



Muya t/a Interno Enterprises v Musyimi t/a Tecta Menna (Civil Appeal E143 of 2024) [2024] KEHC 11871 (KLR) (Civ) (4 October 2024) (Judgment)

Neutral citation: [2024] KEHC 11871 (KLR)

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

**CIVIL
CIVIL APPEAL E143 OF 2024**

**RC RUTTO, J
OCTOBER 4, 2024**

BETWEEN

TERRY MUYA T/A INTERNO ENTERPRISES APPELLANT

AND

JENNIFER MUSYIMI T/A TECTA MENNA RESPONDENT

(Being an Appeal from the Judgment and Decree of the Small Claims Court of Kenya at Nairobi delivered by the Hon. Resident Magistrate J. W Mwangi, on the 15th December, 2023 in Nairobi SCC Comm No E8163 of 2021)

JUDGMENT

1. This appeal arises from a judgment and decree entered in Nairobi SCC Comm No E1218 of 2023. The substratum of the suit, is a liquidated claim arising out of a breach of contract for services rendered by the Appellant.
2. The genesis of the dispute as outlined in the statement of claim dated 30th August 2023 arises from a contract entered into between the Appellant and the Respondent on 25th November, 2022, in which the Respondent was to render painting services. In return, the Appellant was to pay Kshs. 1,026,000/= for the services rendered. However, the Appellant made a partial payment of kshs. 333,000/- and breached the contract by failing to settle the remaining balance.
3. The Appellant filed her answer to the Statement of Claim dated 3rd November, 2023 where he denied owing the Respondent the said amount. Upon hearing and analysing the evidence before court, the trial Magistrate delivered his judgment on 15th December, 2023 in favour of the (Claimant) Respondent herein for the sum of Kshs. 693,000/= plus costs and interest.
4. Aggrieved with the entire judgment, the Appellant lodged this appeal on the following grounds;



1. That the trial Adjudicator erred in law by considering and admitting into evidence electronic text messages presented by the Respondent which text messages related to different transactions other than the subject of the dispute before the court.
 2. That the trial Adjudicator erred in law by basing the entire judgment on the text message exchanges between the Appellant and the Respondent while disregarding the testimony of the Appellant which establishes the factual position of the said exchanges.
 3. That the trial Adjudicator erred in law in relying on extraneous matters in dismissing the Appellant's case.
 4. That the trial Adjudicator misdirected himself by failing to be guided by law and procedure in determining the matter and therefore arriving at a wrong conclusion.
 5. That the trial Adjudicator erred in law in failing to consider the evidence on record and the submissions of the Appellant which failure occasioned a miscarriage of justice.
5. The Appellant prays that the appeal be allowed with costs and judgment delivered on 15th December, 2023 be set aside.
 6. The appeal was canvassed by way of written submissions.

Appellant's submissions

7. The Appellant's relied on their submissions dated 7th June, 2024. He relied on the Court of Appeal case of *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited* [2020] eKLR and submitted that the duty of the court in appeal matters was on pure points of law. According to the appellant, the issue for determination is whether the Respondent proved its case against the Appellant. The Appellant despite listing 5 grounds of appeal submitted on grounds 1,2 and 3 of the Memorandum of Appeal.
8. On ground 1, the appellant argued that the trial magistrate ought not to have ignored the fact that the respondent measured the work and gave a quotation after satisfying herself on the scope of works. That this quotation became the contract amount which ought not to have been ignored. Further, it was the Appellant's submission that at no point was the work varied and there was no evidence by the Respondent on the alleged variation.
9. On ground 2, counsel submitted that the trial magistrate failed to consider the evidence on record particularly the contract amount which was agreed in the contract. He argued that the Respondent re-wrote a contract which the trial court erroneously agreed with her. Counsel further submitted that the trial court failed to consider the Appellant's consistent evidence as demonstrated by the communication and payment for the agreed services. She argued that the trial court failed to consider that the Respondent had admitted that she never completed the contract.
10. On the third and final ground, counsel submitted that it was trite law that he who alleges must prove. He further submitted that the trial magistrate's approach was erroneous since the Respondent had the burden to prove the issue of contract amount and additional works. Counsel relied on the cases of *Momentum Credit Limited v Kabuiya* (Civil Appeal E035 of 2022) [2022] KEHC 13705 (KLR) and the Court of Appeal case in *Margaret Njeri Muiruri V Bank of Baroda (Kenya) Limited* [2014] eKLR.
11. In conclusion, counsel submitted that the trial court considered matters it should not have considered thereby acted on wrong principles in his finding. He urged the court to allow the appeal with costs.



