

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPELLATE DIVISION
CIVIL APPEAL NO. E573 OF 2024

NANCY NJERI
MACHARIA.....APPELANT

VERSUS

INSTA PUMPS ENGINEERING LIMITED.....1ST
RESPONDENT

BEATRICE NJERI WABABU..... 2ND
RESPONDENT

*(Being an Appeal against the entire Judgment/decree of
the Small Claims Court at Nairobi before Hon. V.M
Mochache (Ms.) Resident Magistrate & Adjudicator,
delivered on the 26th April 2024 in SCC COMM 8862 of
2023)*

BETWEEN

INSTA PUMPS ENGINEERING
LIMITED.....CLAIMANT

VERSUS

BEATRICE NJERI WABABU..... 1st
RESPONDENT

**NANCY NJERI MACHARIA.....2nd
RESPONDENT**

JUDGEMENT

A. INTRODCUTION

- 1.** The 1st respondent filed their statement of claim before the small claims court and stated that they were in the business of drilling borehole water, test pumping works, pump service and installation of steel tanks, tower construction and undertaking civil engineers works related thereto. On 16th October 2020, they did enter into a contract with the 2nd respondent where they agreed that they would drill her water at her pepsi farm situated in Rumuruti, Laikipia county for a consideration of ***Kshs.1,773,976.00***.
- 2.** Pursuant thereto, they did discharge their contractual obligation, but the 2nd respondent only paid them ***Kshs.1,200,000/=*** leaving a balance of ***Kshs.573,976.00/=*** which sum remained outstanding and is due plus interest thereon. They thus prayed for judgment to be entered against the 2nd respondent for the said sum plus costs and interest of the suit.
- 3.** In response thereto, the 2nd respondent confirmed that together with her business partner the appellant, they contracted the 1st respondent to drill for them borehole water on LR NO. 3308/3, Which had been leased to them by one Muchiri Kabugi, who is now deceased. The 1st

respondent accepted to under the said works upon payment of a deposit of **Kshs.1,200,000/=** as they continued to discuss terms of the said contract, but unfortunately, they never executed any agreement due to the disagreements that arose relating to the contract sum and the scope of work to be carried out.

4. It was her further contention that it was the 1st respondent who failed to adhere to what was agreed upon as they failed to obtain licenses from the county government and National Environment Management Authority (NEMA) and critically also failed to issue any documentation/ certificate of completion indicating the scope of the works carried out and tests for the water/salinity and usage of the same. The 2nd respondent also faulted the 1st respondent for failing to sue the appellant herein, yet they had jointly contracted him to undertake the drilling work, in their joint names.
5. Finally, it was also the 2nd respondent's contention that the property owner (lessor) died prematurely before they could start their project and that too, had affected implementation of the said project as they were unable to till the land and/or utilize the borehole water as anticipated. The 1st respondents claim was therefore misguided, unmerited and she prayed that the same be dismissed.
6. After filing her response, the 2nd respondent moved court and sought to serve the appellant with a third-party notice but before the said application was determined, the 1st

respondent filed their amended statement of claim including the Appellant as the 2nd respondent thereto. In response, the Appellant denied ever entering into an agreement with the 1st respondent and was categorical that no cause of action rose against her. She thus prayed that the suit as against her be dismissed with costs.

7. When the suit came up for hearing, the parties agreed to canvass the same by way of **Section 30 of the small claims Act**. Accordingly, the parties did file their respective submissions and upon considering the same the trial Magistrate did hold that the claimant/1st respondent had proved his case on a balance of probability and proceeded to enter judgment jointly and severally against the appellant herein and the 2nd respondent in the sum of **Kshs.573,976.00/=** together with costs and interest.

B. THE APPEAL

8. Aggrieved by the judgment, the Appellant filed her memorandum of appeal dated 30th April 2024, raising the following grounds of appeal that: -
- i. That the honorable Magistrate erred both in law and in fact by not considering the Appellants' evidence in the Claim.***
 - ii. That the honorable Magistrate erred in law when she failed to take into account the submissions filed by the Appellant.***
 - iii. That the honorable Magistrate erred both in law and in fact in making a finding that the***

Appellant was a party to the Agreement between the 1st Respondent and the 2nd Respondent when in fact there was no evidence to support such a finding.

- iv. That the honorable magistrate erred in law and in fact in finding that the Appellant had appointed agents to act for the Appellant in the Agreement between the 1st and 2nd Respondent despite no evidence tendered to support the same.***
- v. That the honorable Magistrate erred in law in finding that the Appellant was the business partner to the 2nd Respondent despite there being no evidence in support of the same.***
- vi. That the honorable Magistrate erred both in law and in fact when she made findings on matters that were not before it and yet the dispute was as to whether the 1st Respondent had a claim as against either the Appellant or the 2nd Respondent.***
- vii. That the honorable Magistrate erred both in law and in fact in failing to appreciate the fact that the Appellant denied any negotiations, agreements and transactions and no evidence was adduced by the 1st Respondent to support the contrary.***

C PARTIES SUBMISSIONS

(I) The Appellant's Submissions

- 9.** The appellant relied on her submissions dated 9th December 2024 wherein she submitted that the trial magistrate

disregarded her pleadings and submissions filed and consequently made an erroneous finding on her contractual obligation. In particular, the email correspondences relied upon were not copied to her and were exchanged between the 1st, 2nd Respondents, the firm of Udoto & Company Advocates and one Maureen Macharia and therefore could not be used as a basis for insinuating that she had any contractual obligation with the 1st respondent herein.

10. The appellant further submitted that it was never established in evidence that there was an oral agreement between her and the respondents to prove her inclusion thereto. The said respondents were all strangers to her and therefore could not be made to shoulder obligations under the said contract. The Appellant relied on the case of **Texas Alarms (K) Limited v General Cargo (Transport) Limited (Civil Appeal 10 of 2021) [2023] KECA 1067 (KLR) (22 September 2023) (judgement)**, which states that only parties to a contract can sue on it.

11. The appellant also cited the case of **Kenya National Capital Corporation Ltd vs. Albert Mario Cordeiro & Another [2014] eKLR** where it was held that:

“It is trite that the doctrine of privity of contract is a long-established part of the law of contract. Save for the exceptions brought in by recent reforms of the law in this area which allow third parties for whose benefit the contract is made to

enforce it, the essence of the privity rule is that only the people who actually negotiated a contract, and are thus privy to it are entitle to enforce its terms.....”

- 12.** She reiterated that there was no privity of contract between her and the 1st Respondent and therefore could not bound by the agreement between the 1st and 2nd Respondent. Therefore, the decree directing that she pays ***Kshs. 573,976/=*** was null and void for all purposes. Reliance was placed the case of **William Muthee Muthami vs. Bank of Baroda (2014) eKLR, Stancom Sacco Limited v Alliance One Tobacco Limited [2018] e KLR & Omar Gorhan Vs Municipality Council of Malindi (Council of Kilifi) Vs Overlook Management Kenya Ltd (2020) Eklr** where it was observed that there needs to be an offer, acceptance and consideration.
- 13.** Finally, the Appellant submitted that the ***Partnership Act Cap 29*** provides that partnership was proved through documentation, which in this instance had not been placed before the court. The 2nd Respondent had not surmounted this hurdle and as such the trial court erred in so holding in its judgement against her. Reliance was also placed on Halsbury’s 4th Edition Volume 35 to emphasize on the same principle.
- 14.** The Appellant therefore urged the court to find merit in her Appeal and proceed to set aside the judgment entered

against her by the trial court. She also prayed to be granted costs of this Appeal and the primary suit

