

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
HIGH COURT CIVIL DIVISION
CIVIL APPEAL NO. E216 OF 2023

EDWARD NJENGA KINYAGIA.....
APPELLANT

VERSUS

**UPLANDS PREMIUM DAIRIES & FOODS
LIMITED.....**
RESPONDENT

*(Being an appeal from the Judgement of honourable V.A. Ogotu
(SRM and Adjudicator) dated 13th June 2023 in the Small Claims
Court at Thika SCC No. E430 of 2021)*

JUDGEMENT

1. The instant appeal emanates from a claim for breach of contract. By a Statement of Claim dated 11th April 2023, the Appellant moved the Honourable court seeking to enforce an agreement with the Respondent. The Appellant claimed unpaid money for transport services that he offered to the Respondent on diverse dates between 9th February 2021 and 23rd October 2021 all totalling to Ksh. 493,738.54.
2. It was claimed that the Respondent contracted the Appellant to offer transport services for assorted milk products from its headquarters in Kagwe Githunguri County as from 9th February 2021 and 23rd October 2021.
3. The Appellant offered the transport services through his three motor vehicles being KBU 243Z and KDB 034C. Nevertheless, the Respondent paid the Appellant Ksh. 200,000.00 only. A balance of Ksh.493,738.54 remains unpaid despite the same being demanded.

4. The Respondent denied the existence of any contract of Transport services between itself and the Appellant. Further, the Respondent averred that the ledger produced by the Appellant was merely a schedule for fuel for vehicle registration number KDB 034C and KBU 243Z, which do not prove a Contract for transport services between the Appellant and the Respondent.
5. While determining the matter, the trial court found that the ledger produced by the Appellant did not have sufficient information to confirm the existence of the agreement and terms of the said agreement. The court also observed that, the Appellant failed to produce the copy of the invoices sent to the Respondent nor ownership documents of the said vehicle to establish that indeed the vehicles were his on the basis of the contract. Accordingly, the Appellant's claim was dismissed with costs.
6. Aggrieved and dissatisfied with the decision of the learned magistrate, the Appellant lodged the instant appeal vide a Memorandum of appeal dated 26th June is instituted on grounds that:
 - a. The learned magistrate erred in law and fact in failing to properly consider and evaluate the entire evidence placed on record by the Parties;**
 - b. The learned trial magistrate trial magistrate erred in law and fact in failing to correctly apply the law on the required standard of proof in civil cases thereby arriving at a wrong decision;**
 - c. The learned trial magistrate misapprehended the evidence and took into account extraneous issues and so arrived at a decision that was erroneous and not sustainable in law;**
 - d. The learned trial magistrate erred in law and in fact in failing to find that there was an implied contract between the Appellant and the**

Respondent from their previous dealing including partial payments made;

e. The trial magistrate erred in law and in fact by failing to appreciate that the ledger relied on by the Appellant was issued by the Respondent who did not challenge its authenticity;

f. The trial magistrate erred in law and in fact by failing to appreciate that the Small Claims Court is not bound by the strict rules of procedure and evidence.

7. Therefore, the Appellant prayed that the judgement and decree of Honourable V.A Ogutu delivered on 13th May 2023 be set aside and the Respondent be condemned to pay the Appellant Kshs. 493,738.54

8. By consent of the parties, the matter was disposed through written submissions.

9. It was submitted the Appellants that its case before the trial court was uncontroverted as the Respondent did not adduce any evidence in support of its response. Therefore, the trial court erred in finding in favour of the Respondent yet the Appellant's evidence was unchallenged. See **Trust Bank Limited v Paramount Universal Bank Limited & 2 others.**

10. While admitting that there was no written contract between the parties, the appellant submitted that the ingredients of offer, acceptance and consideration were met in that he used to transport milk on behalf of the Respondent and was paid Kshs. 200,000.00 for the services on 20th September 2021. Therefore, the learned magistrate erred in failing to find that there was an implied contract between the parties. See **Ali Abdi Mohamed vs Kenya Shell & Company Limited (2017) eKLR.**

