

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION
CIVIL APPEAL NO. E097 OF 2022

KITOLOLO CONSULTANTS LIMITED APPELLANT

VERSUS

ANNE MUMBI HINGA RESPONDENT

(Being an appeal from the Judgment of Hon. H.M. Nyaberi (CM) delivered on 13th July 2022 in Milimani CMCC No. 8104 of 2013)

JUDGMENT

Background

1. This is a first appeal arising from the judgment of the Chief Magistrate’s Court dismissing the Appellant’s claim in its entirety. Aggrieved by the above decision of the lower court, the Appellant filed the present appeal based primarily on the contention that the learned trial magistrate erred both in fact and in law in finding that the Appellant had failed to prove its case on a balance of probabilities.

2. The appeal is dated 27th July 2022 and is based on the following grounds which are set out in the Memorandum of appeal:
 1. ***THAT the learned Magistrate erred in law and in fact by dismissing, in its entirety, the Appellant’s suit as against the Respondent.***
 2. ***THAT the learned Magistrate erred in law and in fact by disregarding and misconstruing the evidence tendered by the***

Appellant in support of the suit as articulated in the Complaint dated 19th December 2013.

3. THAT the learned magistrate erred in law and in fact by misapprehending the Appellants case thereby arriving at a wrong conclusion.

4. THAT the learned magistrate erred in law and in fact by making a finding that the Appellant had not proved its case on a balance of probabilities.

5. THAT the learned magistrate erred in both law and fact by taking into consideration irrelevant facts and ignoring relevant and proven facts.

3. As a first appellate court, this Court is obliged to reconsider and re-evaluate the evidence on record and draw its own independent conclusions, while bearing in mind that it neither saw nor heard the witnesses testify. See **Selle and Another Versus Associated Motor Boat Company Ltd & Others [1968] EA 123.**

3. From the record, the Appellant instituted the suit before the subordinate court seeking payment allegedly due for professional services rendered. The claim was resisted by the Respondent.

4. The trial court, having considered the evidence, dismissed the suit on the basis that the Appellant had failed to establish its claim to the requisite standard.

5. The Appellant now invites this Court to interfere with that finding.

Issues for Determination

6. Having considered the grounds set out in the memorandum of appeal, the record of appeal and submissions, I have re formulated the issues in the following terms:

- a. Whether the Appellant proved the existence of a contractual relationship between itself and the Respondent?
- b. Whether the Appellant proved that the Respondent was liable for the sum claimed?
- c. Whether the trial court erred in finding that the Appellant had not proved its case on a balance of probabilities?

Analysis and Determination:

Burden and Standard of Proof

7. The starting point is the well settled principle that he who alleges must prove. The burden lay squarely upon the Appellant to demonstrate, on a balance of probabilities, that:

- i. There existed a contract between itself and the Respondent;
- ii. Services were rendered pursuant to that contract; and
- iii. Payment remained outstanding and was due from the Respondent.

8. The standard required is not proof beyond reasonable doubt, but proof on a balance of probabilities. That standard nevertheless requires cogent and

credible evidence establishing a logical and probable connection between the Respondent and the alleged obligation.

Whether a Contract Was Proved

9. A central difficulty in the Appellant's case, both before the trial court and on appeal, is the absence of clear evidence demonstrating the existence of an agreement between the Appellant and the Respondent.
10. The record does not disclose any written agreement executed by the Respondent. Nor is there sufficient documentary or oral evidence establishing the terms of engagement or linking the Respondent directly to the alleged contractual obligations.
11. Indeed, the Appellant's own material appears to proceed on the assumption of an engagement, rather than demonstrating it.
12. At the trial court the appellant adopted his witness statement as his evidence in chief and produced the list and bundle of documents.
13. Looking at the same, beyond merely stating that the respondent engaged the appellant's professional services, there no such documentary evidence, such as an agreement between the parties to prove this point.
14. In a claim grounded on contractual liability, the existence of the contract is foundational. Without proof of such agreement, the claim cannot stand.

Evidence of Partial Payment

13. The Appellant relied, in part, on alleged evidence of partial payment in the sum of Kshs 50,000 to its firm to support its claim.

14. However, the record reveals that the payment relied upon was made by a person identified as “Julie”, and the signature appended thereto is indicated as the letter “M”.

15. There is no evidence connecting that payment to the Respondent. There is no explanation as to who “Julie” is, her relationship to the Respondent, or the basis upon which such payment, if at all, could be attributed to the Respondent.

16. In the absence of such linkage, the alleged partial payment does not advance the Appellant’s case. On the contrary, it introduces uncertainty as to who, if anyone, was contractually liable.

Consistency and Sufficiency of Evidence

17. The Court has also considered the broader evidentiary record.

18. The material placed before the trial court, including affidavits and documentary exhibits, appears to suggest that services may have been rendered by the Appellant. For instance, the Appellant asserted that structural engineering services were provided and that drawings and approvals were undertaken.

19. However, the critical question is not whether services were rendered in the abstract, but whether they were rendered at the instance of the Respondent, and whether the Respondent assumed liability for payment? On that issue, the evidence remains inconclusive.
20. The Appellant did not demonstrate, with sufficient clarity, that the Respondent instructed the services, accepted them, or agreed to pay for them.
21. The evidentiary gaps identified by the trial court were therefore not merely technical. They went to the very root of the claim.
22. The testimony therefore, while uncontroverted did not meet the legal threshold based the applicable legal standard required.
23. The reliance placed on the decisions of the court in *Trust Bank Limited vs. Paramount Universal Bank Limited & 2 others Nairobi (Milimani) HCCS No. 1243 of 2001 and Kyalo Elly Joy v Samuel Gitahi Kanyeri [2021] eKLR*, in my view do not absolve the Plaintiff from discharging its burden of proof to the applicable standard.

Whether the Trial Court Erred

23. The role of this Court is not to substitute its own view merely because it might have reached a different conclusion, but to determine whether the trial court misdirected itself.

24. Having re-evaluated the evidence, I am unable to find any error in principle or in fact in the trial court's conclusion.

25. I am satisfied that based on the material before the court, the learned magistrate correctly appreciated the burden of proof and properly concluded that the Appellant had failed to discharge that burden to the applicable standard.

26. The upshot is that the trial court was therefore correct in dismissing the suit.

27. Finally, I address the issue of costs. Because the respondent did not participate in the appeal, it is appropriate for each of the parties to bear their own costs.

Disposition

29. Based on the reasons set out above, the appeal is hereby dismissed.

30. The judgment of the Chief Magistrate delivered on 13th July 2022 is upheld.

Dated and signed at Nairobi, the 30th day of April 2026. Delivered virtually through Microsoft TEAMS.

Aleem Visram FCI Arb

JUDGE