



REPUBLIC OF KENYA



**RHS Freight Services Kenya Limited v Mukuche (Civil Appeal E102 of 2023)  
[2024] KEHC 14403 (KLR) (Civ) (19 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14403 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL  
CIVIL APPEAL E102 OF 2023**

**JM OMIDO, J  
NOVEMBER 19, 2024**

**BETWEEN**

**RHS FREIGHT SERVICES KENYA LIMITED ..... APPELLANT**

**AND**

**JOHNSON CHIMASWA MUKUCHE ..... RESPONDENT**

*(Being an Appeal from the Judgement and Decree of Hon. Brenda J. Ofisi Adjudicator/Resident Magistrate delivered on 10th February, 2023 in Milimani SCC COMM No. E7065 of 2022)*

**JUDGMENT**

1. This is an appeal from the judgement and decree of Hon. B.J. Ofisi, Adjudicator/Resident Magistrate delivered on 10<sup>th</sup> February, 2022 in Milimani SCC COMM No. E7065 of 2022. The appeal is preferred by RHS Freight Services Kenya Limited (hereinafter referred to as “the Appellant”) against Johnson Chimaswa Mukuche (hereinafter referred to as “the Respondent”).
2. Being aggrieved with the judgement of the lower court, the Appellant presented the following grounds of appeal vide a Memorandum of Appeal dated 20<sup>th</sup> February, 2023:
  1. That the Honourable Resident Magistrate/Adjudicator erred in law and fact by arriving at an erroneous finding that the Appellant did not prove its case on a balance of probability on the ground that it did not establish the nexus connecting the Respondents with the payments made in terms of the claim therein yet the Appellant categorically stated that the Respondent who was its employee improvised a dummy company Kenbridge Freight Logistics Limited to siphon its funds subsequent to which he deserted duty, a representation that was never contested and/or disputed by the Respondent.



2. That the Honourable Resident Magistrate/Adjudicator erred in law and fact by failing to appreciate that the threshold to be met by the Appellant as expected in civil proceedings was to prove its case on a balance of probability and not beyond reasonable doubt as is applicable to criminal proceedings such that to the extent that it had demonstrated by invoices and payments made that the Respondent set up a dummy company and siphoned funds from itself, including through fictitious tender payments made through his wife's mpesa telephone number and more specifically when the said representation was not contested and/or disputed by the Respondent, the same met the threshold for proving a case on a balance of probability and the claim thereof ought to have been allowed.
  3. That the Honourable Resident Magistrate/Adjudicator erred in law and fact by its finding that the Appellant had not proved its case on a balance of probability therefore disregarding the overwhelming evidence produced by the Appellant in support of its case, which evidence was not controverted by the Respondent who, despite having been served with the court documents, elected not to file any response and/or attend court just like he deserted employment when the Appellant started scrutinizing the said payments initiated by himself.
  4. That the Honourable Resident Magistrate/Adjudicator erred in law and fact by delivering an erroneous judgement thereby misinterpreting and misconstruing the facts of the matter and the legal principles applicable on the burden of proof in civil proceedings.
3. The Appellant proposed that the appeal be allowed and the judgement of the lower court dismissing the claim be set aside and be substituted with judgement in favour of the Appellant for the sum of Ksh.1,000,000/-, together with interest and costs of the suit and of the present appeal.
  4. Directions were given by this court that the appeal proceeds by way of written submissions. Whereas the Appellant filed its submissions, the Respondent did not participate in the appeal.
  5. This being the first appellate court, I am required under Section 78 of the Civil Procedure Act and as was espoused in the case of *Selle v Associated Motor Boat Co. Ltd* [1969] E.A. 123 to reassess, reanalyze and reevaluate the evidence adduced in the Small Claims Court and draw my conclusions while bearing in mind that I did not see or hear the witnesses when they testified.
  6. In *Selle*, Sir Clement De Lestang observed that:

“This Court must consider the evidence, evaluate it itself and draw its own conclusions, though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.

However, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
  7. Going to the trial court's record, the Appellant (the Claimant in the lower court), presented the suit vide a Statement of Claim dated 2<sup>nd</sup> November, 2022 seeking the following reliefs (verbatim): Judgement in the sum of Ksh.1,000,000/-, as the Claimant has forfeited Ksh.79,890/- which amount is over and above this Honourable Court's monetary jurisdiction. Costs of the claim (to be assessed by the court). Interest on principal sum from the date of filing claim till payment in full.



