



**Werks Limited v Hardware & 2 others (Civil Appeal E555 of 2022)
[2024] KEHC 10526 (KLR) (3 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 10526 (KLR)

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

CIVIL APPEAL E555 OF 2022

WM MUSYOKA, J

SEPTEMBER 3, 2024

BETWEEN

THE WERKS LIMITED APPELLANT

AND

PLUMBLINE HARDWARE 1ST RESPONDENT

HAZEL MWIHAKI GICHUNGWA 2ND RESPONDENT

ARNOLD KABENA MUKORA 3RD RESPONDENT

(An appeal arising from the judgment of Hon. DS Aswani, Adjudicator/Resident Magistrate, RM, delivered on 24th June 2022, in Nairobi SCCC No. 1003 of 2022)

JUDGMENT

1. The suit, at the primary court, was initiated by the 1st respondent, against the appellant, for a sum of Kshs. 833,165.00, in respect of goods supplied but not paid for. The appellant filed a defence, in which it denied that the goods were supplied to it, and, at the same time, pleading that the debt had been settled, but the 1st respondent had not paid Value Added Tax (VAT) in respect of the amount paid. The appellant pleaded that the amount it paid for the goods was induced by the 2nd and 3rd respondents, who it named as third parties. The 2nd and 3rd respondents, appeared as third parties, and denied liability, and accused the appellant of fraud.
2. A formal hearing was conducted, on 10th May 2022, when 1 witness each testified for the appellant, 1st respondent, and the 2nd and 3rd respondents. Judgment was delivered on 24th June 2022, in favour of the 1st respondent.
3. The appellant was aggrieved, hence the instant appeal. The grounds, in the memorandum of appeal, dated 22nd July 2022, turn on the trial court failing to appreciate that the suit was by an unpaid seller, under section 31 of the [Sale of Goods Act](#), Cap 31, Laws of Kenya; failing to apply sections 32(2) and



39 of the *Sale of Goods Act*, and especially whether the contract of sale, and the breach, was in respect to a sale where the price was to be settled by the stated instalment of Kshs. 833,165.00 or to be paid for separately, and whether the contract was in relation to the whole of Kshs. 2,919,415.00 as pleaded in the defence; failing to find and hold that the only contract of sale related to the whole of Kshs. 2,919,415.00 as pleaded in the defence; failing to find that the respondent had not pleaded a claim arising out of a contract whose whole price was Kshs. 3,752,580.02; erring in finding that the claim was a balance of the purchase price in a contract whose sale price was Kshs. 3,752,580.02 in the absence of any pleading to that effect in terms of section 39 of the *Sale of Goods Act*; and failed to uphold or sustain the unchallenged defence by the appellant that the claim was unlawful and unmaintainable for the respondent had billed and collected tax from the appellant.

4. Directions, on the disposal of the appeal, were given on 20th December 2023, for canvassing of the appeal by way of written submissions. The file of papers before me has written submissions on the appeal by the 1st, 2nd and 3rd respondents. I have not come across written submissions by the appellant.
5. The 1st respondent only argues 1 substantial issue, whether the appellant was entitled to the reliefs sought in the memorandum of appeal. It argues that some of the issues raised in the appeal were either admitted by the appellant, while the others did not arise at the trial. On the first batch of issues, it is submitted that the claim was for Kshs. 833,165.00, and it emerged at the hearing that the same was a balance from an amount of Kshs. 3,752,580.02, out of which Kshs. 2,919,415.00 had been paid. It is submitted that the contract was admitted, and so was the partial payment of Kshs. 2,919,415.00, and it is argued that the fact that the 1st respondent did not plead that it had been paid Kshs. 2,919,415.00 was not fatal. It is submitted that the appellant had acknowledged that the 2nd and 3rd respondents had authority at all times to act on behalf of the appellant, and that they ran the business of the appellant, as managing directors and shareholders. It cites *Emco Plastic International Ltd vs. Freeberne* [1971] EA 42 (Lutta, Law & Mustafa, JJA), to support their case. On the second batch of issues, it is submitted that they suggest that the respondents herein colluded to defraud the appellant, which is a new issue, that was not canvassed at the trial. It is submitted that it never came up at trial, it was not discussed and no evidence was led on it, and it should not arise on appeal. *Republic vs. Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & others ex parte Tom Mbaluto* [2018] eKLR (Makhandia, Kiage & M’Inoti, JJA) is cited in support.
6. On their part, the 2nd and 3rd respondents argue on the grounds that touch on them, the 2 relating to collusion between them and the 1st respondent. They rely on Order 2 rule 4 of the Civil Procedure Rules, which require a party who alleges fraud, to specifically plead the said fraud in its pleadings. They submit that it was the appellant who dragged them into the suit, and it merely alleged that they did not disclose to it the debts owed to the 1st respondent, and the third party notices, served on them, did not raise questions of fraud or collusion between them and the 1st respondent. They cite *Urmila w/ o Mahendra Shah vs. Barclays Bank International Ltd & another* [1979]eKLR [1976-1980] 1 KLR 1168 (Madan, Wambuzi & Law, JJA), on standard of proof of fraud in civil matters. They submit that no evidence was adduced on the alleged collusion or fraud.
7. The appeal turns around only 2 issues; whether there was a contract, and whether there was collusion between or fraud by the respondents.
8. On the first issue, the appellant denied the existence of the contract, and suggested that there was collusion between the 1st respondent and the 2nd and 3rd respondents to defraud it. The 1st respondent produced invoices and delivery notes, to support its claim that it supplied the goods in question. That was conceded by the 2nd and 3rd respondents, who were running the business of the appellant, that goods were supplied, and part payment was made. However, the appellant alleged or suggested that



