Weda v Raeli Hydro Systems Limited (Civil Appeal E157 of 2024)
[2025] KEHC 13850 (KLR) (25 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13850 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E157 OF 2024

JM OMIDO, J

SEPTEMBER 25, 2025

BETWEEN

MOSES WEDA ..... APPELLANT

AND

RAELI HYDRO SYSTEMS LIMITED ..... RESPONDENT

(Being an Appeal from the judgement and decree of Hon. Christabel Maiyo Resident Magistrate/Adjudicator delivered on 6th August, 2024 in Kisumu SCCOMM No. E433 of 2024; Moses Weda v Raeli Hydro Systems Limited)

JUDGMENT

1. The Appellant herein, Moses Weda, has brought this appeal, being aggrieved by the judgement and decree of Hon. Christabel Maiyo Resident Magistrate/Adjudicator delivered on 6th August, 2024 in Kisumu SCCOMM No. E433 of 2024; Moses Weda v Raeli Hydro Systems Limited.

2. The Appellant has presented the following grounds of appeal vide the Memorandum of Appeal dated 15th August, 2024:

    1. That the learned trial Magistrate/Adjudicator erred in finding that there was no contract between the parties.

    2. That the learned trial Magistrate/Adjudicator erred in law by reaching a conclusion that contracts have to be in writing.

    3. That the learned trial Magistrate/Adjudicator erred in law by concluding that in the absence of a written contract the claim by the Appellant had no founding.

    4. That the learned trial Magistrate/Adjudicator erred in law by failing to appreciate the evidentiary threshold on a probability basis thus arrived at a wrong conclusion.

5. That the learned trial Magistrate/Adjudicator erred in law by re-writing the oral contract between the parties thus arriving at a wrong conclusion.

6. That the learned trial Magistrate/Adjudicator erred in law by holding a quotation to be a contract.

7. That the learned trial Magistrate/Adjudicator erred and misdirected herself by ignoring the Appellant's submissions on record hence arriving at a wrong decision and dismissing the claim.

8. That the learned trial Magistrate/Adjudicator erred in law by failing to appreciate precedents on verbal contracts thus arriving at a wrong conclusion.

3. The Appellant proposes that the instant appeal be allowed and that the judgement of the trial/lower court be set aside and this court proceeds to re-evaluate the evidence so that it reaches its own findings and that the Respondent bears the costs of this appeal.

4. The matter before the trial court was commenced by way of a statement of claim dated 24th May, 2024. vide which the Appellant (the Claimant before the trial court) sought the following reliefs from the Respondent:

a. Judgement in the sum of Ksh.895,000/-.

b. Special damages Ksh.650/-.

c. Compensation (to be determined by the court).

d. Costs of the claim (to be assesses by the court).

e. Other appropriate reliefs (interests).

5. The Appellant's claim was based on breach of an oral contract. The Appellant pleaded that on or about the 23rd day of February, 2024, the two parties entered into an oral agreement whereby the Respondent was to drill and equip a borehole for the Appellant and set up a solar tank at an agreed sum of Ksh.895,000/-.

6. The Appellant pleaded that despite the said amount being paid in full, the Respondent, in breach of the contract, failed to perform its obligations as per the agreement, effectively breaching it.

7. The Appellant pleaded the following particulars of breach as being attributable to the Respondent:

i. The Respondent for no apparent reason and contrary to the terms of the contract has failed to complete the drilling, installation, equipping and commissioning of the borehole despite having received the full consideration from the Claimant.

ii. The Respondent has deliberately and recklessly refused and/or abnegated to remedy the breach within the prescribed or agreed period subsequent to innumerable discussions between it and the Claimant.

iii. The Respondent has deliberately and recklessly refused and/or abnegated to remedy the breach within the prescribed period despite the issuance of notices and/or demands.

iv. No reasons have been advanced to the Claimant by the Respondent in so far as the failure to complete the project is concerned.

8. Claiming that he suffered loss and damage resulting from the alleged breach of contract, the Appellant sought judgement against the Respondent.

9. The Respondent resisted the Appellant's claim by filing a response to the statement of claim dated 14th June, 2024.

10. In its response, the Respondent stated that it entered into an agreement with the Appellant whereby the former was to drill a borehole for the latter at Katito area within Kisumu County at a cost of Ksh.1,076,600/- and equip the same with a solar system at a cost of Ksh.465,100/- and that the Respondent forwarded the quotations for the works to the Appellant, who agreed to pay the same.

