



Mwanake v Jones Muthamia t/a Muthamia Enterprises (Civil Appeal 433 of 2018) [2024] KECA 1175 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1175 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 433 OF 2018
K M'INOTI, M NGUGI & F TUIYOT'T, JJA
SEPTEMBER 20, 2024**

BETWEEN

JOHN MWANIKI MWANAKE APPELLANT

AND

JONES MUTHAMIA T/A MUTHAMIA ENTERPRISES RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya at Kitui (L. N. Mutende J.) dated 19th September, 2018 in High Court Civil Appeal No. 19 of 2017)

JUDGMENT

1. The appellant, John Mwaniki Mwanake, was aggrieved by the judgment of the High Court in Kitui (L. N. Mutende J.) dated 19th September 2018 in which the court set aside the judgment of the Chief Magistrate's Court at Mwingi delivered in his favour on 3rd August, 2017. In his memorandum of appeal dated 30th November 2018, the appellant raises four grounds of appeal in which he argues that the first appellate court erred in law and fact in: vacating and setting aside the judgment of the trial court; substituting the award of the trial court entered on 3rd August, 2017; and in basing its findings on irrelevant issues not supported by evidence on record or the applicable law. Finally, he challenges the decision on the ground that it was against the weight of the evidence on record.
2. The appellant asks this Court to allow his appeal, set aside the judgment dated 19th September 2018, reinstate the judgment of the trial court and condemn the respondent to bear the costs in this Court and the courts below.
3. The background to this appeal is that the appellant had filed suit against the respondent in Civil Suit No. 59 of 2015 in the Magistrate's Court at Mwingi. In the plaint dated 25th September 2015, he alleged that on 4th July 2015, he contracted the services of the respondent, who represented himself as an expert in the field of hydro-geological survey. He paid him Kenya Shillings sixty thousand [Kshs.60,000.00] for a hydro-geological survey report. The report produced by the respondent indicated that the appellant's



- land was suitable for borehole drilling. He further contended that in reliance on the hydro-geological survey report issued by the respondent, he entered into an agreement dated 7th July 2015 the terms of which were that the respondent would drill a borehole for him at a minimum cost of Kenya shillings seven hundred and fifty thousand [Kshs. 750,000] for an initial depth of 100 metres.
4. The appellant further contended that the parties entered into an addendum agreement dated 27th July 2015, the terms of which were that the respondent would drill for the appellant extra metres over and above the agreed 100 metres, which cost was to be paid upon the completion of the project at the rate of Kenya Shillings seven thousand, five hundred [7,500] per metre. It was the appellant's case that he paid a deposit of Kenya Shillings six hundred thousand [Kshs.600,000] before the drilling began, and the parties agreed that the balance of 20% would be paid upon the respondent producing a water analysis report. The appellant contended further that it was a term of the agreement that in the event of default by either party, the party in default would refund the other party the amount already paid for the work, plus interest of 20%.
 5. According to the appellant, the respondent drilled up to a depth of 145 metres and upon realising that the borehole would not bring forth any substantial quantity of water as he had indicated in the hydro-geological survey report, he abandoned the project and ignored efforts by the appellant to recover the amount paid to him under their contract. It was the appellant's case that the respondent conducted a fraudulent hydro-geological survey at a cost of Kshs. 60,000 and issued a report while knowing too well, or out of negligence, that the appellant's land is not suitable for borehole drilling.
 6. It was the appellant's case further that the respondent failed to provide a water analysis report and to refund the amounts already paid to him by the appellant. He contended that the respondent was in breach of contract and prayed for judgment in his favour and orders for payment of Kshs. 1,242,000.00; interest at the contractual rate of 20% and the costs of the suit.
 7. The respondent filed a statement of defence and a counter-claim dated 13th October, 2015. In his defence, he denied the appellant's claim. In the counter-claim, however, while reiterating his denial of the appellant's claim, he averred that he and the appellant had entered into an agreement for drilling a borehole; that the appellant paid some amount and immediately after the hydro-geological survey was conducted and a report given, drilling commenced. He further averred that the appellant was to pay a balance of Kshs. 150,000 but had defaulted; and he asserted that it was the appellant who was in breach of his obligations. The respondent therefore counterclaimed for Kshs. 150,000 and the costs of the suit.
 8. The appellant filed a reply to the defence and counterclaim in which he denied the contents thereof, prayed for it to be struck out and for judgment to be entered in his favour as prayed in the plaint.
 9. Upon hearing the suit, the trial court, in the judgment dated 3rd August 2017, found the respondent in breach of contract and ordered him to refund Kshs. 1,035,000 and Kshs. 45,000 paid by the appellant for pump testing. It further held that the appellant was not entitled to the 20% contractual fine for default since 'he had a drilled bore hole,' albeit a shallow well with a limited amount of water. The trial court dismissed the respondent's counterclaim and directed that he pays the costs of the suit.
 10. Dissatisfied with this decision, the respondent filed Civil Appeal No. 19 of 2017 before the High Court in Kitui. In his memorandum of appeal dated 15th August 2017, he impugned the decision of the trial court on the grounds that the trial court misdirected itself when it: failed to establish that it was the respondent who carried out his duties and obligations as agreed between the parties; based its decision on extraneous matters that were not in issue, a misdirection that led to the court reaching a wrong conclusion; failed to find that the appellant had not proved his case beyond reasonable doubt (sic); and arrived at a decision contrary to law and evidence on record.



11. The respondent further impugned the judgment on the grounds that the trial court erred in delivering its judgment in the absence of the parties; that the court demonstrated open bias in failing to issue notice of the judgment to counsel for the respondent while issuing it to counsel for the appellant; and that it erred in failing to comply with the express provisions of Order
12. In its decision, the High Court substantially allowed the respondent's appeal. It set aside the order of the trial court for refund of the amount of Kshs 1,035,000 and Kshs. 45,000 paid by the appellant but made an order for refund of Kshs. 60,000. It dismissed the respondent's appeal with respect to his counterclaim and ordered that he bears the costs of the suit in the trial court and on the appeal.
13. In reaching its decision, the High Court reasoned that the question before it was who was in breach of the contract between the parties. It observed that from its analysis of the evidence, the respondent before us was in breach of clause 5 of the agreement between the parties as he did not comply with the law regarding drilling of boreholes. The court, however, held that the appellant herein was also in breach as he 'from the outset demonstrated some indifference to the legislation governing drilling', attributing this either to ignorance or a deliberate move on the part of the appellant.
14. The court held that having retained the respondent to drill a borehole for him, the land had to be surveyed; that it was within the appellant's knowledge that the survey was done by DW2, one J. Ndambuki; that the appellant was issued with a report; that he did not question the designation of Ndambuki but proceeded to enter into an agreement with the respondent and made a payment of Kshs. 600,000 to the respondent. The High Court posed the question before it as being 'why the Respondent breached the agreement by making further payment before the production of the water analysis report?' It concluded that since the date of completion of the project was not set, it cannot be said that the respondent herein caused the appellant to pay money upfront while knowing that the project was not viable.
15. The court therefore found that "The learned trial Magistrate in the circumstances should have looked at the seriousness of the breach of either party that affected the contract". It further held that the respondent "who should have been conversant with the law regarding drilling the borehole, drilled an illegal borehole without authorisation from WARMA and failed to instruct a qualified person to carry out the hydro-geological survey". It concluded that "Since the breach was by both parties, it was erroneous on the part of the learned magistrate to fully comply with clause 4 of the agreement." The first appellate court proceeded to set aside the judgment of the trial court in favour of the appellant and substitute it with an order entering judgment for the appellant in the sum of Kshs. 60,000 that he paid for the hydro-geological survey and dismissed the respondent's counterclaim.
16. In submissions dated 29th April, 2019, the appellant identifies the sole issue for determination as being whether there was breach of contract between the parties and if so, who was in breach. He submits that a contract is a legally binding agreement formed by the mutual consent of the parties; that the agreement between the parties herein imposed a contractual obligation on the respondent to perform services with reasonable skill and care, that is, to the standard of a reasonably competent professional.
17. It is his submission that in a contract for drilling a borehole, the client places reliance on the expertise of the contractor, and the contractor generally owes a duty of care for the quality of their work. The appellant submits therefore that the first appellate court erred in holding that it was within the appellant's knowledge that the survey was done by Joseph Kyalo Ndambuki, and that the appellant failed to question the authenticity of the hydro-geological survey report but proceeded to enter into an agreement with the respondent. According to the appellant, he contracted and paid the respondent to carry out the hydro-geological survey and had no prior knowledge of the qualifications of the person contracted by the respondent to carry out the survey.



18. He noted that the respondent had testified at the trial that it was he who brought the surveyor; that he issued the payment receipt for the money paid; and accordingly, in the appellant's view, it was the respondent's undertaking to ensure that the person he brought to conduct the hydro-geological survey was qualified and registered.
19. The appellant further submits that the first appellate court was correct in holding that the respondent failed to instruct a qualified and registered person to carry out the hydro- geological survey; that a reasonably competent contractor should have realised that the hydro-geologist was unqualified and unregistered way before instructing him to carry out the hydro-geological survey; that he owed a duty of care to the appellant to engage the services of a qualified and registered hydro-geologist in order to prevent foreseeable harm to the appellant; and he relied on the expertise and competence of the respondent on the understanding that the respondent, having represented himself to be involved in the borehole business, ought to have competently carried out a proper hydro-geological survey.
20. The appellant submits that the respondent failed to engage the services of a qualified and registered hydro-geologist; failed to follow due process in obtaining a permit from the Water Resource Management Authority (WARMA); failed to procure a licence from the National Environment Management Authority (NEMA) and failed to acquire a no objection letter from the local water services provider. The appellant submits that in light of the above, the respondent clearly breached his contractual obligations, and he was in breach of clause 5 of the addendum to the contract for failing to adhere to the laws regarding drilling of a borehole, which he ought to have been conversant with.
21. The appellant further submits that the addendum agreement dated 27th July 2015 between the appellant and the respondent contains a clause on default which provided that in the event of default, the 'defaulter is required to refund to the *bona fide* party the amount already paid for the work plus an interest of 20%.' He submits that it is clear that the parties anticipated an event of default, and accordingly, the respondent was in clear breach of contract and it is only just that the appellant be refunded the amount he paid to the respondent plus an interest of 20% as expressly agreed.
22. With regard to the first appellate court's finding that he was in breach of contract for making further payments before the production of the water analysis report, the appellant submits that the court erred in taking this position as clause 2 of the addendum agreement only pegs payment of the 20% balance, being Kshs. 150,000 as indicated in the contract dated 27th July 2015, on production to the client (the appellant herein) of the water analysis report. He submits that it is only after filing of the suit that the respondent furnished him with a water analysis report and the pump testing report. It is his case that he engaged the firm of Malawal Enterprises after paying Kshs.45, 000 to conduct a pump test on the borehole, and that the test confirmed that there is no viable water from the borehole. He maintains that the High Court erred in reaching the conclusion that he was also in breach of contract, and he urges this Court to set aside the decision of the first appellate court and reinstate the decision of the trial court.
23. In written submissions dated 3rd May 2019, the respondent submits that the High Court acted within the law when it interfered with the judgment of the trial court as the said decision was improper and biased; that the High Court fully relied on the material evidence tendered by parties and made a fair evaluation thereof; and that it based its decision on relevant issues and made its decision in accordance with the law. He urged this Court to maintain the judgment of the High Court, dismiss the appellant's appeal, make a finding that he had fulfilled his obligation in the contract and vacate the order for him to pay Kshs. 60,000 to the appellant; and award him the costs in this Court and the courts below.
24. As this is a second appeal, our remit is confined to consideration of matters of law only, unless it is shown that the first appellate court considered matters it should not have considered or failed to



consider matters it should have considered or, looking at the entire decision, it is perverse-see *Maina v Mugiria* [1983] KLR 78 and *Stanley N. Muriithi & Another v Bernard Munene Itbiga* [2016] eKLR. What emerges from these decisions is that the position under our law is that where a right of appeal is confined to questions of law only, the court does not interfere with the findings of fact of the courts below unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.

25. We have considered the record of appeal, the decisions of the trial and first appellate courts, and the submissions of the parties. The issue that arises for determination is whether the trial court properly evaluated and appreciated the evidence before the trial court and the applicable law in reaching the conclusion that both the appellant and the respondent were in breach of contract, and in reversing the decision of the trial court.
26. In considering this issue, we are constrained to observe that the first appellate court determined the appeal on a matter that was not one of the respondent's grounds of appeal before it, nor was it an argument that the respondent had advanced in his defence. The respondent's grounds of appeal were that the trial court misdirected itself: when it failed to establish that it was the respondent who carried out his duties and obligations as agreed between the parties; when it based its decision on extraneous matters that were not in issue; in failing to find that the appellant had not proved his case beyond reasonable doubt (a standard, we observe, that is not applicable in civil cases); and in arriving at a decision contrary to law and evidence on record. The respondent's other grounds of appeal before the High Court relate to the manner of delivery of the judgment, not its contents, and are not matters on which a party can properly impugn a judgment.
27. The facts before the trial court were that the appellant required a borehole on his land. In his suit before the trial court, the appellant claimed a sum of Kshs. 1,242,000 which he had paid to the respondent for drilling of a borehole on his land. He also claimed 20% interest as provided in the contract between him and the respondent.
28. It is undisputed that the parties had entered into a contract dated 7th July 2015 under the terms of which the respondent would drill a borehole for the appellant at a cost of Kshs. 750,000, up to a depth of 100 metres initially. The appellant paid a deposit of Kshs. 600,000, being 80% of the cost. The works were set to commence on 9th July 2015.

The parties thereafter entered into an addendum agreement in which it was agreed that the total depth of drilling would be approximately 150 metres, and the appellant would pay to the respondent for any additional metre over and above the 100 metres initially agreed at the rate of Kshs. 7,500 per metre. The cost of drilling the extra metres would be paid upon completion of the project, that is upon reaching the base of the borehole. The 20% balance was to be paid upon the respondent producing a water analysis report. It is undisputed that pursuant to the agreements, the appellant paid a further Kshs. 375,000 to the respondent.
29. The evidence before the trial court indicates that prior to the agreement dated 7th July 2015, the respondent was required to produce and did produce to the appellant a hydro-geological survey report dated 4th July 2015, prepared by one Joseph Kyalo Ndambuki. The report indicated that the appellant's land had water. The appellant paid a total of Kshs. 60,000 for this survey, and a receipt was issued by the respondent.
30. Another undisputed fact that emerges from the record is that Mr. Ndambuki, who was contracted by the respondent to carry out the survey, was not qualified. It emerged from his evidence at the trial court that he had a diploma in art and design; that to be a hydro-geologist, one had to have a degree in



science and geological engineering; and that he was not a registered hydro- geologist, or indeed a hydro-geologist of any shade or colour.

31. The evidence before the trial court further was that the respondent drilled to a depth of 145 metres. He did not conduct the pump testing as agreed in the contract, nor did he produce a water analysis report. The appellant's evidence was that the pump testing that he contracted Malawal Enterprises to conduct at a cost of Kshs. 45, 000 indicated that the water produced was 0.3.m3, and that the borehole was a shallow well. The respondent's case was that he, too, had carried out a pump test which was conducted by Fedah Gitau. While Gitau stated that the pump was put to a depth of 145 metres and produced 10,000 litres per hour for five hours, he conceded that the water was rising very slowly. Another issue not in contention was that the borehole did not have a licence from the WARMA and did not have a borehole number as it was not drilled in accordance with the provisions of the Water Act, 2002.
32. The trial court found that the respondent was in breach in three respects: in the manner in which the hydro-geological survey was carried out; in the depth of the well drilled, and in the amount of water discovered. We note that the High Court agreed with the finding of the trial court that the respondent relied on an unqualified person, holding that 'only a qualified hydro- geologist could give a detailed measurement and description of underground aquifer that would have an influence on the water quality and quantity.' The court further found that it was subsequent to this report, prepared by an unqualified person, that the parties entered into the agreement dated 7th July 2015, and thereafter, the addendum agreement dated 27th July 2015.
33. After analyzing what was required of the respondent as the party responsible for drilling the borehole, inter alia the duty to keep records of the progress of the work done, measurements of the levels of the water struck, and the quantity of water obtained, all of which should have been, in the court's view, submitted to WARMA and the appellant, and noting that the pump test dated 1st December 2015 and the water analysis report were submitted after the appellant had sent a demand letter threatening to file suit, the first appellate court concluded:

“From the foregoing, it is apparent that the appellant herein breached clause 5 of the agreement as he did not comply with the laws of Kenya regarding drilling of the borehole.”
34. Up to that point, in our view, the High Court properly addressed itself to the issues before it, and it should have stopped there, we believe, dismissed the appeal before it and made a finding in favour of the appellant before us. It went on, however, to find and ask a question that indicates an improper appreciation of the law. The court observed that the appellant, 'from the outset, demonstrated some indifference to the legislation governing drilling, either out of indifference or a deliberate move'.
35. We say that this was a demonstration of improper appreciation of the law for reasons that are patently obvious from the facts before the court. The appellant had sought the services of the respondent, who held himself out as having the experience and expertise in drilling of boreholes. The respondent had contracted the services of Joseph Kyalo Ndambuki, whom he held out as having the requisite knowledge and skills to carry out a hydro- geological survey. In those circumstances, was there a responsibility on the appellant to inquire whether the respondent was carrying out his responsibilities in accordance with the law, or that he had contracted persons with the requisite skills to carry out the tasks required? We think not. This, in our view, was a misdirection that tainted the decision impugned in this appeal.



36. At paragraph 31 and 32 of its judgment, the High Court states:

“ 31. It is stated by the respondent that at the time of abandonment of the project he had paid Kshs. 1, 035,000. Circumstances in which the additional sum of money was paid are not stated. The balance could only have been paid after extra metres depth had been drilled. ...The question to be answered is why the respondent breached the agreement by making further payments before the production of the water analysis report?

Since the date of completion of the work was not set, it cannot be alleged that the appellant caused the respondent to pay money upfront knowing that the project was not viable.

32. The learned trial Magistrate in the circumstances should have looked at the seriousness of the breach of either party that affected the contract.”

37. With respect to the learned judge, we must state that this is a rather peculiar (mis)statement of the law. It is, we believe, trite law that a party is said to be in breach of contract when it fails to meet its obligations under a contract. The parties entered into a contract under which the respondent was to drill a borehole for the appellant. The appellant’s obligation was to pay the respondent for his services. He paid 80% of the cost of drilling a 100 metre borehole upon signing of the agreement dated 7th July 2015; a further 375,000; Kshs. 60,000 for the hydro-geological survey report that turned out to have been fraudulent for being prepared by an unqualified person, and Kshs. 45,000 for the pump testing that he contracted Malawal Enterprises to conduct.

38. In our view, the appellant acted in accordance with the obligations placed on him under the agreements with the respondent. Indeed, the worst that can be said of him is that he was too eager to meet his obligations. Having done so, and in the face of breach by the respondent, which the High Court recognized, the only possible outcome of the respondent’s appeal was a dismissal.

39. We accordingly allow the appellant’s appeal and set aside the decision of the High Court, save for the order that the respondent refunds to the appellant the sum of Kshs. 60,000 which he paid for the hydro-geological report prepared by an unqualified person. We substitute therefor the orders issued by the trial court in its decision dated 3rd August 2017. For the avoidance of doubt, our final orders are as follows:

- a. That the respondent refunds to the appellant Kshs. 1,035,000 and Kshs. 45,000 with interest thereon from the date of filing suit as ordered in the judgment of the trial court dated 3rd August 2017;
- b. That the respondent refunds to the appellant Kshs.60,000 as ordered by the High Court in the judgment dated 18th September 2018;
- c. That the appellant shall have the costs of the suit in this Court and the courts below with interest thereon.

40. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

K. M’INOTI

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**JUDGE OF APPEAL
MUMBI NGUGI**

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**JUDGE OF APPEAL
F. TUIYOTT**

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

