Kithuku t/a Muki Hardware & General Works v Ngonda & 3 others (Civil Appeal E095 of 2021) [2025] KECA 863 (KLR) (7 March 2025) (Judgment)

Neutral citation: [2025] KECA 863 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E095 OF 2021

AK MURGOR, P NYAMWEYA & GV ODUNGA, JJA

MARCH 7, 2025

BETWEEN

JOSEPH KITONGA KITHUKU T/A MUKI HARDWARE & GENERAL WORKS ..... APPELLANT

AND

ALPHAS NGONDA, CHAIRMAN ..... 1ST RESPONDENT

SAMUEL CHAKA, SECRETARY ..... 2ND RESPONDENT

SAUM MUSADI, TREASURER ..... 3RD RESPONDENT

KAFUNDUNI PRIMARY SCHOOL MANAGEMENT COMMITTEE .... 4TH RESPONDENT

(An appeal from the Judgment and Decree of the High Court at Mombasa (P. J. O. Otieno, J.) delivered on 7th February 2020 in High Court Civil Appeal No.153 of 2017)

JUDGMENT

1. By an amended Plaint dated 18th September 2013 filed at Mariakani Principal Magistrates Court, the appellant, Joseph Kitonga Kithuku T/A Muki Hardware & General Works sued the respondents for recovery of Kshs. 412,980 being the balance of the purchase price for goods sold to the respondents by the appellant pursuant to an order for the supply of goods made by the respondents. According to the appellant, the respondents ordered for the supply of construction materials for Kafunduni Primary School, whereupon it prepared a quotation for the respondents. He stated that he supplied materials worth Kshs.1,923,620 for which he was paid Kshs.1,510,640 leaving a balance outstanding of Kshs.412,980. He produced the quotation, a delivery note, and a letter requesting for cash; though the respondent acknowledged all the delivery notes, no reason was advanced for failure to pay the balance due. The appellant therefore prayed for judgment on the outstanding sum together with costs.

2. During cross-examination, the appellant confirmed that it was not aware of any tendering process and that there were no advertisements of the tender.

3. On their part, the respondents opposed that suit for being in contravention of Order 2 of the Civil Procedure Rules. They claimed that the appellant was fully paid and that any further claims were a scheme to extort money by unlawfully inflating and exaggerating the prices of the goods supplied and by falsifying delivery of the material purported to have been delivered.

4. The respondents confirmed that they contracted the appellant to supply building materials, whereupon, an invoice was brought to school before all the materials were supplied. They claimed that the prices were exaggerated in that, the price of iron sheets was quoted as Kshs.710,000 when the actual price was Kshs.380,000, while 130 bags of cement were delivered, the appellant charged a price that was equivalent to 180 bags. When they complained about the exaggerated prices, the appellant was to adjust the amount but only did so in part. The respondents stated that the school paid Kshs.1,510,610 being the sum justly due to the appellant according to the estimates dated 25th June 2012. On the basis of the estimated prices, DW2 the school auditor asserted that the appellant had no legitimate claim against the school.

5. In his evidence, DW1, the headmaster stated that the school contracted the appellant to supply building materials and that an invoice of Kshs.2,171,000 was brought to school before all the materials were supplied; that the prices were exaggerated and that the other items including, earth rods, electric settings and timber were under-delivered by 1,000 feet. He stated that following their objection, the invoice was partly adjusted, and that he paid the appellant the outstanding sum of Kshs.1,510,610 which was endorsed by the school's auditor. When cross-examined, he reiterated that some of the goods that were invoiced were never delivered or the prices for the goods was exaggerated.

6. DW2, the school's auditor testified that he audited the school's books of account and discovered several anomalies including, that the prices were changed after the award of the supply order; that materials were under-delivered and the prices hiked. On cross-examination, he said that he relied on an invoice to arrive at his report.

7. DW3, the head of Department of infrastructure, Kwale County testified that he was invited to the school for the purpose of valuing the roof of a class on which there was a dispute with the supplier; that his evaluation showed that 82 iron sheets worth Kshs. 385,400 were utilized, but according to the quotation the cost was Kshs.639,200. In cross-examination, he reiterated that 82 sheets were used and that being an engineer, he was well versed in auditing the materials utilized.

8. The trial magistrate upon considering the evidence allowed the appellant's claim and entered Judgment against the respondents for Kshs.412,980 together with costs of the suit and interest thereon at court rates.

9. Aggrieved the respondents filed an appeal to the High Court on the basis that the appellant failed to prove his case to the required standards as there were inconsistencies in his evidence on the quantity and value of goods supplied.

10. The first appellate Judge upon considering the appeal held that the appellant failed to prove his case on a balance of probabilities and in so finding, the Judge set aside the Judgment of the trial court. The High Court also went on to hold that the procurement laws in the purchase of the construction materials were flouted in that there was no advertisement of the supply tender and as a consequence, the appellant's outstanding claim for Kshs. 412,980 was without basis.

