

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**HIGH COURT CIVIL APPEAL NO. E102 OF 2024**

VEGPRO  
LIMITED.....APPELLANT

KENYA

VERSUS

KENNEDY ACHIENG OWOUR T/A ACHIENG OWUOR &  
COMPANY ADVOCATES.....  
1<sup>ST</sup> RESPONDENT

DIRECT "O" AUCTIONEERS.....  
.....2<sup>ND</sup> RESPONDENT

**JUDGMENT**

*(Being an appeal from the judgment of Hon. E Cherop  
(Adjudicator) delivered on 16<sup>th</sup> August 2024 vide  
Naivasha SCCC E383 of 2024.)*

1. This is a rather straight forward matter. The appellant was sued as respondents vide Naivasha SCCC No(s) 345, 346, 348, 349 all of 2023. The claimants therein were being represented by the 1<sup>st</sup> respondent herein. That, judgment was entered in favour of the claimants in the total sum of Kshs 2,525,967.
2. However, when the decretal sum was claimed a sum of Kshs 2,654,200 was paid thus an overpayment was made in a total sum of Kshs 128,233. That noting the overpayment, the law firm representing the appellant sought for the refund thereof from the 1<sup>st</sup> respondent but the 1<sup>st</sup> respondent though not denying receipt of the overpayment, declined to refund the same on the ground that, the decretal sum claimed had omitted the costs incurred in form of witness and doctor's expenses.
3. The 1<sup>st</sup> respondent avers that, subsequently, he had a telephone conversation with the firm representing the

appellant and agreed to pay a sum of Kshs 50,000 of the overpayment to the 2<sup>nd</sup> respondent as Auctioneer's costs.

4. Notably in the meantime when the appellant delayed in paying the decretal sum the 1<sup>st</sup> respondent instructed the 2<sup>nd</sup> respondent to execute the decree, through proclamation of the appellant's assets. The 2<sup>nd</sup> respondent obtained a warrant of attachment and therefore incurred the auctioneer's costs but the sale was halted.
5. At this stage, the question is; did the 1<sup>st</sup> respondent pay the 2<sup>nd</sup> respondent the Kshs 50,000 as alleged? The 2<sup>nd</sup> respondent has acknowledged receipt of Kshs 50,000 from the 1<sup>st</sup> respondent. The next question is, if the appellant instructed then the 1<sup>st</sup> respondent to pay the 2<sup>nd</sup> respondent Kshs 50, 000 and it was paid, how much money should the 1<sup>st</sup> respondent refund to the appellant? Isn't it Kshs 128,233 less Kshs 50,000

giving rise to Kshs 78,233? Notably that is not the subject of the claim before the Small Claims Court's case which is the subject of this appeal.

6. However, the legal issue, if not moral question remains as to whether the 1<sup>st</sup> respondent had the right to retain the overpayment in the manner he did. The adjudicator rightfully observed that, the 1<sup>st</sup> respondent improperly held the amount of Kshs 128,233 without regularizing the decree. I entirely concur. And whatever worth it may be, it is unprofessional to hold funds against the law and procedure and it is in the interest of justice and professional conduct that, the 1<sup>st</sup> respondent seek for an amended decree to justify utilization of the Kshs 128,233 of Kshs 78,233.
7. The court holds that the correct sum is Kshs 78,233 as the appellant from the outset never sought for refund of the subject overpayment, but directed the 1<sup>st</sup>

respondent to pay or settle the 2<sup>nd</sup> respondent's fees, which he did in the sum of Kshs 50,000.

8. The adjudicator has rightfully arrived at the correct conclusion that, the claim against the 1<sup>st</sup> respondent cannot succeed as at no time did the appellant pay him Kshs 150,000.
9. It is trite law that parties are bound by their pleading. Any response to a claim is founded or based on the claimant's pleadings. In fact even if the 1<sup>st</sup> respondent merely denied receiving Kshs 150,000 from the appellant in a single sentence the appellant's claim against him would still fail.
10. Furthermore, there is no evidence that the sum of Kshs 150,000 allegedly paid to the 2<sup>nd</sup> respondent was paid to be transmitted, held in trust or otherwise on behalf of the 1<sup>st</sup> respondent. The evidence availed does not prove any payment of the said sum to the 1<sup>st</sup> respondent. Consequently, the appellant's claim

against the 1<sup>st</sup> respondent was properly dismissed. Notably, appeals from the small claims court lie on matters of law only as stated under section 38 of the Small Claims Court Act as follow: -

