



**Upperhill Chambers Limited v Kalulu t/a Megflex Supplies (Civil Appeal E009 of 2024)
[2025] KEHC 13446 (KLR) (Commercial and Tax) (25 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13446 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E009 OF 2024
PM MULWA, J
SEPTEMBER 25, 2025**

BETWEEN

UPPERHILL CHAMBERS LIMITED APPELLANT

AND

FESTUS KALULU T/A MEGFLEX SUPPLIES RESPONDENT

JUDGMENT

1. This is an appeal from the decision of the Small Claims Court in which judgment was entered in favour of the Claimant/Respondent against the Respondent/Appellant in the sum of Kshs. 331,288/= together with costs and interest at court rates from the date of filing until payment in full.
2. The appeal is anchored on the memorandum of appeal dated 16th January 2024 which raises seven (7) grounds. However, upon perusal, two issues arise for determination:
 - i. Whether the trial magistrate erred in admitting the Respondent's documents contained in the further list of documents, thereby holding the Appellant liable for the sum claimed; and
 - ii. Whether there was proof of an agreement between the parties for consideration of Kshs. 401,288/=.
3. As this is an appeal from the Small Claims Court, the jurisdiction of this Court is circumscribed by section 38 of the *Small Claims Court Act*, which limits appeals to matters of law only. As stated by the Court of Appeal in *Peter Gichuki King'ara v Independent Electoral and Boundaries Commission & 2 Others* [2013] eKLR. This Court is therefore restrained from re-evaluating findings of fact unless it can be shown that the trial court's findings were not supported by the evidence on record or that the court misapprehended the law.



The issue of Admissibility of the Respondent's Documents

4. At the hearing, the Appellant's witness (RW1, Caroline Mallo, Facility Manager at Upper Hill Chambers Limited) testified that the Appellant engaged the Respondent on short notice to supply a backdrop banner as a windshield for an event held on 20th May 2022. She confirmed that Kshs. 70,000/= was paid to the Respondent on 19th May 2022 in full and final settlement. The Respondent, however, later submitted an invoice dated 19th May 2022 for Kshs. 401,288/=.
5. The Appellant contends that the Respondent's reliance on WhatsApp conversations and a payment requisition extracted from the same, was inadmissible. It is argued that the data was not properly authenticated under sections 78A and 106B of the *Evidence Act*, and the trial court failed to record the Appellant's objection. Reliance was placed on *Racheal Njoki Kahara v Gideon Migiro Nyambati* [2020] eKLR, *Kenneth Nduati Irungu v RMA Motors (Kenya) Limited* [2021] KEELRC 66 (KLR), and *Peter Ngethe Ngari t/a PNN Funeral Services v Standard Group Limited Plc & Another* [2020] eKLR where the courts underscored the requirement of proper certification and authentication for electronic evidence.
6. The Respondent's position is that the Appellant did not object at the hearing to the production of the further list of documents, and in any event, section 32 of the *Small Claims Court Act* exempts the Court from the strict application of the *Evidence Act*. It was further urged that the WhatsApp communication emanated from mobile number 0726xxx belonging to Naftaly Kamau, an employee of the Appellant, who also made the Mpesa payment of Kshs. 70,000/=, thereby linking the Appellant to the transaction. The Respondent also invoked Article 159(2)(d) of *the Constitution* which enjoins courts to administer justice without undue regard to procedural technicalities.
7. Having considered the record, it is clear that the Small Claims Court admitted the documents without compliance with Section 106B of the *Evidence Act*. The law on electronic evidence is well settled. In *Republic v Mark Lloyd Stevenson* [2016] eKLR, the High Court underscored that admissibility of electronic evidence requires certification to establish authenticity. Similarly, in *Republic v Barisa Wayu Matuguda* [2011] eKLR, it was held that strict compliance with Section 106B is mandatory unless otherwise expressly exempted.
8. However, section 32 of the *Small Claims Court Act* allows the Small Claims Court to depart from strict rules of evidence "to achieve the objects of the Court." This provision reflects the legislative intent to facilitate expeditious and substantive justice in small claims, as also affirmed in *Co-operative Bank of Kenya Limited v David Muasya Mutua* [2019] eKLR where the Court held that procedural lapses should not override substantive justice.
9. I am persuaded that while the trial court could admit the WhatsApp communication under section 32 of the Act and Article 159 of *the Constitution*, such discretion must still be exercised cautiously. The probative value of the document must be weighed against the standard evidentiary safeguards. In this case, although the WhatsApp message was linked to the number used to remit Kshs. 70,000/=, the absence of certification under section 106B weakened the evidential weight of that message.
10. On issue of the existence of an agreement, the Appellant submits that there was no binding agreement for Kshs. 401,288/=, only a last-minute request to provide a backdrop banner. No signed contract, purchase order, or acknowledgment of debt was produced.
11. The Respondent, on the other hand, contends that there was an oral agreement supported by part-payment of Kshs. 70,000/=, leaving the balance unpaid.



12. The law is settled that a contract may be oral, written, or implied from the conduct of the parties. However, its existence must be proved on a balance of probabilities. In *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another* [2001] eKLR, the Court of Appeal reiterated that courts cannot rewrite contracts for parties, but can only enforce them as proved. Similarly, in *Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd* [2017] eKLR, the Court emphasized the need for clear evidence of agreement and consideration.
13. In the present case, the only proved payment was Kshs. 70,000/= made on 19th May 2022. Beyond this, the Respondent did not produce any document, such as a signed quotation, delivery note, or acceptance letter demonstrating that the parties agreed on a contract sum of Kshs. 401,288/=. The WhatsApp message, whose admissibility was tenuous, could not, standing alone, establish such a contractual obligation.
14. Having reviewed the record and submissions, I find that the trial court erred in law by admitting electronic evidence without due compliance with section 106B of the *Evidence Act*, and further erred in holding that there was sufficient proof of an agreement for Kshs. 401,288/=. The finding that Kshs. 331,288/= was due from the Appellant was not supported by legally admissible evidence.
15. Consequently, the appeal succeeds. The judgment of the Small Claims Court delivered on 20th December 2023 in SCCCOM E5644 of 2023 is hereby set aside. The Respondent's claim stands dismissed.
16. Given the nature of the claim, I direct that each party to bear its own costs of this appeal and of the proceedings before the Small Claims Court.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF SEPTEMBER 2025.

PETER M. MULWA

JUDGE

In the presence of:

Mr. Ngatia, SC for Appellant

Mr. Kinuthia for Respondent

Court Assistant: Carlos

