to any form of coercion or fraud to warrant them not to be bound by the contract.
19. On the second issue, the Respondent referred to the evidence adduced by the Appellants that they inspected the oxygen plant and that the same was fit for the purpose; that it is trite law that he who alleges must prove; that the Appellants' case by way of counter-claim that the machine was not fit for the purpose and specifications was not proved by evidence; that the Appellants did not adduce any evidence by production of an LPO or any other form of document on the specifications of the machine they had ordered they acknowledged receiving the quotation from the Respondent, which quotation had detailed specifications and paid the deposit. The Respondent relied on the case of *Charterhouse Bank Limited (Under Statutory Management) v Frank N. Kamau* [2016] eKLR, where it was stated that:
- “.....The Plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgment merely because the defendant has not



testified. The proposition that failure by the defendant to call evidence lessens the burden on the plaintiff to make out his case on a balance of probabilities...”

Analysis and Evaluation

20. Bearing in mind my duty as the first appellate court, I have carefully read the entire record of the lower court, the memorandum of appeal and submissions of the parties. I will concentrate my determination on whether the trial court made errors of judgment as claimed by the Appellants in their Memorandum of Appeal.
21. The evidence presented during the trial before the lower court was that PW1, according to his witness statement dated 29/09/2021, gave the quotation to the 1st Appellant after which the Appellants informed him to deliver the machine. He stated that the proforma invoice was sent through WhatsApp message and the same was received; that the specifications were as per the quotation that the machine was 2 normal cubic meters and gave out 33 litres of oxygen per minute; that he delivered the machine and was present during the delivery and the same was paid for before it was installed.
22. PW2 testified that the machine was delivered as per the specifications in the quotation; that he installed the machine after it was paid for by the Appellants and that that he confirmed that the machine was working.
23. The Appellants’ evidence is that DW1 was instructed to visit the Respondent’s premises and confirm that the oxygen plant produced 250 litres per minute; that on 18/8/2021 he visited and confirmed this; that they agreed with the Respondent that the Respondent would call him during delivery to confirm that the machine delivered was the one he had seen; that the machine was delivered but the Respondent did not call him. He testified that they called the Respondents two days later complaining that the machine was not performing well. On cross examination he testified that he did not have any LPO to show that the machine was to provide 250litres per minute. On re- examination he stated that the machine that was delivered was not the one he saw and that it resembled it save for the name plate which was different.
24. DW2 testified that he entered into an oral agreement with the Respondent; that the Respondent did not share a quotation with him; that he sent the DW1 to the Respondent’s premises to inspect the machine; that DW1 called him after the said inspection and confirmed that the machine fitted the purpose; that the amount to be paid was Kshs 6,000,000; that he paid 50% of the amount when the machine was delivered but before being offloaded; that he and DW1 were not present during the delivery; that the quotation and the name plate have the same specifications and that he was still in possession of the machine. He further stated that he has not cleared the balance of Kshs 3,000,000/-.
25. DW3 testified on cross examination that he was given the quotation by Rodgers (director of the Respondent’s company) and Kenneth; that he was present when the oxygen plant was delivered; that he did not inspect it as it was still in the Lorry; that he had no LPO to show he ordered a machine that would produce 250litres of Oxygen per minute and that what was delivered matches the quotation that produces 33.3litres per minute. On re-examination he stated that the quotation was not addressed to them and that he therefore did not stamp it.
26. From the above evidence I find no dispute that sometime in August 2021 the Respondent and the 2nd Appellant entered into an oral contract for the supply of an oxygen plant at the 1st Appellant’s hospital. The Respondent sent to the 2nd Appellant and/or his agent a quotation which described the specifics of the oxygen plant to be supplied at a cost of Kshs 6,000,000/-.



27. The Appellant is accusing the trial court of failure to consider evidence of the Appellant's witnesses; failure to consider that the oxygen plant installed by the Respondent did not match the specifications of the one ordered by the Appellant; failure to consider the Appellant's defence; errors in finding that the Appellant was liable to pay Kshs 3,000,000 and in dismissing the Appellant's counterclaim.
28. I have read the judgment of the lower court. It has captured the evidence of the Plaintiff and that of the Defendant. After analyzing the evidence from both sides, the trial court stated thus:
- “From the above analysis, it is clear that, the defendants were aware of what was being delivered. Indeed, defendant has a biomedical engineer i.e DW1, who had known of the oxygen machine and its capacity. It was incumbent upon the defendant to ensure that DW1 was present during delivery and installation in order to confirm that the machine delivered was what they had requested and expected to be delivered. In fact, DW3 saw the machine upon being delivered and payment of three million shillings paid so that it could be offloaded and installed. The actions of the defendants are a clear indication the machine delivered fitted the description and purpose otherwise they would not have paid such a huge amount of deposit before confirming the same.”
29. From the above, it cannot be true that the trial court made errors as claimed in the grounds of appeal. The trial court considered the evidence of the Appellant and its defence and made its findings that the Respondent delivered a machine that fitted the descriptions and purpose.
30. On my own, I have read the record of the lower court and the evidence adduced by the Appellant's witnesses. I find no evidence to show that the machine ordered was for 250l/m capacity. PW1 testified that the pro-forma invoice sent to the Appellants indicated that the machine gave about 33l/m. DW1, who went to the premises of the Respondent to inspect the machine testified that he confirmed that the machine was fit for the purpose and specification and that it was for 250l/m. He was not present during delivery of the machine and blames the Respondent for not calling him to come and confirm the machine was the same one he had seen. DW1 did not have the LPO showing that the machine to be provided was for capacity of 250l/m. DW2 on his part told the court on cross-examination that there was no LPO as everything was done orally.
31. From my own analysis of this matter, the only record of the machine available to the Court is the Proforma Invoice dated 16th August 2021. This document is contained in bundle of Record of Appeal. This document does not show capacity of 250l/m. The Appellants have not produced anything to show that the machine they ordered was of that capacity. It is left to the word of the Appellants against that of the Respondent.
32. To my mind, the Appellant's argument that the oxygen plant was not producing 250 litres per minute as they had specified is not backed by any documents to prove this was the case. I have seen a report by Flip Systems Limited showing that the oxygen supplied had purity of 76%. It is worth noting that this report was done after examining the machine after it had been installed and had been operational for some time. The report does not confirm to the court the condition the machine was in on delivery and installation.
33. It seems to me that the Appellants slept on their rights. They failed to confirm that the machine was fit for the purpose and specifications before making payments and installing the same. They ought to have insisted on having their experts present to inspect the machine before it was offloaded and installed and before payment was done.



34. Does this court, sitting on appeal, have any reason to disturb the findings of the trial court? In *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] E.A, the court had this to say on this issue:

“The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

35. I find the trial court not guilty of any of the factors stated above. Consequently, I find no reason to interfere with the trial court’s discretion. This appeal is hereby dismissed with costs to the Respondent.

36. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED ON 6TH JUNE 2024.

S. N. MUTUKU

JUDGE

In the presence of:

Ms Adongo for the Appellant

Ms Kabene for the Respondent

