



REPUBLIC OF KENYA



**KENYA LAW**  
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**Wagacha v Kafum Engineering Services Limited (Civil Appeal E447 of 2022)  
[2024] KEHC 13953 (KLR) (Civ) (8 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13953 (KLR)

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

**CIVIL**

**CIVIL APPEAL E447 OF 2022**

**JM OMIDO, J**

**NOVEMBER 8, 2024**

**BETWEEN**

**DR BURTON WAGACHA ..... APPELLANT**

**AND**

**KAFUM ENGINEERING SERVICES LIMITED ..... RESPONDENT**

*(Being an Appeal from the Judgement and Decree of Hon. V.W. Mochache Adjudicator/  
Resident Magistrate delivered on 27th May, 2022 in Milimani SCC COMM No. E1691 of 2022)*

**JUDGMENT**

1. This is an appeal from the judgement and decree of Hon. V.W. Mochache, Adjudicator/Resident Magistrate delivered on 27<sup>th</sup> May, 2022 in Milimani SCC COMM No. E1691 of 2022. The appeal is preferred by Dr. Burton Wachaga (hereinafter referred to as “the Appellant”) against Kafum Engineering Services Limited (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 24<sup>th</sup> June, 2022:
  1. That the learned Magistrate erred in law and in finding that the Respondent had built the specific machine agreed on and was capable of delivering the same to the Appellant within 30 days.
  2. That the learned Magistrate erred in law and in fact in failing to appreciate that and determine the dispute whether the machine ordered to be delivered was either hydraulic or manual.
  3. That the learned Magistrate erred in law and in fact in failing to appreciate that the Respondent had not attached any evidence that the interlocking block 4 machine making machine (sic) of six inches to warrant the issuance of specific performance.



4. That the learned Magistrate erred in law and in fact in failing to appreciate that no prejudice would be suffered by the Respondent should it refund monies well acknowledged.
  5. That the learned Magistrate erred in fact in failing to take into account the submissions of the Claimant.
  6. That the learned Magistrate erred in fact by failing to take into account that neither party had prayed for specific performance of the contract.
  7. That the learned Magistrate erred in law and in fact in relying on extraneous matters other than evidence adduced in court.
3. Directions were given by this court that the appeal proceeds by way of written submissions. Both parties complied and filed their respective submissions.
  4. 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 Magistrate's Court and draw my conclusions while bearing in mind that I did not see or hear the witnesses when they testified.
  5. 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.”
  6. The Appellant pleaded that on 16<sup>th</sup> February, 2021, he entered into a contract with the Respondent for the latter to supply him with a hydraulic brick making machine at a cost of Ksh.450,000/-. To that end, the Appellant paid the Respondent Ksh.225,000/- with the agreement that the balance would be paid upon delivery of the machine.
  7. The Appellant pleaded further that the Respondent failed to supply the hydraulic machine and also refused to refund the deposit that the Appellant had paid.
  8. In response to the statement of claim, the Respondent filed a memorandum of response and a counterclaim dated 20<sup>th</sup> April, 2022. The Respondent averred that the Appellant ordered from the Respondent a customized interlocking block 4 making machine and paid a deposit of Ksh.25,000/-, whereby the balance was to be paid after completion within 3 weeks.
  9. The Respondent stated that it made the interlocking block 4 making machine within the agreed time, to the satisfaction of the Appellant, who then stated that he would pay the balance and take possession. That instead, the Appellant returned about two months later and insisted that he wanted a hydraulic machine which the Respondent stated would cost Ksh.1,350,000/- to make, and not the machine that the Respondent had made.
  10. The Respondent claimed that the Appellant breached the agreement and sought in the counterclaim that the Appellant be ordered to pay the balance, together with weekly maintenance charges of Ksh.500/-.



