



**Ominet Enterprises Ltd v Iterkon Construction Ltd (Civil Appeal E018 of 2024)
[2024] KEHC 10747 (KLR) (Civ) (13 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 10747 (KLR)

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

**CIVIL
CIVIL APPEAL E018 OF 2024**

**RC RUTTO, J
SEPTEMBER 13, 2024**

BETWEEN

OMINET ENTERPRISES LTD APPELLANT

AND

ITERKON CONSTRUCTION LTD RESPONDENT

(Being an appeal from the judgment and decree of the Magistrate's Court in Small Claims Court Commercial Case No. SCC Com/E5709 of 2023 delivered by Hon. J. W Munene (RM & Adjudicator) on 8th December, 2023 in Nairobi SCC No. E5709 of 2023)

JUDGMENT

Background

1. The Appellant is aggrieved by the judgment of the Small Claims court that found that the claimant had proved its case on a balance of probability and entered judgment against the Appellant in the sum of kshs.905,000/- . Notably, this matter proceeded for determination on the basis of documents and written submissions as per the provisions of Section 30 of the *Small Claims Court Act*.
2. The facts of the case are as follows; by an undated Statement of claim filed in Nairobi SCC No. E5709 of 2023 (hereinafter referred to as the lower court claim), the Respondent herein filed a claim against the Appellant seeking a decretal sum of Kshs 905, 000/=, along with costs of the suit, and interest for breach of contract by the Appellant.
3. The Respondent herein averred that between February and September 2019, they entered into an agreement with the Appellant in which the Respondent was required to erect a steel roof and undertake related works on a property in Karen Estate. That they agreed on a consultancy fee of Kshs



4,163,479.08, inclusive of taxes, which the Appellant paid in several instalments, leaving a balance of Kshs 905,000/=.

4. The Respondent further averred that the Appellant issued three cheques for a sum of Kshs 905,000/=-, which he did not bank at the request of one Chrispus Wathimba, the Appellant's Managing Director, who indicated that he would advise on when to deposit it.
5. The Appellant in its response dated 15th October 2023, denied the Respondent's claim in its entirety and further asserted that; the amount the Respondent was claiming was to be paid upon the completion and successful handover of the site to the client; the Respondent did not finish the steel fabricated work as they deserted the construction site before the work was inspected and certificate issued. That they had to finish the work and rectify damages arising from the Respondent's previous work which caused them to incur additional expenses and weekly fines of kshs.50,000/-.

The Appeal

6. Being aggrieved by the decision of the Small Claims Court, the appellants filed an Amended Memorandum of Appeal dated 19th April, 2024 relying on seven (7) grounds of appeal as follows: -
 - i. That the learned adjudicator/ magistrate erred in law and in fact by relying on inadmissible evidence produced by the Respondent and in so doing arrived at a wrong decision.
 - ii. That the learned adjudicator/ magistrate erred in law and in fact by failing to dismiss the Respondent's suit as there was insufficient evidence tendered by the Respondent to support its suit.
 - iii. That learned adjudicator/ magistrate erred in law by holding that the respondent had proved its case on a balance of probability when evidence on record does not support such a finding.
 - iv. That the learned adjudicator/ magistrate erred in law by awarding the Respondent a sum of Kshs 905, 000/= which evidence tendered did not support such an award.
 - v. That the learned adjudicator/ magistrate erred in law by failure to apply the principles laid down in binding authorities cited by the Appellant and in so doing arrived at a wrong decision and further violated the cardinal principle in law and practice that lower courts are bound by precedents of higher courts.
 - vi. That the learned adjudicator/ magistrate erred in law and in fact by awarding interest and costs to the Respondent when the Respondent had failed to prove its case.
 - vii. The learned adjudicator/ magistrate erred in law and in fact by failing to determine the case on the basis of the law and the available facts before her.
7. Reasons whereof, the appellants prayed for the following reliefs: -
 - i. The appeal be allowed and the court does set aside the Learned Adjudicator's/Magistrate's judgment delivered on 8th December 2023 and all subsequent orders therein.
 - ii. The Respondent's suit in the Small Claims Court at Milimani being Smal Claims Court Commercial Case Number E5709 of 2023 be dismissed with costs.
 - iii. The costs of this appeal and of the subordinate court be granted to the Appellant against the Respondent.



8. The appeal was canvassed through written submissions. On 24th June 2024, the parties highlighted their submissions and relied on the written submissions. The Appellant's submissions in support of the appeal are dated 31st May 2024, while the Respondent submissions are dated 27th May 2024.

Appellant's submissions

9. Despite raising seven grounds of appeal, the Appellant condensed them into six issues, namely:
- i. whether the appeal raises points of law,
 - ii. whether the learned Adjudicator erred in law by failing to apply the principles established in binding authorities cited by the Appellant, thereby arriving at an incorrect decision and violating the cardinal principle that lower courts are bound by the precedents of higher courts,
 - iii. whether the learned Magistrate erred in law by concluding that the Respondent had proved his case,
 - iv. whether the learned Magistrate erred in law by finding that the Respondent had proved his case on a balance of probabilities when the evidence on record did not support such a finding,
 - v. whether the learned Magistrate erred in law by awarding the Respondent a sum of Kshs 905,000/= which the evidence did not support, and
 - vi. Who should pay the cost of the appeal and that of the lower court.
10. On whether the appeal raises points of law, the Appellant relies on the cases of [*Greyhound Company Limited v Globetrotter Agency Limited \(Civil Appeal E024 of 2022\)*](#) [2024] KEHC 313 (KLR) (25 January 2024) (Ruling), *Kenya Breweries Limited v Godfret Odongo (Civil Appeal No. 127 of 2007)*, and *Stanley N. Murithi & Another v Benard Munene Ithiga* [2016] eKLR. In these cases, the courts analyzed Section 38(1) of the [*Small Claims Court Act*](#) in urging this court to hold that it has jurisdiction to deal with the instant appeal as it raises points of law.
11. On the second issue, the Appellant submitted that the Adjudicator arrived at an incorrect decision when it failed to be bound by precedents of the higher court that held that a certificate of completion serves as evidence that work has been properly done and completed. Reference was made to the cases of; [*Kennedy Okiki & 4 Others v Lake Basin Development Authority \[2018\] Miscellaneous Application 6 of 2018*](#); *British Institute of Management v Dimbula Valley(Ceyclon)Tea Company Ltd* [1960] QB; *Republic v Director of Public Prosecution Ex Parte Josphat Sirma & 2 Others* [2017]eKLR.
12. The Appellant further submits that the authorities cited support their position that the lack of a certificate of completion indicates that the work was not completed, and as such, the Respondent did not deserve the amount of Kshs 905,000/=.
13. On the third issue, the Appellant, submitted that the evidence tendered by the Respondent did not support the award of Kshs 905,000/=. The Appellant argues that the trial court failed to examine why the Respondent sought only Kshs 905,000/= instead of the balance of Kshs 1,985,500/=. The Appellant contends that the court ignored the provisions of Sections 107, 108, and 109 of the [*Evidence Act*](#) and thus erred in holding that no evidence was furnished by the Appellant that the Respondent did not complete the works as contracted. The Appellant relies on the case of *Juma & 2 Others (Suing as the Personal Representatives of the Estate of Edward Kibe Ngunjiri - Deceased) v David (Civil Appeal E134 of 2021)* [2023] KEHC 26015 (KLR) (Civ).



14. The Appellant further submits that, given that the cheques issued were not banked, it is questionable why the Respondent sought to recover the amount four years later and why the cheques have not been returned to the Appellant.
15. The Appellant also faulted the court for failing to hold that there was no valid contract between the appellant and the respondent for kshs. 905,000/- pursuant to section 3(1) of the Contract Act. They relied on the case of Hydro Water Well (K) Limited v Sechere & 2 Others(sued in their representative capacity as the officers of Chae Kenya Society) Civil Suit E212 of 2019) [2021] KEHC 22 (KLR) (Commercial and Tax)10 August 2021) Judgment
16. On the fourth issue the Appellant submitted that the trial court erred in admitting hearsay evidence of the Respondents witness on the fact that the Appellant’s agent stopped it from banking the cheques. Reliance was placed on the case of [*Kinyatti v Republic eKLR Criminal Appeal No. 60 of 1983*](#).
17. As to whether the trial court erred in law by awarding the Respondent a sum of kshs905,000/- the Appellant while making reference to Section 82 of the [*Evidence Act*](#), submitted that the evidence tendered did not support such an award. That the cheques issued do not automatically admit the debt but rather were intended as a sign of good will and intention to settle the debt once the Appellant inspected and certified the site as complete.
18. On the issue of costs reference was made to the case of Cecilia Karuru Ngayu v Barclays Bank of Kenya & another [2016]eKLR to urge that the Appellant is entitled to the award of costs of both the appeal and at the trial court because it had to undergo financial expenses instructing counsel.
19. They urged that this appeal be allowed for they had proved their case on a balance of probability.

Respondent’s submissions

20. The Respondent while relying on the authorities of [*Gicheru v Kimwaki & Another \(Civil Appeal No. 346 of 2017*](#)[2023]KECA 1107(KLR) and Moses Segite v Kenya Fluorspar Limited [2021]eKLR urged the court to be guided by section 30 of the Small Claims Act and strike out and dismiss all grounds of appeal anchored on matters of facts in limine.
21. The Respondent sets out one issue for determination namely; whether the Appeal is merited?
22. The Respondent submits that, by consent, the parties agreed to conduct the hearing in accordance with Section 30 of the [*Small Claims Court Act*](#), by making all evidence filed in court admissible. That there is no evidence or allegation that the Appellant did not understand the terms and purport of the consent or that it was tainted with misrepresentation, fraud or irregularity,
23. It further submitted that, under section 32 of the [*Small Claims Court Act*](#), the Court is not bound by strict rules of evidence and under section 31(2) of the Small Claims Act, the court may admit any evidence it considers credible or trustworthy even though the testimony recorded or other material is not admissible as evidence in any other court under the law of evidence.
24. They urged the court to find that the Appellant failed to prove or demonstrate that; the oral contract had been varied into a written contract, thus necessitating proof of a completion certificate; that the cheques issued to the Respondent were not for settlement of debt due and owing as a result of the oral contract for fabrication of steel; that payments were made to third parties to complete the same work; that he incurred weekly fines of ksh.50,000/-; and that there was no correspondence between the Appellant and the Respondent to prove any delay in completing the fabrication or a query on the quality or completeness of the works.



25. It was their further submission that the trial court analysed the authorities submitted by the appellant but the same were inapplicable to this matter since the contract between the appellant and respondent was oral. Reference was made to the Court of Appeal decision in *National Bank of Kenya Ltd v Pipe plastic Samkolit (k) Ltd & Another* [2001]eKLR.
26. Also relied upon was the case of *Equatorial Commercial Bank v Wilfred Nyasim Oroko* [2015] eKLR, which cited the decision in *Hannah Issa & Co. v Jeraj Produce Store* [1967] EA 55. Guided by the dictum set out in the case the Respondent urged the court to adopt the finding that where a suit concerns a cheque and the cheque has been admittedly given, the onus is on the Defendant/ Appellant to show the circumstances that would disentitle the Plaintiff/Respondent to a judgment to which they would otherwise be entitled.
27. The Respondent further submits that the Appellant did not adduce any evidence to rebut the existence of the debt, he did not file any counterclaim against the respondent or particularize with proof any of the alleged losses.
28. They urged the court to find that the appeal is without merit and requests that the security of Kshs 400,000/= deposited in court pursuant to court orders be released to it.

Analysis and Determination

29. To begin with the duty of this court as an appellate court is well prescribed under Section 38 of the [*Small Claims Court Act*](#) which limits the jurisdiction of this Court to matters of law only. It 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.”

30. What constitutes, points of law, has been settled. In the case of *Peter Gichuki King'ara v IEBC & 2 Others*, Nyeri Civil Appeal No. 31 Of 2013, (Court of Appeal) (Visram, Koome & Odek, JJA), the court of appeal stated as follows: -

“The court 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.”

31. Based on the above provision of law and the authority referred to, this court has considered the grounds of appeal as they appear in the Amended Memorandum of Appeal dated 19th April 2024, the proceedings of the lower court, and the submissions from both the Appellant and the Respondent. This court discerns the primary question of law that calls for determination is whether the Appellant proved its case on a balance of probabilities, as required by law.
32. The Appellant has faulted the Adjudicator for failing to be guided by the various precedents presented before it and in failing to hold that a certificate of completion serves as evidence that work has been properly done and completed. According to the Appellant lack of a certificate of completion indicated



that the work was not completed, and as such, the Respondent did not deserve the amount of Kshs 905,000/=.

33. In response the Respondent's position was that the contract between the parties was an oral contract and proof of completion certificate was not part of the agreed requirements. The Respondent further opines that the Appellant failed to prove its case by failing to demonstrate that the oral contract between the parties had been varied into a written contract, thus necessitating proof of a completion certificate.
34. Indeed, I agree with the Appellant's position that Small Claim Courts are guided by the decisions of superior courts by way of precedents. However, the general principle in application of precedents is that similar matters are resolved following other similar cases and in doing so the court is guided by the factors including the material facts, the parties' arguments, as well as the reasoning of court.
35. Consequently, this court has taken time to scrutinize the various authorities presented by the appellant. One distinguishable characteristic in those authorities and which has not been brought out by the Appellant in the instant case is that the parties in the authorities quoted had their intentions written and part of the written obligations included the requirement of acquiring the completion certificate. An example is as follows; In Republic v Director of Public Prosecution Ex Parte Josphat Sirma & 2 Others (2017)eKLR, the substratum was the legality of a procurement process whereby the accuracy of the completion certificate signed by the applicant on behalf of his colleagues was in question.
36. The trial court in determining this matter held that the Appellant did not furnish any evidence that the Respondent did not complete the works as contracted. On this the Appellant submitted that the evidence tendered by the Respondent did not support the award of Kshs 905,000/= and that the trial court ought to have examined why the Respondent sought only Kshs 905,000/= instead of the balance of Kshs 1,985,500/=.
37. I have examined the Appellant's assertions against the pleadings before this court. Notably, the Respondent's claim was one for kshs. 905,000/= which was supported by the presentation of three CBA Bank cheques no 00010, 000625, 000627 amounting to kshs. 905,000/=. In response the Appellant denied owing the Respondent any money and instead stated that the Respondent did not finish the steel fabrication work as they deserted the construction site.
38. It is trite law that he who alleges must prove, this is premised upon Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya, provides that: -

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
39. In *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Court of Appeal held that: -

“As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”



40. In the case of *William Kabogo Gitau v George Thuo & 2 Others* [2010] 1 KLE 526 (Kimaru J as he then was) stated that:
- “In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”
41. Also in *Re H and Others (Minors)* [1996] AC 563, 586 the court held that;
- “The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.....”
42. From the evidence on record, the trial court on 3rd October 2023 directed that the matter proceeds for hearing under Section 30 of the *Small Claims Court Act*. This section provides as follows “subject to agreement of all parties to the proceedings, the court may determine any claim and give such orders as it considers fit and just on the basis of documents and written submissions, statements or other submissions presented to the court.
43. It should be noted that none of the parties objected to the matter proceeding under section 30 above. The effect of this was that the parties acquiesced to the production of the documents and the court was right in making a determination on the basis of the documents supplied by the parties.
44. In this case the Appellant’s case was supported by the Response to the claim together with a Witness Statement by Crispus Wathimba all dated 15th October 2023; submissions dated 5th November 2023; and their letter dated 5th December 2023 seeking indulgence to adjourn the matter. Apart from the assertions in the defence and witness statement, it is observed that the Appellant did not adduce any evidence in support of his response.
45. On the other hand, the Respondent’s case was supported by the undated Statement of Claim together with a witness statement by George Kimani dated 28th July 2022; Claimant’s list and bundle of documents dated 28th July 2022, and submissions dated 24th October, 2023.
46. Based on the above authority, it is my view that the Respondent through the presentation of the supporting documentation which were not contested and were relied upon under section 30 of the *Small Claims Court Act* discharged the required burden of proof. The Appellant was only required to present evidence that would counter the Respondent’s claim and demonstrate on a balance of probability reason to doubt the Respondent’s claim. However, he did not present any such evidence.
47. The Appellant also submitted that the trial court erred in admitting hearsay evidence of the Respondent’s witness on the fact that the Appellant’s agent stopped it from banking the cheques. I draw attention to the provision of section 32 of the *Small Claims Court Act* which restricts and limits the application of the *Civil Procedure Act* and Rules, the *Evidence Act* to the Small Claims Court, therefore this ground of appeal fails.



48. From the foregoing analysis, I have no reason to interfere with the trial court's decision. The upshot therefore is that;

a. The subject appeal lacks merit and the same is hereby dismissed with costs to the Respondent.

49. This court also takes note of the Respondent's requests that the security of Kshs 400,000/= deposited in court pursuant to court orders be released to it. The Appellants did not submit on this. Given the outcome of the appeal this court further directs that the Kshs. 400,000/- deposited in court as security be released to the Respondent.

Orders accordingly.

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 13TH DAY OF SEPTEMBER, 2024.

For Appellant:

For Respondent:

Court Assistant:

