



**Majau & another v Mwenda & another (Civil Appeal E137 of 2023)  
[2024] KEHC 15877 (KLR) (17 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15877 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E137 OF 2023  
EM MURIITHI, J  
DECEMBER 17, 2024**

**BETWEEN**

**AUGUSTINE MAJAU ..... 1<sup>ST</sup> APPELLANT**

**AGRIPHINA MAJAU ..... 2<sup>ND</sup> APPELLANT**

**AND**

**BENJAMIN MWENDA ..... 1<sup>ST</sup> RESPONDENT**

**MARTIN MUTHUNGUMI ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgment and decree of the Hon. L. Maina Muoti (RM)  
delivered on 8/8/2023 in Meru Small Claims Court Comm. Claim No. E0260/2023)*

**JUDGMENT**

1. By a statement of claim dated 5/7/2023, the Respondents sued the Appellants seeking Ksh. 243,450 and costs of the claim. They pleaded that on or about 1/7/2019, they entered into a contract with the Appellants for the sale of a business, a bar, which had been operational within Kionyo market at an agreed consideration of Ksh. 159,450. The Appellants paid a down payment of Ksh. 78,000 leaving a balance of Ksh. 81,150 which was to be paid by 12/8/2019. They are demanding Ksh. 81,150 together with Ksh. 162,300 for breach of contract pursuant to the agreement plus costs with interest at court rate.
2. The Appellants filed their response to the claim on 24/7/2023 in denial to the claim on account that the said agreement was fake and the signatures therein were forgeries. They counter claimed for Ksh. 500,000 and prayed for the dismissal of the claim with costs.
3. Upon full hearing, the trial court found that the Respondents had proved their claim against the Appellants and awarded Ksh. 243,500 together with disbursements of the claim and interest.



## **The Appeal**

4. On appeal, the Appellants filed their memorandum of appeal on 29/8/2023 raising 4 grounds as follows:
  1. The learned magistrate erred in law in proceeding with matter or not allowing the appellants to call witnesses.
  2. The learned magistrate erred in law and fact in arriving a decision without consideration of the appellants evidence.
  3. The learned magistrate erred in law and fact in making a decision without any factual legal basis.
  4. The magistrate's decision is unfair, unconstitutional and illegal and above all inequitable.

## **Duty of the Court**

5. This being a first appeal, this court is duty bound to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same and arrive at its own independent conclusions, but always remembering that, the trial court had the advantage of seeing the witnesses testify. (See *Selle & Another v Associated Motor Boat Company Ltd & Others* [1968] EA 123).

## **Evidence**

6. CW1 Benjamin Mwenda, the 1<sup>st</sup> Respondent herein testified that, "I live in Kionyo. I am a businessman and assistant chief. I know the respondent. I wish to adopt my statement and documents 1+2."
7. On cross examination by the 1<sup>st</sup> Appellant, he stated that, "You are the one who signed the agreement in our presence."
8. On cross examination by the 2<sup>nd</sup> Appellant, he stated that, "You did sign the agreement in our presence of my witnesses who was the chief."
9. CW2 Martin Muthugumi testified that, "I live in Kionyo. I work as a boda boda operator. We had rented a bar and after a year they said they did not want our rent and they took our goods and we went to the manager and wrote an agreement totalling 159,000/= and they paid 78,000/= balance 81,150/= . The balance was to be paid through the claimant but they did not pay it. We entered an agreement (C ex 2) but they failed to pay the same hence the claim."
10. On cross examination by the 1<sup>st</sup> Appellant, he stated that, "You did sign the agreement in our presence. We did rent house 13A. There was no agreement of renting house, the agreement in question is of our goods. There was no agreement on house rent. We let the house with you."
11. On cross examination by the 2<sup>nd</sup> Appellant, he stated that, "I do know you. You are Agriphina. You did sign the agreement. It was made in the presence of chief and area manager. The chief is my witness and he stamped the agreement. The agreement in question is on goods."
12. CW3 Doris Kimathi Mbina testified that, "I am the assistant chief Kiongone. I live in Kiongone. I am a witness and I had called the tenants the claimants and the respondents and we entered into an agreement in my presence on the balance of the sums and I am the author of the agreement in question (C ex 1). On 1<sup>st</sup> July 2019 and I recorded in presence my OB. They paid 78,000/= and let balance of 81,000/=."



13. On cross examination by the 1<sup>st</sup> Appellant, she stated that, “The agreement is dated 1<sup>st</sup> July 2019 and the next entry is in September. The OB report is or contracts in my premises. You signed the one before me and I saw you sign. I did not compare the two signatures. The 1<sup>st</sup> claimant is an assistant chief. Philip Mukonge is my area manager and he witnessed the claim. What was brought was the list of items unpaid.”
14. On cross examination by the 2<sup>nd</sup> Appellant, she stated that, “I did write the agreement and you were present on the day and you did sign. I did not compare the ID’s but you were present on that day. I don’t know of any witnesses. My work was on the particular agreement only. You were present and you wrote and signed the documents.”
15. CW4 Philip Nkonge testified that, “I live in Kionyo. I am an area manager and businessman. I have come to tell court that I was present on the day o the agreement and did sign it in all the present on 1<sup>st</sup> July 2019. I had gone to give the weekend report when the claimant walked in and I know they did not abide by the agreement and I was also present when the goods were being counted and I do confirm the goods as per the inventory the sums to be paid.”
16. On cross examination by the 1<sup>st</sup> Appellant, he stated that, “I am an area manager. It is true. I was present and signed the agreement because I was coincidentally there. I don’t know of any tenancy. Yes we did tabulate the goods and you wrote them down. I don’t know of any lease. You were present when writing the agreement.”
17. On cross examination by the 2<sup>nd</sup> Appellant, he stated that, “You were indeed present when you signed the agreement. You signed the document. I don’t remember details further than what I have written. This is not fabricated. I don’t know of any tenancy agreement.”
18. RW1 Augustine Majau testified that, “Live in Kionyo. This case is fabricated. I have never rented a house to the claimants herein and the issue should only be dismissed. It is an invention he does not own the stamp and is untrue. It is not a valid agreement. I have my signature which I have used and it does not require an expert to know it is not forged. The said drafters are professional agreement writers who cannot confuse the defence in signatures. I pray suit to be dismissed.”
19. On cross examination, he stated that, “I do own the plot 13A2 and the ID in question is indeed mine. I don’t know where you got my ID number. There is a chair in the market and there is a bar owner association. The list to the agreement is not mine. The writings are the claimants.”
20. RW2 Augustina Majau testified that, “I live in Kionyo. I work as a teacher. My defence is that the said document is invalid. I did not sign it nor write it. I don’t know where they got my ID from. I never rented them a bar. My signature is forged. I pray it to be dismissed. The items we talk about, I don’t know them at all.”
21. On cross examination, he stated that, “My ID is indeed correct as per agreement but I don’t know where they got it from. There is an association chair of bars. We can come with evidence of me being a bar owner.”

## **Submissions**

22. The Appellants liken the Respondents’ response to the appeal by submissions to be an admission, and cite Erastus Wade Opande v Kenya Revenue Authority & another Kisumu HCCA No. 46 of 2007, Nancy Wambui Gatheru v Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993, Nganga & another v Owiti & another (2008) 1 KLR (EP) 749 and Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi



& another (2014)eKLR. They fault the Respondents for failing to prove their case and urge that they were condemned unheard.

23. The Respondents fault the Appellants for failing to controvert their evidence, and cite Kinyanjui Kamau v George Kamau (2015) eKLR, Ambwera v Ngurwe (Civil Case E006 of 2023) [2023] KEHC 26764 (KLR) (19 December 2023) (Ruling) and Antony Francis Wareham t/a AF Wareham & 2 others v Kenya Post Office Savings Bank (2004) eKLR. They urge that they proved their case on a balance of probabilities and implore the court to dismiss the appeal with costs.

### **Analysis and determination**

24. The issues for determination from the grounds of appeal are two-fold (a) whether the Appellants were condemned unheard and (b) whether the Respondents proved their case on a balance of probabilities.
25. The 2<sup>nd</sup> Respondent testified that, “We entered an agreement (C ex 2) but they failed to pay the same hence the claim.”
26. He affirmed on cross examination that the Appellants signed the agreement in the presence of CW3 and CW4. CW1, CW3 and CW4 corroborated the testimony of CW2.
27. CW3 testified that, “I am the author of the agreement in question (C ex 1). They paid 78,000/= and let balance of 81,000/=.”
28. CW4 testified that, “I was present on the day of the agreement and did sign it in all the present on 1<sup>st</sup> July 2019.”
29. The Appellants testified as RW1 and RW2 respectively vehemently refuting the claim. They denied signing the agreement terming the purported signatures contained therein as forgeries. It behooved them to tender expert evidence that indeed their signatures had been forged, but none was availed. The Respondents maintained even on thorough cross examination that the Appellants had signed the agreement in their presence and that of CW3 and CW4.
30. This court finds that the Appellants were accorded an opportunity to tender their evidence and to cross-examine the Respondents and their witnesses. They cannot now be heard to say that they were condemned unheard.
31. The court finds that the Respondents proved their case against the Appellants on a balance of probabilities and thus they were entitled to entry of judgment in their favour.
32. This court does not find on the facts of this case any error of law or principle by the trial court as would justify appellate interference with the exercise of discretion of the trial court.

### **Orders**

33. Accordingly, for the reasons set out hereinabove, the Appellants’ appeal is without merit and it is dismissed.
34. The appellants will pay the costs of the appeal to the Respondents.

Order accordingly.

**DATED AND DELIVERED ON THIS 17<sup>TH</sup> DAY OF DECEMBER 2024.**

**EDWARD M. MURIITHI**

**JUDGE**



Appearances:

Appellants in person

Respondents in person.

