

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NO. E872 OF 2022**

**DOCKS SUPPLIES & COMPANY LIMITED .....**  
**...APPELLANT**

**VERSUS**

**JACOB MBITHI MUINDE.....RESPONDENT**

**(An appeal arising from the ruling and order of Hon. SA  
Opande, Principal Magistrate, PM, delivered on 12<sup>th</sup> October  
2022, in Nairobi MCCOM No. E625 of 2020)**

**JUDGMENT**

1. The suit, at the primary court, was initiated by the respondent, against the appellant, for compensation, with respect to services rendered and not paid for. The appellant had allegedly been engaged by the appellant to offer services of excavation and rolling of boulders along Five Star Road, South C, Nairobi, for a daily rate of Kshs. 27,000.00, with the appellant fuelling the machinery used in the exercise. Despite the respondent offering the said services the appellant did not pay for the same, hence the claim for Kshs. 646,500.00, grounded on false misrepresentation from the appellant.
2. In response to the claim, the appellant filed a defence, conceding entry into the agreement alleged, but denied that the respondent was to be paid at the rate alleged. It was averred that the respondent was to be paid after the Nairobi City County Government paid the appellant for the work

done on the road, but the Nairobi City County Government did not pay for the work done, and the appellant was still awaiting payment. The allegations of fraudulent misrepresentation are denied.

3. An oral hearing was conducted, the respondent presented 1 witness, while the appellant presented 3. Judgement was delivered on 12<sup>th</sup> October 2025, in favour of the respondent, for the amount claimed. The trial court found that the provision of the service pleaded was not denied, neither was the fact that the moneys were not paid. In the understanding of the trial court, the only issue was whether the failure to pay was malicious, to which the appellant was pleading innocence, on the argument that it was not paid by the Nairobi City County Government, hence it had no money to pay the respondent. It was concluded that there was no evidence of an agreement that the respondent was to be paid after the appellant had been paid by the Nairobi City County Government.
4. The appellant was aggrieved, hence the instant appeal. The grounds, in the memorandum of appeal, dated 25<sup>th</sup> October 2022, revolve around the respondent not having proved his case to the required standard; the trial court failing to appreciate the law, evaluate the pleadings and evidence, and coming to the wrong conclusions; the trial court failing to appreciate that the contract was verbal, and the key term was that the respondent was to be paid, after the respondent had been paid by the Nairobi City County Government; the trial court failed to find that the evidence adduced by the respondent varied with its pleadings; and the trial court

failed to attach any weight to the evidence of the appellant and its witnesses.

5. Directions, on the disposal of the appeal, were given, on 7<sup>th</sup> May 2025, for canvassing by way of written submissions.
6. I have seen, read and considered written submissions by the appellant, but none were filed by the respondent. It is submitted that the documents attached as evidence by the respondent indicated that payment was to be effected after the Nairobi City County Government paid the appellant, and that the respondent did not adduce evidence to demonstrate that he disagreed with that. It is further submitted that the appellant had paid Kshs. 163,000.00 to the respondent, despite the appellant not being paid by the Nairobi City County Government. There is also submission that no evidence was adduced of fraudulent misrepresentation. *Dickson Mwangu Ndeva vs. Christopher Kisalu Ndeva* Kitui HCCA No. 241 of 2015 (Limo, J) and *Vineyard Holdings Limited vs. Sanja Construction Limited & another* Narok HCCA No. 25 of 2018 (Gikonyo, J) are cited.
7. There was no dispute that the parties had between them the contract alleged in the pleadings, and that the services contracted for were in fact rendered. The only dispute was about payment for the said services. The respondent contended that he was never paid for the services rendered, something conceded by the appellant, save that it claimed to have had part paid. The only other dispute was on the amount agreed as the daily fee for the service. According to the respondent it was Kshs. 27,000.00, while the appellant pleaded that it was Kshs. 25,000.00. A related area of

dispute is that the money was payable only after the appellant, as the main contractor, had been paid by the Nairobi City County Government.

8. The trial court had the benefit of seeing and hearing the witnesses presented by both sides. In the end, it believed the respondent, with respect to the agreed daily fee of Kshs. 27,000.00 and the fact of the non-payment of what was outstanding for the entire services rendered. I would have no reason to come to a different conclusion, given that the contract, as pleaded by both sides, was oral or verbal.
9. On when the payment was to be made, I again reiterate that the contract was verbal. There was no consensus that that was to be the case. It was the appellant who raised that in its defence statement. There was a duty on its part to adduce evidence to support that contention, for he who alleges proves. None of the witnesses presented by the appellant testified on that allegation. Only the witness for the respondent mentioned it in cross-examination, stating that the appellant did not allude to payment being only effected after the appellant had been paid by the Nairobi City County Government. The appellant did not, therefore, adduce evidence to establish that allegation.
10. I note that the appellant, in its written submissions, points to material that had been filed by the respondent at the trial court, which, according to it, alluded to such an understanding. I have looked at that material. It was produced as exhibits. I see nothing in that material, taking the form of WhatsApp messages, which point to any form of agreement between the 2 parties, that payment would be

effected only upon the appellant being paid by the Nairobi City County Government.

11. On how the trial court handled the matter, in terms of considering the evidence adduced by the parties, I have read and re-read the same, and I am satisfied that the trial court considered everything that placed before it, to come to the conclusions that it came to.
12. I do not find any basis, therefore, upon which I can conclude that the appeal herein has merit. I hereby dismiss it. The respondent shall have the costs thereof. Orders accordingly.

**DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS,  
AT BUSIA, THIS 3<sup>RD</sup> DAY OF OCTOBER 2025.**

**W MUSYOKA  
JUDGE**

**Mr. Arthur Etyang, Court Assistant, Busia.**

**Ms. Carolyn Oyuse, Court Assistant, Milimani, Nairobi.**

**Advocates**

**Mr. Okondo, instructed by JA Guserwa & Company, the Advocates for the appellant.**

**Mr. Ojwang, instructed by Ochich TLO & Associates, the Advocates for the respondent.**