



**Machiri Limited v JB Legacy Enterprises Limited (Civil Appeal E366 of 2023)
[2024] KEHC 12105 (KLR) (Civ) (11 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12105 (KLR)

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

CIVIL

CIVIL APPEAL E366 OF 2023

RC RUTTO, J

OCTOBER 11, 2024

BETWEEN

MACHIRI LIMITED APPELLANT

AND

JB LEGACY ENTERPRISES LIMITED RESPONDENT

*(Being an appeal from the judgment delivered by Hon. P.K Rotich (SRM) on 14th
April 2023 in Chief Magistrates Court at Nairobi MC.CC No. 8080 of 2018)*

JUDGMENT

1. This is an Appeal seeking to set aside the decision of the trial court in Nairobi Chief Magistrates Court No. 8080 of 2018 in its entirety. In that case, the Appellant was sued by the Respondent for failure to pay Kshs 762, 250. 80 which was part of invoiced amounts raised for supplying machine spare parts and rendering mechanical repair services.
2. The Appellant in response to the claim filed a defence dated 1/11/2018 admitting to the arrangement of delivery of goods and services but denied the allegation of failure to pay the invoiced amount. The Appellant alleged that he is not indebted to the Respondent. He contended that, contrary to the agreement, the Respondent did not supply some of the agreed-upon spare parts and also failed to carry out maintenance on the machines to date. Furthermore, the Appellant stated that it paid for the spare parts supplied by the Respondent and for the mechanical repairs carried out by the Respondent, totaling to Kshs 611,842/=.
3. During the hearing, each party called one witness. After hearing and analysis of the evidence of the parties, the trial court entered judgment as prayed in the plaint/for the Respondent for kshs 762,560/-, as well as costs and interest.



4. Aggrieved by the decision of the trial court, the Appellant lodged this appeal seeking that the appeal be allowed and Judgment of the lower court be set aside. He also sought for costs of the Appeal. The Appeal sets out eight (8) grounds as follows: -
 - a. That the Learned Trial Magistrate erred in fact and law in awarding the Plaintiff Kshs 762, 560. 80 together with costs and interest. A finding that is not supported by the evidence on record.
 - b. The Learned trial Magistrate erred in law and in fact in finding that the Plaintiff had proved that invoices of Kshs 762, 560. 80 were raised with dates.
 - c. The Learned trial Magistrate erred by failing to consider the inconsistencies in the Plaintiff's invoices and delivery notes thereby reaching an erroneous finding in its judgment.
 - d. The Learned Trial Magistrate failed to consider the fact that the Defendant had already paid the Plaintiff Kshs 611, 842 for parts delivered and repairs carried out.
 - e. The Learned Trial Magistrate erred in fact and law in finding that the Defendant's claim that the Plaintiff failed to undertake some repairs and deliver some Motor Vehicle parts is vague and without factual basis. A finding that is contrary to the evidence on record.
 - f. The Learned Trial Magistrate erred in fact and law in finding that the Plaintiff had proved its case against the Defendant on a balance of probability. A finding that is not supported by the evidence on record.
 - g. The Learned Trial Magistrate erred in fact and law in failing to consider the facts of the case against the evidence on record and the applicable laws thus arriving at the wrong conclusion.
 - h. The Learned Trial Magistrate erred in law in awarding costs of the suits and interest to the Plaintiff.
5. The Appeal was canvassed by way of written submissions. The Appellant filed its submissions dated 6/6/2024 in support of the Appeal while the Respondent's submissions opposing the Appeal are dated 4/4/2024.

Appellant's submissions

6. The Appellant while referring to the case of Susan Munyi v Keshar Shiani (2013) eKLR urged this court to review the evidence in order to determine whether the conclusion reached should stand.
7. It was the Appellant's submission that the Respondent's claim was a special damage claim and special damages must be pleaded and strictly proved with certainty and particularity both in pleading and actual damage. To support this argument reliance was placed on the cases of John Richard Okuku Oloo v South Nyanza Sugar Co. Ltd [2013] eKLR and Capital Fish Kenya Limited v The Kenya Power & Lightning Company Limited [2016] eKLR.
8. The Appellant urged the court to find that there were inconsistencies between the invoices and delivery notes, and that the trial court erred in awarding damages to the Respondent on that basis. The Appellant further submitted that, according to the agreement between the parties, as detailed in the Appellant's evidence-in-chief, the Respondent was to supply machine spare parts and perform mechanical repairs on the Defendant's machinery. Upon completion of each task, the Respondent would provide delivery notes as a record of the work done and parts supplied. A member of the Appellant's mechanical department would then conduct a preliminary inspection of the completed work and report to the Managing Director. Thereafter, the Respondent would generate an invoice for the work completed, which would then be paid by the Appellant.



