



REPUBLIC OF KENYA



KENYA LAW
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**Duncan v John (Civil Appeal 114 of 2022)
[2023] KEHC 25284 (KLR) (18 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 25284 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL 114 OF 2022
PJO OTIENO, J
OCTOBER 18, 2023**

BETWEEN

OCHOMO DUNCAN APPELLANT

AND

MAGOMERE OKOLA JOHN RESPONDENT

*(Being an appeal from the Judgment & Decree of Hon. Sylvia A. Wayodi
RM in Kakamega SCCOM E181 of 2022 dated 29th November, 2022)*

JUDGMENT

Background of the Appeal

1. The Respondent by way of a statement of claim dated 26th October, 2022 sued the Appellant and another at the Small Claims Court in Kakamega and claimed the sum of Kshs. 715,160/- being the costs of blue gum trees sold by him to the Appellant. He also claimed costs of the suit and interest on the sum claimed.
2. It was the Respondent's claim that on or about 3rd to 7th March, 2022 he supplied the Appellant with 238.9 tons of wood at a sum of Kshs. 3,000/- per ton making an aggregate sum of Kshs. 715,160/- and that despite the Appellant receiving the wood and selling same for a consideration he refused to pay for the same.
3. By way of a Defence/Partial Admission dated 24th November 2022 but filed in court on the 28th April 2022, the Appellant admitted the contract between the parties but denied the sum claimed. He took the position that the oral agreement between the parties was that he would sell the trees and earn 30% commission. He thus asserts that the trees that were delivered were costed at 343,440/- for which he had paid to the Respondent a sum of Kshs. 48,200/-, he, the Appellant, retained Kshs. 10,322/- as the agreed commission and the balance due to the Respondent is Kshs. 192,280/-.



4. In a reserved Judgment delivered by the trial court on 29th November 2022, the Court found in favour of the Respondent and awarded a total sum of Kshs. 452,612/- together with interest at court rates from the date of filing the claim and costs of the suit. In arriving at that sum, the Court said: -

“In my view, the claimant has proved his case on a balance of probabilities. The 2nd Respondent confirmed to the claimant advocate that it paid the 1st Respondent and the 1st Respondent admitted to have received Kshs. 343,440 from the Respondent and he was entitled to 30% as per their verbal agreement. The 1st Respondent told the Court that the Claimant has the correct tonnage as he gave him the deliveries hence the tonnage as per the claimant was 238.9 tonnes going for Kshs. 3000 per tonne. The 30/5 in view of the Court is logical as the 1st Respondent was the link between the claimant and the 2nd Respondent hence entitled to a commission. From the court calculations, the claimant is entitled to Kshs. 715,160 less (30%) Kshs. 214,548 = 500,612 less Kshs. 48,000 = Kshs. 452,612.”
5. Aggrieved with the decision of the trial court, the Appellant lodged a Memorandum of Appeal dated 30th December, 2022 and challenged the Judgment on the grounds that; the claimant did not prove his case, which took the form of a special damage claim, on a balance of probabilities and that the Court erred in failing to find that the contract on which the claim was based was illegal and unenforceable.
6. Even though the appeal was directed to be canvassed by way of written submissions, only the Appellant filed his submissions while the Respondent chose the unusual route of arguing the appeal by way of a Replying Affidavit.
7. On its mandate as a first appellate court, the Court has read all the papers filed including the submissions and Replying Affidavit in line with the pleadings filed, proceedings recorded at trial and the Judgment of the trial court. After so doing, the Court discerns the only issues for determination to be; whether agreement between the parties having been oral, the same was capable of enforcement and if the case was proved on a balance of probabilities.
8. The claim was a special damage one. The claimant needed to have strictly proved the sum. He left it to the documents produced by both sides. Even though delivery notes were produced, none of the parties told the court the total number of tones delivered from the Respondent’s farm. The delivery notes produced by the claimant hardly proved 150 tonnes. There was thus no evidence that 238.9 tonnes were delivered.
9. Secondly, both sides agree that the agreement was oral. It was important for the trial court to establish the price per tonne. That task was not undertaken by the Court. The Respondent produced a letter by Comply Industries Limited; the entity both parties agree bought the logs, which say the price per tonne was Kshs 2,000. That was the only evidence the Court was to use in calculating the sum due. It ignored that evidence and applied a sum that was contested. In doing so, the Court erred.
10. In the absence of evidence on the total tonnes delivered and the unit price, the finding that the sum claimed had been proved was erroneous. The error in arriving at a decision that was not supported by evidence is a question of law, which entitles the court to interfere with the award made. With the error disclosing a judgment not supported by evidence, the same is hereby set aside. Based on the admission, which was partly conceded by the Respondent, the Court finds that sum paid for the logs was Kshs 343,440. Out of that sum, the Respondent admits having received Kshs 48,000 leaving a balance of Kshs 295,440. Out of that sum, the Court finds that the appellant was entitled to a commission. He has pleaded and claimed a sum of Kshs10.322. Being bound by that pleading, the Court can’t give him



30% of the price of the trees. When the said commission is deducted from the sum due, the Court gets a sum of Kshs 285,118.

11. In conclusion, the appeal is merited and allowed to the extent that the judgment sum of Kshs 452,612/- is set aside and in its place substituted a sum of Kshs. 285,118.
12. Even though the Appellant has succeeded, he, all the time admitted the debt but failed to pay. He occasioned the litigation and should not benefit that design. Each party shall bear own costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA, THIS 18TH DAY OF OCTOBER 2023.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

The Appellant in person

Mr. Ondieki for the Respondent

Court Assistant: Polycap Mukabwa