11. The Respondent pleaded and stated that the Appellant paid only Ksh.500,000/- instead of the agreed amount of Ksh.1,076,600/-, as a result of which the Respondent used its own resources to drill the borehole and that the Appellant threatened to terminate the contract when the Respondent demanded for the balance.

12. That subsequently, the Respondent embarked on the second phase of the works which involved the installation of the solar system but the same was hampered by the fact that the supplier of the solar panels and submersible pumps that were to be installed delayed in delivering the same, a position that was well within the knowledge of the Appellant.

13. The Respondent further pleaded that the Appellant subsequently terminated the contract at a time when 85% of the works had been completed, with only the installation of the equipment, which the Respondent had already purchased, remaining.

14. The Respondent stated in his pleading that the quotation for the drilling and equipping the borehole was Ksh.1,441,700/- yet the Appellant only paid Ksh.895,000/- and that its demands for payment of the balance were not honoured.

15. On 18th October, 2024 and 2nd December, 2024, this court directed that the appeal proceeds by way of written submissions and the two sides filed their respective submissions.

16. This being a first appeal, 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.

17. 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."

18. The record of the trial court bears it that the Appellant's case was premised on his testimony while that of the Respondent was on the evidence of one Johnson Ouko.

19. In his evidence before the trial court as adopted from his witness statement dated 24th May, 2024, the Appellant told the court that he entered into the oral agreement with the Respondent in the months of January – February, 2024.

20. The Appellant stated that the Respondent sent to the him a quotation for the amount of Ksh.1,076,600/- for the works, which included drilling a borehole and equipping it with a submersible pump.

21. The Appellant further stated that following negotiations, the parties agreed that the project would be completed at a cost of Ksh.500,000/-. The Appellant stated further that the parties agreed that an additional Ksh.395,000/- would be paid by the Appellant for purposes of installing a solar tank. The total amount would then be Ksh.895,000/-.

22. The Appellant stated that he paid to the Respondent Ksh.800,000/- on 23rd February, 2024 and the balance of Ksh.95,000/- on dates that he did not disclose in his statement.

23. That in breach of the contract, the Respondent subsequently failed to complete and commission the project, causing him loss and damage.

24. The Appellant produced the following documents in support of his case:

    a. A copy of the Appellant's national identity card.

    b. Quotations issued by the Respondent.

    c. Remittance advices.

    d. Copies of correspondence with the Respondence.

    e. A copy of the Respondent's CR12.

    f. Demand letter.

25. Upon being cross examined, the Appellant stated that the first quotation that he received from the Respondebt for the works of drilling and equipping the borehole was for Ksh.1,076,600/- while the second one which was for equipping the borehole with a solar system was for Ksh.465,000/- and that the total amount in the two quotations was therefore Ksh.1,541,700/-.

26. The Appellant told the trial court upon being cross examined that he paid Ksh.895,000/- after the amount was reviewed by the parties. He however admitted that none of the documents that was produced by the parties showed any such review.

27. On being further cross examined, the Appellant told the trial court that the Respondent successfully drilled the borehole and that the borehole machines were delivered to the site.

28. The Respondent's witness adopted the contents of his statement dated 14th June, 2024 as his evidence in chief. In his statement, he stated that the agreed amount for the works at the borehole was Ksh.1,076,600/- and a further Ksh.465,100/- for installation of the solar system and that the requisite quotations were forwarded to the Appellant.

29. The witness stated that the agreement reached between the parties was that the Appellant was to pay the Ksh.1,076,600/- for the works to commence.

30. That contrary to the agreement, the Appellant only paid Ksh.500,000/- in piecemeal, which then impelled the Respondent to use its own resources and successfully drilled the borehole.

31. The witness further stated in his statement that when the Respondent embarked on the second stage of the works which involved the installation of the solar system, the supplier of the solar panels delayed in delivering the same, which was well known to the Appellant. The witness stated that the Appellant

paid to the Respondent Ksh.395,000/- instead of the agreed amount of Ksh.465,100/- for the second phase of the works.

32. The witness told the trial court that by the time the Appellant terminated the contract, the Respondent had concluded 85% of the works and that what was pending was only the installation of the equipment, which the Respondent had by then purchased.

33. Thus then, the Respondent's witness stated that the total quotation for completion of the two phases of the works was Ksh.1,441,700/- but the total amount that the Appellant paid was Ksh.895,000/-. The witness stated that the Respondent demanded for the balance but the Appellant failed to pay the same.