9. The Appellant submitted that it paid for invoices Nos. 277, 278, and 279 in accordance with the parts delivered and the repairs carried out. It further asserted that the delivery notes ought to be in tandem with the invoice for payment to be made.
10. In further stating that the trial court erred in awarding special damages despite the glaring inconsistencies between the delivery notes and the cross-referenced invoices by the Respondent, the Appellant relied on the case of *Securax Agencies (KD) Ltd v Resort Kenya Limited & Another (Commercial Appeal E015 of 2023)* [2023] KEHC 21751 (KLR) (Commercial and Tax) (29 August 2023) (Judgment).
11. The Appellant further submitted that the trial court failed to consider its evidence, which indicated the specific parts and work that it had paid for, as detailed in its defence. Additionally, the report submitted by the Appellant, which outlined the Respondent's failed repairs and the costs incurred in hiring another party to perform those repairs, was not considered by the trial court. Therefore, the Appellant argued that the Respondent did not prove its entitlement to the claimed sum, and that the trial court's judgment constituted a grave injustice, as it unjustly enriched the Respondent while equally impoverishing the Appellant. He urged the Court to allow the Appeal.

Respondent's submissions

12. The Respondent briefly introduced the facts of the matter and subsequently addressed two issues: first, whether the learned trial magistrate erred in law and/or fact by finding that the Plaintiff had proved its case against the Defendant on a balance of probabilities, thereby entitling the Plaintiff to judgment in the sum of Kshs 762,560.80, along with costs and interest; and second, whether the Appellant is entitled to the prayers sought in its Memorandum of Appeal dated 12th May, 2023.
13. On the first issue, the Respondent submitted that the learned trial magistrate's conclusions, as outlined in the judgment, were based on a sound analysis of all the evidence on record, as well as the relevant law and facts. The trial court was guided by the tabulations in the plaint, which referenced the invoices and delivery notes; these items were not challenged by the Appellant. Furthermore, the Respondent contended that the Appellant attempted to introduce a different defence in its submissions to suggest that it was never served with the invoices and delivery notes, despite acknowledging the invoices in its defence and the delivery notes being duly signed by its representatives. In asserting that parties should be bound by their pleadings, the Respondent relied on the Supreme Court ruling in *Raila Amolo Odinga & Another v. IEBC & 2 Others* [2017] eKLR.
14. The Respondent also submitted that the entire Statement of Account was not disputed by the Appellant. He stated that even though the Respondent failed to produce invoice number 113, it did provide the related delivery notes, the 2014 payment, and the credit note. This clearly indicated that an invoice was raised and was to be settled within two days of its issuance. It is therefore incorrect for the Appellant to claim that invoices were never raised, as the Appellant's defence acknowledges that it partially paid invoices numbers 277, 278, and 279.
15. The Respondent submitted that the Appellant did not demonstrate any inconsistencies during the trial hearing, aside from a far-fetched attempt to demonstrate a purported inconsistency between invoice number 279 and the related delivery note number 525, which allegation was unfounded and nonexistent. Additionally, the Respondent argued that the Appellant's claim that the Respondent failed to undertake certain repairs and deliver specific motor vehicle parts is vague and lacks a factual basis. The Respondent maintained that this claim is both legally and factually unsound, and the Appellant made no effort to substantiate the allegation.



16. The Respondent submitted that, having demonstrated that certain deliveries were made through delivery notes and subsequently raised invoices, the burden of proof shifted to the Appellant to identify the repairs that were allegedly not undertaken despite being invoiced, as well as the items invoiced but never delivered. He stated that the Appellant failed to substantiate these claims. Furthermore, the documents filed by the Appellant do not reference any items that were not delivered or mechanical repairs that were not completed.
17. Regarding whether the Appellant is entitled to the prayers sought in its Memorandum of Appeal dated May 12, 2023, the Respondent submitted that, based on the totality of the evidence presented, the trial court correctly held that they had proved their case on a balance of probabilities. The Respondent relied on the cases of *Mumbi M’Nabea v. David M. Wachira* [2016] eKLR and *Palace Investments Limited v. Geoffrey Kariuki Mwenda & Another* [2015] eKLR.

Analysis and Determination

18. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand. The foregoing duty was succinctly stated by the Court of Appeal in the case of *Selle v Associated Motor Boat Company Ltd* (1968) EA 123 and *Peters v Sunday Post Limited* [1985] EA 424).
19. After carefully analysing the record of appeal, the memorandum of appeal and parties’ submissions, the only issue for determination is whether the Respondent proved its case to the required standard to warrant the award for the sum of Kshs 762, 560/=.
20. The applicable law as to the burden of proof is found in Sections 107, 108 and 109 of the [Evidence Act](#) which is to the effect that “whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.” This was further buttressed in the Court of Appeal case of *Mumbi M’Nabea v David M. Wachira* [2016] eKLR when, discussing the standard of proof in civil liability claims in our jurisdiction the appellate Court had this to say:-

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the [Evidence Act](#), Cap 80 Laws of Kenya provides as follows:

“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.” The above provision provides for the legal burden of proof.

