



**Mwangi v Wambugu (Civil Appeal E202 of 2022) [2023] KEHC 1884 (KLR)
(Commercial and Tax) (10 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1884 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E202 OF 2022
EC MWITA, J
MARCH 10, 2023**

BETWEEN

JOSEPH GACHERU MWANGI APPELLANT

AND

JOHN KIHUMBA WAMBUGU RESPONDENT

(appeal from the judgment and decree of B J Ofisi, (SRM/Adjudicator) delivered on 30th August 2022 in SCC COM No. E2644 of 2022 at the Small Claims Court, Nairobi)

JUDGMENT

1. On 30th August 2022, Hon. B J Ofisi, Senior Resident Magistrate and Adjudicator, delivered judgment in favour of the respondent allowing the respondent's claim to the extent of Kshs 176,000 only instead of Kshs. 210,000 that was prayed for in the claim.
2. The respondent had claimed before the Small Claims Court that he entered into an oral agreement with the appellant to contribute money for a venture and he gave the appellant Kshs. 500,000 as his share towards starting the business venture. The business did not take off and the respondent refunded Kshs. 290,000 leaving a balance of Kshs. 210,000 outstanding.
3. The appellant filed a defence denying that the respondent given him Kshs. 500,000. The appellant stated that he was only given Kshs. 400,000 towards that business venture. He then refunded Kshs. 38,000 which he deposited into the respondent's account; Kshs. 80,000 on 6/8/2019; Kshs. 100,000 on 6/8/2020 and Kshs. 110,000 on 20/4/2022, leaving a balance of Kshs. 72,000.
4. The learned adjudicator heard evidence from the parties and after the evidence, documents, and submissions made on behalf of the parties, concluded that the amount outstanding was Kshs. 176,000 and entered judgment accordingly, prompting this appeal.



5. The basis of this appeal, as can be seen from the grounds of appeal in the memorandum of appeal and submissions, is that the learned adjudicator fell into error by holding that the amount due was Kshs. 176,000 and not Kshs. 72,000 the appellant admitted.
6. Counsel for the parties argued this appeal through written submissions which I have considered. I have also read the record of proceedings, evidence and the impugned decision. This being a first appeal, it is the duty of this court to reevaluate, reconsider and reanalyze the evidence afresh and come to its own conclusion, bearing in mind that it did not see the witnesses testify and give due allowance for that.
7. Both parties agree that the basis of the suit was an oral agreement. They also agree that the appellant refunded some money to the respondent. The point of departure is on the balance outstanding. Whereas the appellant argues that the amount outstanding is Kshs. 72,000, the respondent maintains that the amount outstanding is Kshs. 210,000.
8. As already stated, the trial adjudicator allowed Kshs. 176,000 as the outstanding amount which the appellant has disputed. I have read the evidence on record and the impugned judgment. I agree with the learned adjudicator that there was no evidence that the respondent gave the appellant Kshs. 500,000. I also agree with the adjudicator that there was no evidence of an agreement to pay a commission.
9. The respondent admitted in re-examination that Kshs. 34,000 had been paid which he had treated as commission. This could not be the case given that there was no evidence for agreement for payment of a commission.
10. On the other hand, the appellant testified that he received Kshs. 400,000 from the respondent, had refunded the money leaving a balance of Kshs. 72,000. The respondent admitted that the appellant had paid Kshs. 290,000 but maintained that the balance was Kshs. 210,000.
11. During the hearing of this appeal, counsel for the respondent admitted that the appellant had paid Kshs. 80,000; Kshs. 100,000; Kshs; 110,000 and Kshs. 34,000, leaving a balance of Kshs. 210,000. Counsel for the appellant argued that the learned adjudicator failed to take into account Kshs. 34,000 which the appellant had paid, thus erroneously allowed Kshs. 176,000 in favour of the respondent.
12. In the commitment letter dated 11th March 2020 the whole amount was stated to be Kshs. 320,000. The appellant undertook to pay Kshs. 100,000 by 31st July 2020. Kshs. 110,000 was paid on 20th April 2022 after the claim had been filed. Kshs. 34,000 was also paid to reduce the debt, but not as a commission.
13. If the amount the appellant received was Kshs. 400,000, when the commitment was signed stating that the whole amount was Kshs. 320,000, meant that Kshs. 80,000 had been refunded, leaving the balance of Kshs. 320,000. Kshs. 100,000 was to be paid on 31st July 2020 which would leave a balance of 220,000. The appellant paid Kshs. 110,000 as the trial adjudicator found and which was also admitted by parties, thus leaving a balance of Kshs. 110,000. The appellant had also paid Kshs. 34,000 which the respondent had claimed, without proof, to be a commission. When this amount is taken into account, the balance remaining would be Kshs. 76,000.
14. I, therefore, agree with the appellant that there was no basis for the learned adjudicator to allow Kshs 176,000, thus fell into error. Awarding the respondent Kshs. 176,000 would give him Kshs. 500,000, an extra Kshs. 100,000 that he did not give to the appellant.
15. In the circumstances, I find that this appeal has merit and is allowed. The judgment of the adjudicator allowing Kshs. 176,000 in favour of the respondent is set aside. In place therefor, judgment is hereby entered for the respondent for Kshs. 76,000. Since the appeal has substantially succeeded, the appellant shall have costs of this appeal.



DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF MARCH 2023

E C MWITA

JUDGE

