

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANGA
CIVIL APPEAL NO. E049 OF 2022

MURANG'A CO-OPERATIVE CREMARIES.....1ST
APPELLANT

MURANG'A COUNTY GOVERNMENT.....2ND
APPELLANT

VERSUS

JOHNSON NJOROGE NDUATI
RESPONDENT

(Being an appeal from the judgment of and decree of Hon Amelea Okullo delivered on 16th August 2023 at Murang'a in CM'S Civil Case E252 OF 2021)

JUDGEMENT

Background:

- 1.** This Appeal challenges the Judgement issued by Hon A. Okullo (RM) in Muranga CMCC NO E252 of 2021 dated 16th August 2022, in favour of the Plaintiff.
- 2.** The Respondent had instituted proceedings at the Murang'a Chief Magistrates Court vide a Plaint dated 6th December 2021, the seeking payment of Kshs. 486,000, and a further sum of Kshs. 20,000 allegedly owed, general damages for breach of contract, costs, interest, and any other relief. The claim arose from an alleged motor vehicle hiring agreement between the Appellants and the Respondent dated 1st March 2021 for the lease of a vehicle to transport dairy products.
- 3.** At the hearing, the Respondent adopted his witness statement and testified that they had an arrangement with

the appellants to provide him with his vehicle and driver. He was to service the vehicle and the Respondents were to fuel. He stated that he was to be paid every end of the month upon production of invoices. He testified that he had not been paid for the deliveries.

- 4.** On cross examination the Respondent confirmed he had a contract with Murang'a County Creameries as it operated under Murang'a County Government. Referring to the contract he stated that it was to commence on the 1st of March, 2021 and terminate on 1st of July. It was his evidence that he terminated the contract having not received any payment for three (3) months. He stated that the contract was signed before Waweru Nyambuna Advocate. He produced delivery notes as exhibits.
- 5.** Under re-examination he stated that the agreement was written by the officials of Muranga Cooperative Creameries. He affirmed that that the contract was to run for one year, that there was an error by the author of the contract in that when filing dates, it was 1st of July, 2021 but it commenced on 1st of March, 2021. He reiterated that he performed his obligations but was not paid.
- 6.** The Appellants did not call any witness and proceeded to close their case.
- 7.** The trial Court entered judgment against the defendants jointly and severally stating that indeed the Plaintiff had established on a balance of probabilities that he had entered into a binding contract with the Defendants which was not honored by the Defendants. The Plaintiff's suit was allowed with costs.
- 8.** The Appellant, being dissatisfied with the above stated judgment filed the Memorandum of Appeal dated 8th

September 2022. The Appellant preferred six (6) grounds of appeal namely:

- i. That the Learned Magistrate erred in law and in fact by awarding special damages when specific damages were not proven.*
 - ii. That the Learned Magistrate erred in law and in fact by relying on evidence which was not produced nor relevant.*
 - iii. That the Learned Magistrate erred in law and in fact by failing to consider the evidence produced judiciously.*
 - iv. That the Learned Magistrate erred in law and in fact by following the wrong procedure during the hearing by seeking evidence to be produced after the close of the case.*
 - v. That the Learned Magistrate erred in law and in fact by not following procedure during trial denying the appellant a chance to be heard.*
 - vi. That the Learned Magistrate erred in law and in fact by granting a judgement not supported by evidence which is violative of the principles of natural justice and equity.*
9. The Appellant seeks for the Court to allow the appeal, the and to set aside and any other orders the court may deem fit.
 10. The Appeal was canvassed by way of written submissions following directions of the court.
 11. The Appellants submitted that the claim for special damages was unproven, contending that the receipts produced did not

relate to specific deliveries and that invoices could not substitute for receipts or delivery notes.

- 12.** They challenged the authenticity and probative value of the Respondents' documents, particularly alleging that purported delivery notes were irregularly substituted with invoices without amendment, rendering them unreliable and unconstitutional.
- 13.** They further argued that the trial magistrate improperly relied on evidence that was neither pleaded nor produced, and erred in finding the existence of a binding contract whether written or oral despite no such pleading by the Respondents.
- 14.** The Appellants also faulted the trial court for failing to fairly and judiciously evaluate the evidence, alleging reliance on unsupported material even after the Respondents admitted errors, and for denying them an opportunity to be heard, including the chance to file witness statements.
- 15.** They maintained that the proceedings offended principles of natural justice and equity, and urged the court to find that the claim was unsubstantiated and dismiss it with costs.
- 16.** Any Case law?