11. Going to the evidence before the trial court, the Appellant testified and adopted the contents of his statement dated 22<sup>nd</sup> March, 2022 through which he told the court that he entered into an agreement with the Respondent and ordered for a hydraulic brick making machine that was to cost Ksh.450,000/- and paid the sum of Ksh.225,000/- to the Respondent as a deposit and that the parties agreed that he would pay the balance upon delivery of the machine.
12. The Appellant stated further that the Respondent failed to supply the machine that he ordered for and further refused to refund the deposit that the Appellant paid for the machine. He stated that the Respondent did not make the machine that the Appellant ordered for.
13. The Appellant produced the following documents in support of his case in the lower court: Copy of receipt dated 16<sup>th</sup> April, 2021. Copies of demand letters.
14. Upon being cross examined, the Appellant stated that there was no document referring to a hydraulic machine and that he did not know the difference, if any, between a hydraulic machine and a block making machine.
15. The Respondent called Fredrick Sikukuu Obwar as its witness (DW1). The witness told the court that he was a director of the Respondent. The witness adopted the contents of his statement dated 19<sup>th</sup> April, 2022 as his evidence. He stated in the statement that the Appellant ordered for a customized interlocking block 4 making machine and paid a deposit of Ksh.225,000/- with an agreement that he would pay a similar amount being the balance after three weeks, once the machine had been made.
16. That the Appellant later inspected the machine and was satisfied and left, promising to pay the balance, which he failed to do. That instead, the Appellant returned months later and insisted that he had ordered for a hydraulic machine, which the witness stated had a different mechanism and would cost Ksh.1,350,000/-. As such, the Respondent's position was that it was the Appellant who breached the agreement. The witness stated that the Respondent was ready and willing to give possession of the machine to the Appellant upon payment of the balance.
17. The following documents were produced in support of the Respondent's case: Copy of invoice dated 16<sup>th</sup> February, 2021. Photo of a machine. Demand letter from Mamalo Auctioneers. Quotations for block machines. Quotations for hydraulic brick machines. Document depicting the difference between a brick and a block. Certificate of registration of the Respondent. Copy of DW1's national identity card.
18. Upon being cross examined, DW1 stated that the machine that the Appellant had ordered for was also called an eggling machine and was depicted in a photo in the quotation that the Respondent produced as an exhibit.
19. In the matter before the lower court, the learned trial Magistrate's judgement rendered on 8<sup>th</sup> November, 2017, the trial court, in conclusion, pronounced itself as follows:
  23. In view of the foregoing reasons, this court makes a judgement in the following terms;
    - a. The Respondent is directed to deliver to the Claimant, within 30 days from the date of this judgement a machine fitting the description as per the receipt dated 26<sup>th</sup> February, 2021.
    - b. The Claimant is directed to honour its obligation by making full payment of the agreed purchase price of the machine as per the receipt dated 26<sup>th</sup> February, 2021, that is a balance of Ksh.225,000/- upon delivery of the machine.
    - c. Each party to bear its own costs.
    - d. no orders as to interest.



20. As I look to determine this appeal, I am alive to the fact that appeals from the Small Claims Court are provided for under Section 38 of the [Small Claims Court Act](#), which provides as follows:
- 38.(1) A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.
- (2) An appeal from any decision or order referred to in subsection (1) shall be final.
21. Having in mind the provision above, it is important that I examine the grounds of appeal as presented by the Appellant vis a vis the evidence on record and be satisfied that they raise matters of law and are worthy of determination on appeal.
22. To that end, I have perused the Memorandum of Appeal and note without a doubt that the matters raised in grounds 1, 2, 3 and 4 are issues of fact. This court has no jurisdiction to determine the issues raised in the said grounds by dint of Section 38 of the [Small Claims Court Act](#). I need not say more on that.
23. With respect to grounds 5 and 7 – that the learned trial Magistrate failed to take into account the submissions of the Appellant; and that the trial Magistrate relied on extraneous matters other than the evidence adduced in court – I have gone through the submissions that the Appellant filed on the appeal and I can with certainty state that the Appellant did not point out with particularity the submissions that were not considered before the lower court. As such, the Appellant has not supported that ground. The Appellant also failed to point out in his submissions the extraneous matters that he alleges that the learned trial Magistrate considered. That ground is therefore also without basis.
24. With regard to ground 6 – that the learned trial Magistrate fell into error by failing to take into account that neither party prayed for specific performance – nothing could be further from the truth as indeed the Respondent sought in its counterclaim an order or relief in the nature of specific performance, and the trial court was within the law to consider the same and grant it as it did.
25. From the foregoing, I reach the conclusion that there are no issues raised herein that are capable of being determined through the present appeal.
26. As such, the only fate that can befall the appeal is for it to be dismissed for being unmeritorious. I proceed to dismiss.
27. Section 27 of the [Civil Procedure Act](#) dictates that costs shall follow the event. The Respondent shall in line with the said provision have the costs of the appeal.

**DELIVERED (VIRTUALLY), DATED & SIGNED THIS 8<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**JOE M. OMIDO**

**JUDGE**

For The Appellant: Ms. Maina for Mr. Thuku.

For The Respondent: No appearance.

Court Assistant: Ms. Njoroge.

