



**Raeli Hydro Systems Limited v Ouko (Civil Appeal E029 of 2024)
[2024] KEHC 14997 (KLR) (21 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14997 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E029 OF 2024
RE ABURILI, J
NOVEMBER 21, 2024**

BETWEEN

RAELI HYDRO SYSTEMS LIMITED APPELLANT

AND

EDWARD OUKO RESPONDENT

*(Appeal from the judgment and decree of Hon G. Serem, Adjudicator, in Kisumu
Smal Claims Court Case No. E 423 of 2024 delivered on 1st February, 2024)*

JUDGMENT

Introduction

1. The respondent Edward Ouko sued the appellant Raeli Hydro Systems Ltd vide a statement of claim filed on the September 16, 2023 in which the respondent sought judgement in the sum of Kshs. 875,800 being a debt he alleged the appellant owed him following the appellant's failure to complete irrigation and fencing works on his Jaber Farm in Muhoroni as agreed.
2. The appellant filed a response dated 24th January 2024 denying that it owed the respondent any money and further that it had been sub-contracted to carry out the work that were frustrated by theft in the farm and as such, the suit be dismissed with costs.
3. In her judgement, the trial adjudicator found that it was clear from the evidence presented that the respondent had contracted the appellant and even paid it for the irrigation and fencing works at his farm but the appellant failed to deliver. The trial adjudicator further found that despite allegations by the appellant that the works had been frustrated by theft, there was no evidence presented before court to prove that allegation.
4. The trial adjudicator thus found in favour of the respondent and awarded him the claimed sum with interest from the date of judgement until payment in full plus costs of the suit.



5. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 12th February 2024 raising the following grounds of appeal:
 1. That the learned adjudicator/magistrate erred in law by allowing the appellant to proceed to testify in the absence of its advocate who had indicated to the court that he was indisposed.
 2. That the learned adjudicator/magistrate erred in law in failing to find that there was no written agreement between the appellant and respondent.
 3. That the learned adjudicator/magistrate erred in law in failing to find that the quotation emanated from the contract between the appellant and Sawa Firms Limited.
 4. That the learned adjudicator/magistrate erred in failing to take into account the evidence and submissions of the appellant while considering her judgement.
 5. That the learned adjudicator/magistrate erred in law in failing to state the reasons for her judgement and the reasons why she failed to consider the appellant's submissions.
 6. That the learned adjudicator/magistrate erred in law in awarding the respondent the amount sought in the claim without considering that the appellant mobilized labourers who worked for a period of over a month during which period it carried out substantial work.
 7. The learned adjudicator/magistrate erred in law in failing to find that the respondent did not exhaust the dispute resolution mechanisms before approaching the honourable court.
6. The parties filed written submissions to canvass the appeal

The Appellant's Submissions

7. The appellant submitted that the learned trial Magistrate/Adjudicator erred in failing to exercise his discretion in favor of appellant to grant an adjournment and thus the fair hearing thresholds were not met as was held in the case of *Lawrence Muturi Mburu v Dalago Tours Ltd* [2019] eKLR.
8. The appellant submitted that the learned trial magistrate erred in law in failing to exercise his discretion in favor of appellants to grant an adjournment, and to allow the Appellant to proceed to testify in the absence of its Counsel.
9. The appellant further submitted that that there was no privity of contract between it and the Respondent and as such it could not be made liable under a contract that it was not privity to as was held in the case of *Alsafra Health Care Ltd v KAM Pharmacy Ltd & Anor, HCCC NO. 261 of 2001.*
10. The appellant further submitted that there was no contract between the it and the Respondent as the relationship between the Appellant and Respondent emanated from the Contract between the Respondent and Sawa Farm Limited thus the Appellant could not sue the Respondent directly.
11. It was submitted that the delay was occasioned by Respondent's failure to provide security and denying the Appellant access to the construction site as the Appellant raised the security concerns but the Respondent did not take any action.
12. The appellant submitted that the contract between the Appellant and the Respondent, wherein the Quotation emanated from had a dispute mechanism clause that stated that any arising disputes should be subjected to the dispute resolution mechanism stated therein. It was further submitted that the trial Magistrate/Adjudicator thus erred in law and fact in failing to find that the Respondent did not exhaust the dispute resolution mechanisms under the contract.



The Respondent's Submissions

13. It was submitted that the Appellant was given a fair trial in the Small Claims Court as he was heard, granted every adjournment it requested for and the case fully determined on its merit thus the learned Adjudicator/Magistrate did not consequently err in law by failing to accord the Appellant any opportunity to put forth their defence and/or be represented whilst doing it; as alleged by the Appellant.
14. The respondent submitted that the only Agreement, which was annexed by both the Appellant and the Respondent, in the Lower Court, that had both the Appellant and the Respondent as a party was the Quotation for 20 Acres Irrigation and Other Services which was the only basis for the relationship between the Appellant and the Respondent
15. It was thus submitted that the Learned Magistrate did not err in considering the quotation as the only relationship between the parties, and disregarding any other contracts referenced by the Appellant that were not between the Appellant and the Respondent.
16. The respondent submitted that the Appellant was in breach of the terms of the agreement and/or contract between the parties, as they never undertook their scope of work outlined in the quotation, whilst the Respondent duly and pertinently fulfilled his obligation to pay the Appellant the agreed fees which the Appellant did not deny being in receipt of, in the Lower Court.