11. Dissatisfied, the appellant filed an appeal to this Court on the grounds that: the trial Judge was in error in law and fact in disregarding the appellant's submissions and the judgment of the lower court which addressed the issues pertaining to procurement; that despite observing that the adjustments undertaken were agreed by both parties, the learned Judge held that the public body had not received the value for the money demanded; that the learned Judge failed to appreciate that the Public Procurement and Assets Disposal Act provides that anyone can float an open tender which does not require to be prequalified, and that an LPO generated by a buyer and accepted by the seller becomes binding and justified; that the learned Judge also failed to appreciate that the respondents had enriched themselves as they received the goods delivered to them even after the agreed adjustments were undertaken; that as per the Quantity Surveyors report dated 19th June 2015, the iron sheets supplied to the respondents were 680m2 and not 410m2 as indicated in the Delivery Note No 1001 dated 7th May 2012;

12. Both the appellant and the respondents filed written submissions, and when the appeal came up for hearing on a virtual platform, learned counsel for the appellant Mr. Shujaa informed us that he would rely on the written submissions in their entirety. In its submissions, the appellant submitted that the learned Judge based his decision on the evidence of the appellant and that of DW1 after rejecting the evidence of two other witnesses, that is, an auditor and a quantity surveyor; that the learned Judge's conclusion was erroneous given that evidence adduced by the appellant showed that the respondents had ordered for the goods and that the appellant had submitted quotations with prices for the goods ordered; that the learned Judge failed to analyze the delivery notes and invoices that were produced in evidence so as to reconcile them with the agreed adjustments in the prices of the goods delivered. It was submitted that it was erroneous for the learned Judge to hold that there was doubt on the quantity and value of the goods delivered without first ascertaining from the evidence adduced whether the quantity and price of the goods delivered was in accord with that specified in the agreement.

13. Counsel further faulted the learned Judge for concluding that the agreement between the appellant and the respondents for the supply of goods did not comply with the provisions of the *Public Procurement and Asset Disposal Act*; that this conclusion was based on a misapprehension of the evidence and the law pertaining to procurement of goods by a public entity; that Section 88(a) of the *Public Procurement and Asset Disposal Act* 2005 permitted a procuring entity such as the respondents to request for quotations as an alternative mode of procuring goods if the same was for goods that were readily available and there was an established market for them; that the tender was based on a request for quotations which were approved by the committee; that the appellant upon request provided the quotations for the building materials that were requested by the respondents; that having been issued with a request for quotations for supply of building materials, the appellant was not obligated to inquire into the internal workings of the respondent in a bid to find out whether other suppliers of building materials had also received requests for quotations and that they had given their quotations to the respondent before the tender was awarded to him.

14. It was submitted that the evidence showed that the procurement of the goods was done in accordance with Section 88(a) of the *Public Procurement and Asset Disposal Act* 2005 (now repealed), and that even though there was no formal written contract, the appellant supplied the goods on the basis of the local purchase orders issued by the respondents on grounds of urgency and the terms agreed between them; that no evidence was adduced showing that the respondents had returned the goods which they claimed were of inferior quality or which did not meet the specifications set out in their local purchase orders and as such to disallow the respondents claim would result to unjust enrichment of a public entity at the expense of a member of the public and against public policy.

15. There was no appearance by counsel for the respondents though served with the hearing notice. In their written submissions, however, the respondents submitted that the learned Judge carefully re-evaluated the entire evidence and held that the trial Magistrate did not consider the evidence of the 1st respondent and other witnesses thereby arriving at a wrong decision; that the Judge found out that the 4th respondent being a public entity required that the dealings between it and the appellant ought to have been aboveboard and that the procurement procedure required to be followed.

16. This is a second appeal. The mandate of this Court has been enunciated in a long line of cases. See Maina vs Mugiria [1983] KLR 78; Kenya Breweries Ltd versus Godfrey Odongo, Civil Appeal No. 127 of 2007 and Stanley N. Muriithi & Another vs Bernard Munene Ithiga [2016] eKLR to wit; that on a second appeal, the Court jurisdiction is limited 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.

17. In applying these requirements to this appeal, we discern that issues that arise for determination, are: i) whether the appellant proved his case to the required standards, and ii) whether the contract was rendered null and void on the grounds that the appellant's procurement processes were flouted.

