Marble Logistics Company Limited v Mbashi Printers & Logistics (Civil Appeal E127 of 2024) [2025] KEHC 12021 (KLR) (15 August 2025) (Judgment)

Neutral citation: [2025] KEHC 12021 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E127 OF 2024

J NGAAH, J

AUGUST 15, 2025

BETWEEN

MARBLE LOGISTICS COMPANY LIMITED ..... APPELLANT

AND

MBASHI PRINTERS & LOGISTICS ..... RESPONDENT

JUDGMENT

1. This appeal arises out of a judgment rendered on 11 April 2024 by the Adjudicator, the Honourable Gatambia, P.M. in Mombasa Small Claims Court Case no. 062 of 2024. In that case, the claimant, the appellant in the instant appeal, had sought judgment against the respondent for the sum of Kshs. 959,708.96 being the cost of labour and materials for what was described in the claim as compensation for "aluminium partitioning for office room number 11 at plot no. L.R.XV/100." The description of the plot number was later amended to read "Mombasa/ Block/XX/74" but the amendment was rejected by the court. I will return to this issue of amendment later in this judgment.

2. According to the claim, the partitioned office space had previously been leased to the appellant but the respondent took possession of the same space upon the expiry or termination of the appellant's lease. The basis of the appellant's claim was what it claimed to be an oral contract between it and the respondent to the effect that the latter would reimburse the appellant for the cost and labour of the partitioning of the office space. The cost is said to have been agreed at Kshs. 956,708.96.

3. The respondent denied having entered into such a contract with the appellant and, as a matter of fact, it denied having taken over the space described in the claim as "office room number 11 situate at plot number L.R No. XXV/100 in Mombasa".

4. The learned Adjudicator dismissed the appellant's claim and, in doing so, he held as follows:

    5. From the record, there is no doubt that the Claimant did install the aluminium partition. This can be gathered from the pictorial evidence depicting the same as well as the design layout

together with the estimates of materials in both quantity and pricing before undertaking the actual partitioning.

6. The Claimant's evidence was however shaken by that of the Respondent in the sense that the Respondent was able to prove that it is not a tenant in the very office space that the Claimant alleged. It also then becomes doubtful how in spite of the costly investment that the Claimant had put in, it failed to cover itself by covenanting with the new tenant of the office that it vacated."

5. The appellant has now appealed against this decision on the grounds expressed in the memorandum of appeal as follows:

1. The Learned Adjudicator erred in fact in failing to find that there was an oral contract between the Appellant and the Respondent for sale of aluminium partitioning installed in an office space despite the Appellant adducing sufficient evidence to prove that all the essential elements of a valid contract were satisfied.

2. The Learned Adjudicator erred in disregarding the evidence in the Witness Statement dated 28/3/2024 and filed on 2/ 4/20241 given by Juma Ali Kijumbe who was the caretaker/ agent in charge of the suit building at the material time and witnessed the Appellant and the Respondent negotiating and entering into the said oral contract.

3. The Learned Adjudicator erred in law at paragraph 6 in failing to find that the oral agreement between the Appellant and the Respondent was a valid and enforceable contract and did not require any written covenant.

4. The Learned Adjudicator erred in fact and in law at paragraph 6 in finding that the Respondent proved that it is not a tenant in the subject office space by,

a. Disregarding the Appellant's Amended Statement of Claim dated 28/3/2024 and filed on 2/4/2024, wherein the Appellant amended the Plot Number on which the subject office space containing the aluminium partitioning was erected.

b. Failing to appreciate that the issue in dispute was whether there was a contract between the Appellant and the Respondent, and not whether the Respondent was a tenant in the subject office.

5. The learned Adjudicator erred in fact in failing .to find that the Respondent breached the terms of the oral contract, despite the Appellant adducing sufficient evidence to prove that the Respondent failed to pay the Appellant the agreed consideration of Ksh. 959,708.96/=, without any or any lawful justification.

6. The Learned Adjudicator erred in fact and in law in failing to find that in any event, the failure of the Respondent to pay the Appellant the agreed Kshs. 959,708.96/= amounts to unjust enrichment despite,

a. Finding at paragraph 5 that 'there is no doubt that the Claimant did install the aluminium partition'.

b. The Appellant adducing sufficient evidence to prove that the Respondent retained and utilized the said aluminium partitioning without compensating the Appellant for her investment.

7. Accordingly, the Learned Adjudicator erred at paragraph 8 in dismissing the Appellant's Statement of Claim dated 31/1/2024 and in failing to enter judgment for the Appellant in the sum of Ksh. 959,708.96."

6. Based on the foregoing grounds, the appellant has asked this Honourable Court to allow the appeal and set aside the Adjudicator's judgment and substitute it with a judgment for the appellant against the respondent in the sum of Kshs. 959, 708.96 with costs. In the alternative, the appellant wants an order for the respondent to remove and deliver to the appellant the aluminium partitioning failure of which the appellant ought to be allowed to remove the partitioning. The appellant has also asked for costs of the suit.

7. The appeal has been opposed by the respondent and submissions in that regard were filed on its behalf. I have had the opportunity of considering these submissions and the appellant's submissions.

8. For starters, Section 38 of the *Small Claims Court Act* cap.10A makes provision for appeals to this Honourable Court against the decisions of the Small Claims Court; it states as follows:

38. Appeals

1. A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.

2. An appeal from any decision or order referred to in subsection (1) shall be final.

9. Thus, unlike in appeals from the ordinary magistrates' courts where this court would be enjoined to interrogate facts or evidence adduced during the trial and come to its own conclusions of fact in exercise of its appellate jurisdiction, its concern about appeals from the Small Claims Courts is restricted to matters of law only.

10. The learned Adjudicator established as a fact that the appellant partitioned some office space as pleaded in its claim; however, he dismissed the appellant's claim because, according to the evidence before him, the description by the appellant of the portioned office was different from that given by the respondent. In the claimant's statement of claim, the appellant pleaded as follows, as far as the description of the office in issue is concerned as follows:

" 3. Nature of the Claim

A breach of an oral agreement relating to the sale/purchase of office alluminium (sic) partitioning for office room number 11 situate at plot number L.R No. XXV/100 in Mombasa."

11. In disputing this claim, the respondent pleaded in its defence as follows:

b. The Respondent avers that it does not own an office and has never owned an office space at Plot No. L.R No. XXV /100, Mombasa and puts the Claimant into strict proof thereof.

c. The Respondent avers that its offices are situated at Plot Number Mombasa/block/XX/74 (Shiva Towers. Off Moi Avenue).

d. Further to paragraph (c) above, the Respondent avers that it has been in occupation of the said office space since 1.4.2018."

12. With this averment, and perhaps realising its mistake, the appellant attempted to amend its claim and describe the office space as:

> "...office room number 11 situate at plot number L.R No. Mombasa/block/XX/74 in Mombasa".

13. That the appellant sought to amend its claim so that its description of the office space in in issue was consistent with that given by the respondent, is proof enough that the space it may have been alluding to in its claim was the space described by the respondent. But its "amended statement of claim" that purportedly gave the proper description of the office was rejected.

14. The record shows that the "amended" statement of claim was filed without leave after the closure of the pleadings. The record of the proceedings of when the issue of the validity of the amended statement of claim arose reads as follows:

> " 11/4/2024
>
> Before Hon. Gatambia – PM
>
> Court Assistant - Abdi
>
> Mr. Wachira for Respondent
>
> Mr. Mwai for Claimant
>
> Mr. Wachira:
>
> We are here for Judgment.
>
> After we had taken directions for submissions, the Claimant filed further documents without leave of the court and will seek directions on how to proceed.
>
> Mr. Mwai:
>
> The amended claim on the number of the suit of the property is in question. We do not believe that would be prejudicial.
>
> Mr. Wachira
>
> That is very prejudicial as it relates to the exact plot where the suit property is located."

15. In rejecting the amended statement of claim, the learned magistrate held as follows:

> " The court agreed that the purported change of the suit property name or number as per a title deed or lease without the leave of court would be prejudicial given that the very nature of the dispute before court relates to fixtures on same property standing on a property of land.
>
> While the court acknowledges such amendment which was ·without the court's leave, the same was disregarded and court will proceed to deliver judgment only on the basis of the evidence that was properly and procedurally admitted."

16. So, since the fate of the appellant's claim turned on the proper description of the office space in issue, the only question of law that arises in this appeal is whether the appellant's amended statement of claim ought to have been allowed or whether it was properly rejected. The answer to this question lies in rule 17 of the Small Claims Courts Rules, 2019 on amendment of pleadings filed in the Small Claims Court. It reads as follows:

1. A claimant, respondent or third party, may amend and serve on the other parties to the proceeding the Statement of Claim, response or counterclaim filed with the court, as the case may be, at any time, but not later than seven days before the date fixed for hearing of the claim.

2. Where hearing has commenced, a party may, with leave of the Court on written application, amend and serve any of the documents referred to in sub-rule (1) on such terms as the Court may direct.

3. An application under this rule shall be made by way of a letter accompanied by copies of the document sought to be amended, showing the proposed amendments.

4. The proposed amendments shall —

    a. be underlined in red;

    b. indicate the date on which the amendment is made; and

    c. be signed by the party making the amendment.

5. Any party wishing to respond to an amendment under this rule shall file and serve his or her response on all the parties named in the proceeding in the manner prescribed under rule 35 within seven days of being served with the amended document, or within such period as the Court may direct.

17. The court record shows that on 26 February 2024, the matter was set down for hearing on 13 March 2024. The directions of the court were captured as follows:

> " Hearing of both the Claimant and r (sic) on 13th March, 2024. The Respondent to file and serve any of its remaining documents by close of business on 28th February, 2024. With the right of any further response not later than 01st March, 2024 when all pleadings ought to have closed."

18. According to rule 17(1) of the Small Claims Court Rules, the amended statement of claim ought to have been filed seven days before 13 March 2024; yet it was not until 2 April 2024 that the amended statement of claim was filed.

19. It is, however, worth noting that on 13 March 2024, the matter did not proceed by way of oral hearing as earlier envisaged. On that date, the claimants counsel was absent and the learned counsel who held his brief sought for an adjournment. The court found as valid the reason given for the application for adjournment but instead of adjourning the matter it opted to proceed and determine the dispute on the basis of the documents on record. The directions in this regard were given as follows:

> " Rather than have the matter slated for a Hearing getting adjourned in as much as the Claimant's plea would be one that will warrant for adjournment the court invokes section 17, 30 and 34 of its parent Act to direct that the matter proceeds by way of document only.
>
> The Claimant is also visited all the time as they represent Kenya in the sports endeavour (sic). The Claimant is however at liberty to file submissions and serve not later than March 2024.The Respondent to comply not later than 27th March, 2024. The Judgment to be delivered on 11th April, 2024 whether the submissions ·will have been filed or not. Each party to adhere to their timelines."

20. When the amended statement of claim was filed on 2 April 2024, parties were presumed to have filed submissions and, going by the timelines set by the court, the matter was pending judgment.

21. Having failed to file the amended statement of claim seven days before the hearing date, the only window open to the appellant was rule 17(2) of the Small Claims Court Rules according to which it would have sought leave to file the amended statement of claim. And even when the question on the validity of the amended statement of claim was raised, the claimant was obviously out of time but under section 31 and 32 of the Small Claims Act, it was open to the appellant to apply to court for extension of time to file an amended statement of claim or to have the filed amended statement of claim deemed as duly filed. These two provisions read as follows:

> 31. In the conduct of any proceedings before it, the Court shall not be bound by the strict rules of procedure or evidence.
>
> 33. The Court may extend or shorten a time limit fixed under these Rules or by any order of the Court requiring anything to be done under these Rules, on such terms as the Court thinks just.

22. If the court had been moved appropriately, it would have been bound to consider the application for amendment on merits. But besides the learned counsel for the appellant making a casual remark that the respondent would not suffer any prejudice if the amended statement of claim was allowed on record, he never made any efforts to take advantage of the provisions of the law to amend the statement of claim or persuade the court to admit as duly filed the amended statement of claim on record.

23. Without belabouring the point, the amended statement of claim was filed contrary to rule 17(1) and (2) of the Small Claims Court Rules and, therefore, the court cannot be faulted for rejecting it. Since the appellant's case turned on the identification of the premises or office space in issue, the appellant's case collapsed with the rejection of the amended statement of claim which would have given a proper identification of the office space.

24. Considering that the court, on its own motion, decided to determine the matter based on the documents before it, a more forceful ground of appeal would have been to question the magistrate's decision in that respect because under section 30 of the *Small Claims Court Act*, the court could only take that course upon consent of the parties. That section reads as follows:

> 30. Proceeding by documents only Subject to agreement of all parties to the proceedings, the Court may determine any claim and give such orders as it considers fit and just on the basis of documents and written submissions, statements or other submissions presented to the Court. (Emphasis added).

25. There is nothing on record to show that parties consented to the determination of their dispute on the basis of documents before the court and written submissions.

26. Although in deciding as he did the learned magistrate invoked section 17 of the *Small Claims Court Act* which, on the face of it, gives the small claims court a wide latitude in the manner it conducts its proceedings, that provision of the law is not carte blanche to the court to overlook or ignore the rest of the express provisions of the Act. As a matter of fact, it is clear from the same provision that it is subject not only to the rest of the provisions of the Act but it is also subject to the rules as well. To be precise, it reads as follows:

> 17. Subject to this Act and Rules, the Court shall have control of its own procedure in the determination of claims before it and, in the exercise of that control, the Court shall have regard to the principles of natural justice. (emphasis added)

27. The court could not, therefore, invoke this provision to disregard section 30 of the Act on the need for the consent of the parties as a prerequisite for the determination of a claim based on the documents and submissions filed. A consent of the parties on reliance of the documents and submissions in determination of their dispute rather than being heard orally in court is, no doubt, a vital element of the principles of natural justice which section 17 acknowledges as necessary and which, for that reason, the court ought to take into account in the disposal of any dispute before them.

28. Section 34 which the learned magistrate also invoked in dispensing with oral evidence enjoins Small Claims Courts to determine the claims before them expeditiously, among other things; even then it does not purport to supplant section 30 of the Act. If anything, a consent of the parties on the manner of disposal of any claim before the Small Claims Court, or any other court for that matter, is ordinarily a positive step towards disposing of the dispute between them expeditiously.

29. That said, none of the grounds in the memorandum of appeal questioned the course adopted the learned adjudicator adopted in disposing of the claim. I felt compelled to address the provisions of sections 17, 30 and 34 only because the learned adjudicator invoked them in sidestepping the statutory and mandatory requirement of the consent of the parties whenever the court opts to base its determination on the documents and submissions without taking oral evidence in court.

30. The appellant's appeal is dismissed solely for the reason there is no basis to fault the learned magistrate in rejecting the amended statement of claim that was intended to capture the correct description of the office space whose cost of partitioning and the compensation thereof was in dispute.

31. According to the learned adjudicator's judgment, the respondent successfully contested that it was in possession of the office space partitioned by the appellant, a fact that the appellant could not deny in the wake of its failed attempt to rely on a statement of claim amended to give what, in the appellant's view, would have been a proper description of the office space in issue.

32. If the office occupied by the respondent is not the office that the appellant partitioned, then the question of whether there was even a valid contract the enforcement of which would have been a question for determination in this appeal does not arise. Put simply, following the rejection of the amended statement of claim, the subject matter of the would-be contract does not exist. This why it is unnecessary to delve into the rest of the grounds of appeal.

33. For all I have said, the appeal is dismissed. The respondent will have costs of the appeal.

SIGNED, DATED AND DELIVERED ON 15 AUGUST 2025

NGAAH JAIRUS

JUDGE