(ii) 1ST Respondents Submissions

- 15.** The 1st Respondent submitted that ***Section 38 of the Small claims court Act*** only empowered the High court to determine appeals based on points of law and not to interfere with the factual findings of the trial Magistrate. The only window where the appellate court do so is where it was shown that the trial court had failed to consider evidence that it should have or that the trial court considered evidence that it should have not. Reliance was placed in ***Bashir Haji Abdullahi Vs Adan Mohammed Nooru & 3 others (2014) Eklr***, which cited with approval the case of ***Bracegirdle Vs Oxley (2),(1947) 1 All E.R 126 and Mwita Vs Woodventure (K) Limited & Another (Civil Appeal No 58 of 2017),(2022) KECA 628(KLR)***.
- 16.** Based on the grounds of appeal raised by the Appellant, she had sought to impeach the trial court's findings on matters of fact as to whether or not she was a party to the agreement upon which the cause of action arose. That 1st respondent insisted that the court should decline the said invitation as such a determination would run contrary to the provisions of ***Section 38 of the small claims Act***. Reliance was placed in the case of ***Daniel Torotich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR& Amunga v Muisu (Civil Appeal E725 of 2022) [2024]***

KEHC 2504 (KLR) (Civ) (8th March 2024) (Judgement)

where it was held that

“.....to the grounds of appeal herein, the same would appear to exemplify an attempt at legal ingenuity to dress- up and camouflage purely factual issues with the borrowed grab of ‘legalness’ in a bid to escape the stricture of Section 38 of the Small Claims Court Act.....”

- 17.** The 1st respondent asserted that they had proved by the correspondences presented that they received a deposit for the work done from both the Appellant and the 2nd Respondent and/or conversely, the Appellant had not offered any explanation as to why she had paid the 1st Respondent her share of borehole drilling expense as her contribution thereto, as confirmed by the email correspondence exchanged and joint receipts issued.
- 18.** Additionally, the Appellant acted through her daughter and appointed the firm of Udoto & Company advocates who were acting for her. She had consented to the matter proceeding under **Section 30 of the small claims Act** and could therefore not argue that the correspondence/emails produced were not properly before the court for the failure of both Udoto Advocate and her Maureen Macharia being called to testify.

19. Finally, the 1st Respondent also urged this court to note that the Small claim court is not bound by the strict rules of evidence as provided for in section 32 of the said Act. The existence of a partnership was not predicated on existence of partnership documents as it was clear from the evidence adduced that the Appellant and the 2nd Respondent sought the Claimants services to drill a borehole for profit reasons. The 1st Respondent therefore urged the court to find the appeal to be wholly without merit and dismiss the same with costs.

(iii) 2nd Respondents Submissions

20. The 2nd Respondent submitted that the Appellant made payment towards the drilling of the borehole as evidenced by the various email correspondence and receipts jointly issued for the same. The Appellant, through her counsel had also exchanged email correspondence with her counsel for purposes of drafting a partnership agreement and by her conduct admitted to the existence of an agreement for the drilling of the borehole on their Pesi Farm. She was therefore estopped from denying the same. Reliance was placed on the Court of Appeal case of **Serah Njeri Mwobi v John Kimani Njoroge (2013) eKLR** where the court held that: -
“The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous

action or statement of that person.” The 2nd Respondent also urged the court to be guided by the holding in the celebrated case of **Central London Property Trust Ltd v. High Trees House Ltd. [1947] K-B. 130 (1946).**

- 21.** Lastly, the 2nd Respondent submitted that the Appellant was jointly and severally liable to settle the outstanding sum due to the 1st Respondent as they had adduced enough evidence on the amount agreed between the parties and there was a balance that was left thereafter and as such the appeal should fall with costs.

