



**Musungu v Ajinja & another (Commercial Appeal E003 of 2024)  
[2025] KEHC 2266 (KLR) (28 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2266 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
COMMERCIAL APPEAL E003 OF 2024  
DK KEMEL, J  
FEBRUARY 28, 2025**

**BETWEEN**

**WALTER MUYODI MUSUNGU ..... APPELLANT**

**AND**

**OTIENO KEVIN AJINJA ..... 1<sup>ST</sup> RESPONDENT**

**ERICK OTIENO OWINO ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal against the judgement and orders of Hon.J.P Mkala (SRM)  
in Siaya Small Claims Court NO. E135 of 2024 delivered on 16/10/2024)*

**JUDGMENT**

1. The Appellant herein lodged the present appeal against the judgment of Hon. Mkala SPM in Siaya Small Claims Court No. E135 of 2024 delivered on 16/10/2024 wherein he together with another were held jointly and severally liable to the Respondents herein and that judgment was entered in the sum of Kshs185,000/=plus costs of Kshs40,000/= and interest at court rates.
2. Aggrieved by the aforesaid judgment, the Appellant filed a memorandum of appeal dated 24/10/2024 wherein he raised the following grounds of appeal:
  - a. That the Adjudicator misdirected himself by holding and finding that there exist circumstances that imply privity of contract between the Appellant and the Respondents.
  - b. That the Adjudicator erred in law by failing to grant the Appellant an opportunity to make his case under Article 50 (c) and 159 (d) when the Respondent sought leave of the court to file additional documents within time which would have included information that would have assisted the court to make a just determination.



- c. That adjudicator failed to act judiciously by failing grant leave to the respondent as articulated in Section 3 of the *Small Claims Court Act* and underpinned in Article 50 (c), 159 (2) (d), 10(2) of *the Constitution* of Kenya, 2010 which commands the court to eschew procedural technicalities and uphold fairness and justice at all times.
- d. The Adjudicator failed to appreciate the law of contract as there was no privity of contract between the Appellant and the Respondents.
- e. That the Adjudicator misinterpreted, misapplied and rewrote a contract between the Appellant/1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent in the lower/trial court by imposing liability upon the Appellant.
- f. That the cause of action as pleaded or however perceived by the Respondents did not fall within the purview of Section 12 of the *Small Claims Court Act*.
- g. That the Adjudicator erred in law by failing to find and hold that parties are bound by their pleadings only.

The Appellant sought for the following orders:

- i. The appeal be allowed and the lower court judgment and subsequent orders be set aside and as such substituted by the orders of this Honourable Court.
  - ii. The whole judgment and orders of Hon. J.P Mkala RM at Siaya Small Claims Court, SCCCOMM/E135/2024, at Siaya Law Courts, delivered on 16<sup>th</sup> Day of October, 2024 be set aside.
  - iii. The Appellant be awarded the costs of this appeal and those in the lower court.
3. The appeal was canvassed by way of written submissions. Both parties filed and exchanged submissions.
  4. Appellant's submissions are dated 16<sup>th</sup> December 2024. Learned counsel submitted that the 1<sup>st</sup> Respondent instructed Mako Auctioneers to execute warrants emanating from Siaya SCCCOMM/E024/2024 and as such those instructions were never directed to the Appellant even if the warrants were collected by him. It was also submitted that the said 2<sup>nd</sup> Respondent confirmed before the trial court that she is the one who executed the warrants and that the Appellant received the warrants on her behalf and further that all processes were carried out by her through the Appellant's account. Further, it was submitted that the auction was carried out by the 2<sup>nd</sup> Respondent who confirmed having sold the goods and received the proceeds thereof. It was therefore erroneous for the Adjudicator to make a finding that the Appellant was involved yet the Appellant did not receive any money. It was therefore erroneous for the trial court to make him liable for actions of the 2<sup>nd</sup> Respondent yet there was no privity of contract between him and the 1<sup>st</sup> Respondent. It was further submitted that the rights of the Appellant to a fair hearing were curtailed by the trial court because the trial court refused to grant him an opportunity to file additional documents in support of his case. It was also submitted that the Adjudicator lacked jurisdiction to deal with the matter pursuant to Section 12 (1) Small Claims Act. It was submitted that the claim related to money which was received in an auction whereby there was no monetary value in existence and therefore the case should have been filed before the Chief Magistrate's Court. Further, the claimant in the suit ought to have gone back to the trial court which issued the decree instead filing a new suit. Again, the claimant had already lodged a claim at Auctioneer's Board and should have waited for it to determine his claim instead filing a new suit.
  5. It was submitted that the decision by the Adjudicator was in error because he ruled that an amount of Kshs 200,000/= had been received from the Auction yet there was no evidence to support the same.



The Appellant therefore, submits that the Adjudicator relied on evidence that was not pleaded. The Appellant therefore sought for the setting aside of the Adjudicator's decision and allow the appeal.

6. The Respondents' submissions are dated 1<sup>st</sup> December, 2024. It was submitted that the Claimant approached the Appellant herein to execute a warrant and which the Appellant accepted and that the Appellant carried out execution of the warrant and therefore there was a contract between the Appellant and the Claimant. It was submitted that even though the Appellant seeks to shift blame to the 2<sup>nd</sup> Respondent, he still remains the person who was instructed to execute the warrant and that the 2<sup>nd</sup> Respondent was merely his agent since the two worked together. It was also submitted that the Appellant's claim that he was denied an opportunity to file additional documents has no basis because the same was made after the rest of the parties had closed their respective cases. Further, the trial court in rejecting the request ruled that the Appellant did not disclose the documents he intended to be added and that the request was an ambush to the other parties. It was also submitted that the Appellant's ground that the trial court did not have the jurisdiction should be rejected since the issue of jurisdiction ought to have been raised by him before the trial court. He cannot participate in the trial fully from the start to finish, and turn around and claim that the court did not have the requisite jurisdiction. He ought to have raised it before that court. It was submitted that the appeal has no merit and that the same should be dismissed with costs to the Respondents.
7. This being the first appellate court, its duty is well spelt out namely to re-evaluate the evidence tendered before the trial court and arrive at its own independent conclusion. In carrying out this task, the court must take cognizance of the fact that the trial court had the advantage of seeing and observing the demeanour of the witnesses as they testified. See *Selle & Another Vs. Associated Motor Boat Co. Ltd* [1968] EA 123.
8. CW1 Otieno Kevin Ajinja stated that he is a teacher at Uranga Secondary School and the 1<sup>st</sup> Claimant. He adopted his statement of claim as his evidence in chief and also produced a list of documents dated 8/9/2024. He testified that the Appellant herein approached him that he would help him in executing a warrant of attachment in order to enable him realize the decree. He stated that the Appellant agreed with the instructions and later organized for the auction of the said goods. That the Appellant introduced himself as the Director of Mako Auctioneers. That he learned that during the date of the auction, the Appellant never appeared and that the sale proceeds of Kshs200, 000/= was never given to him.

On cross examination, he stated inter alia; that he issued instructions to the Appellant to execute the decree and that upon successful execution, he was to pay his fees but that no auction took place; that costs were to be recovered during and after the execution; that they did not agree on the auctioneer's fees; that they did not pay any money; that he recalled the auction; that he could not confirm whether the public auction was published; that the Appellant introduced himself as Mako Auctioneers; that he handed over a generator to the 2<sup>nd</sup> Respondent who had come to clear the mess; that he did not receive any money from the Respondents; that his claim is for Kshs200,000/=; that nobody appeared for the auction; that there is a receipt for Kshs150,000/=; that the auction was not done; that he has Whatsup messages regarding his communication with the Appellant.

On re-examination, he stated inter alia; that there was no successful execution; that the advertisement contains wrong details; that the Appellant valued the goods at Kshs200,000/=; that the 2<sup>nd</sup> Respondent appeared on 7<sup>th</sup> August, 2024.

That marked close of the Claimants' case.



9. RW1 Walter Musungu Muyodi (Appellant herein) testified that he is a licensed Auctioneer trading under the name and style of Rhemat Auctioneers. He relied on his statement which was adopted as his evidence in chief.

On cross examination, he stated inter alia; that he trades as Rhemat Auctioneers; that he did not receive any warrants and that he was never instructed; that Cell Phone numbers 0723xxxx and 0724xxxx are not his; that the Claimant is his friend; that 0724xxxx is his number; he did not receive any instructions; he collected the warrants of attachment; he did not file the application for security; that his colleague also uses his account number; that his colleague also filed through his account; that his colleague did the advertisement under Mako Auctioneers; he was not there during the auction; that he is not aware whether returns of the auction were made; that exhibit was prepared by his colleague Margaret.

On re-examination, he maintained that he was not instructed and that it was Mako Auctioneers that received the instructions.

10. RW2 Margaret Nandakho Wanjala testified that she is a licensed auctioneer. She adopted her statement filed on 4/10/2024. She also adopted the documents which were produced as REX-1-2.

On cross examination, she stated inter alia; that the documents were filed on 23/8/2024 by Isaac Barasa; that she has not filed any returns; that she issued a certificate of sale; that she knows the 1<sup>st</sup> Respondent(Appellant) who is a licensed Class ‘A’ Auctioneer; that she does execution by herself; that she received instructions to execute the warrant; that the instructions were sent to the Appellant on her behalf; that warrants were picked by the Appellant; the proclamation was done by herself; that she met the 1<sup>st</sup> Claimant(1<sup>st</sup> Respondent herein); that she prepared the application for security which she filed through the Appellant’s account; that she received a request for compliance and that she sent kshs40,000/= to the advocate which was returned immediately; that she was executing for Kshs800,000/=; that the execution is partly done; the execution was not completed; that she was present on 6/8/2024; that she has not produced her licence; she sold goods worth Kshs150,000/=.

On re-examination, she stated that execution is not complete. That she received Ksh 150,000/=.

That marked the close of the Respondent’s case.

11. I have considered the evidence tendered before the lower court as well as the rival submissions. It is not in dispute that the claimants had obtained judgment vide Siaya Small Claims Court No. E024/2024 wherein judgment was entered in their favour for a sum of Kshs 800,000/=. It is not in dispute that the Claimants wanted to execute the decree on which they instructed the Appellant herein. It is not in dispute that there was partial execution of the warrant in that a sum of Kshs 200,000/= was claimed to have been realized but which did not reach the Claimants. That it is not in dispute that as a result of the Claimants failure to receive the proceeds of the sale in an auction, the claimants filed suit before the Small Claims Court vide No. E135/2024 in which they sued the Appellant and one Margaret Wanjala. It is also not in dispute that the Appellant and the said Margaret Wanjala had used their company Mako Auctioneers to carry out the execution. It is not in dispute that the Appellant and the said Margaret Wanjala were ordered by the trial court to refund the sums received from the Auction as well as pay costs and which has now precipitated this appeal. The issue for determination is whether the Claimants (Current Respondents’) case was proved against the Appellant on balance of probability.
12. Looking at the grounds of appeal raised by the Appellant, the same can be distilled into three issues namely whether there was a contract between the Appellant and the Respondents, whether the small claims court had jurisdiction to hear the matter and finally whether the Appellant’s rights were violated when the trial court declined his request to file further documents.



13. As regards the issue of the existence of a contract between the Appellant and Respondents, the lower court record is that the 1<sup>st</sup> Respondent was approached by the Appellant herein and after exchange of phone numbers, the Appellant took up instructions and collected the warrants and that an auction was later conducted. The Appellant sought to shift blame upon one Margaret Wanjala who is the proprietor of Mako Auctioneers as the person responsible for the execution of the warrant and eventual auction. Whereas the Appellant seems to suggest that he has been sued wrongly on the ground that he did not have a contract with the Respondents, the same is not correct going by the evidence availed which was inter alia; that he is the owner of mobile phone No. 0724xxxx through which communications were exchanged with the Respondents and that is where the instructions to execute the warrant were issued; that he admitted on cross examination that the said mobile number 0724xxxx actually is his; the Respondents produced the whatsapp communication as exhibit and this left no doubt that the Appellant had been contracted by the Respondents; that the Appellant had used his colleague Margaret Wanjala in the execution of the warrant wherein Mako Auctioneer is alleged to have carried out the exercise; that the Appellant's colleague received the proceeds of the auction but failed to remit to the Respondents; that the Appellant was the duly authorized auctioneer to carry out the exercise and that if he gave the task to another agent, then his responsibility to the Respondents still remained with him until the conclusion of the task given. It is therefore surprising that the Appellant could now turn around and claim that his firm namely Rhemat Auctioneer had not been involved. This beats logic in that the Appellant approached the Respondents to give him the job of execution which was duly given and therefore he cannot now turn around and hide behind a new entity and seek to run away from his obligations. It is clear that the person who carried out the task on the Appellant's behalf was his agent and therefore the Appellant is still liable to render an account to the Respondents over the execution of the warrant and amounts realized in the auction. I find that there was a contract between the Appellant and the Respondents which gave rise to the suit being lodged at the Small Claims Court.
14. On the issue of jurisdiction raised by the Appellant, it is instructive that the Appellant proceeded with the case at the Small Claims Court upto conclusion and at no time did he challenge the jurisdiction of the court to determine the matter. The Appellant has not explained why he did not do so. Even though the issue of jurisdiction can be raised by parties at any stage of proceedings, it is prudent to raise it at the earliest time possible so as to avoid a situation where parties end up participating in the suit with great expenses. It is instructive that this a matter under the Small Claims Act under Section 12(1) thereof. The claim by the Respondents related to money received from an auction. In that auction a sum of Kshs200,000/= was allegedly raised. Learned counsel for the Appellant has contended that the suit ought to have been filed in Magistrates' court and not Small Claim. I am not persuaded by the Appellant's contention because the claim by the Respondents fell within the claims provided the act. The primary suit which gave rise to the one involved the Appellant, involved a judgment for Kshs800,000/= in which the Respondents were executing against. The Appellant has also claimed that the Respondents should have gone back to the court which handled the primary suit. Again, this is not convincing because the Respondents could not go to the same court since a new party namely the Appellant is being brought on board yet he was not a party in the initial suit. It was therefore perfectly in order for the Respondents to initiate a different suit against the Appellant over the claim for Kshs200,000/=. Finally, the Appellant claimed that the Respondents had already approached the Auctioneers Licencing Board to intervene in their claim against the Appellant. Whereas that was an administrative process, nothing barred the Respondents from filing the suit against the Appellant. In the end, I find that the trial court had jurisdiction to entertain the Respondents' suit against the Appellant.
15. As regards the claim that the Appellant's constitutional rights were violated by the trial court in rejecting his request to present more documents, it is noted that the matter in the trial court had



proceeded substantially and that the other parties had already closed their respective cases and that the trial court did consider his request and found that it had no merit since the Appellant did not disclose the documents he sought to produce. I am in agreement with the finding by the trial magistrate that the Appellant's request lacked merit.

16. On the whole, the Appellant's defence in the lower court did not controvert the evidence of the Respondents. The evidence that the Appellant had been given instructions to execute the warrant was not challenged and that his attempt to shift blame upon his colleague Margaret Wanjala was not believable in that the actions of the said Margaret Wanjala were deemed to be carried out at the behest of the Appellant as his agent. The Appellant therefore was bound by the activities of the said agent. Indeed, the Respondents sued the Appellant and the said agent.
17. Finally, in view of the foregoing observations, it is my finding that the Appellant's appeal lacks merit. The same is dismissed with costs to the Respondents.

**DATED AND DELIVERED AT SIAYA THIS 28TH DAY OF FEBRUARY, 2025.**

**D.KEMEI**

**JUDGE**

In the presence of:

Oduol.....for Appellant

Ondego.....for Respondents

Ogendo.....Court Assistant