However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

21. The duty of proving the averments contained in the plaint laid squarely upon the Respondent. The uncontested facts are that the Appellant retained the services of the Respondent to supply machine parts and render mechanical repair services. The contentious issue is whether the Appellant paid for all



the goods and services rendered. Whereas the Respondent position is that the Appellant failed to pay Kshs 762,560.80/- for the goods and services rendered, the Appellant position is that the Respondent failed to supply some of the agreed spare parts and failed to carry out certain repairs to date. The Appellant asserts that they paid for the spare parts and mechanical services rendered.

22. This court therefore has a duty to evaluate and review the record of appeal before it and come up with its own findings. See the case of *Selle v Associated Motor Boat Company Ltd* [1968] EA 123 . Thus, upon reviewing the evidence on record it is evident that to prove its case, the Respondent relied on the statement which shows that they were owed a total of Kshs. 762,560.00 arising out of invoices No. 113, No 277, No. 278 No. 279 and No. 280; some of the invoices as well as the delivery notes were also attached. The statement also shows that there was a credit note issued and some payments made leaving the owed balance of Kshs 762,560/-.
23. Notably, the Appellant pleaded that it paid for the parts that were delivered and repairs carried out. In particular, he alleges paying a total of kshs. 611,842/- for invoices No. 277, No. 278 and No. 279. It is evident from the tabulations that the payments did not fully correspond with the amounts invoiced. For instance, Invoice 277 was for Kshs 174,348, but according to the Appellant's tabulation in the statement of defense, only Kshs 61,000 was paid. Similarly, Invoice 278, as shown in the Respondent's documents, was for Kshs 390,514, but the Appellant alleges to have paid only Kshs 230,250 without providing any evidence of payment.
24. Based on the above set of facts this court notes that the issue of issuance of the statement of accounts and invoices is not disputed. The Appellant does not deny receiving the invoices and neither does he challenge their authenticity. However, according to the Appellant, the Respondent failed to do the work as instructed by failing to complete some repairs and to deliver certain motor vehicle parts and as such was not entitled to full payments as per the invoices.
25. In this scenario, the court is faced with a situation where one party engages another to perform certain services, but when payment is due, the beneficiaries begin to question whether the other party deserves to be paid. While such an outcome is possible if the services are not performed satisfactorily, the agreement between the parties herein was clear: the respondent would perform the services and then raise invoices for payment.
26. But what happens if the appellant challenges the invoices, claiming that the services rendered are not worth the amount charged? The court's reasoning is that, although questioning invoices could occur, the appropriate course of action for the appellant would have been to either seek a remedy of specific performance or discontinue any remaining services while pursuing claims for substandard work. However, refusing to pay an invoice constitutes a breach of contract, as it represents failure to pay for services already rendered.
27. In this case, it seems the appellant chose to pay only part of the amount due, rather than the full sum, effectively deciding unilaterally how much the services were worth, despite the clear invoices provided.
28. This court also notes the Appellant submission that that the Respondent claim was a special damage claim which ought to have been pleaded and strictly proved with certainty and particularity both in pleading and actual damage. Suffice to say that special damages are specific and awarded to compensate a party for the actual out-of-pocket expenses and provable losses that they incurred as a direct result of the other party's actions or behaviour.
29. In this instance the uncontested facts are that the Appellant retained the services of the Respondent to supply machine parts and render mechanical repair services. The contentious issue is whether the Appellant paid for all goods and services rendered. Further, in the plaint the plaintiff prays that



judgment be entered for a specified liquidated amount, he does not seek for special damages as alleged by the Appellant. This court therefore finds that this is not a special damage claim as stated by the Appellant but a liquidated claim arising out of failure to pay invoiced amount for the supply of some of the agreed-upon spare parts and maintenance on the machines. Therefore, this ground of appeal fails.

30. I am satisfied that the Respondent proved its case on a balance of probability by relying on the statement of account, invoices and delivery notes to proof his liquidated claim. I see no need of interfering with the trial court's findings. Therefore, the appeal fails.
31. In light of the foregoing, I find no merit in the appeal and thus proceed to dismiss it. Each party to bear its own costs of the Appeal.

Orders accordingly

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 11TH DAY OF OCTOBER 2024

For Appellant:

For Respondent:

Court Assistant:

