



REPUBLIC OF KENYA



**Ewaso Ng'iro North Development Authority v Ndumberi General Merchants Limited
(Civil Appeal E134 of 2022) [2024] KECA 1132 (KLR) (6 September 2024) (Judgment)**

Neutral citation: [2024] KECA 1132 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL E134 OF 2022
P NYAMWEYA, LK KIMARU & AO MUCHELULE, JJA
SEPTEMBER 6, 2024**

BETWEEN

EWASO NG'IRO NORTH DEVELOPMENT AUTHORITY APPELLANT

AND

NDUMBERI GENERAL MERCHANTS LIMITED RESPONDENT

*(Being an Appeal from the judgment of the High Court of Kenya at
Nyeri (F. Muchemi, J.) dated 24th March 2022 in HCCC No. 14 of 2017)*

JUDGMENT

1. This is an appeal from the judgment of the High Court (F. Muchemi, J.) dated 24th March 2022 at Nyeri in which the claim of Kshs. 25,334,118.34 plus interest and costs was awarded to the respondent Ndumberi General Merchants Limited, against the appellant Ewaso Ng'iro North Development Authority. The respondent claimed that it had, following agreement, constructed three (3) water pans for the appellant during the period between 2010 and 2012; that the works were worth Kshs.60,366,677.70; that the appellant had paid Kshs.35,032,559.36; and the outstanding balance was Kshs.25,334,118.34, which had been demanded but not paid.
2. The appellant was not satisfied with the decision and appealed on the following grounds:-
 - “ 1. That the learned Judge relied on a technicality to make a finding against the appellant.
 2. That the learned Judge erred in law by failing to consider and apply the principles of the Law of Contract laid down in the appellant's submissions.
 3. That the learned Judge erred in law by failing to acknowledge the principle of quantum meruit and the fact that the respondent did not perform its tasks to



completion as per the Local Service Order hence was not entitled to the balance of the amount payable.

4. That the learned Judge erred in law by failing to acknowledge the extent of Agency-Principal relationship by upholding the fact that the payment was based on the certificate that was issued by the professional consultants, yet the consultants issued the same without the authority of their principal.
5. That the learned Judge erred in law in failing to consider and apply the law appropriately.
6. That the learned Judge erred in law by violating the appellant's right to fair trial.
7. The judgment of the learned Judge was against the weight of evidence and facts adduced and was not just in rejecting the appellant's defence.
8. The learned Judge erred in law and fact by failing to consider the appellant's defence when arriving at her judgment."

It was sought that the judgment and decision be revised, varied and/or set aside.

3. This is a first appeal. Our duty is to analyse the evidence that was tendered before the trial court afresh, re-evaluate it and reach our own independent conclusion thereon, while bearing in mind that the court had the advantage of seeing and hearing the witnesses who appeared before it. (See [*John Teleylo Ole Sawoyo - v- David Omwenga Maobe* \[2013\] eKLR](#). In [*Ephantus Mwangi & Another - v- Duncan Mwangi Wambugu* \[1982-1988\] I KAR 27](#) at page 292, this Court stated as follows:-

"A Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did."

4. Put differently, this Court cannot substitute the factual findings by the trial court with its own unless it is evident that there was no evidence on which the trial court based its findings or unless the court was plainly wrong. (See [*Kiruga - v- Kiruga & Another* \[1988\] KLR 348](#)).
5. There was no dispute that the appellant issued three Local Service Orders (LSOs) as follows:
 - a. LSO dated 6th April 2011 for Ackam Water Pan, requiring the respondent to excavate a 7,500cm³ cofferdam and excavating 25,000cm³ pan for the consideration of Kshs.14,751,256/=;
 - b. LSO dated 6th April 2011 for Kiharo Water Pan, requiring the respondent to excavate a 7,500 cm³ copper dam and excavating 35,000cm³ pan for the consideration of Kshs.19,290,104/=; and
 - c. LSO dated 6th April 2011 for Karimeno Water Pan, requiring the respondent to excavate a 7500cm³ copper dam and excavating 35,000cm³ pan for the consideration of Kshs.11,500,617.50.
6. The second uncontested issue was that the respondent appointed M/s Professional Consultants Limited, who were consultant engineers, to oversee the projects on its behalf; that the engineers issued interim certificates as the works progressed and practical completion certificates upon completion of



the works; and that the appellant paid Kshs.35,023,559.36 towards the projects, which left a balance of Kshs.25,334,118.34 which the respondent claimed in the plaint dated 14th July 2017.