Respondent's Submissions

- 17.** The Respondents filed submissions on 22nd May 2025 and reiterated the proceedings at the lower court. It was submitted the Appellants never bothered to file any witness statements and did not exhibit any documents in support of their defence.
- 18.** It was further submitted that the Appellants defence were mere denials with no specifics, they were not to be taken

seriously and averred they were treating judicial proceedings casually.

- 19.** The Respondent largely argued that the Learned magistrate's determination was firmly anchored on sound legal principles a proper appreciation of the evidence on record, that the Magistrate had correctly read the intention of the parties to deduce a legal relationship.
- 20.** In conclusion, it was submitted that the Respondents claim was based on contract and were strictly bound by the terms they agreed upon, that the appeal should fail and the Respondent was entitled to the fruits of his judgement in the lower court with cost and interests in both courts.

Analysis and Determination

- 21.** This Court has carefully considered the Memorandum of Appeal, the Trial Court record and the submissions of the parties in this Appeal.
- 22.** This being a first appellate court and as aptly stated in the case of **Selle & Another v Associated Motor Boat Co Ltd & Others [1968] EA 123** this court should evaluate and/or assess the evidence on record as follows: -

"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

- 23.** At the same time, the Court is guided by the settled principle that it will not lightly interfere with findings of fact by the trial court unless it is demonstrated that such findings were based on no evidence at all, or on a misapprehension of the evidence, or that the trial court acted on wrong principles in arriving at its conclusions.
- 24.** Having carefully reconsidered the record, the issues that fall for determination are twofold:
- i. whether there existed a binding contract between the parties?***
 - ii. Whether the appellant was in breach of the contract?***
- 25.** From the pleadings, it cannot be gainsaid that the Respondent gave a coherent and consistent account of a motor vehicle hiring arrangement under which he provided both the vehicle and driver, while the Appellants undertook to meet fuel costs and remit monthly payments upon issuance of invoices. This testimony remained unshaken under cross-examination and was corroborated by documentary evidence in the form of delivery notes produced before the trial court.
- 26.** Of notable significance is the fact that the Appellants elected not to call any witnesses or adduce any evidence in support of their defence. Their pleadings, therefore, remained mere averments devoid of evidentiary backing. It is a well-established principle that pleadings are not evidence, and where a party fails to tender evidence in support thereof, such pleadings remain unsubstantiated. In the circumstances, the Respondent's evidence stood uncontroverted, and the trial court cannot be faulted for relying upon the same.
- 27.** On the contention that the contract was unenforceable for want of execution, this Court concurs with the learned trial

magistrate that a contract need not, in all instances, be reduced into a formally signed documents to be binding. A contract may be inferred from the conduct of the parties, provided the essential elements of offer, acceptance and consideration are discernible. In the present case, the Respondent rendered hiring services which were accepted and utilized by the Appellants. Such conduct leaves no doubt as to the existence of a contractual relationship between the parties.

- 28.** In determining what constitutes a contract, the Court of Appeal in **William Muthee Muthami v Bank of Baroda (2014) eKLR** stated as follows;

“... In the Law of Contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach....”

- 29.** As previously observed, a contract may be inferred from the conduct of the parties and is not solely dependent on the formal execution of a written document. Where there is a clear meeting of minds and the essential elements of a contract are discernible, a court will be slow to deny the existence of a binding agreement between the parties in dispute.
- 30.** The Court has further considered the conduct of the parties as evidenced by the delivery notes on record. Notably, the said delivery notes bear dispatch stamps from the Murang’a Co-operative Creameries, which signify acknowledgment of receipt or processing of the goods. This evidence was not controverted or challenged by the opposing party. In the absence of any rebuttal, the Court is entitled to draw an

inference that the deliveries were duly effected and accepted, thereby reinforcing the existence of a subsisting contractual relationship between the parties as demonstrated through their conduct.

