B.O.M. Msare Mixed Secondary School v Mwangi t/a Pilgrim Business Services (Civil Appeal E071 of 2024) [2026] KEHC 1342 (KLR) (10 February 2026) (Judgment)

Neutral citation: [2026] KEHC 1342 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL E071 OF 2024

DKN MAGARE, J

FEBRUARY 10, 2026

BETWEEN

B.O.M. MSARE MIXED SECONDARY SCHOOL .... APPELLANT

AND

EVELYN MWANGI T/A PILGRIM BUSINESS SERVICES .... RESPONDENT

JUDGMENT

1. This is an appeal from the judgment and decree of the court by Hon. Angela Munyuny in Migori SCCCOMM No. E102 of 2024. This judgment is a simple reminder that the government does not owe you unless it says it owes. It is a stack reminder that protections given to the government in the *Government Proceedings Act*, the *Public Finance Management Act*, among others, are not decorations.

2. This judgment will not follow normal structures as it is not a normal judgment. It does not matter the remit of powers or discretion given to the court under section 12 of the *Small Claims Court Act*, 2016. When dealing with this monolith called government in all its facets, certain realities must dawn on parties. The first reality is that the government does not speak, but it writes. Therefore, parol evidence of a contract's existence is useless and of no value.

3. Contracts with government are written and never implied or created by implication or estoppel. The courts have treated parol evidence regarding documents with circumspection as stated in the case of Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017) eKLR, where the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;-

   > "Courts adopt the objective theory of contract interpretation and profess to have an overriding view sometimes called the Four Corners of an Instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic evidence."

4. The court is bound by Section 32 of the *Evidence Act* on aspects of the case. However, where there is no evidence of a government contract, it does not matter how persuasive the court's reasoning is. Failure to produce a government contract is not a matter of fact but a matter of law.

5. In this case, the respondent proceeded in the most peculiar way. The first one is that she served a government institution via WhatsApp on a person purported to be a principal of the school and obtained exparte judgment. An application was filed by the State Law Office to stay execution and set aside the exparte judgment. The application for entry of judgment was made orally on 8.07.2024 without service on the appellant. Service was said to be under Order 5 Rule 22 of the Civil Procedure Rules, which is irrelevant for purposes of the small claims court.

6. Subsequently, the court granted the Attorney General leave to come on record. On 30.07.2024, a ruling on the application was delivered, allowing the re-trial of the matter. It is not clear on record.

7. The respondent testified that she stayed in Nairobi and was a businesswoman. She prayed for the sum in the claim. She stated that she did not have a contract but had an invoice and delivery. They sell from school to school and have no agreement. They invoiced for a sum of Ksh. 226,350/=.

8. The principal testified and stated that the respondent was not one of the contractors for the school and did not have a contract letter, local purchase order, delivery/invoices, and copies of cheques made. She could not ascertain the debt.

9. The court entered judgment for a sum of Ksh 129,350/=, which resulted in this appeal. The memorandum of appeal raises the following grounds:

    a. That the learned trial magistrate erred in law and in fact and was fundamentally wrong to assume jurisdiction over the matter when by law, court did not have it.

    b. That the learned trial magistrate erred in law and in fact and was fundamentally wrong in failing to consider the Appellant's response to claim duly filed on judiciary e-filing system before arriving at her decision thereby occasioning miscarriage of justice.

    c. That the learned trial tribunal was wrong and proceeded to make an error of law and fact in failing to consider the proceedings and evidence taken by her sister Hon. Chepkoech before assuming the matter from where it had reached.

    d. That the learned trial tribunal made an error of fact and law in making a finding that the Appellant owed the Respondent Kshs. 129,350/= based on unsigned invoice, receipt and non-existent contract contrary to the law.

    e. That the learned trial magistrate erred in law and in fact and was fundamentally wrong in failing to consider that Appellant was not a corporate body with legal capacity to be sued as required by law.

Analysis

10. This being an appeal from the Small Claims Court, the jurisdiction of this Court is limited by section 38(1) of the *Small Claims Court Act*, which provides as follows::

    (1) A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.

11. An appeal of this nature is on matters of law. It can be pure matters of law or mixed matters of law but matters of law it is. An appeal on matters of law is akin to a second appeal to the Court of Appeal.

The duty of a second appellate court was set out in the case of Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] KECA 894 (KLR) that:

> This is a second appeal. I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. (See: Stanley N Muriithi & another v Bernard Munene Ithiga [2016] KECA 821 (KLR)).

12. In the latter case, Stanley N Muriithi & another v Bernard Munene Ithiga [supra] K, the court of appeal [Waki, Karanja & Kiage, JJ.A] was more succinct in defining the remit of what constitutes a matter of law:

> In Kenya Breweries Limited v Godfrey Odoyo [2010] eKLR (Civil Appeal No. 127 of 2007) Onyango Otieno, J.A. put it succinctly in the following words:
>
> "In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse."
>
> We hasten to observe, however, that failure on the part of the first appellate court to re-evaluate the evidence tendered before the trial court and as a result, arriving at the wrong conclusion is a point of law. We note that indeed, learned counsel for the appellants did submit that the learned Judge failed to consider most of the documents that were produced in evidence, and therefore arrived at the wrong conclusion.