*(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.*

11. In the case of Charles Kipkoech Leting v Express (K) Ltd & another [2018] eKLR the Court of Appeal dealt with an appellate court's mandate where an appeal is confined only to a question of law and stated as follows: -

*“This is a second appeal. Our mandate is as has been enunciated in a long line of cases decided by the Court. See Maina versus Mugiria [1983] KLR 78,*

*Kenya Breweries Ltd versus Godfrey Odongo, Civil Appeal No. 127 of 2007, and Stanley N. Muriithi & Another versus Bernard Munene Ithiga [2016] eKLR, for the holdings inter alia that, on a second appeal, the Court confines itself to 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 also the English case of Martin versus Glywed Distributors Ltd (t/a MBS Fastenings) 1983 ICR 511 where in, it was held inter alia that, where a right of appeal is confined to questions 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 appellate 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.”*

12. Further, the 2<sup>nd</sup> respondent was discharged from liability on the basis that, they denied knowledge of one Pius Ngundu Kasao who the appellant paid Kshs 150,000. That person was neither called as a witness nor joined in this matter as a third party. The moment the 2<sup>nd</sup> respondent filed their statement of response denying receipt of Kshs 150,000, the claimant was under duty to strictly prove the payment of Kshs 150,000.

13. Furthermore, the 2<sup>nd</sup> respondent from the parties herein and their description is an artificial entity. It has been sued to refund a sum of Kshs 150,000. Is there any evidence that, the 2<sup>nd</sup> respondent as “Direct

“O” Auctioneers” received any money from the appellant.

14. In any case the appellant will not be prejudiced in that, it can always pursue the person who was paid the sum of Kshs 150,000 based on the evidence adduced. Furthermore, evidence reveals that, the auctioneer intends to pursue further payment from the appellant, they will have an opportunity to counter claim or enforce its right otherwise.

15. I note from the submissions herein by the appellant that, they argue that trial court misdirected itself on the principle of subrogation. However, I find that first and foremost the trial court did not dismiss the appellant’s case purely on the principle of subrogation. Therefore, the discussion by the court on that principle was an alternative finding and having held that the trial court properly dismissed the appellant’s claim for failure to support the pleadings

with facts, a discussion of whether the principle of subrogation applies or not does not suffice.

16. It is also submitted that the 1<sup>st</sup> and 2<sup>nd</sup> respondents colluded in forcefully and unduly demanding Kshs 150,000 from the appellant for release of its motor. However, there is no evidence that was availed before the trial court of the alleged collusion.

17. The appellant also submits that, the 1<sup>st</sup> respondent has unlawfully enriched itself, that may be, if there is no proof that, the sum retained was though not procedurally retained but was based on a sound claim of payment of doctor's and witness expenses.

18. Finally, I note that, in the entire appellant's submission herein they do not address the salient findings of the trial court that: -

*a) Had the appellant sought for a sum of Kshs 128,233 instead of Kshs 150,000 their prayer would have been granted*

*b) That the relationship between Mr. Pius Ngundu and 2<sup>nd</sup> respondent was not established and the 2<sup>nd</sup> respondent having denied the claim, the claim against it fails*

19. The afore findings were the basis of the dismissal of the appellant's case, and therefore failure to address it means the appellant does not find fault with the same and supports dismissal of their case on that basis.

20. Pursuant to the aforesaid I find that the appeal herein has no merit and I dismiss it in its entirety with costs to the respondents.

Dated, delivered and signed on this 12<sup>th</sup> day of March 2026

**GRACE L. NZIOKA**

**JUDGE**

In the presence of:

Mr. Njoroge H/B for Mr. Momanyi for the appellant

Mr. Onduso for the 1<sup>st</sup> respondent

N/A for the 2<sup>nd</sup> respondent

Ms. Hannah: Court Assistant