18. In determining the question of whether the appellant proved its case on a balance of probabilities, the trial magistrate found that the respondents did not prove that the appellant was guilty of fraud. The trial magistrate stated:

> As a matter of fact, there are anomalies in the documents supplied to me. Some of the highlighted ones include invoice no. 1054 which shows amendments on the quantity of timber supplied, no. 1137 has some amendments on the quantity of timber and blocks supplied, no. 1157 where the chipboards supplied were plain and not flowered, no. 1131 has various overwriting and no. 1171 has some additional items. There is also on record the amended invoices from the plaintiff. However, I have not been shown how such amounts amount to fraud or an attempt to the fraud since most of the amendments seem to have been done by the parties themselves. It would have been more prudent to deal with the supplies and deliveries in a more professional way, but that's a sailed ship".

19. For its part, the High Court, in setting aside the trial court's decision concluded that, the appellant failed to prove its claim. The court had this to say:

> ...the evidence by DW 1 which was to the effect that there was under delivery of iron sheets by 270 metres but the invoice was for 680 metres in the sum of Kshs.710 000 and therefore an overcharge of Kshs 230,000. Then there was the invoice for 50 extra bags of cement not received and an under delivery of 100 feet of 2 x 2 feet timber and that a complaint was lodged and an agreement reached on adjustments. Faced with such evidence, no attempt was made by the respondent in cross-examination to discredit the evidence. It then remained open by that evidence that there was both under delivery accompanied with overcharge and therefore there was no basis for the court to find and enter judgment for the respondent without addressing the contradictions. I do find that at the close of the respondent's case there was doubt as to the authenticity of the quality and value of the materials delivered and when evidence was led by the appellants it became clear that the public body had not received the value for the money it was being asked to pay. I therefore find that the respondent failed to prove his case on a balance of probabilities and therefore the judgment he obtained from the trial court was erroneous and this hereby set aside".

20. Taking into account the conclusions reached by the two courts below, what becomes apparent is that, both courts discerned that there were anomalies in the appellant's supply documents. The trial court preferred to address the anomalies as "amendments" and in so doing, formed the opinion that fraud as alleged by the respondents was not proved. While in the learned Judge's view, there were discrepancies between the quotation and the materials supplied which the court found amounted to under deliveries and overcharging by the appellant; in failing to rebut the respondents' assertions on overcharging and under deliveries, the appellant failed to prove its claim for Kshs. 412,980.

21. As to whether the appellant's claim was based on proof of fraud as discerned by the trial magistrate, or whether it proved its claim as pointed out by the learned Judge, requires that we interrogate and reevaluate the evidence, and come to our own independent conclusions. We begin by interrogating the nature of the claim as was set out in the pleadings, that is, the amended plaint, the amended defence and the reply to defence that were before the trial court.

22. From the amended plaint, at all times, the appellant claimed that it supplied building materials totaling Kshs.1,923,620 out of which the respondents paid Kshs.1,510,640 leaving a balance of Kshs. 412,980 as evidenced by the delivery notes and invoices that comprised the outstanding amount due to the appellant.

23. In the amended defence, the respondents denied owing the appellant the amount of Kshs.412,980. They denied buying goods from the appellant either in cash or credit or requesting the appellant to advance or give them credit in cash. They asserted that if indeed they owed, it was an amount of Kshs. 1,510,640 which amount was paid and acknowledged by the appellant, who declined to issue legal receipts. According to them, by inflating or exaggerating the prices and falsifying deliveries of the materials purported to have been delivered to the school, the appellant was seeking to enrich himself through corrupt deals extortion or illegally obtaining money from the respondents. The particulars of fraud, falsifying measurement and materials without actual delivery and exaggerating the prices and materials were set out in the plaint.

24. Clearly therefore, the crux of the appellant's claim was the outstanding amount of Kshs. 412,980 allegedly owed by the respondents, and central to the respondents' defence was the denial that they owed the amount claimed because it was inflated, the prices were exaggerated and deliveries of the materials were falsified.

25. It would seem that, in determining whether the appellant was entitled to the sum claimed, the trial magistrate solely addressed the question of whether fraud was proved, but the court failed to address the question of whether the appellant proved its claim. The learned judge on the other hand found that the appellant did not prove that it was owed the sum claimed since it did not rebut or refute the respondents' contestation that it had inflated or exaggerated the prices and falsified deliveries of the materials.

26. For our part, notwithstanding the respondents' assertions of fraud, we agree with the learned Judge that the question for determination was whether or not the appellant proved its claim in the face of the allegations by the respondents that it had inflated the prices of the materials and falsified deliveries. In substantiating the allegations levelled against the appellant, the respondents pointed to various discrepancies in the quotations and delivery notes, relative to the materials supplied. In answer to whether the appellant proved its claim, our reevaluation of the evidence leads us to conclude that it did not. We say so because, for instance, the respondent's evidence was that according to the quotation, the appellant was to supply 180 bags of cement, yet, as part of the cement requisitioned, the delivery note dated 3rd May 2012, indicated that the appellant only delivered 130 bags instead of 180 bags that was specified.

