Toddy Civil Engineering Limited v Adkins Equipment Supplies Limited (Civil Appeal 535 of 2019) [2025] KECA 988 (KLR) (30 May 2025) (Judgment)

Neutral citation: [2025] KECA 988 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 535 OF 2019

FA OCHIENG, AO MUCHELULE & JM NGUGI, JJA

MAY 30, 2025

BETWEEN

TODDY CIVIL ENGINEERING LIMITED ..... APPELLANT

AND

ADKINS EQUIPMENT SUPPLIES LIMITED ..... RESPONDENT

(Being an appeal from the judgment and decree of the High Court at Nairobi (P.J. Otieno, J.) dated 13th September 2019 in Civil Appeal No. 10 of 2019)

JUDGMENT

1. This is a second appeal, and therefore we acknowledge that we have to resist the temptation of delving into matters of fact. We shall confine ourselves to matters of law unless it is shown that the two 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 Kenya Breweries Ltd -vs- Godfrey Odoyo [2010]eKLR).

2. In a plaint filed before the Chief Magistrate's Court at Milimani, Adkins Equipment Supplies Limited (the respondent) sued Toddy Civil Engineering Limited (the appellant) seeking judgment for a sum of Kshs. 2,850,000, plus interest at court rates from 1st November 2015, and costs of the suit. The respondent claimed that the parties had orally entered into a contract in August 2015 for the respondent to deliver sand to the appellant's construction site in the Matuu area. The agreement was that the respondent would supply sand using his lorry at the rate of Kshs. 25,000 per delivery. Initially, the appellant paid the agreed amount daily, which later changed to weekly payments. Payments were made to the respondent's Equity Bank Account. In November 2015, the appellant defaulted, and at that time, Kshs. 2,850,000 was outstanding.

3. Despite the service of the plaint being effected upon the appellant, it failed to enter an appearance or file a defence thereof. The respondent moved the trial court to enter an ex- parte judgment, which was

entered on 22nd June 2016. In a ruling delivered on 11th November 2016, the ex-parte judgment that had been entered against the appellant was set aside, and directions were given for filing the defence within 14 days.

4. The appellant filed a statement of defence on 14th June 2015 in which it was admitted that the appellant and the respondent had an agreement whereby the later would supply sand to the former, but on a need-be basis. The appellant, however, denied that it was indebted to the respondent in the amount claimed, or at all. Its case was that it had paid for all the sand that had been delivered.

5. When the suit came up for hearing before the learned Principal Magistrate (Mr. D.A. Ocharo), the parties consented that they would not call witnesses but rely on filed documents without calling the makers. Each side was to file submissions based on that understanding. In a judgment delivered on 6th February 2019, the trial court dismissed the respondent's suit with costs. It found that, since witnesses did not testify it was difficult to say that the contract had been breached.

6. The respondent was aggrieved by the decision and appealed to the High Court on four grounds:-

    a. that the learned trial magistrate erred in law and fact by failing to hold that the respondent's evidence remained uncontroverted and as such the issue of liability should have been ipso facto resolved in favour of the respondent;

    b. that the learned trial magistrate erred in law and fact by failing to find that the statement of defence filed by the appellant was a mere denial;

    c. that the learned trial magistrate erred in law and fact in finding that the burden of proof lay with the respondent despite the fact that it had adduced documentary evidence by way of list of documents whilst the appellant had not filed any list of document;

    d. and the learned trial magistrate erred in law and in fact in awarding costs of the suit to the respondent without any justification.

7. The appeal was heard by the learned P.J. Otieno, J. of the High Court at Milimani. In a judgment delivered on 13th September 2019, the learned Judge set aside the trial court's decision and allowed the respondent's claim, with costs and interest. The learned Judge observed that, the consent that the parties had entered into was a contract by which the court was to determine the claim based on the documents that had been filed. In this case, only the respondent had filed documents on the supply and delivery of sand, and the documents included delivery notes and invoices together with a bank statement to indicate what had been paid. When it was agreed that no witnesses would be called, the documents were not challenged as there was no cross-examination. The appellant had not tendered any document. When the appellant pleaded that it had paid for all the sand delivered, the court found that, based on the decision in Ragbit Singh Chatte -vs- National Bank of Kenya Ltd [1996] eKLR, this was a mere denial which was not a sufficient defence; that, when the appellant stated that it had paid for all deliveries in full, under section 112 of the *Evidence Act*, this was a special knowledge upon it and it became necessary for it to lead evidence in that regard.

8. This is what led the appellant to come before this Court on appeal. Its grounds as contained in the memorandum of appeal were as follows:-

    "1) That the learned judge erred in law by diluting the importance and centrality of the agreement for the supply of building materials from which the term of contract would be deciphered to give effect to the allegations averred in the plaint.

2. That the learned judge erred in law in inferring terms and conditions of the agreements from the plaintiffs' documents, thereby redrafting an agreement between the parties as a basis for his judgment.

3. That the learned judge erred in law by being selective and the submissions filed by the parties.

4. That the learned judge erred in law by exercising his judicial functions unjustifiably in substituting the judgment by the trial court with his judgment having regard to the circumstances of this case.

5. That the learned judge erred in law by ignoring the cardinal principle of law relating to how he exercises his discretion on an appeal before him."

9. It was sought that the appeal be allowed, the judgment by the superior court be set aside and the judgment by the trial court be reinstated.

10. When the appeal came before us for hearing, learned counsel Ms. Buyengo was holding brief for learned counsel Mr. Walubengo for the appellant, while learned counsel Mr. Ochieng Opiyo was present for the respondent. Counsel had filed respective submissions which were highlighted.

11. The learned counsel for the appellant submitted that while the two parties had a contract for the supply of sand, the claim for Kshs.2,850,000/= had not been substantiated. This was because, he argued, the invoices produced did not show that Kshs.2,850,000/= was outstanding. There was no clarification whether the respondent was paid in tonnage or for the number of lorry loads of sand supplied. Further, it was urged that the delivery notes had not been properly executed in accordance with the law, the reception of the alleged sand could not be ascertained, the signatures on the delivery notes did not indicate the recipient and, in all, the notes were forgeries. Lastly, it was submitted that the respondent was under a duty to prove its case, but that the burden had not been discharged, and that, therefore the learned Judge had been wrong in disagreeing with the trial magistrate's determination and by finding for the respondent.

12. According to learned counsel for the respondent, the learned Judge was justified in setting aside the trial magistrate's decision. This was because, the parties had agreed to rely on the documents filed to determine the dispute. The respondent had filed witness statements and documents in support of its case while the appellant had not filed any statements or documents. The respondent submitted that according to the statements and documents the respondent filed, it was rightly found, the appellant had failed to pay for 114 lorry loads of sand whose value was Kshs.2,850,000/= given that each lorry was Kshs.25,000/=. Learned counsel submitted that the appellant had admitted receiving the sand, but had pleaded that he had paid for all of it. It was argued that, once the parties had agreed that they would rely on the documents filed, and only the respondent had filed documents showing the deliveries; what had been paid for and how much was outstanding, the learned Judge had correctly found that the respondent had proved its case.

13. We have considered the record of appeal and the rival submissions. To us, the first question is whether the learned Judge erred when he found that, on the evidence, the appellant had no sufficient defence to the respondent's claim. Secondly, whether the respondent's case stood uncontroverted.

14. As admitted before us by counsel for the appellant, no documents were attached to the appellant's statement of defence. On the other hand, the respondent had filed witness statements to which were attached documents. The documents included delivery notes, invoices and a bank statement showing how much money had been paid by the appellant for the deliveries of sand. According to the delivery notes, 114 lorry loads of sand had not been paid for and that was how the figure of Kshs.2,850,000/=

had been arrived at. Each delivery was for Kshs.25,000/=. The parties agreed that they were not going to call witnesses, but were going to rely on the documents that had been filed. The appellant had pleaded that it had paid in full for all the sand that had been delivered. However, it offered no evidence of such payment either in a witness statement or documentary proof of payment.

15. In Ragbit Singh Chatte -vs- National Bank of Kenya Ltd (supra), this Court observed as follows:-

> "When a party in any pleading denies an allegation of fact in a previous pleading, of the opposite party, he must not do so evasively but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount but he must deny that he received that sum, or any part thereof, or else set out how much he received...First of all, a mere denial is not sufficient defense in this type of case. There must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is therefore not sufficient to deny liability without some reason given."

16. In the instant case, the respondent's case was that it supplied 114 lorry loads of sand whose value was Kshs.2,850,000/=, at the rate of Kshs.25,000/= but that the appellant had not paid for the same. Hence the suit. The appellant admitted that there was a contract between the two parties, and that the respondent delivered sand pursuant to the said contract. However, it was the respondent's case that it had paid for all the sand that had been delivered. We note that the appellant did not deny the assertions that 114 lorry loads of sand were delivered and that each such load was valued at KShs.25,000/=. In the circumstances, we hold the considered view that the defence put forward by the appellant was merely evasive. It did not answer the case which had pleaded, and which had been supported with both a witness statement as well as with documents. In the event, the learned Judge cannot be faulted for the conclusion he arrived at in the impugned Judgement.

17. As a consequence, we find no merits in the appeal, and therefore dismiss it, with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF MAY 2025

F. OCHIENG

.....

JUDGE OF APPEAL

A.O. MUCHELULE

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.