Analysis and Determination

17. This Being a first appeal the 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.”
18. I have carefully considered the grounds of appeal and the parties’ rival written submissions. I have also read the Judgment of the trial court. I find that the issues for determination are:
 1. Whether the appellant was granted a fair hearing before the trial court and;
 2. Whether the respondent proved his case on a balance of probabilities to warrant grant of the prayers sought.
19. On the first issue, the appellant pleaded before this court that he was denied a fair trial as the trial adjudicator/magistrate denied it an adjournment and its witness subsequently testified in the absence of their counsel. This was denied by the respondent who asserted that the Appellant was given a fair trial in the Small Claims Court as he was heard, granted every adjournment it requested for and the case fully determined on its merit.
20. I have perused the record herein and I observe that on the 16th October 2023, at the first mention whereby the Respondent and Appellant advocates were present, the Appellant had not filed their Defence and were given leave to file the same out of time; at the second mention, on the 23rd October 2023 the Appellant was still yet to file and requested a further two (2) days to file the same out of



time, the Court yet again granted them leave to do so after which a Hearing Date was then set for 15th November 2023;

21. The record reveals that on the Hearing Date, which was taken by consent in Court, the Appellant's advocate filed an application seeking to amend their Statement of Response which application was allowed and a Hearing Date set for 22nd November 2023. Further on the 22nd November 2023, the Respondent availed their witness, and the Appellant was given an opportunity to cross-examine the Respondent's witness, the Respondent's case came to a close and the Appellant sought an adjournment for the Appellant's case, and the same was granted until 30th November 2023;
22. On the 30th November 2023, the Appellant and their advocate did not appear in Court, despite them being contacted both by the Court's registry and the Respondent's advocate and at this time the Court noted that the date was taken by consent in court and therefore closed the Appellant's case and issued a Judgement Date of 14th December 2023.
23. On the 8th December 2023, the Appellant filed an application, under Certificate of Urgency, seeking to arrest the Court's Judgement and to re-open the Appellant's case which application was granted on the 14th December 2023 when the court re-opened the Appellant's case, gave them a last adjournment, and set a hearing of the Appellant's case to take place on 19th December 2023;
24. On the 19th December 2023, both the appellant and the respondent's advocate were present for the Hearing of the Appellant's case whereby the Appellant's witness adopted his Witness Statement, produced his documents in Court and was duly cross-examined after which the Appellant's case was duly closed and the parties were given time to file their submissions, which they both did. Judgement was set for the 1st February 2024.
25. From the foregoing evidence on record, it is evident that the Appellant was given every opportunity to be heard by the trial Court and had his case fully determined on its merit. I thus find that this limb of the appeal lacks merit.
26. As to whether the respondent proved his case on a balance of probabilities to warrant grant of the orders sought, the respondent testified and produced a quotation for 20 acres' irrigation and other services from the appellant on which he based his claim against the appellant. He further testified that he paid the full amount quoted by the appellant in the quotation but the appellant never completed the works charged.
27. On its part, the appellant averred that it never entered into any contract with the respondent and that the relationship between the Appellant and Respondent emanated from the Contract between the Respondent and Sawa Farm Limited thus, the Appellant could not sue the Respondent directly. RW1 who testified on behalf of the appellant admitted to receiving money from the respondent but that they did not complete the works due to theft of their equipment.
28. It is trite that in its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party. In *Dunlop Pneumatic Tyre Co Ltd -versus- Selfridge & Co Ltd* [1915] AC 847, Lord Haldane, LC rendered the principle thus:

“My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it.”



29. Accordingly, the only contract that bound the parties herein, albeit an implied contract, was the “Quotation for 20 acres irrigation and other services,” which was more of an invitation to treat which the respondent took up by making payments to the appellant after which the appellant, on its own admission, commenced works as provided in the aforementioned Quotation.
30. Having accepted the said funds and commenced the fencing works, the appellant was bound to complete the works as set out in the quotation and is estopped from asserting that it could not be sued by the respondent.
31. The appellant pleaded that the works were frustrated by theft and that is why it did not complete the works. Further, it was its assertion that there were no completion timelines for the agreed works, and as such the respondent was prematurely in court.
32. It is my view that the appellant failed to prove his allegations of frustration before the trial court. No evidence was placed before the trial adjudicator/magistrate to lead her to arrive at the conclusion that the contract between the parties herein was frustrated by theft. There was no report made to the relevant authorities of the alleged theft. The appellant also failed to adduce any evidence of any progress that had been halted to necessitate the application of the doctrine of frustration.
33. On the ground that the contract had a clause for resolving disputes in the alternative forum to the courts, as stated above, the document which bound the parties to perform their part of the bargain was the “Quotation for 20 acres irrigation and other services,” following which the respondent paid the appellant money to perform its part. There is no other valid agreement containing any terms on the alternative mode of dispute resolution between the parties hereto. Accordingly, that argument fails.
34. Taking all the above into consideration, it is my finding that the respondent proved his case on a balance of probabilities against the appellant and I find no reason to interfere with the trial court’s judgement.
35. The upshot of the above is that I find this appeal to be devoid of merit and I dismiss it with costs to the respondent assessed at Kshs 40,000 payable within 60 days of today and in default, execution to issue.
36. Judgment to be uploaded.
37. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 21ST DAY OF NOVEMBER, 2024

R.E. ABURILI

JUDGE