- 31.** Although the Appellant strongly denies the existence of a motor vehicle hiring agreement between the parties, to be absolved of liability it must demonstrate that the alleged hiring services were never rendered to it, despite that the invoices bear the dispatch stamp.
- 32. In Ali Abid Mohammed vs Kenya Shell & Company Limited (2017) eKLR**, the Court of Appeal emphasized that a contract between parties in the absence of words reduced into writing can still be inferred from the conduct of the parties. The Court held that:

“.... It therefore follows that a contract can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded. See Timoney and King vs King 1920 AD 133 at 141. In the circumstances of the instant case, there existed an enforceable contract between the parties by reason of conduct. Indeed, it was not disputed by the respondent that it supplied petroleum products to the appellant at a specific amount per liter and for a certain period of time.....”

- 33.** The Appellants’ allegation that the documents produced were fabricated was not supported by any cogent evidence. Allegations of fraud, illegality or fabrication must not only be specifically pleaded but must also be strictly proved to a standard higher than that of a balance of probabilities. No such proof was tendered before the trial court. In the absence

of rebuttal evidence, the invoices and delivery notes retained their probative value and were properly relied upon.

34. In the case of **Ndolo vs. Ndolo (2008) 1KLR** the court stated that:

“We start by saying that it was the Respondent who was alleging that the will was forged and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases. In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

35. Also, in the case of **Gichinga Kibutha v Caroline Nduku [2018] eKLR**, the Court stated with authority,

“that it is therefore settled law that in civil cases, a party who wishes the court to give a judgment or to declare any legal right dependent on a particular fact or sets off acts that a party has legal obligation to provide evidence that will best facilitate the proof of existence of those facts. The party must present to the court all the evidence reasonably available on the litigated factual issues and that a party is bound by their own pleadings and the evidence they adduce in court and that the purpose of pleading is to ascertain with clarity the matter on which parties disagree and points of agreement so as to ascertain matters for determination”

- 36.** From the foregoing therefore, the Appellants having sought the court to pronounce judgment on particular facts they bear the burden of producing the best available evidence to establish those facts, a burden they failed to discharge.
- 37.** With regard to special damages, the law is settled that they must be specifically pleaded and strictly proved. From the record, the Respondent duly pleaded the sums claimed and supported the same with documentary evidence. When considered alongside the uncontroverted oral testimony, this Court is satisfied that the claim was proved on a balance of probabilities.
- 38.** On the alleged denial of the right to be heard, the record paints a different picture. The Appellants were afforded an opportunity to present their case but chose not to call any witnesses. A litigant who fails to take advantage of the opportunity accorded by the court cannot subsequently be heard to complain that they were denied a hearing.
- 39.** In the case of **Union Insurance Co. of Kenya Ltd -vs- Ramzan Abdul Dhanji, Civil Application No. Nairobi 179 of 1998**, the court held thus:

“Whereas the right to be heard is a basic natural justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the Applicant was denied the right to defend itself. The Applicants were notified on every step the Respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the Applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the Applicant will be such an arguable point in the

appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given reasonable opportunity of being heard and once that opportunity is given and not utilized, then the only point on which the party not utilizing the opportunity can be heard is why he did not utilize it". (emphasis added).

- 40.** From the evidence on record, I find that the Appellants were given an opportunity to be heard but did not seize it. They cannot therefore complain that they were not given a fair hearing.
- 41.** Deriving from the foregoing, it is this Court's finding that it was the Appellants that failed to pay for the hiring services offered to it by the respondent as per their contract hence in breach of their contract. From the above evidence and the parties conduct, this Court finds and holds that all the elements of contract were proved in this case and that there existed a binding motor vehicle hiring agreement between the Appellant and the Respondent.
- 42.** In the final analysis, it is evident that the learned trial magistrate properly directed himself on both the law and the evidence, and correctly discerned the intention of the parties. The finding that a valid contract existed and that the Appellants were in breach thereof was firmly grounded on sound legal principles and supported by the evidence on record.
- 43.** Accordingly, this Court finds no reason to disturb the Judgment of the trial court. The appeal is devoid of merit and is hereby dismissed with costs to the Respondent.

44. Final Orders: Appeal dismissed. The trial court judgement delivered on 16th August 2023 is hereby upheld. Costs to the Respondent,

Dated, Signed and Delivered Virtually on this 13th day of May 2026.

HON. T. W. OUYA, OGW

JUDGE

In the presence of:

Mr. Kirubi for the Respondent

No appearance for Appellant

Hamza/Kevin - Court Assistants