



**Kisilu & 2 others v Kiluva & another (Commercial Appeal E037 of 2024)
[2024] KEHC 15720 (KLR) (Commercial and Tax) (13 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15720 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E037 OF 2024
BM MUSYOKI, J
DECEMBER 13, 2024**

BETWEEN

**FRED KISILU 1ST APPELLANT
OSCAR KISILU 2ND APPELLANT
TIJAN KISILU 3RD APPELLANT**

AND

**GREG KILUVA 1ST RESPONDENT
JANET KILONZO 2ND RESPONDENT**

*(Being an appeal against the Judgment of Hon. Kiongo Kagenyo, Adjudicator
delivered dated 19th January 2024 in SCC COMM NO. E5499 OF 2023)*

JUDGMENT

1. This is an appeal against the Judgment of Hon. Kiongo Kagenyo, Adjudicator delivered on the 19th January 2024 in small claims court commercial suit number E5499 OF 2023. The background of the matter is that, by the statement of claim dated 22nd July 2023, the appellants pleaded that they and the respondents had engaged in a farming venture, after which a dispute arose and the appellant approached the small claims court with a claim of Kshs 1,000,000 as against the respondents although they stated that the amount due to them from the respondents was Kshs 1,202,438.00. The appellants were ready to forfeit the amount in excess of Kshs 1,000,000.00 in order to fit in the jurisdiction of the small claims court.
2. In response to the claim dated 16th August 2023, the respondents admitted owing the appellants Kshs 240,112.50 only. In the particulars of the response, it was stated that the respondents entered into a joint venture agreement as pleaded but denied owing the appellants more than Kshs 240,112.50. In



the part of the remedy proposed, the respondents pleaded that ‘the respondents request the court to enter judgement in favour of the claimants against the respondent in the sum of Kshs 240,112.50.’

3. The matter was heard under Section 30 of the *Small Claims Court Act* which allows the court with consent of the parties to proceed by way of documents already filed without calling witnesses. The honourable adjudicator dismissed the appellants’ claim with costs which decision has prompted this appeal. In their memorandum of appeal the appellants have raised the following grounds;
 1. That having found the respondents had admitted owing the appellants the sum of Kes 240,112.50, the adjudicator erred in law by dismissing the appellants’ case and failing to award the said admitted amount to the appellants.
 2. That the adjudicator erred in law by finding that the respondents were entitled to costs in the matter.
 3. That the adjudicator erred in law by failing to evaluate the evidence tendered in this matter judiciously before arriving at his findings.
 4. That the adjudicator erred in law by failing to consider in his judgement that the respondents had requested the court to enter judgment for the appellants in the sum of Kes 240,112.50 and thereby ignored the respondents’ pleadings and evidence.
 5. That the adjudicator erred in law by failing to appreciate the totality of evidence produced and on record in support of and against the appellants suit and thereby relied on extrinsic factors.
 6. That the adjudicator failed to appreciate the written submissions of the appellants herein.
4. From the above grounds of appeal, I form the opinion that the only issue for consideration is whether the court erred in failing to enter judgment for the admitted sum of Kshs 240,112.50. Indeed, the appellants have not prayed that this court overturns the whole of trial court’s decision. This is clearer in the prayers in the memorandum of appeal where they ask that;
 - a. This appeal be allowed.
 - b. The subordinate court’s finding be set aside, overturned and/or varied and substituted with finding of this honourable court awarding the appellants the sum of Kshs 240,112.50 which sum is admitted by the respondents or in the alternative the honourable court makes its own findings.
 - c. Such further reliefs(s) as may appear just to the Honourable Court.
5. This appeal was heard by way of written submissions. Appellants through their submissions dated the 7th of August 2024 argued that the trial court should have entered judgement for the admitted sum. They added that by dint of Order 13 of the Civil Procedure Rules the court should have found that they were entitled to judgment on the admitted sums as the admission was obvious and not subject to proof.
6. The respondents filed what they called reply to the appeal dated the 14th of August 2024 and submissions dated the 30th of August 2024. It is the respondents’ case that the trial court was right in dismissing the claim because the contract between the parties was not properly pleaded and proved. It was also the respondents’ position that the admission in their response to the claim was not in respect of the same contract and as such the court could not enter judgement as the contract was not proved.



7. Section 38(1) of the *Small Claims Court Act*, which states that:

‘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.’

8. After reviewing the memorandum of appeal and the pleadings, including the parties’ submissions, I am satisfied that the appeal raises a genuine point of law which this court needs to evaluate and make a decision on. Although the honourable adjudicator did not state that the admitted sum was liable to proof, it is important to answer question whether where a contract is not proved, a court can enter judgment on strength of admission without proof of the contract. I have flagged out the below extract from the handwritten judgment of the adjudicator thus;

‘The other difficulty I find myself in is that the claimant’s case was having been built on nothing, it could not stand. However, the respondents in the response admitted to owing the claimant some Kshs 240,112.50. Such an admission invites me to enter judgment on admission. However, can a court enter judgement on admission in a case whereby the claimant’s case is a candidate of dismissal? I believe it is unsafe so to do.’

9. I understand the adjudicator as saying that where a case is not proved (because that is the only justifiable reasons for dismissing a case), the court cannot enter judgement in an admitted sum. Admissions in cases are covered by Order 13 of the Civil Procedure Rules and Section 61 of the *Evidence Act*. Order 13 Rule provides that;

‘Any party to a suit may give notice by his pleading, or otherwise in writing, that he admits the truth of the whole or part of the case of any other party.’

10. Section 61 of the *Evidence Act* states that;

‘No fact need be proved in any civil proceedings which the parties thereto or their agents agree to admit at the hearing, or which before the hearing agree, by writing under their hands, to admit, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings.

Provided that the court may in its discretion require the facts admitted to be proved otherwise than by such admissions.’

11. The above provisions of the law are unequivocal and clear that admitted facts are not required to be proved. It is my position and the position of the law, that where a claim is admitted, it does not matter whether the other part of the claim stands on strong rock foundation or a quick sand. An admission does not call for any proof. The admission in this case was clear and unequivocal from the pleadings and submissions of the parties. I cannot think of any admission clearer than a prayer made by the respondents in their own pleadings. The respondents did not only admit the amount in paragraph 3 of their response to the claim but also in their own prayers in which they asked the court to enter judgement against them for Kshs 240,112.50. Actually, the response did not even have a prayer for dismissal. With this kind of admission, I am unable, with all due respect, to understand the line of thought of the honourable adjudicator.

12. It is true that the written agreement the appellants were relying on was not signed but that does not mean that there was no agreement at all between the parties. In their response to the claim, the respondents had acknowledged the agreement and the only dispute they raised was that it was the appellants who were in material breach. Agreements may be proved in many ways other than written



documents. For instance, oral agreements if admitted are enforceable unless there is a specific statutory requirement that agreements on particular subject matters be in writing.

13. The respondents have claimed that the court had found that the admitted sum had no connection to the contract the appellants were trying to enforce. I have gone through the judgement and I can't see where the court held as such and even if it did, it would have been wrong because the parties' pleadings were clear that the debt admitted was in respect of the pleaded contract. The appellants had pleaded that the debt arose from a joint venture for farming business in Kibwezi area of Makueni County. In their response at paragraph 3(a), the respondents stated, 'that at all material times, the respondents did enter into a joint venture agreement with the claimants who drafted the said agreement whilst at Kibwezi East in Makueni County' and then went in 12 paragraphs that follow to explain how the deal went to the woods before praying for judgment to be entered for the plaintiff for the admitted sum. In whatever way one looks at it, I cannot see any interpretation of this other than that the parties had entered into an agreement and the respondents were admitting owing the appellants a sum of Kshs 240,112.50 out of that deal.
14. Flowing from the above, it is this court's finding that this appeal is merited and the same is allowed. I however do not see the reason for subjecting the respondents to costs in the trial court as they had admitted the claim but they must pay the cost of this appeal which they have opposed. In conclusion, I make the following specific orders;
 1. The judgment of the court in the milimani small claims court commercial suit number E5499 of 2023 dated 19-01-2024 is hereby set aside in entirety and substituted for judgement of this court entering judgment for the appellants against the respondents jointly and severally for a sum of Kshs 240,112.50.
 2. The above sum shall bear interest from 19-01-2024 at court rates until payment in full.
 3. Each party shall bear their own costs in the trial court.
 4. The respondents shall pay the costs of this appeal.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF DECEMBER 2024.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Mr. Mutuku for the appellant and in absence of counsel for the respondent.