Respondent's submissions

12. The Respondent's relied on their submissions dated 30th May, 2024. They submitted on the jurisdiction of the court and urged that this court can only entertain appeals on points of law and not facts. He relied on numerous authorities including *Njoroge v Nyagisera* (Civil Appeal E464 of 2022) [2024] KEHC 5163 (KLR).
13. The Respondent submitted that the initial quotation dated 25th November, 2022 was based on rough estimates since he did not have exact measurements. He further submitted that there was existence of a contract but that the payments were made for services rendered within the initially agreed scope. He added that the additional works were outside the contract purview and not agreed upon.
14. It was the respondent's further submission that the trial court rightly assessed the evidentiary burden and that the Appellant's assertion on the additional works were not substantiated.
15. He also submitted that the trial court correctly applied the legal principles regarding contractual obligations and equity. The Respondent applauded the trial court for correctly applying the principles in the cases of *Photo Production Ltd v Securicor Transport Ltd* and *Dormakaba Limited v Architectural Supplies Kenya Limited*.
16. The Respondent further submitted that the assessment of damages by the trial court was well founded and concluded that, the trial court's judgment was just and fair. They urged the court to dismiss the appeal as it is based on facts rather than law and to award the Respondent costs since the appeal lacks merit.

Analysis and Determination

17. 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 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.”

18. What constitutes, points of law, has been settled in the case of *Otieno, Ragot & Company Advocates v. National Bank of Kenya Limited* (2020)eKLR.
19. 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 Memorandum of Appeal dated 31st January 2024, the Record of Appeal, and the submissions of both parties and discerns that the primary question of law that calls for determination is:

Whether the respondent proved its case on a balance of probabilities as required by law

20. In the instant case, both the Appellant and Respondent allude to the fact that the quotation dated 25th November, 2022 was the basis of the alleged contract for painting service for the sum of Kshs. 1,026,000/=.



21. The Appellant's appeal is that the trial court disregarded the appellants testimony that the respondent measured the work herself and gave a quotation after satisfying herself on the scope of works. That the quotation became the contract amount and the trial court ought not to have ignored this fact. They fault the court for rewriting the contract.
22. In response the respondent asserts that the trial court rightly assessed the evidentiary burden by relying on the oral testimonies and documentary evidence including WhatsApp conversation and invoices.
23. Regarding whether the respondent proved its claim, this court notes that the entire transaction including the offer, acceptance and consideration, took place via the WhatsApp platform, where all relevant discussions occurred. In their testimony, this court notes that the Appellant stated that at no point was the contract varied and if it were to be varied, the variation would not exceed 15% as per the law. The appellant further stated that he objected to the variation and did not authorise it. However, he did not provide any proof of his alleged objection. It is on that basis that, the trial court made a finding that the appellant in the final message did not object to the items in the invoice nor did she state that the same included uncontracted work. Quite the opposite, she replies in a positive manner towards the invoice and later on 28-12-22 stated am told the boss said he will sort you out.
24. On the other hand, the respondent testified that the contract was subject to getting the accurate measurement of the area which was to be confirmed on site. That they updated the valuation/invoice to depict work done and further suggested that a Quantity Surveyor should confirm measurements. The trial court noted that to the contrast instead of addressing the respondent/claimant suggestion, the appellant apologized for not having cleared with the claimant and proceeds to ask for the payment details of the claimant. Further, the court also noted the appellant statement saying that the Quantity Surveyor measured and is fine.
25. Upon analysing the evidence of parties, particularly the WhatsApp messages conversation and invoices between the Appellant and Respondent, the trial court set out the issues for determination as the exact area of space that was to be painted? And whether the service was rendered? The trial court then came to the conclusion that the testimony of the claimant/respondent was credible and trustworthy and on a balance of probability when weighed against the testimony of the appellant, the claimant had proven its case on a balance of probability.
26. This court acknowledges the nature of the *Small Claims Act*, which is a self-executing statute with its own procedures. Notably, under section 32, the court has the authority to evaluate the evidence and determine which evidence it believes to be true. In particular, the said section 32 provides that;
 - “(1) The Court shall not be bound wholly by the Rules of evidence.
 - (2) Without prejudice to the generality of subsection (1), the Court may admit as evidence in any proceedings before it, any oral or written testimony, record or other material that the Court considers credible or trustworthy even though the testimony, record or other material is not admissible as evidence in any other Court under the law of evidence.”
27. Taking cognisant of the above provision of law, this court notes that in arriving at its decision, the trial court was well guided by the evidence placed before it. This evidence included oral testimonies and conversations contained in a WhatsApp log between the appellants and the respondents. Notably there is no dispute or reservation as to the conversation chats between the parties and hence the trial court rightly made reference to them and relied upon them.



28. This court therefore finds that in small claims matters, unlike other appeals, it is not enough to allege that the respondent did not prove its case, the appellant ought to demonstrate how the adjudicator failed to apply the principles of law into the circumstances. In this case this court finds that the adjudicator rightfully applied the principles governing the small claims court in finding that the Appellant failed to fulfil all the contractual terms by failing to pay the amount owed to the Respondent for services rendered. The adjudicator was well guided by the evidence placed before it.
29. From the foregoing analysis, I have no reason to interfere with the trial court's decision. The upshot therefore is that;
30. The subject appeal lacks merit and the same is hereby dismissed with each party bearing its costs.
Orders accordingly.

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 4TH DAY OF OCTOBER 2024

For Appellants:

For Respondent:

Court Assistant:

