



**Davis & Shirtlift Limited v George Philliph Investments Ltd. t/  
a Rock Motel & 2 others (Environment and Land Appeal E012 of 2023)  
[2024] KEELC 851 (KLR) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 851 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL E012 OF 2023  
SO OKONG'O, J  
FEBRUARY 22, 2024**

**BETWEEN**

**DAVIS & SHIRTLIFT LIMITED ..... APPELLANT**

**AND**

**GEORGE PHILLIPH INVESTMENTS LTD. T/A ROCK  
MOTEL ..... 1<sup>ST</sup> RESPONDENT**

**ITIKON AFRICA LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**HARISH K. PATEL ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. C.L.Yalwala  
(SPM) delivered on 23rd March 2022 in Maseno SPMELC No. 18 of 2018))*

**JUDGMENT**

**Background**

1. The 1<sup>st</sup> Respondent filed a suit against the appellant and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents before this court on or about 4<sup>th</sup> April 2014. In its amended plaint dated 7<sup>th</sup> May 2014, the 1<sup>st</sup> Respondent averred that in September 2012, it engaged the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to construct a swimming pool and a spa within its property known as Rock Motel/Resort, Kisumu at a consideration of Kshs. 2,500,000/-. The 1<sup>st</sup> Respondent averred that it engaged the services of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents for that assignment on the recommendation of the Appellant who also undertook to supervise the construction work by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
2. The 1<sup>st</sup> Respondent averred that pursuant to the said agreement, it paid to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents a total sum of Kshs. 1,200,000/- in September and October 2012 as part payment of the agreed contract sum. The 1<sup>st</sup> Respondent averred that the construction work commenced and the Appellant's



employees visited the construction site from time to time in the performance of their supervisory role for which they were paid. The 1<sup>st</sup> Respondent averred that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents abandoned the construction work midway and the Appellant failed to provide the progress report on the project. The 1<sup>st</sup> Respondent averred that it consulted the Ministry of Lands, Housing and Urban Development engineers who inspected the swimming pool and declared it defective for poor workmanship. The 1<sup>st</sup> Respondent averred that the said engineers from the Ministry of Lands, Housing and Urban Development recommended that the swimming pool be demolished and constructed fresh at a cost of Kshs. 2,692,850/-. The 1<sup>st</sup> Respondent averred that it had suffered loss and damage for which it held the Appellant and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents liable. The 1<sup>st</sup> Respondent sought judgment against the Appellant and 2<sup>nd</sup> and 3<sup>rd</sup> Respondents jointly and severally for; Kshs. 1,300,000/- being a refund of the payment made to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, Kshs. 2,692,850/- being the cost of a new swimming pool, general damages for breach of contract and loss of business, and cost of the suit.

3. The Appellant filed a defence on 28<sup>th</sup> May 2014 in which he denied the 1<sup>st</sup> Respondent's claim in its entirety. The Appellant averred that the 1<sup>st</sup> Respondent approached it for advice on the construction of a swimming pool. The Appellant averred that it informed the 1<sup>st</sup> Respondent that it was not involved in the business of constructing swimming pools and that it could recommend to the 1<sup>st</sup> Respondent companies which were carrying out the business. The Appellant averred that it recommended several companies to the 1<sup>st</sup> Respondent from which the 1<sup>st</sup> Respondent picked the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents for the assignment. The Appellant averred that its role was limited to the recommendation that was sought by the 1<sup>st</sup> Respondent and that it was up to the 1<sup>st</sup> Respondent to enter contracts with the said companies for the construction of the swimming pool. The Appellant averred it was not involved at any time in the construction of the said swimming pool. The Appellant averred that the 1<sup>st</sup> Respondent requested it to act as a consultant for the project but it declined the invitation due to lack of technical capacity to do so.
4. The Appellant denied that it was involved in the supervision of the project and averred that it was engaged by the 1<sup>st</sup> Respondent after the construction of the swimming pool to assess the pool and give recommendations on its performance. The Appellant averred that it undertook the assignment and was paid for the same by the 1<sup>st</sup> Respondent. The Appellant averred that that was the only contract that it had with the 1<sup>st</sup> Respondent. The Appellant urged the court to dismiss the 1<sup>st</sup> Respondent's suit.
5. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed separate statements of defence on 26<sup>th</sup> June 2014. The 2<sup>nd</sup> Respondent averred that it was a stranger to the 1<sup>st</sup> Respondent's claim and the alleged loss that was suffered by the 1<sup>st</sup> Respondent. The 3<sup>rd</sup> Respondent also denied the 1<sup>st</sup> Respondent's claim. The 3<sup>rd</sup> Respondent averred that it was a stranger to the claim and the loss allegedly suffered by the 1<sup>st</sup> Respondent. The 3<sup>rd</sup> Respondent admitted receiving a total sum of Kshs. 1,200,000/- from George Joshua Ongonga Okungu. The 3<sup>rd</sup> Respondent averred that the said payment was in settlement of a debt that was owed to him by the said George Joshua Ongonga Okungu. The 3<sup>rd</sup> Respondent urged the court to dismiss the 1<sup>st</sup> Respondent's suit with costs.
6. The suit was transferred to the Senior Principal Magistrate's Court at Maseno on 13<sup>th</sup> March 2018 where it was given new case number Maseno SPMC ELC No. 18 of 2018 (hereinafter referred to only as "the lower court"). The lower court heard the suit and delivered a judgment on 23<sup>rd</sup> March 2022. The lower court entered judgment for the 1<sup>st</sup> Respondent against the Appellant and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents jointly and severally for Kshs. 1,200,000/- being a refund of the payment made to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents by the 1<sup>st</sup> Respondent and Kshs. 2,692,850/- being the cost of constructing a new swimming pool. The court also awarded the 1<sup>st</sup> Respondent interest on the said amounts and costs of the suit.



7. The lower court relied on the Appellant's Daily Work Sheet dated 8<sup>th</sup> January 2014 and a receipt for Kshs. 5000/- paid to the Appellant by the 1<sup>st</sup> Respondent on 6<sup>th</sup> January 2014 and made a finding that the Appellant had provided inspection services during the construction of the 1<sup>st</sup> Respondent's swimming pool although there was no written contract between the parties. The lower court further found that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents who were engaged by the 1<sup>st</sup> Respondent to construct the swimming pool and the Appellant who was to supervise them were in breach of the contracts that they entered into with the 1<sup>st</sup> Respondent the swimming pool having been found and condemned as defective by the Ministry of Lands, Housing and Urban Development engineers. The court found further that the 1<sup>st</sup> Respondent was entitled to the sum of Kshs. 1,200,000/- that was paid to the 3<sup>rd</sup> Defendant by the 1<sup>st</sup> Respondent as part payment of the contract sum. The lower court further found that the 1<sup>st</sup> Respondent was entitled to the claimed sum of Kshs. 2,692,850/- to enable it to construct a new swimming pool. The court found the 1<sup>st</sup> Respondent's claim for damages not proved.

### **The appeal**

8. The Appellant was dissatisfied with the judgment of the lower court and preferred the present appeal against the same. In its memorandum of appeal dated 6<sup>th</sup> March 2023, the Appellant challenged the lower court's decision on the following grounds;
  1. That the learned magistrate erred in law and fact in finding that there was a contract between the Appellant and the 1<sup>st</sup> Respondent for the provision of the supervision services for the construction of the swimming pool.
  2. That the learned magistrate erred in law and fact in entering judgment against the Appellant jointly and severally with the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and awarding damages for the sum of Kshs. 1,200,000/- to the 1<sup>st</sup> Respondent despite the admission that this sum was only paid to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
  3. That the learned magistrate erred in law and fact in entering judgment for the 1<sup>st</sup> Respondent against the Appellant jointly and severally with the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents for damages in the sum of Kshs. 2,692,850/- while there was no contract between the Appellant and the 1<sup>st</sup> Respondent for the construction of the swimming pool.
  4. That the learned magistrate erred in law and fact in entering judgment against the Appellant for costs and interest.
  5. The Appellant urged the court to allow the appeal and set aside the lower court judgment. The Appellant prayed in the alternative that the court makes such orders as it deems just.

### **The submissions**

9. The Appellant filed its submissions on 4<sup>th</sup> August 2023 while the 1<sup>st</sup> Respondent filed its submissions on 25<sup>th</sup> January 2024. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents did not participate in the appeal. The Appellant submitted that the lower court erred in finding that there was a contract between the Appellant and the 1<sup>st</sup> Respondent and in entering judgment for the 1<sup>st</sup> Respondent against the Appellant jointly and severally with the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. The Appellant submitted that the burden of proof rested with the 1<sup>st</sup> Respondent and that the lower court's finding aforesaid was not based on the evidence on record. The Appellant submitted that the 1<sup>st</sup> Respondent did not establish the existence of the elements of a valid contract in respect of the alleged supervision contract that it claimed to have entered into with the Appellant. The Appellant submitted that; there was no evidence that the Appellant had



offered to render supervisory services to the 1<sup>st</sup> Respondent during the construction of the swimming pool, that it rendered such services and was paid for the same. The Appellant submitted that it made it clear to the 1<sup>st</sup> Respondent at the onset of the project that it was not involved in the construction of swimming pools and associated civil works and that the Appellant never departed from that position. The Appellant submitted that based on the said erroneous finding, the lower court entered judgment against the Appellant jointly and severally with the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. The Appellant submitted that there was no basis for entering judgment against it for Kshs. 1,200,000/- which was paid by the 1<sup>st</sup> Respondent to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. The Appellant submitted that the said amount could only be recovered from the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. Concerning the sum of Kshs. 2,692,850/-, the Appellant submitted that the contract for the construction of the swimming pool was between the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. The Appellant submitted that it could not be held liable for the defects in the said swimming pool resulting from poor workmanship by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. The Appellant urged the court to allow the appeal as prayed. The Appellant cited several authorities that I have considered.

10. In its submissions, the 1<sup>st</sup> Respondent supported the lower court judgment. The 1<sup>st</sup> Respondent submitted that the lower court finding that there was a contract between the Appellant and the 1<sup>st</sup> Respondent for the provision of supervisory services was supported by evidence. The 1<sup>st</sup> Respondent submitted that although the contract was oral, the same was established at the trial. The 1<sup>st</sup> Respondent submitted further that there was no misdirection on the part of the lower court in entering judgment against the Appellant and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents jointly and severally. The 1<sup>st</sup> Respondent submitted that the sums of Kshs. 1,200,000/- and Kshs. 2,692,850/- awarded to the 1<sup>st</sup> Respondent were damages and the court should be slow in interfering with such award. On the issue of costs, the 1<sup>st</sup> Respondent submitted that the same was at the discretion of the court and as such there was no need for this court to interfere with the exercise of that discretion. The 1<sup>st</sup> Respondent urged the court to dismiss the appeal. The 1<sup>st</sup> Respondent also relied on several decisions that I have considered.

### **Analysis and determination**

11. I have considered the pleadings and the proceedings of the lower court, the judgment of the court, the grounds of appeal put forward by the Appellant, and the submissions by the advocates for the parties. As correctly submitted by the 1<sup>st</sup> Respondent, this being a first appeal, this court has to consider and re-evaluate the evidence on record and draw its conclusions on the issues that were raised for determination before the lower court. However, the court has to bear in mind that it did not have the advantage of seeing and hearing the witnesses who testified before the lower court. In *Kenya Ports Authority v Kuston (Kenya) Limited* [2009] 2EA 212 the Court of Appeal stated that:

On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.” See also, *Verani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Co. Ltd* [2004] 2 KLR 269, *Selle v Associated Motor Boat Co. Ltd.* [1968] E.A 123 and *Abok James Odera t/a Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013]eKLR on the duty of the first appellate court.

12. The court will also not interfere with the findings of fact by the trial court unless they were not based on evidence at all or they were based on a misapprehension of the evidence, or where it is demonstrated



that the court acted on wrong principles in reaching its conclusion. See, *Peter v Sunday Post Ltd.* [1958] E.A 424 and *Makube v Nyamuro*[1983] KLR 403.

13. From the Appellant's grounds of appeal, the issues arising for determination in this appeal in summary are; whether the lower court erred in its finding and holding that there was a contract between the Appellant and the 1<sup>st</sup> Respondent for the supervision of the construction of a swimming pool at the 1<sup>st</sup> Respondent's hotel premises, whether the lower court erred in entering judgment for the 1<sup>st</sup> Respondent against the Appellant jointly and severally with the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents for Kshs. 1,200,000/- being a refund of the payment that was made to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent by the 1<sup>st</sup> Respondent and Kshs. 2,692, 850/- being the cost of a new swimming pool together with interest and costs of the suit. I will consider these issues together.
14. Upon review of the evidence that was before the lower court, I find the findings of the lower court and its judgment against the Appellant difficult to support. The alleged agreement between the 1<sup>st</sup> Respondent and the Appellant for the supervision of the construction of the said swimming pool was oral and was said to have been entered into in August 2012 or thereabouts. To establish the alleged agreement, the 1<sup>st</sup> Respondent produced before the lower court, a copy of a page of the 1<sup>st</sup> Respondent's Visitors Book for 8<sup>th</sup> January 2014, a copy of the Appellant's Daily Work Sheet for 8<sup>th</sup> January 2014 and a copy of the Appellant's receipt issued to the 1<sup>st</sup> Respondent for Kshs. 5,000/- dated 6<sup>th</sup> January 2014. In its judgment, the lower court stated that upon perusal of the said Daily Work Sheet and receipt, it was satisfied that the Appellant provided inspection services to the 1<sup>st</sup> Respondent and did make recommendations to it concerning the swimming pool and was paid for the same. The lower court found based on the foregoing that there was a contract between the Appellant and the 1<sup>st</sup> Respondent. I am of the view that the lower court misconstrued the evidence that was before it and arrived at an erroneous finding. The Appellant placed evidence before the lower court in the form of a letter to the 1<sup>st</sup> Respondent dated 11<sup>th</sup> April 2012 in which the Appellant stated expressly that "We wish to bring to your attention that Davis & Shirtlift Ltd. does not engage in swimming pool construction services and other associated civil works." How could the 1<sup>st</sup> Respondent have engaged the Appellant to supervise experts in the field of swimming pool construction in which field the Appellant had expressly stated that it had no expertise? Again, how could the Appellant have assumed such a huge responsibility at a fee of Kshs. 5000/- while the contract sum was Kshs. 2,500,000/-? In my view, the lower court ignored without giving any reason the Appellant's contention which was supported by documentary evidence on record that it was called upon by the 1<sup>st</sup> Respondent after the construction of the swimming pool had been completed to inspect the pool and make recommendations. The receipt dated 6<sup>th</sup> October 2014 for Kshs. 5000/- shows that the 1<sup>st</sup> Respondent paid the said amount as a deposit for the Appellant to visit its premises. The payment was not for any services rendered. A copy of the Visitors Book shows that three employees of the Appellant visited the 1<sup>st</sup> Respondent's premises to inspect the swimming pool. The Daily Work Sheet dated 8<sup>th</sup> January 2014 shows that the said employees inspected **"the already constructed pool"** and made recommendations on where the pump house could be built. The team also noted anomalies in the swimming pool that included cracks in the deep-end floor. The employees of the Appellant informed the 1<sup>st</sup> Respondent that they would consider the said defects when they reached the office and would make appropriate recommendations. According to the report by the Ministry of Public Works, Housing and Urban Development Directorate of Public Works engineers, they visited the said swimming pool on 14<sup>th</sup> and 16<sup>th</sup> January 2014 a few days after the Appellant's employees. They also inspected the swimming pool whose construction had been completed and made recommendations. There is no doubt that the inspection that was done by the Appellant of the swimming pool was done after the construction of the said pool had been completed, and the recommendation that the Appellant was to make was on how the defects that had been noted



could be remedied. There was completely no credible evidence before the lower court on which it could find that the Appellant had supervised the construction of the said swimming pool and was paid for the same. All the evidence before the court pointed to the Appellant's engagement at the end of the construction work. For the foregoing reasons, it is my finding that the lower court erred in its finding that there was a contract between the Appellant and the 1<sup>st</sup> Respondent for the supervision of the construction of the swimming pool at its hotel premises.

15. The foregoing erroneous finding led to the entry of an erroneous judgment against the Appellant. In the absence of a contract between the Appellant and the 1<sup>st</sup> Respondent for the supervision of the construction of the swimming pool, there was no basis upon which the Appellant could be liable to the 1<sup>st</sup> Respondent for Kshs. 1,200,000/- being a refund of the payment that was made to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents by the 1<sup>st</sup> Respondent and Kshs. 2,692, 850/- being the cost of a new swimming pool. In any event, the Appellant could not be liable to refund to the 1<sup>st</sup> Respondent the sum of Kshs. 1,200,000/- that was paid to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. The refund could only be made by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents who received it. I did not also appreciate the reason behind the award of Kshs. 2,692, 850/- to the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent was to pay a total sum of Kshs. 2,500,000/- for the construction of the swimming pool. It only paid Kshs. 1,200,000/- less than half of the contract price and got a defective swimming pool for it. The court found that there was a breach of contract by the contractors who constructed the said swimming pool and ordered that the 1<sup>st</sup> Respondent get a refund of Kshs. 1,200,000/- that it paid to the said contractors for the work. This was fair in that it was putting the 1<sup>st</sup> Respondent back in the same state in which it was before the breached contract. After getting a refund of the payment made for the defective work, what was Kshs. 2,692, 850/- for? Why should the 1<sup>st</sup> Respondent get a refund of Kshs. 1,200,000/- for the payment made for the defective work on the swimming pool and an additional sum of Kshs. 2,692, 850/- for a new swimming pool while it did not even complete the payment for the defective pool?
16. Due to the foregoing, it is my finding that the 1<sup>st</sup> Respondent's case in the lower court against the Appellant was not proved to the required standard. The lower court therefore erred in entering judgment for the 1<sup>st</sup> Respondent against the Appellant.

### **Conclusion**

17. In the final analysis, I find merit in the Appellant's appeal. The appeal is allowed. The judgment of the lower court delivered on 23<sup>rd</sup> March 2022 is set aside as against the Appellant and substituted with an order dismissing the 1<sup>st</sup> Respondent's suit in the lower court as against the Appellant. The Appellant shall have the costs of the Appeal and the lower court suit to be paid by the 1<sup>st</sup> Respondent.

**DELIVERED AND DATED AT KISUMU ON THIS 22<sup>ND</sup> DAY OF FEBRUARY 2024**

**S. OKONG'O**

**JUDGE**

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Wamuyu for the Appellant

Mr. Odero h/b for Mr. Wasuna for the 1<sup>st</sup> Respondent

Ms. J. Omondi-Court Assistant