11. Relying on Section 32 of the Small Claims Court Act, the Appellant submitted that the Small Claims Court is not bound by strict rules of procedure and evidence. It was also submitted that the court having found that the ledger bore the Appellant's name, ought to have established that there was part payment which would have revealed that the Respondent had engaged the Appellant. See the case of ***Telkom Kenya Limited v Kenya Railways Corporation [2018] eKLR.***
12. Therefore, the Appellant submitted that the judgment of the trial court be set aside.
13. The Respondent submitted that the appeal was incompetent, pursuant to Order 42 rule 2 of the Civil Procedure Rules, as the decree appealed against was not annexed to the Record of Appeal. The requirement to attach a decree to the Record of Appeal is couched in mandatory terms and therefore a failure to adhere to such a requirement is fatal to the appeal. See ***Akile & Another vs Mugo (Civil Appeal E013 of 2023)***
14. It was further submitted by the Respondent that the Appellant had not satisfied the standard of proof required for civil cases. Therefore, there was no situation that required the shifting of the burden of proof from the Appellant to the Respondent.
15. Regarding the question of costs, the Respondent submitted that it ought to be awarded costs as the instant appeal is defective.
16. The Respondent therefore prayed that the appeal be dismissed with costs.

17. A first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions, bearing in mind that it did not see or hear the witnesses testify. (See the ***Court of Appeal in Gitobu Imanyara & 2 others v Attorney General [2016] eKLR.***
18. The main issue for determination is whether the Appellant proved her case on a balance of probabilities. The appellant sued the respondent for Kshs. 493,738.54 being the balance of the amount due having rendered transport services for assorted milk products on behalf of the Respondent.
19. The Appellant argues that he tendered enough evidence to establish his case on a balance of probabilities. Although the Appellant did not provide any written contract between the parties. He invited the court to imply the existence of a contract on the basis that the ledger attached to the claim bore the appellant's name.
20. On implied contracts, the Court of Appeal in ***Ali Abdi Mohamed vs. Kenya Shell & Company Limited (2017) eKLR*** referred to the following persuasive decisions:
- “.... In Lamb v Evans [1893]1 Ch 218, Bowen LJ stated:“...The common law, it is true, treats the matter from the point of view of an implied contract, and assumes that there is a promise to do that which is part of the bargain, or which can be fairly implied as part of the good faith which is necessary to make the bargain effectual. What is an implied contract or an implied promise in law? It is that promise which the law implies and authorizes you to infer in order to give the transaction that effect which**

the parties must have intended it to have, and without which it would be futile.

Bingham LJ in The Aramis [1989] 1 Lloyd's Rep 213 made some general observations about the circumstances in which a contract might be implied. At p 224 col 1, he said:

“As the question whether or not any such contract is to be implied is one of fact, its answer must depend upon the circumstances of each particular case - and the different sets of facts which arise for consideration in these cases are legion. However, I also agree that no such contract should be implied on the facts of any given cases unless it is necessary to do so; necessary that is to say, in order to give business reality to a transaction and to create enforceable obligations between parties who are dealing with the one another in circumstances in which one would expect that business reality and those enforceable obligations to exist.

Further,

...I do not think it is enough for the party seeking the implication of a contract to obtain “It might” as the answer to these questions for it would, in my view, be contrary to principle to countenance the implication of a contract from conduct if the conduct relied on is no more than consistent with an intention to contract than with an intention not to contract. It must surely be necessary to identify conduct referable to the contract contended for or at the very least, conduct inconsistent with there being no contract made between the parties to the effect contended for. Put another way, I think it must be fatal to the implication of a contract if the parties would or might have

acted exactly as they did in the absence of a contract..."

21. From the proceedings, it came out clearly that the Respondent stated that the ledger produced by the Appellant was merely a schedule for fuel for vehicle registration number KDB 034C and KBU 243Z, which do not prove a Contract for transport services between the Appellant. At all material times, the appellant bore the burden of proving the existence of a contract for transport services with the Respondent. From the proceedings, it is evident that he was unable to discharge that burden to the required standard.
22. Given the circumstances of this case, a contract cannot be implied between the appellant and the respondent. The appellant was under duty to prove the existence of a clear contract between the appellant and the respondent. The terms thereof should concern the provision of transport services for assorted milk products.
23. Even though one need not own a vehicle to fulfill a contract for provision of transport services, in the instant case, for a contract for provision of transport services to be implied, the appellant needed to do more than simply avail a ledger. He should have availed invoices, hire documents or ownership documents for motor vehicle registration numbers KDB 034C and KBU 243Z
24. From my re-evaluation of the evidence, the appellant did not prove his case on a balance of probabilities. On this finding, the trial court did not err. I therefore find no reason to fault the finding of the trial court.
25. ***Resultantly, I find that this appeal lacks merit and is hereby dismissed with costs to the respondent.***

26. Thirty (30) days stay of execution to apply.

DATED, SIGNED AND DELIVERED ELECTRONICALLY THIS 2ND OCTOBER, 2025.

**HON. T. W. Ouya
JUDGE**

ORIGINAL