34. The Respondent's witness produced the following documents in support of the Respondent's case"

    a. Copies of quotation for drilling and equipping.

    b. A copy of the hydrological survey report.

    c. A copy of the test pumping report.

    d. Copies of receipts.

    e. A copy of a letter authored by the Respondent dated 24th April, 2024.

35. Upon being cross examined, the Respondent's witness told the trial court that the contract between the parties was verbal. He stated that the parties communicated verbally and through email.

36. With regard to payments, the witness acknowledged that the Respondent received Ksh.895,000/- from the Appellant and said that the same was part payment of the Ksh.1,076,500/- as per the issued quotation, which was for the first phase of the project which involved drilling of the borehole. He stated that no money was paid in respect of the second phase, whose quotation was for Ksh.465,100/-.

37. The witness stated that the Respondent completed the first phase of the project and the certificate of completion was prepared.

38. From the evidence adduced by the parties, the following issues are not contested (as they are indeed admitted by the parties):

    a. That the Appellant and the Respondent entered into a verbal or oral agreement for two sets or phases of works, whereby in first phase the Respondent was to drill a borehole for the Appellant and in the second phase, the Respondent was to install a solar system at the borehole.

    b. That the Respondent issued two quotations to the Appellant; for Ksh.1,076,600/- for the first phase of the works and for Ksh.465,100/- for the second phase.

    c. That the total amount that the Appellant paid to the Respondent was Ksh.895,000/-.

    d. That the Respondent successfully drilled the borehole at the agreed site.

    e. That the Respondent did not complete the works, particularly the second phase.

39. Now to the record of the trial court, the learned Adjudicator, upon considering and analyzing the material presented before her, set out the following issues for determination (verbatim):

    1. Whether there was an agreement formed between the Claimant and the Respondent.

    2. Whether there was a breach in the agreement, (if any).

3. Whether the Claimant is entitled to the reliefs sought in the Statement of Claim.

40. With regard to the first issue, while the learned Adjudicator reached the finding that there was no written agreement between the parties, she was of the persuasion, in my understanding of her judgement, that there existed an agreement between the parties for the two phases of the works to be done. She however opined that the Appellant's position that there were negotiations that varied or lowered the total consideration for the two phases of works from Ksh.1,541,700/- to Ksh.895,000/- was not proved by the Appellant and that as such, the total amount that was to be paid was the amount stated in the quotations, which was Ksh.1,541,700/.

41. The clear issue that the learned Adjudicator was addressing upon reaching the finding that an oral agreement existed between the parties was whether the total consideration of the two sets or phases of works was Ksh.895,000/- as was proffered by the Appellant or Ksh.1,541,700/- as per the Respondent's position. From her judgement, the learned Adjudicator went ahead to find in favour of the Respondent on this aspect, when she held as follows:

> 19. I have perused the documents filed by both the Claimant and the Respondent and no such written agreement was entered by the parties save for the two quotations supplied upon the Claimant.
>
> 20. The Claimant's position that the contract was varied from Ksh.1,541,700/- to Ksh.895,000/- has not been proved to this court.
>
> In Pius Kimaiyo Langat v Cooperative Bank of Kenya Limited [2017] eKLR, the Court of Appeal further stated that:
>
> "We are alive to the hallowed legal maxim that it is not the business of courts to rewrite contracts between parties, they are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved."
>
> 21. A quotation is not a contract, although it could be a document for negotiation but once a contract is signed, then the contract supersedes the quotation made prior to the contract. In this case, no contract was signed by the parties and as such I shall hold that the quotation takes the precedence in the transaction".

42. On the second issue, whether the Respondent breached the agreement, the trial court having reached the determination that the contract consideration was Ksh.1,541,700/-, went ahead to reach the finding that the Respondent did not breach the agreement.

43. With regard to the issue which was whether the Appellant was entitled to the reliefs sought, the learned Adjudicator's answer was in the negative, following which she dismissed the Appellant's claim.

44. Having considered the grounds of appeal, the submissions of the parties, the record of the trial court and having re-analyzed and re-assessed the evidence adduced before the trial court, I discern the issues for determination to be as follows:

a. Whether the appeal is premised on points or issues of fact.

b. Subject to (a) above, whether the learned Adjudicator reached the correct findings that the contractual amount was Ksh.1,541,700/- as per the Respondent's position, as opposed to the Appellant's position that the consideration was Ksh.895,000/-.

c. Whether the learned Adjudicator reached the correct finding that the Respondent did not breach the contract.

