REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL APPEAL NO. E098 OF 2024

DENKO PROPERTIES LIMITED.......................................1ST APPELLANT
GREEN GRO INTERNATIONAL LIMITED.......................2ND APPELLANT

VERSUS

SARJU MADHUKAR DESAI ....RESPONDENT

(An Appeal from the Judgement and Decree of Hon. B.A. Luova (Ms), Adjudicator in SCC COMM. NO. E313 of 2022 at the Small Claims Court at Machakos delivered on 7th March 2024)

JUDGEMENT

1. By a Statement of Claim dated 12.10.2022, the Respondent then Claim instituted a Claim against the Appellant then Respondent at the Machakos Small Claims Court in Claim No. E313 of 2022 seeking the following reliefs:-

   a) Judgement in the sum of Kshs.864,850/= being returns as per the Contract dated 20.9.2018.
   b) Costs of the Claim.
   c) Interest on the prayers sought above.

2. The Respondent’s claim was that Parties herein entered into a Contract dated 20.9.2018. It was agreed that the 1st Appellant would construct a green house on parcel of land No. 71 belonging to the Respondent at a cost of Kshs.625,000/= which sum was paid.

3. It was further agreed in the said Contract that the 2nd Appellant would manage the greenhouse for purposes of agronomic support for a renewable period of one year and five months that contains two seasons of eight and a half months each. That the1st and 2nd Appellants failed to remit the returns for the greenhouse for two seasons.

4. The Appellants filed their Response to the Claim on 10.9.2023 and denied the Claim in toto and further the 2nd Appellant Counterclaimed for the sum of Kshs.185,325/= being the 30% entitlement of profit share from the sale of Basil and the 1st Appellant filed a Counterclaim for the sum of Kshs.127,200/= being unpaid water bill used for farming.

5. The Counterclaims were denied in toto by the Respondent through the Response dated 16.10.2023.

6. The claim proceeded for hearing where parties adduced both oral and documentary evidence. At close of the case, the trial Adjudicator gave directions on the filing of submissions. The record shows that at the time of writing the judgement, the Appellants had not filed their submissions. However, I have perused the record and confirmed that the Appellant's/Respondents' submissions are shown at page 82-89 of the ROA duly filed in court on 04.03.2024 while the Claimant's submissions though not shown in the ROA were filed on 29.02.2024 dated 28.02.2024.

7. In her judgement dated 07.03.2024, the trial Adjudicator found that the Respondent/Claimant had proved his claim for the sum of Kshs.864,850/= on a balance of probabilities and consequently, the Counterclaims by the Appellants failed.

8. The Respondent/Claimant was also awarded the costs of the claim and interest from the date of filing the claim at court rates.

9. Being aggrieved by the said judgement, the Appellants lodged the instant appeal vide a Memorandum of Appeal dated April 2024 raising 7 grounds of appeal as follows:-

    1. *THAT the Learned Magistrate erred in law by failing to apply the provisions of the Law of Contract Act.*

2. *THAT the Learned Magistrate erred in law by failing to find that the Respondents herein frustrated the execution of the contractual terms subject of the suit.*

3. *THAT the Learned Magistrate erred in law by failing to consider the legal effect of the various vitiating factors affecting the contractual terms subject of this matter.*

4. *THAT the Learned Magistrate erred in law by finding that the Appellant had breached the contractual provisions in the agreement between the parties herein in absence of the requisite legal conditions for the same.*

5. *THAT the Learned Magistrate erred in law by misinterpreting the contractual provisions in the agreement between the parties herein.*

6. *THAT the Learned Magistrate erred in law by delivering her Judgement without Jurisdiction to do so, more than three (3) days after the hearing of this case on 26H' February 2024.*

7. *THAT the Learned Magistrate erred in law by entertaining and hearing this case without jurisdiction to do so.*

10. The appeal was canvassed by way of written submissions. Both parties filed their respective submissions.

Analysis and Determination

11. This being an appeal from the Small Claims Court, the jurisdiction of the Court is circumscribed in section 38 of the Small Claims Court Act. Section 38 of the Small Claims Court Act provides as follows:

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

2. An appeal from any decision or order referred to in sub section (1) shall be final.

12. The above provision means that this Court can only intervene if the evidence on record does not reasonably support the conclusions made by the trial court. More specifically, an appeal before this Court is essentially limited to points of law. Such points of law would include misapplication of statutory provisions; misdirection on evidence and errors in legal evaluation of facts as noted hereinbefore.

13. Among the Grounds of Appeal herein are that the Learned Magistrate erred in law by failing to apply the provisions of the Law of Contract Act; failed by misinterpreting the contractual provisions in the agreement between the parties herein; and that he erred in law by delivering her Judgement without Jurisdiction to do so, more than three (3) days after the hearing of this case on 26H' February 2024 which was without jurisdiction.

14. I have carefully read the Record of Appeal, the grounds of appeal and rival submissions by the parties' counsel. In my view, the above grounds raise points of law hence the Appeal is competent and properly before the court. I will however summarize the Appellants' grounds into two pertinent legal issues for determination in this appeal as follows:-

    i. *Whether delivery of the judgement more than three (3) days after the hearing of the claim was without jurisdiction;*

    ii. *whether this court should allow the appeal and set aside the trial court's judgement;*

i. Whether delivery of the judgement more than three (3) days after the hearing of the claim was without jurisdiction;

15. The Appellants contends that the Respondent herein filed this matter at the trial court on 26th October 2022. Judgement was delivered on 7th March 2024, more than a year after lapse of the statutory 60-day period, thus, after expiry of the 60 days statutory period, the trial court lacked jurisdiction to deliver the Judgement.

16. Section 34 of the Small Claims Court Act provides as follows:-

> ***"34. Expeditious disposal of cases***
>
> ***(1) All proceedings before the Court on any particular day so far as is practicable shall be heard and determined on the same day or on a day to day basis until final determination of the matter which shall be within sixty days from the date of filing the claim.***
>
> ***(2) Judgment given in determination of any claim shall be delivered on the same day and in any event, not later than three (3) days from the date of the hearing."***

17. The import of section 34 of the Act is for the expeditious disposal of all proceedings and not to interfere with the discretion of the court as to the handling of proceedings. Whereas the Act provides for timelines, the court itself has the flexibility to render the judgment outside the stipulated timeline owing to fact that the said provision is directory and not mandatory. Hence every judgment delivered outside the three-day timeline of hearing are valid in the eyes of the law.

18. The phrase, '**so far as is practicable in the circumstances'** as used in Section 34(1) of the Small Claims Court Act meant that where the circumstances rendered it impossible to deliver judgment within the 60- day period, then the judgment of the Small Claims Court would still be valid.

19. From the proceedings in this matter, it is evident that the Appellants (then Respondent) to some extend occasioned the delay in the finalization of this matter. The Respondent's were duly served with the Claim, however they failed to defend the claim until after when an Auctioneer was instructed to execute the default judgment entered against them.

20. It is following the execution that the Appellant's filed an application to set aside the default judgement. It was not possible to thereafter hear the parties and deliver the judgment within the said 60 days from the date of filing the suit. The Appellants, having benefitted from the Adjudicator's discretion that allowed them to file their response to the claim late in the day and the interlocutory judgment entered against them set aside, cannot plead strict timelines when they are substantially responsible for the delay in the determination of the claim.

21. It is this court's position that whereas the afore-stated section is couched in mandatory terms, it does not vitiate any judgment delivered by courts after the said period, the section does not give sanctions for any proceedings undertaken outside the statutory limit.

22. See the reasoning of **Magare J** in **Biosystems Consultants versus Nyali Links Acarde (Civil Appeal E185 of 2003) 2023] KEHC 21068 (KLR) (31 July 2023) (Ruling)** where the learned Judge held that:-

> ***"The legislative intent of section 34 of the Small Claims Court Act was not to impose unnecessary bottlenecks. Even tax statutes had timelines for paying or declaring taxes. It was never that non-payment made those taxes void. There should be consequences. In the Income Tax Act, the non-compliance with deadlines did not vitiate the taxes. It attracted known penalties. What were the consequences under section 34 of the***

small claims court?… A purposive interpretation should be given to statutes so as to reveal the intention of the statute. The purpose of the <u>Small Claims Court Act</u> was to facilitate expeditious disposal of the disputes while at the same time respecting the right to be heard. The net result was that balancing the two may result at times to overshooting the 60 days. The 60 days did not have penal consequences for good reason. They were aspirational. That was part of having access to justice over amounts that needed not be in the normal system. Allowing the application would open floodgates that would eventually defeat the purpose of the Act."

23. Similarly in the case of **Crown Beverages Limited vs MFI Document Solutions Limited (Civil Appeal E833 of 2021) [2023] KEHC 58 (KLR) (Civ) (17 January 2023) (Judgment),** Justice Majanja stated as follows: -

"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.

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."

24. Lastly, in the case of **Wekesa v Matata (Civil Appeal E685 of 2022) [2024] KEHC 8284 (KLR) (28 June 2024) (Judgment)** Justice Njagi had this to say**:-**

    "I take the view postulated in the latter case that non-compliance with the section is not fatal to a case. The court has to look into what the intention of the legislature was when it passed the section. I do not think that the legislature intended to mean that the court ceased to exercise jurisdiction over a matter filed in that court which was not finalized within 60 days. If that were the case, it would defeat the purpose of the whole Act. I thereby dismiss the argument that the judgment of the Adjudicator in this matter was a nullity"

25. Based on the above decisions, it's my finding that the trial court/ Adjudicator had jurisdiction to deliver the judgment notwithstanding the timeline it was delivered under. The same is merited and proper. I find this ground of appeal to be lacking in merit and the same is disallowed.

ii. whether this court should allow the appeal and set aside the trial court's judgement;

26. In determining this issue, the court will have to first consider whether the terms of the contract were breached and by which party. The Appellants and the Respondent entered into a Contract/Agreement (Agricultural (Green House) Management Agreement) dated 20.09.2018 which was produced by the Respondent/Claimant as Exhibit 2.

27. The Appellants argue that the trial Court erred in law by failing to consider matters that it should have considered, by holding that the terms of the contract were breached by the Appellants by failing to satisfy the provisions of Clause 4.1 of the Contract dated 20/9/18 titled Agronomic Support and Market Linkage Articles of Agreement.

28. The said clause 4.1 of the Contract dated 20/9/18 provides as follows;

    "Payment shall be done over the harvest period of 8.5 months (as indicated on schedule I) Payment of the agreed contract price by the Service Provider shall be made by a single full payment at the end of the harvesting period."

29. That it is not in dispute that the Articles of Agreement dated 20/9/18 required the Appellants to Farm, Harvest and Sell the produce so as to pay the Respondent's returns. Thus, by evicting the Appellants from the farm, the Respondents did not give the Appellants a chance to perform their part of the contract. The Appellants stated that how then would the Appellants be able to pay returns without having harvested and sold the produce? Clearly, it is unfair for the Appellants to be required to pay returns for produce which they did not sell.

30. That upon evicting the Appellants, the crops in the greenhouse remained in the Respondent's possession. As such, the Respondent incurred no loss noting that it retained the crops in the farm. In fact, even at the hearing of this matter which was held on 26th February 2024, the Respondent herein who was the Claimant then, admitted on Cross-examination that there were crops in the greenhouse at the time when he evicted the Appellants from his farm. That these are matters which the trial Court failed to consider thus making erroneous findings,

31. The Appellants maintain that the Respondent unreasonably evicted them from the property on 5th February 2020 or

thereabouts during an ongoing season when the Appellants had planted **Basil crops** which were almost mature in the greenhouse, thereby frustrating the Appellant's execution of its part of the contract and further agreements.

32. The Appellants state that the Respondent herein went ahead to falsely allege that it did not give consent to planting of Basil herbs despite the various emails showing the Respondent's consent in writing whereby the parties' consensus was to grow the basil crops in the circumstances of the Fusarium Wilt disease. That the fungal disease "*Fusarium Wilt*" was an Act of God which was not attributable to any actions or inactions of the Appellants, as well the effects of COVID-19 pandemic which had begun to manifest at the time. Thus, these vitiating factors affected performance of the contract on the part of the Appellants greatly. They were unforeseen events which the Appellants had no control over.

33. The Appellants argued that the trial court ought to have considered this crucial bit of the case in rendering a decision regarding breach of the contract. That the act of evicting the Appellants from the farm amounted to interference with the day to day running of the project contrary to Clause 6 of the contract.

34. Thus, the Appellants maintained that to require performance in the face of such unforeseen and unavoidable circumstance not caused by any acts and/or omission on their part was unfair, absurd and unjust.

35. The Appellants invited this Court to find that the trial Court ought to have considered the issue of eviction in analysing breach of the aforementioned contract. That the Respondent frustrated the contract by evicting the Appellants during an ongoing season, contrary to Clause 6 of the Contract which prevented the Respondent from interfering with the day to day running of the project including harvesting of the product. A party cannot be allowed to benefit from their own wrongdoings. The Respondent should not complain of breach

whereas it instigated the frustration of the Agreement by evicting the Appellants from the farm.

36. The Respondent argued that the findings of the trial magistrate at the lower court were anchored in law and evidence presented to the court. It is trite law that he who alleges must prove. The documentary evidence produced by the Respondent at trial demonstrated that the parties herein had entered into a contract dated 20th October 2018.

37. As per the terms of the contract; particularly Clause Recitals at (e), the Appellants were mandated to seek the Respondent's consent in writing in order to plant any other crop in the greenhouse. The Contract was for planting of tomatoes only. Further to it, the decision to extend the seasons was never communicated to the Appellant's contrary to the provisions of Clause 12.4 of the contract which expressly provided that:-

> ***"No amendment change or addition to this agreement shall be effectual or binding on the parties hereto unless it is in writing and duly executed by or on behalf of the parties hereto"***

38. Again, in the performance of the contract, the Appellants were required to procure insurance liability cover over the greenhouses as was mandated by the provision of the contract at Clause 3 (3.1) (e).

39. It is the Respondent's position that the terms of the contract were binding on all the parties therein. As a matter of fact, Clause 13 of the said contract expressly stated that:

> **"Each of the parties hereto agrees and confirm for the purpose of Law of Contract Act (Chapter 23 Laws of Kenya) that it has executed this agreement for sale with the intention to bind itself to the contents hereof".**

40. Reference was made to the case of **International Aircraft Group SA vs Airway Kenya Aviation Limited [2020 eKLR** where it was stated as follows: -

    "…Parties to a contract that they have entered voluntarily are bound by its terms and conditions."

41. The Respondents stated that the Appellants having executed the contract out of their free will, for all intents and purposes were bound by the said terms of the contract. They cannot turn around and seek refuge from this court in varying the terms of the contract.

42. It was submitted that is now a longstanding established principle of law, that parties to contract are bound by the terms and conditions thereof, and that it is not the business of courts to rewrite such contracts. This principle was espoused in the case of **National Bank of Kenya Ltd vs. Pipe Plastic Samkolit (K) Ltd (2002) 2 E.A. 503, (2011) eKLR** wherein the learned judges of the Court of Appeal at page 507 stated that: -

    > ***"A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved."***

43. Further in the case of **Pius Kimaiyo Langat vs. Co-operative Bank of Kenya Ltd (2017) eKLR** the Court of Appeal held that: -

    > ***"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 the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved."***

44. From the foregoing, the Respondent argued that at trial, she sufficiently satisfied to the trial court that the Appellants breached the contract between the parties by going against the terms that they were bound to. The terms thereof were that the 2nd Appellant would construct the greenhouses and the 1st Appellant would manage the constructed greenhouses for purposes of agricultural farming for a renewable period of one (1) year containing two (2) seasons of six months each. The crop agreed to be planted was **tomato**. The returns were agreed at Kshs.432, 425 payable 45 days from the end of each season as per schedule one.

45. That the Appellants proceeded to plant **capsicum** and **basil** crop on the Respondent’s property without the express consent of the Respondent. Further the Appellant’s failed to provide the insurance cover and also failed to remit the earnings and or otherwise profits to the Respondent at the lapse of the season. Thus, the trial court made a just and fair determination anchored in law when she held that the Appellants had breached the contract. On this account the Respondent invited this Court not to interfere with the judgment of the trial court.

46. After considering the Parties’ rival submissions, it appears that the breach of the Contract seems to be pegged on whether or not there was a written consent to plant Capsicum and Basil crop instead of tomatoes and whether the Respondent evicted the Appellants before due time.

47. The Respondent maintains that it did not give consent to planting of Basil herbs while the Appellants maintain that there were various emails showing the Respondent's consent in writing whereby the parties' consensus was to grow Capsicum and Basil crops in the circumstances of the Fusarium Wilt disease.

48. I have thoroughly perused the email dated February 25, 2020 at 3.47 pm between parties contained in the Appellants' list of documents dated 16.09.2023 and the email dated Monday, May 18,2020 at 4.15 PM, Monday, March 16, 2020 at 6.36PM and the email dated Friday, March 2020 at 9.39AM contained in the Appellants' Further list of documents dated 19.12.2023.

49. I find that none of these emails show any written consensus by the parties to grow **Capsicum** and **Basil** crops in the circumstances of the Fusarium Wilt disease

50. The trial court's record shows that the Appellants produced a lab report dated 15.02.2019. It was the Appellants' evidence that the lab report was shared with the Respondent to prove that there was infestation of Fusarium Wilt. An email dated **18.05.2020** was produced to confirm that the 2nd Appellant had gotten market supply for the Basil crop planted and was yet to be harvested. It was his evidence that the Respondent frustrated the contract by evicting the Appellants before the maturity of the Basil crop. The Appellants stated that the email to evict them was sent on **25.02.2020**. The Respondent denied ever receiving a lab report on the Fusarium Wilt infestation. The Appellants did not adduce evidence to prove that in deed the report was sent to the Respondent.

51. The Respondent admitted that the eviction happened outside the timelines stipulated in the contract as the same happened when the Respondents failed to provide any returns after 2 seasons despite providing a guarantee of returns as provided in Clause 11.2 which provided that:-

> **"The service provider agrees to remit the net proceeds to the Purchaser's account as agreed and detailed in schedule one regardless of any occurrences or circumstances that may arise**

> **within the term of this agreement that would impede or affect the yield or production levels of the crop”**.

52. The Appellants stated that the Fusarium Wilt attacked the soil in February 2020, one month to end of the season and the contract was to cover 2 seasons. It was stated that the Fusarium Wilt caused delay hence no payment was made as before the harvest of the Basil, the Respondent evicted the Appellants from the property. According to the contract at Clause 4.1 provides that:-

> **“Payment shall be done over the harvest period of 8.5 months as indicated in schedule 1. Payment of the agreed contract price by the service provider shall be made by a single payment at the end of the harvesting period”**

53. As already found, there was no written consent on planting any other crop except for tomatoes and further that at the time of eviction which was on 25.02.2025 as per the email sent on 05.02.2020 to the Appellants from the Respondent. Clearly, the eviction came much later when the seasons should have ended as provided by the recitals in which a season is defined as “**period commencing from the effective date and shall cover planting, growing and harvesting of the produce which shall be 6 months for tomatoes or any other crop**” effective date is defined as “**60 days from the date of making payment for the green house(s) construction and shall run consecutively after every 6 months of harvesting**.”

54. The Appellants did not adduce evidence to confirm that tomatoes were planted on the Respondent’s property and towards the end of season and almost harvest time, the tomatoes were attacked by Fusarium Wilt. There was also no evidence that the contract was varied.

55. The upshot is, I find that the trial court made a just and fair determination anchored in law when she held that the Appellants had breached the contract. I have no reason to interfere with the judgment of the trial court.

56. Accordingly, the appeal is dismissed with costs.

It is so ordered.

JUDGMENT WRITTEN, DATED & SIGNED AT MACHAKOS THIS 24TH FEBRUARY 2026

NOEL I. ADAGI

JUDGE

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS 24TH FEBRUARY 2026