

REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT THIKA  
CIVIL APPEAL NO. E125 OF 2024

PATRICK SHIKOLI.....APPELLANT

-VERSUS-

KELLEN WARIGIA.....RESPONDENT

*(Being an appeal from judgment and decree of the Small Claims Court at Thika (Hon. Sylvia A. Wayodi Adjudicator/RM) claim number E1205 of 2023 dated 9<sup>th</sup> May 2024)*

**JUDGMENT**

In the lower court, the respondent had claimed Kshs 145,000.00 being a refund for work not done after she had paid the appellant Kshs 232,000.00 for digging her a well in her plot in February 2023. She claimed that she had overpaid the appellant because he had overstated the depth of the well leading her to paying for 69 feet but it turned out that he had dug a depth of 41 feet. She claimed that the value of the depth done was Kshs 87,000.00 giving an overpayment of what was prayed in the statement of claim. She also claimed interest of Kshs 20,000.00

In response to the claim, the appellant admitted the contract and stated that the agreement was for rate of Kshs 3,362.00 per foot deep and that he dug 69 feet and after the respondent complained, he increased it to 85 feet. This was followed by disagreement upon which the appellant confiscated his tools of trade which he valued at Kshs 45,950.00. He also claimed that the respondent involved police who arrested him and caused him mental anguish, pain and suffering. He therefore

counter-claimed Kshs 99,742.00 being the cost of the extra 16 feet and the value of the confiscated tools.

In its judgement dated 9<sup>th</sup> May 2024, the trial court found in favour of the respondent after finding that the report produced through its directions had found that the well was 41 feet deep. On counterclaim, the court found no proof of the same and dismissed it.

The appellant appealed the above judgement and raised the following grounds;

1. ***THAT*** the learned trial Adjudicator erred in law by failing to find that there was a mistake apparent in the contract between the respondent and the appellant.
2. ***THAT*** the learned trial Adjudicator erred in law and fact by disregarding the evidence adduced both in document production and in cross examination in proof of the counterclaim raised by the appellant.
3. ***THAT*** the learned trial Magistrate erred in law and fact by misconstruing the terms of the conditional contract dated 13<sup>th</sup> June 2023.
4. ***THAT*** the learned trial Magistrate erred in law and fact by failing to take into consideration the report filed after site visit by representatives of both parties and a neutral person dated 13<sup>th</sup> February, 2024.

The appeal was disposed of by way of written submissions with the appellant filing his submissions dated 14-05-2025 while the respondent filed submission dated 15-05-2025. After going through the parties' respective submissions alongside the

record of appeal, I have formed opinion that, appeal raises the following three issues for determination;

- a. Whether there was a mistake in the contract between the parties.
- b. Whether the court disregarded the evidence of the parties including the reports filed in court?
- c. What are the appropriate orders in the matter?

I am alive to the provisions of Section 38(1) of the Small Claims Court Act which limits jurisdiction of this court over the appeals from the small claims court to matters of law only. I am also satisfied that the matters raised by the appellant in his memorandum of appeal and some parts of submissions are matters of law.

The appellant submits that the contract dated 13<sup>th</sup> June 2023 was fully performed and revisits the evidence of the respondent pointing out some inconsistencies. For instance, he submits that the respondent had denied that the well had no water but it was found to have water after a report was filed in court. He also pointed out that the respondent admitted the days and hours worked despite having made a different averment in her earlier testimony. The appellant added that the respondent was in a mission to unjustly enrich herself as there was no agreed actual per foot rate agreed between the parties. I find the line of submissions asking the court to revisit the oral testimony of the parties to be touching on matters of facts and by virtue of the aforesaid Section 38(1), I will not delve into that.

On his part, the respondent submits that the memorandum of appeal is defective as it does not propose what should happen after the appeal is allowed. She claims that the appellant has not challenged the award of Kshs 145,000.00 and the costs of Kshs 10,000.00 and the appeal should therefore be dismissed.

I find the submissions by the respondent misleading. The memorandum of appeal is clear that the appellant is asking for the appeal to be allowed. Prayer 1 of the memorandum of appeal specifically asks that this appeal be allowed and the judgement of the trial court be set aside. It is obvious that where an appellate court allows an appeal and sets aside the trial court's decision, it should settle the matter by issuing appropriate orders as it may think fit. In any event, the appellate court has the obligation to analyse the evidence afresh and come to its own independent conclusion.