13. Then what constitutes a point of law? In Twaher Abdulkarim Mohamed v Independent Electoral and Boundaries Commission (IEBC) & 2 others, (2014) eKLR, the court stated as doth:

> " 4. Although the phrase 'a matter of law' has not been defined by the *Elections Act*, it has been held in Timamy Issa Abdalla Vs Swaleh Salim Swaleh Imu & 3 Others, Malindi Civil Appeal No. 39 of 2013 (Court of Appeal), (Okwengu, Makhandia & Sichale, JJA) of 13.01.2014 that a decision is erroneous in law if it is one to which no court could reasonably come to, citing Bracegirdle vs Oxney (1947) 1 All ER 126. See also Khatib Abdalla Mwashetani Vs Gedion Mwangangi Wambua & 3 Others, Malindi Civil Appeal No. 39 of 2013 (Court of Appeal), (Okwengu, M'inoti & Sichale, JJA) of 23.01.2014 following AG vs David Marakaru (1960) EA 484."

14. What was agreed was that there was no agreement or contract entered into between the appellant and the respondent. There were also no local purchase orders. The respondent appears to have been hawking from place to place whatever goods she was selling. The question on the amount on invoices is a question of fact for which this court does not have jurisdiction to delve in. The summation of the issues as understood by the court is whether in law a public entity can enter an oral contract or a contract by estoppel. In other words, does delivery of goods and invoicing for them result in an obligation to pay in law for a public entity?

15. The second question raised by the defence was whether the claim was time barred by dint of the Public Authorities Limitations Act Cap 39, Laws of Kenya. The last that was raised was whether the court

had jurisdiction to hear the matter given that the respondent was residing in Nairobi, by dint of section 15 of the Small Claims Act.

16. There is no dispute that the appellant is a public school and as such a government entity for purposes of both the *Government Proceedings Act* and the Public Authorities Limitations Act Cap 39, Laws of Kenya. The claim related to invoices between 10.7.2017 and 15.08.2019. The suit was filed in 2024. That is between 5 years and 7 years after the invoices. The court awarded amounts in respect of the invoice dated 10.7.2017, that is Kshs. 139, 350/=. Even in the normal Limitation of Action Act the claim was time barred.

17. There is no power to extend time in relation to a contract. Nevertheless, there was no extension and thus the claim fell by the wayside.

18. The second aspect was that there was no contract between the parties. It was said to be informal. Unfortunately, under the *Public Procurement and Asset Disposal Act*, No. 33 of 2015, there has to be a formal request for proposal and a local purchase order or contract. Under section 44(1) of the Act, an accounting officer of a public entity is primarily responsible for ensuring that the public entity complies with the Act. The court cannot thus burden the accounting officer, in this case the principal, with illegal debts.

19. Section 2 of the *Public Procurement and Asset Disposal Act*, No. 33 of 2015 provides for the meaning of contract administration as follows:

    Means management of terms of procurement or asset disposal contracts made with contractors or suppliers after tender award by a procuring entity, for the purpose of assuring compliance with obligations such as timely delivery, quality and quantity inspection, acceptance, payment, claims, dispute resolution and completion, among other terms.

20. This means that for contract with government entity, there has to be contract administration governing payment, delivery and completion. There can be no informal contracts in public service. Woe unto thee if that happens.

21. Pursuant to section 4(1) of the *Public Procurement and Asset Disposal Act*, No. 33 of 2015, the Act applies to all state organs and public entities in respect of the following:

    (a) Procurement planning

    (b) Procurement processing

    (c) Inventory and asset management

    (d) Disposal of assets; and

    (e) Contract management

    (2) For avoidance of doubt, the following

22. Under that said Act schools are included as public entity as follows:

    A college or other educational institution maintained or assisted out of public funds;

23. Ipso facto, given that a school is a public entity, there was no room for payment outside the *Public Procurement and Asset Disposal Act*, No. 33 of 2015. The court was clearly wrong to overturn a statute and imply a contract. Whereas it is true that contracts can be implied or constructed, this does not apply to public entities where the law must be followed. Either there is a request for proposals and

an LPO issued or other forms of contracts entered into. The court therefore fell in an error of law in implying a contract between a public entity and a private person.

24. It is unnecessary to deal with the remainder of the issues in view of the finding herein. Consequently, the appeal is allowed.

25. Award of costs in this court is governed by section 27 of the *Civil Procedure Act*. They are discretionary. The Supreme Court has set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> " (18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

26. Since costs follow the event, the Appellants are entitled to costs of the appeal. A sum of Ksh. 35,000/ = will be right and just.

27. Given that there was no successful party in the lower court, each party will bear their own costs in that court.

Determination

28. In the upshot, I make the following orders:

    a. The appeal is allowed. The judgment and decree given in the lower court is set aside. In lieu thereof, I substitute with an order dismissing the small claims case.

    b. The appellant shall have costs of Ksh. 35,000/=.

    c. Each party to bear their own costs in the lower court.

    d. 30 days stay of execution.

    e. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 10TH DAY OF FEBRUARY, 2026. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

No appearance for parties

Court Assistant – Matiko/Michael