



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL DIVISION

CIVIL APPEAL NO. E045 OF 2024

DENKO PROPERTIES LIMITED.....1ST

APPELLANT

GREEN GRO INTERNATIONAL LTD.....2ND

APPELLANT

VERSUS

PARDEN

LIMITED.....RESPONDENT

(Being an Appeal against the Judgement of the Honourable B Luova(Small Claims Court Machakos Law Courts in SCCOMM no. 0314 of 2022 delivered on 26/01/2024)

JUDGMENT

1. In the court below, the Respondent who was the claimant successfully sued the Appellant for failure to remit the returns for a greenhouse amounting to Kshs 452,300 for each season.
2. Briefly, the claim arose from a contract entered between the respondent and the 1st appellant on 16th July 2018 where it was

agreed that the 1st Appellant would construct a greenhouse on LR No. 116 at a cost of Kshs. 625,000 which sum was duly paid by the Respondent. The greenhouse was to be managed by the 2nd appellant for the purposes of agricultural farming for a renewable period of one year which was two seasons of 6 months each. The returns were agreed at Kshs 452,300 for each greenhouse payable 45 days from the end of each season. The 1st and 2nd appellants failed to remit the returns for the greenhouse for the two seasons amounting to Kshs 452,300 for each season.

3.The Appellant vehemently resisted the claim and blamed the Respondent for the frustration of the contract. It contended that it as a matter of fact constructed the greenhouses but the same was infected by fusarium wilt which affected the plants. He blamed this on an act of God and also on the closure of markets due to Covid 19 which again he attributed to an act of God. The Appellant contended that it would have kept its end of the bargain had it not been evicted by the Respondent.

4.After considering the evidence and submissions by both sides the Adjudicator found in favour of the Respondent and allowed the claim costs to the Respondent.

5.Aggrieved by the Judgment, the Appellant lodged this appeal on grounds that: -

- “a. The Adjudicator erred in law by failing to apply the provisions of the Law of Contract Act.***
- b. The Adjudicator erred in law in failing to find the respondents herein frustrated the execution of the contractual terms subject of suit.***
- c. The Adjudicator erred in law by failing to consider the legal effect of various vitiating factors affecting the contractual terms subject of this matter.***
- d. The Adjudicator erred in law in finding that the appellants had breached the contractual provisions in the agreement between the parties herein in absence of the requisite legal conditions for the same.***
- e. That the Adjudicator erred in law in misinterpreting the contractual provisions in the agreement between parties herein.***
- f. That the Adjudicator erred in law in delivering her judgement without jurisdiction to do so, more than three (3) days after the hearing of this case on 16th November 2023***
- g. That the Adjudicator erred in law by entertaining and hearing the case without jurisdiction to do so.”***

6. The appeal was canvassed by way of written submissions.

Submissions

7. Learned counsel for the appellants urged this court to find that the adjudicator did not consider that the appellant was

evicted without notice; that the Respondent frustrated the contract by evicting the Appellants without giving them notice as was required by Clause 5.1b of the Contract dated 15th July 2018. Relying on the case of **GUERRA V URYSIA LIMITED (CAUSE 649 OF 2017) [2024] KEELRC 488 (KLR)** Counsel submitted that the act of eviction was in total disregard of the fact that that the effects of the Covid-19 Pandemic were not attributable to the actions and/or omissions of the Appellants. Further the fungal disease "Fusarium Wilt" was also an Act of God and these factors greatly affected performance of the contract on the part of the Appellants. Counsel contended that these unforeseen events which the Appellants had no control over; that despite the force majeure events, the Appellants made efforts to recover from the adverse effects that arose from loss of business but the Respondent went ahead to evict the Appellants from its greenhouse. Counsel argued that that Adjudicator erred by misconceiving the contractual provisions in the contract, when she held in Paragraph 16 of the Judgment, that the contract was for planting tomatoes and consent was not granted for planting any other crops.

8. Drawing from the case of **KARTAR SINGH DHUPAR & COMPANY LIMITED V ARM CEMENT PLC (IN LIQUIDATION) (CIVIL APPEAL 129 OF 2022) [2023] KEHC 2417 (KLR)** Counsel submitted that claim was filed on

26th October 2022 yet judgment was delivered on 26th January 2024, more than a year after lapse of the statutory sixty days period and hence the judgment was delivered without jurisdiction.

9. Finally, counsel submitted that based on the Appellants' evidence and submissions, the Appellants proved their case on a balance of probability but the Adjudicator did not consider the entirety of the evidence adduced thereby leaving out crucial evidence and that therefore, the Appellants are entitled to the reliefs sought in the Appeal.

10. For the Respondent, Counsel relied on the **Biosystems Consultants versus Nyali Links Arcade (Civil Appeal E185 of 2003) 2023] KEHC 21068 (KLR)** and the case of **Crown Beverages Limited vs MFI Document Solutions Limited (Civil Appeal E833 of 2021) [2023] KEHC 58 (KLR)** and submitted that that the trial court had jurisdiction to deliver the judgment notwithstanding that it was delivered out of the sixty days provided in the Act.

11. It was submitted that the Respondent sufficiently satisfied the trial court that the Appellants breached the contract by going against the terms that they were bound to. Further, that the instant appeal is unmerited and is only calculated at getting an unfair advantage over the Respondent despite the Appellant having materially breached the contract. The court

was urged to dismiss the appeal with costs to the Respondents.

Determination

12. As the first appellate court, I have considered and re-evaluated the evidence that was adduced in the court below while keeping in mind that I did not see or hear the witnesses. I have also considered the rival submissions of the learned counsel for the parties, the cases cited and the law.
13. As there is no dispute that there was a contract between the parties and the terms thereof are also not in contention, the issue is which of the parties was in breach and whether the Respondent's claim against the Appellants was proved to the standard required.
14. The appellant's case was that they entered into a contract with the respondent to construct and manage the green houses. He also testified that they faced challenges with crop failure due to soil infection that caused fusarium which infected the tomatoes planted into the farm and that the claimant evicted them from the property during an ongoing season when basil crops had been planted.
15. The respondent's case on the other hand was that it was agreed that the 2nd appellant would manage the greenhouse for purposes of agricultural farming for a renewable period of one year containing two seasons of 6 years each plus

additional 75 days. The returns were payable 45 from the end of each season.

16. It was the respondent's case that the contract was for planting of tomatoes and that at no point in time did they give consent to the farming of the basil in the greenhouse.

17. Clause 6 on the recitals part of the contract provided that the appellants were to plant tomatoes and if they considered planting any other crop they were to seek the respondent's consent. The appellants did not adduce any evidence to prove that they were given consent to plant any other crop other than the tomatoes as provided in the contract.

18. In the case of **Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited [2017] KECA 152 (KLR)** Court held;

“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 terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.”

19. Having subjected the evidence to my own independent evaluation, I find that the appellants were responsible for the breach of the contract. The non-performance of their part is what led to the Respondent evicting them. There was nothing as at the time, that could have been attributed to an Act of God. I am therefore not persuaded that there is any merit in this limb of the appeal.

20. In regard to the submissions that the judgment was delivered out of time, it is indeed evident from the record that it was. It is however, not lost to this court that there was a judgment which had been delivered within time only for it to be set aside at the behest of the appellant. It took long for the appellant to file its response and for parties to settle down so that the hearing could begin. The appellant cannot therefore benefit from his inaction by having this appeal dismissed on this ground. It would be unjust and unfair to compute the time from when the claim was filed rather than from the time the response was eventually filed. Moreover, there is also a school of thought and I ascribe to it, that such a judgment is not a nullity. That the provisions of Section 34(2) of the Small Claims Court Act were intended to be directory as opposed to mandatory. The logic is that it would beat the purpose of the Act were each and every judgment delivered outside of the sixty days declared a nullity. See the case of **Crown Beverages Limited v MFI Document Solutions Limited (Civil Appeal No.E0833 of 2021) [2023] LEHC 58 (KLR) (Civ)(17 January 2023) (Judgment)** where Majanja held:

“8. It is not in dispute that the suit before the subordinate court was heard on September 29, 2021 and October 28, 2021 and upon conclusion of the trial, the judgment was delivered on December 3, 2021. Based on the timelines, the appellant argued that the trial

court violated the mandatory provisions of the SCCA and as a result of the delay, the jurisdiction of the trial court lapsed hence the judgment ought to be set aside. The respondent takes the view that the judgment is valid as the court conducted a full trial and in any case, the appellant was to blame for delay. It adds that the court has the power to enlarge time especially if the reason for extension is beyond the control of the court.

- 9. Although section 34(2) of the SCCA is couched in mandatory terms, the court must look at the context of the provision in light of the guiding principles which include, inter alia, the timely disposal of all proceedings before the court using the least expensive method. The provision as to delivery of judgment is meant to be directory and not mandatory as it is not the intention of the SCCA to invalidate any proceedings that violate the statutory timelines. To adopt such a position would undermine the statutory objects and cause injustice to the parties as the case would have to be reheard.***
- 10. The issue of breach of timelines for delivery of judgment is not a novel issue and has been dealt with by our courts in reference to order 21 rule 1 of the Civil Procedure Rules which provides that judgments must be delivered within 60 days upon conclusion of the hearing. In Nyagwoka Ogora alias Kennedy Kemoni Bwogora v Francis Osoro Maiko Civil Appeal No 271 of 2000 (UR) the Court of Appeal observed as follows: The real question is what is the***

consequence of non-compliance therewith? no doubt that rule is an important one in the expeditious dispensation of justice. And it is made to be obeyed. However, if non-compliance with the rule were to have the effect contended for by the appellant, we think the overall result would be more injustice than justice to the parties. A lot of time and resources spent in litigation would come to naught if judgments delivered after the expiry of 42 days were to be voided or declared void ipso facto. The rule cannot and in our view could not have been intended to deprive a trial judge of his jurisdiction to write and pronounce judgment in a case he has heard. In our considered view, while non-compliance with the rule and particularly persistent non-compliance or inordinate delay in compliance should call for censure of the judicial officer concerned from those in-charge of judicial administration, it should not be a ground for vitiating a duly delivered judgment. Being of that persuasion we would reject ground 1 of appeal.

- 11. There may be instances where the delay is inordinate and such delay prejudicial to the parties. In such cases, the court may set aside the judgment as was held by the Court of Appeal in Manchester Outfitters Services Limited and Another v Standard Chartered Financial Services Limited and Another [2002] eKLR. The appellant does not contend that the failure to deliver the judgment within the stipulated timelines was prejudicial or that the**

delay was inordinate. I therefore reject the appellant's contention that the judgment is null and void."

21. Similarly, in this case the appellant does not allege that it was prejudiced by the late delivery of the judgment and neither does it allege it was inordinate; just that it should be nullified for being filed outside of time. That, in my view does not suffice. Consequently, having found that the case against the appellant was proved beyond reasonable doubt and that the judgment though delivered out of time is regular it follows that the appeal is dismissed in its entirety. The judgment of the Adjudicator is upheld. The costs of the appeal shall be borne by the Appellant.

Orders accordingly.

Judgment signed, dated and delivered virtually this 4th day of December, 2025.

**E. N. MAINA
JUDGE**

IN THE PRESENCE:

Ms Mulama for Appellant

Mr. Ochieng for the Respondent

Geoffrey – Court Assistant/Interpreter