I have looked at the contract dated 13-06-2023 between the parties which appears at page 12 of the record of appeal. None of the parties has disowned that contract except the claim by the appellant that he signed it in order to be released. He however did not tell the court that the same should be declared null. Actually, in ground 1 of his memorandum of appeal, he stated that the court erred in failing to appreciate that there was a mistake in the contract but he has not emphasized what was the mistake.

The appellant claimed in his submissions that the contract was fulfilled. In ground three of his memorandum of appeal, the appellant blames the trial court for misconstruing the terms of the contract. The appellant cannot in one hand say he did not sign the contract on free will and at the same time seek to rely on the same in advancing his side of the case. The totality of this considered alongside his response to the claim means that the respondent acknowledges that there was a valid contract between him and the respondent. I do not see any mistake in the contract and I therefore hold that the first issue is answered in the negative.

Turning to the 2<sup>nd</sup> issue, it must be born in mind that the parole evidence rule does not allow parties to give or rely on oral evidence which seems to be inconsistent, outside or in contradiction to written evidence. Such evidence is inadmissible where it appears to contradict the language of a written instrument which has a plain meaning. The principle was restated by Honourable Lady Justice N.A. Matheka in ***Too v Orchardson (2022) KEELC 12578 (KLR)*** when she held that;

*‘The parole evidence rule is a common law rule that aims to uphold this premise and preserve the integrity of written contracts by excluding extrinsic evidence. Where parties have agreed contractual terms in a written document, it is rational that matters which have not been explicitly included should not be interpreted as varying the terms of that contract.’*

I have looked at the contract and to me it settled two issues which the parties were haggling over. First, it provides that the respondent had paid Kshs 232,000.00 for digging of 69 feet. This to me translates to Kshs 3,362.20 per foot. That’s settles what was the applicable rate. In its wisdom and with concurrence of the parties, the trial court ordered for reports of two experts, each party nominating one expert, to ascertain the depth of the well. Only the respondent’s report was filed showing that the well was 41 feet deep. The appellant’s counsel stated that he would be relying on the report filed by the respondent. That settled the issue of the depth of the well.

Based on the above, a simple calculation will settle this matter. The rate was Kshs 3,362.30 per feet and the depth was 41 feet meaning that the appellant was entitled to Kshs 137,854.30. There is consensus that the appellant had been paid Kshs 232,000.00 meaning that he was overpaid by Kshs 94,145.70. In its judgement, the trial court did not explain or indicate how it arrived at Kshs 145,000.00 and in the

circumstances, there is no doubt that the same should be reduced to Kshs 94,145.70.

In my view, the above figures explain why the appellant came up with counterclaim for Kshs 99,745.00. Perhaps he hoped that his counter-claim will offset what he had been overpaid. However, he did not provide evidence of the costs of the tools he claimed to have been confiscated by the respondent. There was no proof of the conditions the tools were in when they were allegedly confiscated. The appellant submits that this court should take judicial notice that these type of tools do to ordinarily attract receipts and it should take the word of the appellant on their value. Other than their value, the appellant had no proof that the alleged tools had been confiscated by the respondent. This is a court of law and cannot make decisions based on speculations. The counter-claim was rightly dismissed.

The last issue is what are the appropriate orders in this matter. In the circumstances of the above discussion, this court finds that this appeal is partly successful and gives the following orders;

- a. Judgement in the Small Claims Court at Thika claim number E1205 of 2023 is set aside and substituted for an order of this court entering judgement for the respondent (claimant in the lower court) against the appellant (the respondent in the lower court) for a sum of Kshs 94,145.70 with interest from the date of filing the claim until payment in full.
- b. The order for costs of Kshs 10,000.00 for the proceedings in the lower court is retained and upheld.

c. The decision of the lower court dismissing the counter-claim is upheld.

d. There shall be no orders as to costs of this appeal.

Dated, signed and delivered at Nairobi this **28<sup>th</sup>** day of **November** 2025.

**B.M. MUSYOKI**  
**JUDGE OF THE HIGH COURT.**

Judgment delivered in presence of Mr. Wandera for the appellant and absence of the respondent.