



**Ochieng v Jujahon Limited & 3 others (Commercial Appeal E089 of 2022)
[2026] KEHC 819 (KLR) (Commercial and Tax) (29 January 2026) (Judgment)**

Neutral citation: [2026] KEHC 819 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E089 OF 2022
PM MULWA, J
JANUARY 29, 2026**

BETWEEN

STEPHEN OCHIENG APPELLANT

AND

JUJAHON LIMITED 1ST RESPONDENT

EMMANUEL OTIENO ANYIRI 2ND RESPONDENT

MILLICENT AKOTH AHERO 3RD RESPONDENT

JAMES HAYA ANYIRI 4TH RESPONDENT

JUDGMENT

1. This appeal arises from the judgment of the Chief Magistrate's Court at Milimani (Hon. E. M. Kagoni, PM) delivered on 1st July 2022 in CM COMM No. E322 of 2020, by which the Appellant's claim for a refund of Kshs. 3,161,000/- arising from an alleged breach of a construction contract was dismissed.
2. Aggrieved by that determination, the Appellant preferred this appeal vide a Memorandum of Appeal dated 13th July 2022, contending, in summary, that the learned Magistrate erred in law and fact by failing to properly evaluate the pleadings and evidence; by requiring proof of matters expressly admitted by the Respondents; by misapplying the law on burden of proof; and by erroneously awarding costs against the Appellant.

Background

3. The material facts were largely uncontested. The Appellant pleaded that on 17th May 2020, he entered into a contract with the Respondents for the construction of two bungalows at an agreed consideration of Kshs. 4,500,000, together with Kshs. 100,000/- for plans. He paid an initial sum of



Kshs. 3,100,000/-, after which the Respondents commenced works that were to be completed within nine weeks, but subsequently abandoned the site. The Appellant consequently sought a refund and ancillary expenses amounting to Kshs. 3,161,000/-.

4. In their joint Statement of Defence dated 22nd December 2020, the Respondents admitted the existence of the contract, acknowledged commencement of works, and pleaded that the project stalled, asserting that the value of work done exceeded the sums paid.
5. At the hearing, the Appellant testified and adopted his documentary evidence. The Respondents called no witness. Their advocate later withdrew from the matter, and the defence case was closed without evidence.
6. The trial court nonetheless dismissed the suit, holding that the Appellant had failed to prove payment, the existence of a contract, and breach.

Issues for determination

7. As a first appellate court, the duty of this Court is to reconsider the evidence and draw its own conclusions, mindful that it did not see or hear the witnesses, in accordance with *Selle v Associated Motor Boat Co. Ltd* [1968] EA 123. The appeal turns on three issues:
 - i. Whether the trial court erred in requiring proof of admitted facts;
 - ii. Whether breach of contract and entitlement to a refund were established; and
 - iii. Who bears the costs?

Analysis

(a) Proof of admitted facts

8. Section 61 of the *Evidence Act* provides that facts admitted by the parties need not be proved. The Respondents' Defence contained clear admissions on the existence of the contract, receipt of payment, and commencement of works. Those admissions were never retracted or displaced by evidence.
9. The principle is settled. In *Synergy Industrial Credit Limited v Oxyplus International Limited & 2 Others* [2021] eKLR, the Court affirmed that a clear admission is conclusive and dispenses with proof. Likewise, in *CMC Aviation Ltd v Crusair Ltd (No. 1)* [1987] KLR 103, it was held that an admission in pleadings constitutes evidence.
10. The learned Magistrate therefore erred in law by placing upon the Appellant the burden of proving facts that stood admitted on the pleadings.

(b) Breach of contract and entitlement to refund

11. It was common ground that the Respondents commenced the works and subsequently abandoned the project. No evidence was tendered to justify the abandonment or to demonstrate completion commensurate with the sums received.
12. The Respondents' assertion that the value of work done exceeded the payments remained a bare pleading. In the absence of a valuation or testimonial evidence, it carried no probative weight. As stated in *Rono v Lomsons Enterprises* [2024] KEHC 6249 (KLR), a defence unsupported by evidence remains a mere allegation.



13. The law is equally settled that a party who fails to perform its contractual obligations cannot retain monies paid under a contract that has failed. This was reaffirmed in Kenya Tourism Development Corporation v Sundowner Lodge Ltd [2018] eKLR.
14. On the totality of the evidence, and applying the balance of probabilities, the Appellant established that a contract existed, that payment of Kshs. 3,100,000/- was made, that the Respondents abandoned performance, and that the Appellant suffered the pleaded loss of Kshs. 3,161,000/-.
15. The dismissal of the suit in the face of admitted facts and uncontroverted evidence was therefore plainly erroneous.

(c) Costs
16. Costs follow the event unless a good reason is shown otherwise. None was demonstrated to justify the order made by the trial court against the Appellant.

Disposition

17. The appeal is accordingly allowed. The judgment and decree of the Chief Magistrate's Court delivered on 1st July 2022 in CM COMM No. E322 of 2020 are hereby set aside.
18. Judgment is entered for the Appellant against the Respondents jointly and severally in the sum of Kshs. 3,161,000/-, together with interest at court rates from 1st June 2020 until payment in full.
19. The Appellant shall have the costs of the suit in the lower court and of this appeal.
It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI

THIS 29TH DAY OF JANUARY 2026.

PETER M. MULWA

JUDGE

In the presence of:

Ms. Ondieki h/b for Ms. Abidha for Appellant

Ms. Rachier h/b for Mr. Wakwaya for Respondent

Court Assistant: Carlos