7. The appellant's defence dated 11th August 2017 denied that the amount in question was owed. This is what was pleaded by the appellant:

- “ 5) Further to paragraph 4 herein before, the defendant denies that the plaintiff denies it owes the plaintiff any outstanding amounts, as the work and labour agreed to be supplied, was not either in accordance with the orders given and/or of the highest and best workmanship and standard agreed on by the defendant.
- 6) The defendant further states that, by reason of this premises the work and/or labour were worth far less than the amounts sought to be recovered and less than what the plaintiff has already been paid.
- 7) The defendant specifically states that it had paid all monies due to the plaintiff and therefore the amounts claimed as outstanding balances are excessive and unreasonable.”

8. According to the record, Christopher Kawai Kamau (PW 1), the respondent's Managing Director, testified for the respondent, while Josiah Willie Mulwa (DW 1) and Lukah Kingori (DW 2) testified for the appellant. The two were the appellant's Chief Technical Services and Operations Manager and Field Officer, respectively. The evidence of PW 1 was that the projects were carried out according to the LSOs and that both interim and completion certificates were issued by the consultant engineers, on the basis of which Kshs.35,032,5559.36 had been paid leaving a balance of Kshs.25,334,118.34 which the respondent had sued to recover.

9. The evidence of DW 2 was that he visited the water projects in 2012 and observed that the water pans had not been excavated. He was alone when he visited the sites. He did a report to that effect. He, however, did not produce the report in evidence. He testified that he did not know that the appellant had engaged consultant engineers to supervise the works. According to DW 1, the pans were excavated but not to the required standard; that the works were not done properly, according to the beneficiary communities and the audit that was consequently carried out. He further testified that the certificates had been issued unprocedurally. As far as he was concerned, the projects were being supervised by the consulting engineers. He was not himself attached to the projects during the works.

10. This is the evidence that the learned Judge considered and decided in favour of the respondent by finding that the contracted works had been done in accordance with the LSOs and as certified by the consulting engineers, and therefore the respondent was owed the claimed money.

11. We have to consider and determine whether the evidence on record supported the learned Judge's findings.

12. The learned Judge took note of sections 107 to 109 of the *Evidence Act* regarding the burden of proof placed on the respondent, and the standard of proof that was to be discharged. The decision in *D.T. Dobie Company (K) Limited - v- Wanyonyi Wafula Chebukati* [2014] eKLR in this regard was cited. The respondent was required to establish a probable case to be able to get the prayers in the plaint.

13. As between DW 1 and DW 2, one was saying that a shoddy job was done and the other was saying no job at all was done. One knew that the projects were being supervised by consultant engineers and the other had no idea that there were engineers supervising the projects. DW 1 was not the officer assigned



to the projects. The officer who was assigned to the projects was not called, and there is no evidence that he was sanctioned if no works were carried out or that the works had not properly carried out. Similarly, if the completion certificates were issued irregularly, were the consulting engineers sanctioned?

14. According to DW 1, the audit that discovered that the works had not been carried out properly was conducted in 2018. If DW 2 had in 2012 discovered that no water pans had been excavated, why didn't this prompt immediate audit? Would the results of the audit have been different if it was carried out in 2012, 2013, or 2014?
15. Against the evidence by DW 1 and DW 2, PW 1's version was consistent that the respondent was issued with LSOs; the works were performed as per the LSOs; the works were supervised by the consulting engineers as agreed; the consulting engineers were satisfied with the works; the engineers certified the works; the appellant made part payment; and there was a balance of Kshs.25,334,118.34.
16. In conclusion, we find that the complaint by the appellant as contained in the grounds of appeal lacked any basis. The evidence supported the findings by the learned Judge. Consequently, the appeal lacks merits and is dismissed with costs.

DATED AND DELIVERED AT NYERI THIS 6TH DAY OF SEPTEMBER 2024.

P. NYAMWEYA

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JUDE OF APPEAL

L. KIMARU

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JUDE OF APPEAL

A.O. MUCHELULE

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JUDE OF APPEAL

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

Signed

DEPUTY REGISTRAR

