

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**  
**CIVIL APPEAL NO. 204 OF 2023**

**JAMES KARIUKI NJOROGE.....**  
**APPELLANT**

**VERSUS**

**KENNETH MWAURA T/A KENLINE**  
**CONSUTANTS...RESPONDENT**

**JUDGMENT**

**Background**

1. This appeal arises from the judgment of the Chief Magistrate’s Court at Nairobi (Milimani Commercial Courts) delivered by Hon. R. L. Musiega (SRM) on 4<sup>th</sup> August 2023 in CMCC No. E3946 of 2020, in which judgment was entered in favour of the Respondent for the sum of Kshs. 699,270/= together with costs and interest.
2. The dispute between the parties stems from an oral agreement for renovation works entered into on or about September 2017 between the parties. The Respondent, a contractor trading as Kenline Consultants, undertook renovation works for the Appellant at his proposed offices at Mirage Plaza in Nairobi. The Respondent contended that the total cost of the works was Kshs. 1,599,270/=, out of which

the Appellant paid Kshs. 900,000/=, leaving an outstanding balance of Kshs. 699,270/=. The Respondent instituted the suit before the Chief Magistrate's Court seeking recovery of the outstanding sum together with interest and costs.

3. In his Defence, the Appellant admitted that renovation works were undertaken, denied liability and maintained that the agreed cost of the works was Kshs. 900,000/=, which he asserted had been fully paid.
4. After hearing the parties, the trial court found that the Respondent had proved his claim on a balance of probabilities and entered judgment for the outstanding sum. Dissatisfied with that determination, the Appellant lodged the present appeal challenging the entire decision vide the Memorandum of Appeal dated 30<sup>th</sup> August 2024, raising several grounds of appeal which are verbatim as follows:
  - i. The learned trial magistrate misdirected himself on several matters of law and facts;*
  - ii. The learned trial magistrate erred in fact and in law by allowing the Respondent's prayers at paragraphs 13(a), (b), (c) & (d) of the Plaint dated 15<sup>th</sup> September, 2021;*
  - iii. The learned trial magistrate erred in law and in fact in arriving at a decision contrary to the law, facts and evidence before the court;*
  - iv. The learned trial magistrate erred in the law of evidence by finding that the burden of proof shifted to the Appellant;*

- v. *The learned trial magistrate erred in law and in fact by allowing alterations on the final certificate prepared by the Quantity Surveyor (QS);*
  - vi. *The learned trial magistrate misdirected himself in law by caricaturing the wrong principles of the law of agency;*
  - vii. *The learned trial magistrate erred in the law of evidence by failing to appreciate that the evidence placed before him by the Respondent herein was not of any probative value to warrant the grant of the prayers sought in the Plea dated 15<sup>th</sup> September, 2021; and*
  - viii. *The learned trial magistrate's judgment was contrary to the evidentiary weight of the case of the Respondent, thus rendering the same ripe and proper for being dismissed in limine.*
5. The Appellant therefore seeks orders that the judgment of the lower court be set aside and the Respondent's suit be dismissed.
6. The appeal was canvassed through written submissions.

### **Analysis and determination**

7. Having considered the memorandum of appeal, the record of appeal and the submissions by both parties, the Court is of the view that the following issues arise for determination:

- a. *Whether the trial magistrate erred in finding that the Respondent had proved the agreed consideration of Kshs. 1,599,270/= for the renovation works.*
  - b. *Whether the trial court improperly shifted the burden of proof to the Appellant.*
  - c. *Whether this Court should interfere with the finding.*
8. This being a first appeal, this Court is obligated to reconsider the evidence adduced before the trial court and arrive at its own independent conclusions while bearing in mind that it did not have the advantage of seeing or hearing the witnesses.
9. The principles governing the role of a first appellate court were stated in **Abok James Odera t/a A.J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR** as follows:
- “This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”***
10. An appellate court will only interfere with findings of fact if they are based on no evidence, or on a misapprehension of the evidence, or if the trial court is shown demonstrably to have acted on wrong principles.

11. The Appellant contends that the learned trial magistrate erred in law and fact in finding that the agreed consideration for the renovation works undertaken at the Appellant's offices was Kshs. 1,599,270/=. The Appellant's position is that the agreed sum for the renovation works was Kshs. 900,000/=:, which he states was fully settled through payments of Kshs. 600,000 and Kshs. 300,000/=:.
12. The Respondent, on the other hand, maintained that the total value of the renovation works was Kshs. 1,599,270/=:, out of which the Appellant paid Kshs. 900,000/=:, leaving an outstanding balance of Kshs. 699,270/=:, which formed the subject of the suit before the trial court.
13. The pleadings and evidence on record confirm that the dispute between the parties arose from an oral agreement for renovation works undertaken at the Appellant's offices in Westlands. The Respondent pleaded that after completing the renovation works he prepared a valuation of works done and invoices which reflected the total cost of Kshs. 1,599,270/=:.
14. The Appellant did not dispute that renovation works were undertaken. Indeed, the record shows that he admitted to making payments of Kshs. 600,000/=: and Kshs. 300,000/=: to the Respondent.
15. The central issue, therefore, before the trial court was not the existence of the contract but the agreed

consideration for the works undertaken. **Sections 107, 108 and 109** of the **Evidence Act (Cap 80)** provide that:

***“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”***

16. The Respondent therefore bore the legal burden of proving the existence and terms of the oral contract, including the agreed consideration of Kshs. 1,599,270/=. In **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR**, the Court of Appeal held that courts do not rewrite contracts for parties and can only enforce the terms proved by the evidence placed before them.
17. From the record, the Respondent supported his claim with documentary evidence comprising email correspondence exchanged between the parties, a valuation of the works undertaken, a draft bill of quantities, and demand letters issued after completion of the works. These documents, taken together, point to a consistent valuation of the renovation works at Kshs. 1,599,270/=. The valuation and the bill of quantities in particular itemized the materials, fittings, labour and other components of the renovation works and collectively formed the basis upon which the Respondent asserted the total value of the works done.

18. The Respondent also called two witnesses, including himself and an advocate who testified regarding the payments made by the Appellant and the outstanding balance.
19. On the other hand, while the Appellant disputed the figure of Kshs. 1,599,270/=, he did not place before the trial court any documentary evidence demonstrating that the agreed consideration was Kshs. 900,000/=. No alternative bill of quantities, valuation, written quotation, or contemporaneous correspondence was produced to support that assertion. The Appellant's position therefore remained a bare statement unsupported by evidentiary material.
20. The burden of proof in civil cases rests upon the party who would fail if no evidence were tendered - See **Karugi & Another v Kabiya & 3 Others [1987] KLR 347**.
21. In civil proceedings, the burden rests upon the party who asserts the existence of a particular fact. In the present case, the Respondent bore the legal burden of demonstrating the value of the works undertaken and the outstanding balance claimed. The Respondent discharged that burden by producing documentary evidence showing the valuation of the works as well as proof of partial payment by the Appellant.
22. Once such evidence was placed before the court, the evidential burden shifted to the Appellant to rebut the Respondent's claim. In **Syronda Limited v School Equipment Production Unit [2001] eKLR**, the court held:

***“In the instant case, the plaintiff has placed before court sufficient evidence to prove that a contract... was entered into, that the goods were supplied and that the defendant made part payment... Given those circumstances, the burden shifts onto the defendant to show that it has a good defence.”***

23. In the absence of documentary evidence supporting the alleged contract sum of Kshs. 900,000/=, the Appellant’s contention remained unsubstantiated. The Court of Appeal in **Karugi & Another v Kabiya & 3 Others [1987] KLR 347** held that:

***“The burden on a plaintiff to prove his case remains the same throughout the case...but where the defendant fails to adduce evidence, the plaintiff’s evidence remains uncontroverted.”***

24. In the absence of evidence contradicting the Respondent’s valuation of the works, the trial court was entitled to accept the Respondent’s evidence as establishing the value of the works on a balance of probabilities.
25. Consequently, the trial court cannot be faulted for accepting the Respondent’s evidence as establishing the value of the renovation works and the outstanding balance claimed.

26. In the circumstances, this Court finds that the Respondent proved, on a balance of probabilities, that the value of the renovation works was Kshs. 1,599,270/=, out of which the Appellant paid Kshs. 900,000/=, leaving a balance of Kshs. 699,270/= as rightly found by the trial court.
27. The principles governing appellate interference with findings of fact are well settled. In **Selle v Associated Motor Boat Co. Ltd [1968] EA 123**, the Court of Appeal stated that a first appellate court is obliged to reconsider and evaluate the evidence on record and draw its own conclusions, while bearing in mind that it neither saw nor heard the witnesses testify.
28. Nevertheless, an appellate court will not lightly interfere with findings of fact by a trial court unless it is demonstrated that the findings were based on no evidence, were founded on a misapprehension of the evidence, or that the trial court acted on wrong principles.
29. Guided by those principles, this Court has carefully re-evaluated the record of appeal. It is evident that the learned trial magistrate considered the documentary evidence relating to the valuation of the renovation works as well as the Appellant's admission that he made payments amounting to Kshs. 900,000 towards the works.
30. The Appellant did not produce any documentary or other credible evidence to demonstrate that the agreed contract price was Kshs. 900,000, nor did he produce any

valuation or quotation to challenge the Respondent's valuation of the works.

31. In the circumstances, I am not persuaded that the learned trial magistrate erred in finding that the Respondent had proved that the agreed consideration for the renovation works was Kshs. 1,599,270/=.

32. Upon evaluation of the evidence on record, this court is satisfied that the learned trial magistrate properly directed himself on both the facts and the law.

33. The Appellant has not demonstrated that the trial court misapprehended the evidence, ignored relevant considerations, or applied wrong principles in arriving at that conclusion.

34. Having carefully reconsidered the record of appeal, the judgment of the trial court, and the submissions of counsel, this Court finds that the appeal is devoid of merit.

35. In the premises, the appeal fails. Accordingly, the Court makes the following orders:

***a. The appeal is hereby dismissed in its entirety.***

***b. The judgment of the Chief Magistrate's Court delivered on 4<sup>th</sup> August 2023 in CMCC No. E3946 of 2020 is hereby upheld.***

***c. The Respondent shall have the costs of the appeal.***

**JUDGMENT** delivered virtually, dated and signed at **NAIROBI**

This **12<sup>th</sup>** day of **March** 2026.

**P.M. MULWA**  
**JUDGE**

**In the presence of:**

*Ms. Were h/b for Mr. Njenga for Appellant*

*Mr. Antony Burugu for Respondent*

*Court Assistant: Carlos*