



**Guo & another v Divine Assinter Limited & another (Civil Appeal
E518 of 2022) [2024] KEHC 8178 (KLR) (Civ) (5 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8178 (KLR)

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

CIVIL

CIVIL APPEAL E518 OF 2022

DAS MAJANJA, J

JULY 5, 2024

BETWEEN

SONG GUO 1ST APPELLANT

W & G TRANSPORTERS LIMITED 2ND APPELLANT

AND

DIVINE ASSINTER LIMITED 1ST RESPONDENT

HARRY OMONDI 2ND RESPONDENT

*(Being an appeal from the Judgment and Decree of Hon.C.A Okumu, RM/Adjudicator
dated 20th June 2022 at the Small Claims Court, Milimani in SCC No. E1725 of 2022)*

JUDGMENT

Introduction and Background

1. Before the court for determination is an appeal filed by the Appellants that is grounded in their undated memorandum of appeal filed on 13.07.2022 where they seek to set aside the judgment of the Subordinate Court dated 20.06.2022 and substitute it with an order dismissing the suit that was filed against them by the 1st Respondent.
2. The 1st Respondent claimed that on or about 03.07.2020, the parties entered into a partly oral agreement and partly written agreement for the hire of trucks for material transportation and that between 03.07.2020 to 13.07.2020, the 1st Respondent supplied KCT G, KCV H, KCU S and KCR A (“the trucks”) to the Appellants and the 2nd Respondent. That it was agreed between the parties that the Hire charges would be Kshs. 16,000.00 per truck full day worked and or Kshs. 8,000.00 per truck



- per half day worked, payable within 24 hours upon invoicing failure to which interest would accrue at 10% per annum.
3. The 1st Respondent claimed that the trucks worked depending on the work available either on full day or half day bringing a total cost of Kshs 603,200.00 less Kshs 272,000.00 paid on account. This left a balance of Kshs. 331,200.00 for which the 1st Respondent raised an invoice on 15.07.2020 (DAL/2020/001) which remains unpaid hence the suit against the Appellants and the 2nd Respondent.
 4. In response, the Appellants stated that they engaged the services of the 2nd Respondent as an independent supplier to transport certain building materials from various locations to various construction sites in consideration of a fee per trip. That the Appellants fully paid the 2nd Respondent for each and every trip as agreed and therefore, they had no contractual relationship with the 1st Respondent and they thus denied owing the 1st Respondent any money.
 5. The Appellants stated that they came to know about the 1st Respondent after services had already been rendered by 2nd Respondent and for which services the Appellants fully paid to the 2nd Respondent. The Appellants averred that they were being dragged to this dispute because the 1st Respondent appeared to have failed to get his money from the 2nd Respondent premised on a contract between the two of them to which the Appellants were not parties. The Appellants contended that there was no privity of contract between the Appellants and the 1st Respondent.
 6. The matter was disposed by way of documents. The Subordinate Court determined whether there was a valid contract between the parties and whether the 1st Respondent was entitled to the reliefs sought in his claim. The Adjudicator noted that the purported written agreement dated 04.07.2020 that was between the 1st Respondent and the 2nd Appellant was not signed as between the parties but the fact that the Appellants had admitted to some form of contract as was between the 1st Respondent and the 2nd Respondent, it held that the 1st Respondent's evidence "sounded more believable" on a balance of probability. Thus, the Subordinate Court concluded that there was some form of contract between the parties.
 7. On the reliefs sought, the Subordinate Court held that the Appellants did not call any evidence in support of their position that they had dealt with the 2nd Respondent as a sub-contractor and that they had fully paid the 2nd Respondent and as such, the Appellants were estopped from denying that they engaged the 1st Respondent. That the Appellants did not deny knowing whom the hired trucks belonged to. It disagreed with the Appellants' submissions that the 2nd Respondent was not their agent or that none of the 1st Respondent's witnesses stated that they met or interacted with the Appellants and thus no contractual agreement between them. Consequently, the Adjudicator entered judgment in favour of the 1st Respondent as against the Appellants and the 2nd Respondent jointly and severally for Kshs. 331,200.00 with costs and interest.
 8. The Appellants have preferred this appeal against the decision. The parties have filed written submissions which I have considered. I do not seek to rehash the same but I will make relevant references to them in my analysis and determination below.

Analysis and Determination

9. In determining this appeal, I am aware that the court's jurisdiction is limited by section 38(1) of the *Small Claims Court Act* (Chapter 10A of the Laws of Kenya) which provides that '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.' A court limited to matters of law is not permitted to substitute the Subordinate Court's decision with its own conclusions based on its own analysis and appreciation of the facts unless



the findings are so perverse that no reasonable tribunal would have arrived at them (*John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others* [2018] eKLR). Thus, the duty of this court is to determine whether the subordinate court's conclusions were supported by the evidence on record and the law.

10. In order to prove its claim for the Kshs. 331,200.00, the 1st Respondent produced an agreement dated 04.07.2020, transcript of WhatsApp text messages, a statement of account, an invoice dated 15.07.2020 addressed to the 2nd Appellant and a demand letter to the Appellants and the 2nd Respondent dated 24.03.2021. While the Appellants admitted hiring the trucks, they claimed that they did so through the 2nd Respondent who contracted the 1st Respondent. That they paid the 2nd Respondent in full.
11. As stated by the Adjudicator, the success of this dispute depended on whose version of events or story was more believable (See *James Munuu Mucheru v National Bank of Kenya Ltd* [2019] eKLR). Further, the 1st Respondent bore the burden of proving the existence of the facts he wanted the subordinate court to believe.
12. The question for resolution is whether the trucks were hired by the 2nd Respondent on behalf of or as an agent of the Appellants or whether the Appellants had privity of contract between the 1st Respondent and the 2nd Respondent. The parties agree that the written agreement produced was not signed by the parties indicated therein; that is the 1st Respondent and the 2nd Appellant. I have also gone through the WhatsApp transcript and note that the conversations were largely between representatives of the 1st Respondent and the 2nd Respondent. However, I also note that the WhatsApp group created is titled "DAL-W&G Transporters Job". Since the Appellants did not dispute hiring the trucks from the 2nd Respondent, it will not be a stretch to hold that "DAL" stood for Divine Assinter Limited, the 1st Respondent and "W&G Transporters", the 2nd Appellant. This supports the position that the 2nd Respondent was communicating and stating to the 1st Respondent that he was the disclosed principal of the 2nd Appellant for the said transportation job. Likewise, the 2nd Appellant is estopped from denying this agency relationship when it is evident that the 2nd Respondent hired the trucks on its behalf.
13. The Court of Appeal, in *William Muthee Muthoni v Bank of Baroda* [2014] eKLR stated that once it is demonstrated that there exists an agency relationship, then the doctrine of privity of contract and the general rule that a contract cannot confer rights on persons who are not party to it, does not apply. In this case, the evidence supports the conclusion that there was an implied and express agency between the 2nd Appellant and the 2nd Respondent and as such, the 2nd Appellant could not plead or invoke to the doctrine of the privity of contract to avoid its obligations. If at all I am to accept that the 2nd Appellant paid the 2nd Respondent the entire sum for hiring the trucks and the same was never remitted to the 1st Respondent, then this is an issue between the 2nd Appellant and the 2nd Respondent for which the former is at liberty to pursue and does not negate the 1st Respondent's entitlement to the unpaid hiring charges. I therefore find and hold the Adjudicator's conclusion was consistent with and reflective of the evidence on record and the law and as such, does not warrant the court's interference.
14. On the other hand, there is no evidence that the 1st Appellant was party to the agency arrangement between the 2nd Respondent and the 2nd Appellant. Judgment could not be pronounced against him as the evidence only tied the 1st Respondent, the 2nd Respondent and the 2nd Appellant, who is a juristic person capable of being sued on its own without unnecessarily involving its subscribers (*Salmon v Salmon & Co.* [1897] AC 22). This was an error of law that warrants the intervention of this court.



Disposition

15. The Appellants' appeal succeeds but only to the extent that judgment against the 1st Appellant is set aside and substituted with an order dismissing the suit against him with costs. The 1st Appellant costs of the appeal are assessed at Kshs. 30,000.00 and shall be borne by the Respondents jointly and severally.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF JULY 2024.

D. S. MAJANJA

JUDGE