27. In other words, the appellant was paid for 50 undelivered bags which were specified in the quotation, equivalent to an amount of Kshs. 34,000 at the rate of Kshs. 680 per bag x 50 bags. This evidence remained uncontroverted as the appellant did not respond to the allegations or explain the discrepancies.

28. Furthermore, the appellant's quotation made provision for 100 pieces of flowered chipboards at the rate of Kshs. 130,000. But according to the delivery note dated 1st May 2012, it delivered plain chipboard and not flowered chipboard as was ordered. Once again, the appellant did not controvert this evidence.

29. We also find it of importance to interrogate the entries in the appellant's quotation at page 164 of the Record of appeal, where several entries itemized as, "Cash Withdrawal" stand out. The record also comprises of delivery notes dated "22/05/2012" and "26/05 /2012" that make reference to the cash withdrawals.

30. In his witness statement and evidence, the appellant stated that he made cash advancements to the school for various amounts for which he was claimed a refund. The cash withdrawals allegedly paid on varying dates ranged from Kshs. 100,000 to Kshs 5,000. According to the appellant, the cash withdrawals were for the benefit of the respondents' school. On their part, in the amended defence, the respondents expressly denied that such payments were made to them, or that they were the recipients.

31. Section 107 of the *Evidence Act* provides;

    1. 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.

    2. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

32. While Section 108 of the Act states that: "The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

33. Additionally, Section 109 of the Act, provides:

> The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact lie on any particular person."

34. In other words, the above provisions are clear that he or she who alleged must prove the facts that are alleged. As to whether the appellant proved its claim, as stated above the respondents' contention was that the appellant was not entitled to the amount claimed for the reason that its quotations and delivery notes were inflated and riddled with under deliveries. They pointed to inflated quotations, invoices, and delivery notes for materials that were not supplied, to which assertions the appellant failed to rebut or deny. Furthermore, much as the learned Judge discredited the evidence of DW2 the auditor, and DW3, the county surveyor, it is not lost on us that the reports clearly demonstrated that there were serious discrepancies between the appellants' quotation and what was ultimately supplied to the respondents' school.

35. And in reanalyzing the evidence pertaining to the cash withdrawals, we find that, not only were these claims highly irregular because the appellant could not purport to be a financial entity mandated to make cash advances, but it is also evident that the advances were not substantiated, and nothing proved that the amounts were paid to the respondents or the school. We can find nothing in the evidence that discloses to whom the money was paid or who received it, and there was no explanation provided for

how a tender for the supply of building materials was converted into transactions for cash withdrawals or advances to the respondent school, which was a public entity.

36. Further, the record does not show that, the appellant substantiated the claims for the cash withdrawals, or provided any cogent explanation as to their purport or the reason for their inclusion in the invoices for supply of the construction materials.

37. When the anomalies in the quotation and the clear evidence of under- supply of the materials, and the unexplained cash withdrawals are considered together, it becomes patently clear that the appellant failed to prove his claim for Kshs. 412,980 on a balance of probabilities. For this reason, we uphold the Judge's decision to set aside the trial court's judgment that allowed the appellant's claim.

38. Turning to the next issue of whether the contract was rendered null and void because the procurement processes by a public body were flouted, the learned Judge determined that:

> 25. The respondent had expressly pleaded the fact of impropriety in the amended defense at paragraphs 5c and 6b and the respondent did join issues with such pleadings in its Reply to defence filed thereafter. It was therefore a clear issue for determination which the court was bound to determine and was never determined. ...I do find that the evidence led showed that *Public Procurement and Asset Disposal Act* was not followed in awarding the tender upon which the suit was grounded and that on that account it was not open to the court to enforce such an agreement by entry of judgment."

39. We have been through, the amended defence, and the reply to the defence, as well as the oral and documentary evidence, that was before the trial magistrate and find that the issue regarding the failure to adhere to the laid down procurement process under the *Public Procurement and Asset Disposal Act* was not canvassed before the trial court. And therefore, the issue of whether the appellant complied with the *Public Procurement and Asset Disposal Act* was not a matter for determination by the trial court, or indeed the High Court. What can be distinctly discerned from the pleadings is that the dispute between the parties was centered on the appellant's demand for payment of an outstanding amount of Kshs. 412,980 by the respondents, and whether at any time a valid supply contract existed between the parties.

40. In determining that the appellant had disregarded the procurement laws in supplying the construction materials to the respondents, we find that the learned Judge misapprehended the pleadings, and by so doing misdirected himself and determined a matter that was not before the court.

41. The aforegoing notwithstanding, we nevertheless, find that the learned judge rightly concluded that the appellant failed to substantiate its claim, and rightly set aside the judgment of the trial court.

42. In sum, the appellant's appeal is lacking in merit and is accordingly dismissed with costs to the respondents.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF MARCH, 2025.

A. K. MURGOR

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR