



REPUBLIC OF KENYA



Busia Water & Sewerage Company Limited v Daburn Engineering & Consultants (Civil Appeal E118 of 2024) [2024] KEHC 14350 (KLR) (18 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14350 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E118 OF 2024
RE ABURILI, J
NOVEMBER 18, 2024**

BETWEEN

BUSIA WATER & SEWERAGE COMPANY LIMITED APPELLANT

AND

DABURN ENGINEERING & CONSULTANTS RESPONDENT

(An appeal arising out of the Judgment of the Honourable G.C. Serem in the Small Claim's Court in Kisumu delivered on the 13th May 2024 in Kisumu SCC No. E156 of 2024)

JUDGMENT

Introduction

1. The appellant was sued by the respondent vide a statement of claim dated 1st March 2024 who sought judgement in the sum of Kshs. 1,000,000, being the maximum sum awardable by the Small Claims Court.
2. The respondent's case against the appellant was that he was awarded a contract to remove water hyacinth from its sewerage ponds and cleaning the pond compound which he did and thereafter raised a bill of Kshs. 2,445,585 out of which the appellant paid Kshs. 950,000 in four instalments leaving a balance of Kshs. 1,495,585.
3. The appellant filed a response to the claim dated 15th March 2024 denying owing the respondent any money but admitting that it had entered into a contract with the respondent for the removal of water hyacinth and cleaning the pond compound for Kshs. 3,399,373 however the respondent failed to complete the works as agreed, there was no inspection of works done and consequently no completion certificate issued by it to warrant payment of the whole contract amount.
4. The appellant further averred that the amount paid to the respondent was paid out of good faith to facilitate the respondent do the works as required.



5. The parties before the trial court consented to proceeding by way of section 30 of the [Small Claims Court Act](#).
6. In her judgement, the trial court found that the appellant's allegation that emails filed by the respondent were inadmissible were not merited by virtue of section 32 (1) and (2) of the [Small Claims Court Act](#) and further that it was upon the appellant to prove duress as alleged so as to negate the respondent's claim which was for the work done and not the full contract sum. The trial magistrate found that the respondent had proved its case on a balance of probabilities and thus proceeded to grant it the claimed sum of Kshs. 1,000,000.
7. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 11th June 2024 raising the following grounds of appeal;
 - a. That the honourable adjudicator erred in law and fact by failing to find that the claimant had not proved its case on a balance of probability to warrant payment of the contract sum as there was no completion certificate issued.
 - b. That the honourable adjudicator erred in law by failing to find that there was no inspection of works done in accordance with section 48 (1) of the [Public Procurement and Asset Disposal Act](#), 2015 so as to warrant payment of the contract sum.
 - c. That the Honourable adjudicator relied on electronic evidence which were not accompanied by electronic certificate as provided for by the [Evidence Act](#).
 - d. That in all the circumstances of the case, the finding to the learned adjudicator were not supported in law and there was no basis laid to justify the grant of orders.
8. The parties agreed to dispose the file off by way of written submissions but only the appellant filed his submissions.

The Appellant's Submissions

9. The appellant submitted that the respondent did not prove its case on a balance of probability to warrant the contract sum as it was the respondent who bore the evidential burden to present evidence against the appellant demonstrating that they had indeed completed the works and were therefore entitled to payment from the appellant.
10. It was submitted that the respondent did not provide any evidence to show that a definite sum was agreed upon by the parties the absence of which suggests that the respondent had not met the burden of proof required to substantiate its claim for the contract sum.
11. The appellant submitted that the respondent did not fulfill its contractual obligations and given that the principle of payment in construction contracts is that remuneration must be commensurate with the work completed as was held in the case of *Tindinyo Investments Ltd v Eldoret Water and Sanitation Company Ltd* [2014] eKLR.
12. The appellant submitted that the adjudicator erred in law by failing to find that there was no inspection of works done that would warrant the payment of the contract sum as provided in section 48 (1) of the [Public Procurement and Asset Disposal Act](#) that make it a prerequisite for the issuance of a certificate of completion prior to payment.
13. The appellant submitted that the adjudicator erred in law by failing to find that electronic evidence that was not accompanied by electronic certificate as provided for in section 78 and 106 of the [Evidence Act](#) cannot be relied on. It was further submitted that the said provisions of the [Evidence Act](#) were



not merely procedural and technical but pertain to both form and substance as was held in the case of *William Odhiambo Oduol v IEBC & 2Others, Election Petition No. 2 of 2012* and the case of *The Speaker Kisumu County Assembly v The Clerk Kisumu Assembly Service Board & 6 Others* [2015] eKLR.

Analysis and Determination

14. This being a first and last appeal on points of law only from the Small Claims Court, this Court relies on a number of principles as set out in *Selle and Another v Associated Motor Boat Company Ltd & others* [1968] 1EA 123:

“...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

15. I have already highlighted the pleadings by parties in the lower court. The broad issues for determination before this court therefore, are: -

- a. Whether the trial adjudicator erred in relying on electronic evidence presented without an electronic certificate and
- b. Whether the respondent proved its case to warrant grant of the orders sought.

16. On the first issue, it was the appellant’s case both before the trial court and this court that those emails filed by the respondent were inadmissible.

17. The trial adjudicator on her part held that the appellant’s aforementioned averment was not merited by virtue of section 32 (1) and (2) of the *Small Claims Court Act*.

18. The long title of the Small Claims Court, no 2 of 2016 is said to be: -

“An Act of Parliament to establish a Small Claims Court; to provide for the jurisdiction and procedures of the court and for connected purposes.”

19. The guiding principles objective of the Act is as set out in section 3 of the act: -

Guiding principles

- (1) In exercise of its jurisdiction under this Act, the court shall be guided by the principles of judicial authority prescribed under article 159(2) of *the Constitution*.
- (2) The parties and their duly authorized representatives, as the case may be, shall assist the court to facilitate the observance of the guiding principles set out in this section, to that effect, to participate in the proceedings of the court and to comply with directions and orders of that court.
- (3) Without prejudice to the generality of subsection (1) the court shall adopt such procedures as the court deems appropriate to ensure—



- (a) the timely disposal of all proceedings before the court using the least expensive method;
- (b) equal opportunity to access judicial services under this Act;
- (c) fairness of process; and
- (d) simplicity of procedure.

20. The jurisdiction of that court is set out in section 12 of the Act. The same provides as doth: -

“Nature of claims and pecuniary jurisdiction

- (1) subject to this Act, the rules and any other law, the court has jurisdiction to determine any civil claim relating to—
 - (a) a contract for sale and supply of goods or services;
 - (b) a contract relating to money held and received;
 - SUBPARA (c) liability in tort in respect of loss or damage caused to any property or for the delivery or recovery of movable property;
 - (d) compensation for personal injuries; and
 - (e) set-off and counterclaim under any contract.
- (2) Without prejudice to the generality of subsection (1), the court may exercise any other civil jurisdiction as may be conferred under any other written law.
- (3) The pecuniary jurisdiction of the court shall be limited to one million shillings.
- (4) Without prejudice to subsection (3), the Chief Justice may determine by notice in the Gazette such other pecuniary jurisdiction of the court as the Chief Justice thinks fit.

21. Under section 13 of the Act, there are certain exclusions to the jurisdiction of the Small Claims Court. It also provides for transfer of claims by a higher court to the small claims court subject to section 12(3), that is the limit of pecuniary jurisdiction for not more than 1,000,000/=.

22. The procedure for the court is also exclusive. In section 17 of the act, the law requires that the court exercises its own procedure, having regard to principles of natural justice. The said section states as doth: -

“Procedure of Small Claims Court Subject to this Act and Rules, the court shall have control of its own procedure in the determination of claims before it and, in the exercise of that control, the court shall have regard to the principles of natural justice.”

23. The effect of the foregoing is that the Civil Procedure Act and rules does not apply to the Small Claims Court. Indeed, even the application of the Evidence Act is severely restricted by section 32 of the Act which provides:

“Exclusion of strict rules of evidence

- (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.
- (3) Evidence tendered to the court by or on behalf of a party to any proceedings may not be given on oath but that court may, at any stage of the proceedings, require that such evidence or any part thereof be given on oath whether orally or in writing.
- (4) The court may, on its own initiative, seek and receive such other evidence and make such other investigations and inquiries as it may require.
- (5) All evidence and information received and ascertained by the court under subsection (3) shall be disclosed to every party.
- (6) For the purposes of subsection (2), an Adjudicator is empowered to administer an oath.
- (7) An Adjudicator may require any written evidence given in the proceedings before the court to be verified by statutory declaration.”

24. Taking all the aforementioned into consideration, I am in agreement with the trial adjudicator that the email correspondence between the parties herein produced by the respondent were properly before court. In any case, the said correspondence plays a role in helping the trial court and this court arrive at its decision and further that the appellant never presented any evidence before this court and the trial court to show how it would be prejudiced by the court admitting the said evidence.
25. I thus find that despite the lack of electronic certificate as required by sections 78 and 106 of the *Evidence Act*, I am reinforced by the provisions of section 32 (2) of the *Small Claims Court Act* that the email correspondence produced by the respondent were properly before court.
26. I already set out the parties’ pleadings and there’s no need to repeat the same. It is not debated that the parties herein entered into a contract on the 30th May 2023 for the removal of water hyacinth, cleaning of the sewer pond compound and desludging of pond one and two at a sum of Kshs. 3,399,373.
27. It was further not denied that the respondent raised a bill of Kshs. 2,445,585 out of which the appellant paid Kshs. 950,000 in four instalments leaving a balance of Kshs. 1,495,585.
28. The rule of evidence is clear that “He who alleges must prove”. The maxim has been grounded in law under Section 107 of the Law of Evidence. The same was enunciated by Justice Majanja in *Evans Otieno Nyakwana v Cleophas Bwana Ongaro* [2015] eKLR when he said that:

“...As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107 (1) of the *Evidence Act* (Chapter 80 of the Law of Kenya), which provides:

“107. (1) 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...”
29. It was thus upon the respondent to prove that he warranted grant of the Kshs. 1,000,000 that he had claimed.



30. From the record, it is clear from the email correspondence that the respondent was not claiming for the full contract amount but only the amount for the works done. It is admitted by both parties that the project was not complete. In his claim, the respondent pleaded that the claim as for services rendered in the year 2023 to the value of Kshs. 2,445,585 whereas the appellant reiterated that the respondent had not completed the project to warrant further payment.
31. Section 48 of the *Public Procurement and Asset Disposal Act* as a whole does not provide for the issuance of a certificate of completion but rather the formation of inspection and acceptance committee. It is thus not relevant to the proceedings before this court. Section 48 (1) relied on by the appellant provides
48. Inspection and acceptance committee
- (1) An accounting officer of a procuring entity may establish an ad hoc committee known as the inspection and acceptance committee.
32. The upshot of the above is that I found that the respondent proved its case on a balance of probability before the trial court. I am in agreement with the trial court's holding of the same and proceed to uphold it.
33. The upshot of the above is that I find that this appeal lacks merit and proceed to dismiss it with costs to the respondent assessed at Kshs 30,000 to be paid within 30 days of today and in default, the respondent is at liberty to execute for recovery.
34. I so order and proceed to close this file.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 18TH DAY OF NOVEMBER, 2024

R.E. ABURILI

JUDGE