that transaction did not involve it, for the 2nd and 3rd respondents acted in their personal capacities, with respect to their own personal affairs, and not that of the appellant. The appellant did not offer any evidence that established that the 2nd and 3rd respondents dealt with the appellant in their personal capacities, or that the goods were ordered as such, and were supplied to them in those personal capacities. The trial court noted that the invoices and delivery notes were in the name of the appellant. The court also noted that the 2nd and 3rd respondents run the business of the appellant, and the 3rd respondent detailed to the trial court, in his testimony, how RW1, the witness for the appellant, would approve the payments that were made to the 1st respondent. The trial court had the advantage of seeing and hearing the witnesses who appeared and testified before it, and was best placed to make assessments on their credibility and reliability as witnesses..

9. There was an issue raised by the appellant, in its response, and written submissions at the trial, about tax, the allegation that the 1st respondent billed it and illegally collected tax from it, which it did not release to the Kenya Revenue Authority, which made the sales contract illegal. The appellant has raised the tax matter as an issue in the appeal. However, I note that RW1 did not make any reference to that issue in his witness statement, dated 9th May 2022, which he adopted at trial, neither did he testify on it when he gave oral evidence on 10th May 2022. The issue was argued in the written submissions. An allegation made in a pleading, is not evidence, and is of no evidential value, until some facts are placed before the court at the trial, to support the allegation. That never happened in this case. The allegation about the tax, allegedly illegally collected by the 1st respondent, from the appellant, remained just that, an allegation in the pleadings, which was not supported by any of the facts that the appellant placed before the trial court to support its case. The trial court did not have to rule on it, and, quite properly, made no reference to it in its decision. Similarly, written submissions are not evidence. They are supposed to be an analysis of the pleadings and the evidence, weighed against the applicable law, essentially an argument advanced of the case by the party. Submissions are based on the evidence, they cannot, therefore, be the evidence.
10. The appellant has raised issue about certain provisions of the *Sale of Goods Act*, and argues that the trial court did not take them into account. I note from the response filed by the appellant, to the claim at the trial court, that the appellant did not raise any issue about those provisions of the *Sale of Goods Act*; neither did it make arguments around these provisions of the *Sale of Goods Act* in its written submissions at the trial. Its witness did not mention the *Sale of Goods Act* in his written witness statement and his oral testimony. The *sale of Goods Act* was not made an issue at the trial; it cannot be made one now.
11. The appellant has also raised issue, in the grounds of appeal, about whether the contract was for Kshs. 833,165.00, or Kshs. 2,919,415.00, or Kshs. 3,752,580.02. The pleadings, by the 1st respondent, limited its claim to Kshs. 833,165.00. It was the appellant who introduced the sum of Kshs. 2,919,415.00, stating that that that was the amount that it had paid to the 1st respondent. The 2nd and 3rd respondents then explained that the contract was actually for Kshs. 3,752,580.02, out of which Kshs. 2,919,415.00 was paid, leaving a balance of Kshs. 833,165.00. The pleadings by the 1st respondent could, perhaps, have been done more neatly, but the other parties, including the appellant, filled in the gaps in them, in their responding pleadings. Nothing really should turn on this, given that it was an issue that remained in the pleadings. RW1, the witness for the appellant did not address it in his written witness statement, nor in his oral testimony. It was, therefore, not addressed in the evidence that the appellant presented at the trial. It cannot now be made an issue on appeal. The same would apply to whether the contractual amount was to be paid in lumpsum or in instalments.
12. From the material before me, I am not persuaded that the trial court came to the wrong conclusions, on the existence of the contract the subject of the trial.



13. On the second batch of issues, the alleged collusion between the respondents, to defraud the appellant, I note, from the response filed by the appellant, to the claim by the 1st respondent, that the appellant did not allege collusion between or fraud by the respondents. Similarly, the third party notices issued to the 2nd and 3rd respondents, by the appellant, dated 18th March 2022, made no allegation of fraud by or collusion between the respondents, neither were the acts of fraud particularised. The law on particularisation of acts of fraud, where fraud and collusion are alleged, is well settled in such cases as *Urmila w/o Mahendra Shah vs. Barclays Bank International Ltd & another* [1979]eKLR [1976-1980] 1 KLR 1168 (Madan, Wambuzi & Law, JJA). I have very keenly perused the testimony of RW1, the witness presented for the appellant, and I have been unable to find any evidence which supports the allegation of fraud and collusion by and between the respondents.
14. Overall, I find no merit in the appeal herein, and I hereby dismiss it with costs. It is so ordered.

DELIVERED BY EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 3RD DAY OF SEPTEMBER 2024

W MUSYOKA

JUDGE

Ms. Veronica, Court Assistant, Milimani.

Mr. Arthur Etyang, Court Assistant, Busia.

Advocates

Ms. Oloo, instructed by Sharpley Barret & Company, Advocates for the appellant.

Ms. Mugo, instructed by Kiamah Kibathi & Company, Advocates for the 1st respondent.

Mr. Omuma, instructed by Omuma Advocates LLP, Advocates for the 2nd and 3rd respondents.

