



REPUBLIC OF KENYA



**Ochieng v Jujahon Limited & 4 others (Civil Appeal E089 of 2022)
[2023] KEHC 17336 (KLR) (Commercial and Tax) (12 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17336 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E089 OF 2022**

DAS MAJANJA, J

MAY 12, 2023

BETWEEN

STEPHEN OCHIENG APPELLANT

AND

JUJAHON LIMITED 1ST RESPONDENT

EMMANUEL OTIENO ANYIRI 2ND RESPONDENT

MILLICENT AKOTH ADERO 3RD RESPONDENT

JAMES HAYA ANYIRI 4TH RESPONDENT

SHALTON OMONDI ONGUTO 5TH RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. E. Kagoni, PM dated 1st July 2022 at Magistrates Court Nairobi at Milimani in CMCC No. E322 of 2020)

JUDGMENT

1. This is an appeal against the judgment and decree of the Subordinate Court dismissing the Appellant's case against the Respondents.
2. The Appellant's case against the Respondent is set out in the Amended Complaint dated 12th November 2020. He alleged that on 17th May 2020, he contracted the Respondents to construct two bungalows on his plot; Trans Nzoia/Maridadi/347 at a cost of Kshs. 4,700,000.00 together with an additional Kshs. 100,000.00 for plans. According to the Appellant, the 2nd Respondent introduced the other Respondents to him and maintained that they would all be jointly and severally responsible for execution of the project. It was agreed that the project would be completed in 9 weeks between 18th May 2020 and 20th July 2020 upon payment of an initial deposit of Kshs. 3,100,000.00.



3. The Appellant averred that although the Respondents commenced work and although he issued several reminders through the 2nd Respondent, the work did not proceed as agreed. As a result, the Appellant claimed damages of Kshs. 3,161,000.00 as special damages for breach of contract.
4. The Respondents filed a defence dated 22nd December 2020. In response to allegations of breach of contract, they averred that the project stalled due to the Plaintiff's refusal to finance the same and that the value of work done was way above the amount of money paid by the Plaintiff as demonstrated by the valuation report they intended to produce. They denied the allegation of breach and urged the court to dismiss the claim.
5. At the hearing of the suit, only the Appellant (PW 1) testified whereupon judgment was reserved after the filing of written submission. In the judgment giving rise to this appeal, the trial magistrate held that the Appellant failed to adduce evidence of any sums paid to the Respondents for the project and that the WhatsApp messages produced lacked any probative value as it was not clear to who they were sent and that they were insufficient to establish the Appellant's case. The trial court concluded that the Appellant had failed to prove its case on the balance of probabilities and as such dismissed the suit.
6. The Appellant's grounds of appeal are set out in the Memorandum of Appeal dated 13th July 2022 and his written submissions. The Respondents did not participate in this appeal. The main issue in this appeal is whether the Appellant proved its case on the balance of probabilities. In resolving this issue, this court, as the first appellate court is required to re-evaluate the entire record of evidence and come to its own conclusion while making an allowance that it neither heard or saw the witnesses testify (see *Selle and Another v Associated Motor Boat Co., Ltd and Others* [1968] EA 123).
7. Whether the Respondents were liable as alleged by the Appellant is a question of fact. In this case and in their Defence, it is clear that the Respondents admitted undertaking the project and that they were paid. The Appellant is correct to submit that under section 61 of the *Evidence Act* (Chapter 80 of the Laws of Kenya), admitted facts need not be proved. The trial magistrate therefore fell into error by holding that the Appellant had not proved that he had paid the Respondents when in fact the Respondents had admitted payment. Since the Respondents admitted payment, the question then is how much were they paid and whether they completed the project as agreed. On this issue, the Appellant was required to prove its case on a balance of probabilities.
8. In his testimony, the Plaintiff recalled that he had paid the sum of Kshs. 3,100,000.00. He produced WhatsApp messages, a program of works prepared by the 1st Respondent, a demand letter and correspondence sent by email. The Appellant's testimony and evidence was not controverted. In *Trust Bank Limited v Paramount Universal Bank Limited and 2 Others* [2009] eKLR, it was held that failure to adduce evidence or to challenge the case by the adverse side means the case is uncontroverted. Weighing the unchallenged testimony and evidence against the express admissions by the Respondents in their Defence that it was paid, that some work was done and the fact that the emails were not answered, leads me to conclude that the Plaintiff proved its case on a balance of probabilities.
9. For the reasons I have set out above, I allow the appeal and order as follows:
 - a. The judgment dated 1st July 2022 be and is hereby set aside and is substituted with a judgment for the Appellant against the Respondents jointly and severally for Kshs. 3,161,000.00 with interest thereon at 12% p.a. from the date of filing suit until payment in full.
 - b. The Respondents shall bear the Appellant's costs before the Subordinate Court and of this appeal. The costs of this appeal are assessed at Kshs. 25,000.00.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY, 2023.



D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.

Mr Abidha instructed by Abidha and Company Advocates for the Appellant.