8. The Respondent did not file any response to the Appellant’s claim, prompting the Appellant to orally request for judgement in default on 19<sup>th</sup> December, 2022, upon which the court, being satisfied that the Respondent was served, made orders as follows:

“The return of service is noted. The Respondent was duly served. Interlocutory judgement is entered against him. Claimant’s counsel to file written submissions within 14 days. Judgement on 3<sup>rd</sup> February, 2023”.

9. In complying with the order of the court, the Appellant filed its submissions dated 21<sup>st</sup> December, 2022 to which was attached the Statement of Claim and seven documents that had been filed as part of the Appellant’s list of documents.

10. Although the Appellant’s Memorandum of Appeal is couched as having four grounds of appeal, it in precise has only one ground, which in essence is a challenge to the learned Adjudicator’s finding that the Appellant did not prove his claim against the Respondent on a balance of probabilities.

11. In the court’s judgement delivered on 10<sup>th</sup> February, 2023, the learned Adjudicator held as follows:

“The only issue for determination is whether the Claimant is entitled to the amount pleaded.

Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & another [2005] 1 EA 334, in which the Court of Appeal held that:

“As a general proposition under Section 107(1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”

The Claimant has adduced in evidence various documents to support its claim. I have carefully perused the said documents which include an employment contract, bank statements and invoices.

The court is unable to establish the involvement of the Respondent in siphoning off the Claimant’s money in his capacity as an employee.

In light of the foregoing, the Court finds that the Claimant has failed to prove the claim to the required standard.

Consequently, it is dismissed with no orders as to costs.”

12. As this is an Appeal from the Small Claims Court, the jurisdiction of the Court is circumscribed by Section 38 of the *Small Claims Court Act* which limits appeals to matters of law. This means the Court can only intervene if the evidence on record does not reasonably support the conclusions made by the trial Court.

13. It is instructive from the Statement of Claim that the principal relief that the Appellant sought for against the Respondent was for a liquidated sum of Ksh.1,000,000/-.

14. Having been satisfied that the Respondent had been properly served and had failed to enter an appearance and defend the suit, the proper manner to proceed would have been for the court to enter a final judgement on account of default of a response to the liquidated claim, at the request of the Appellant, and not an interlocutory judgement as the court did in the matter before it. While the



former would result in a final determination, the latter would pave way for presentation of evidence via formal proof. The learned trial Adjudicator erred thus.

15. I further observe from the record of the lower court that the learned trial Adjudicator directed that the Appellant files submissions after the entry of interlocutory judgement. What I can say about that is that even in the case where the appropriate course is an interlocutory judgement (as opposed to a final judgement in default on a liquidated claim), the proper manner for the court to proceed would be to give an opportunity to the Claimant to present evidence and formally prove his case.
16. In the matter before the Learned Adjudicator, the court went on to pronounce that the Appellant did not prove its case on a balance of probabilities, yet no opportunity was presented to it to tender evidence before the court. As a matter of fact, no evidence was tendered at all as the court made its findings on documents that were not produced as exhibits or evidence. Those documents were filed with the intention that they would be produced as exhibits.
17. Documents that are filed as part of a list of documents only become part of the evidence on record when formally produced as exhibits by a witness or witnesses. Admissibility and proof of documents is to be determined at the time of production of the documents as exhibits.
18. As such, the documents that the trial court relied on did not become exhibits before the trial court, and were therefore not available for consideration as such as they were of no evidential value.
19. My persuasion then is that the learned trial Adjudicator fell into error in failing to permit the Appellant to formally prove his case, then proceeding to dismiss the same for failure by the Appellant to prove the same.
20. In the result, albeit on different grounds than those presented by the Appellant, I find the appeal herein to be meritorious. I proceed to set aside the judgement of the lower court and all consequential orders. As there were procedural irregularities in the matter that were not pursued in this appeal as I have pointed out above, I opine that the best course for this matter to take is a fresh trial.
21. Accordingly, I order that the lower court file be placed before the Head of Station, Small Claims Court on 3<sup>rd</sup> December, 2024 who will then allocate this matter to another Adjudicator other than Hon. Brenda J. Ofisi for purposes of undertaking a fresh trial, which shall proceed apace.
22. As regards costs of the appeal, I will make no order in respect thereof as the Respondent did not participate in the appeal.

**DELIVERED (VIRTUALLY), DATED & SIGNED THIS 19<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**JOE M. OMIDO**

**JUDGE**

For Appellant: Mr. Sumba.

For Respondent: No appearance.

Court Assistant: Ms. Njoroge.