45. With regard to the first issue, the Respondent proffers the position that the appeal as presented is based on issues of fact and is therefore not tenable, noting that the same emanates from a judgement of the small claims court.

46. Section 38 of the Small Claims Courts Act provides that:

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.

47. The Respondent urges that all the grounds that the Appellant presented are matters of fact and are therefore not suited for appeal before this court.

48. A casual perusal of the grounds set out in the memorandum of appeal and the submissions of the Appellant largely provides the position that what the Appellant complains of is that the evidence that was adduced before the trial court was not properly considered and that as a result, the trial court reached erroneous decisions.

49. The correct position in law is that failure by a trial court to properly evaluate or appreciate the evidence amounts to a legal error, because courts are legally required to consider all relevant evidence before making a finding. Although such failure may result in findings of fact, it is by itself a point of law.

50. In the case of Kenya Ports Authority v Kuston (Kenya) Limited [2009] 2 EA 212 the Court of Appeal held that a decision based on no evidence or on a misapprehension of the evidence is an error in law.

51. In Odd Jobs v Mubia [1970] EA 476 the court stated that where relevant evidence is ignored, or irrelevant evidence is considered, a misdirection in law occurs.

52. The jurisprudence that emerges from the decisions above is that where a party presents the position that the evidence that was adduced before a trial court was not or not properly considered, that issue when presented before an appellate court is an issue of law and not fact, notwithstanding that the resulting finding may have been one of fact.

53. The issues raised in the present appeal are therefore issues of law, and the appeal is therefore properly before this court.

54. As for the second issue for determination, I will look at what the law provides under Section 107 of the *Evidence Act*, regarding the burden of proof. Let us read the said provision of statute:

107. Burden of proof.

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

55. Section 107 of the *Evidence Act* places the initial responsibility (burden) on the person who makes a claim (the Appellant in this case) to prove the fact that he asserts in court. In simple terms, he who alleges must prove what he alleges.

56. In the case of Jennifer Nyambura Kamau v Humphrey Nandi [2013] eKLR, the Court of Appeal emphasized that:

> " He who alleges must prove. It is a time-honoured legal principle that a party who wishes the court to find in his favour must place evidence before the court to enable the court make such a finding."

57. In civil cases, the standard required of the party to prove the existence or otherwise of a fact is on a balance of probabilities. Kimaru J. (as he then was) explicitly framed what the balance of probabilities amounts to in the case of William Kabogo Gitau v George Thuo & 2 Others [2010] 1 KLR 526, as follows:

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

58. So, summarised succinctly, Kimaru J. defined "a balance of probabilities" as "more likely than not," and quantified it by saying that a party establishing their case to a 51% likelihood (versus 49%) meets the standard. The threshold is thus just over an even split.

59. From the material before the lower court, the evidence adduced by the Respondent that the amount of Ksh.1,541,700/- was the contract amount, is in my view more likely than not, the amount alleged by the Appellant of Ksh.895,000/-, whereof he gave no evidence of the negotiations and agreement of the review of the amount in the two quotations.

60. The Appellant alleged that there were negotiations that resulted in the consideration amount being lowered from Ksh.1,541,700/- to Ksh.895,000/-. That in my view remained to be an unproved allegation and the learned Adjudicator in my view reached the correct finding that there was no evidence adduced to prop up that allegation.

61. The third issue is whether the learned Adjudicator reached the correct finding that the Respondent did not breach the contract. The Appellant admitted in his evidence that it was a condition of the agreement or contract that he fully pays for the first phase before the works would be undertaken. Having reached the determination on the second issue that the consideration was Ksh.1,541,700/- as opposed to Ksh.895,000/-, it follows that it is the Appellant who failed to perform his part of the contract. I agree with the learned Adjudicator, therefore, that the Respondent did not breach the agreement.

62. I think that I have said enough on the appeal. Being of the foregoing findings, I reach the result that the appeal herein is devoid of merit. I proceed to dismiss it.

63. On costs, Section 27 of the *Civil Procedure Act*, Cap 21 Laws of Kenya dictates that costs ought to follow the event. Consequently, the Appellant shall bear the Respondent's costs of the appeal, which I assess at Ksh.30,000/-.

64. This file is hereby closed.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 25TH DAY OF SEPTEMBER, 2025.

JOE M. OMIDO

JUDGE

For The Appellant: No Appearance.

For The Respondent: Ms. Munyiva For Mr. Mudany.

Court Assistant: Mr. Ngoge.