D. ANALYSIS AND DETERMINATION

- 22.** This being an appeal from the Small Claims Court, it is important to point out that **Section 38 of the Small Claims Court Act** provides that appeals from the said court shall be only on issues of law. It provides thus:

Section 38

- 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.***
- 2. An appeal from any decision or order referred to in subsection (1) shall be final.”***

- 23.** It is clear from the provision that the jurisdiction of this Court from the Small Claims Court will only lie on matters of law and not on factual issues. An appeal limited to matters of

law does not permit the appellate court to substitute the tribunal's decision with its own conclusions based on its own analysis and appreciation of the facts.

24. In **John Munuve Mati Vr The returning officer, Mwingi North Constituency & 2 others (2018) eKLR**, what amounts to “***matters of law***” was described as;

(38) The interpretation or construction of the constitution, statute, or regulations made thereunder or their application to the sets of facts established by the trial court. As far as facts are concerned, our engagement with them is limited to background and context, and to satisfy ourselves, when the issue is raised, whether the conclusions of the trial judge are based on the evidence on record or whether they are so perverse that no reasonable tribunal would have arrived at them. We cannot be drawn into consideration of the credibility of witnesses or which witnesses are more believable than others; by law, that is the province of the trial court.

25. In the case of **Charles Kipkoech Leting Vs Express (K) Ltd & Another (2018) Eklr the court of Appeal, cited the English case of Martin Vrs Glywed Distibutors Ltd (T/A MBS Fastenings) 1983 ICR 511**, where it was held that;

“ Where a right of Appeal is confined to question of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact and law, and, it should not interfere with the decisions of the trial or first appellant court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.”

26. This Court has carefully considered the pleadings, the record of appeal, the submissions of the parties, and the applicable law. The central issues that arise for determination in this Appeal are that:

- (a) Whether the Appellant privy to the contract entered into between the respondents herein and therefore should not have been held to be jointly liable with the 2nd respondent to settle the outstanding sum due to the 1st respondent for the borehole sunk and its associate civil works.**
- (b) Whether the email evidence was properly admitted for the court’s consideration.**
- (c) whether there was a partnership agreement between her and the 2nd respondent, and**
- (d) Who should bear the costs of this Appeal.**

- 27.** The first issues raised by the Appellant can only be established by the relooking at the material facts presented before the trial court and in so inviting this court to do so would be contrary to the provisions of **Section 38 of the Small claims Act**. The trial court keenly examined the trove of evidence adduced before her and concluded as a result that it harbours no doubt that the Appellant was a business partner of the 2nd respondent despite her name being absent in the borehole drilling agreement. That gap was sufficient explained by the trove of emails produced, which established that the Appellant paid **Kshs.700,000/=** being her contribution for the borehole drilling. and her counsel engaged the 2nd respondents counsel to agree on term of the said partnership.
- 28.** The said determination is premised on determination of the primary facts and the conclusion drawn therefrom are not unreasonable to attract interference by this court.
- 29.** On the second issue, the Appellant having agreed to proceed under **Section 30 of the small claims Act**, was also estopped from putting forth arguments that the evidence relied upon by the court was not proved and/or that the said evidence extrinsic evidence was not properly before the court. By their action, they had allowed the evidence to be admitted unopposed and could not come back to cry wolf over the court's reliance on the same.

30. The final issue for determination by this court as to whether there was a partnership agreement between the parties, again that is an issue of fact not law, which was sufficiently proved by the emails produced, and receipts issued by the 1st respondent in the names of both respondents. In short, the conclusion arrived at by the trial court was not unreasonable as it was fully supported by the evidence presented.

E DISPOSITION

31. The Upshot therefore is that this Appeal is wholly unmerited and is dismissed with costs to both Respondents.

32. The Same is assessed at **Kshs.120,000/=** each, all inclusive.

33. It is so ordered.

Dated, signed and delivered virtually at Marsabit this **20th** day of **FEBRUARY 2025**.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Team this **20th** day of
FEBRUARY ,2025.

In the presence of: -

N/AAppellant

N/ARespondent

Mr. Jarso.....Court Assistant

ORIGINAL