



**Ali v Ondieki (Commercial Case E001 of 2023)
[2024] SCC 6 (KLR) (6 February 2024) (Judgment)**

Neutral citation: [2024] SCC 6 (KLR)

**REPUBLIC OF KENYA
IN THE SMALL CLAIMS COURT AT LAMU
COMMERCIAL CASE E001 OF 2023
FM MULAMA, RM
FEBRUARY 6, 2024**

BETWEEN

ALI MOHAMED ALI CLAIMANT

AND

KENNEDY ONDIEKI RESPONDENT

JUDGMENT

A. Introduction.

1. Ali Mohamed instituted this claim vide statement of claim dated 7/12/2023 claiming against Kennedy Ondieki a total of Kshs.196,000/= . He also prays for costs of the claim.
2. The claim is opposed vide a response to statement of claim dated 11/12/2023.
3. The claimant called additional 4 witnesses to prove the claim against the respondent whereas the respondent did not call any other witness other than himself.
4. The matter was heard viva voce and parties were directed to file written submissions which have been duly considered.

Claimant's case

5. The claimant avers in his testimony that he was verbally retained and/or contracted by the Respondent to supply building materials for the construction of houses in Ndau.
6. the claimant then supplied materials between 10/4/2023 and 21/4/2023 but he was stopped before he could supply all the materials and on 15/4/2024 vide Mpesa he received Kshs.100,000/= and later after issuing a demand to respondent he paid Kshs.135,000/= vide Mpesa and promised to clear the balance. He produced mpesa statement to prove this.



7. It is his case that he supplied sand worth approximately Kshs.34,000/=, stones/blocks worth approximately Kshs.273,000/= inclusive of transport, concrete worth Kshs.11,000/= and water worth approximately Kshs. 11,172/= being 447 jericans.
8. The respondent failed to pay the balance of Kshs.196,000/= and which he now claims from the Respondent which is the balance of the materials supplied and not paid.
9. The claimant to prove the issue of supply of the materials he called some of the people through him he supplied the items. For instance CW2 testified that he was employed by a company and he does not know the respondent and he has never seen him but in the employment he was contracted by the claimant to carry stones to a construction site.
10. CW 3 in his testimony indicated that indeed the respondent had been contracted to construct a police post in Ndau using his company and that he witnessed the verbal agreement between the claimant and the respondent. He could not also confirm whether building materials were ever supplied to the site.
11. As for CW 5 he was contracted to supply water to the construction site since he owned a Jabia but admitted to not knowing the respondent.
12. The claimant in his submissions, raises issues to do with whether there was an oral agreement between the claimant and the respondent, whether there was breach of that contract by the respondent and who should pay for costs of the claim.
13. On the issue of the oral contract, counsel for the Claimant submitted that a contract exists where no words have been used but where it can be inferred from the conduct of parties that a contract has been concluded. She relied on the case of *Ali Abid Mohammed vs Kenya Shell & Company Limited* [2017]eKLR
14. She further submitted that the claimant's action of supplying the building materials constituted an offer which was accepted by the claimant and that the claimant's supply of the said materials upon request of the respondent amounted to consideration.
15. She finally submitted that all the 3 elements to wit offer, acceptance and consideration were present and hence there was a contract al beit an oral one that was witnessed by CW 3 and that by conduct of the respondent and the claimant there was hence an oral contract.
16. Ms. Suheila further submitted that the respondent breached the contract by failing to pay the claimant the balance owing to wit Kshs.196,000/=.
17. She finally submitted that costs are discretionary and follow events and that the claimant should be granted costs as a necessary follow of events.

Respondent's case.

18. The respondent adopted his response to the claim and further added in cross examination that he has never contracted the claimant whether verbally or otherwise for supply of building materials.
19. He admitted having sent the claimant Kshs. 235,000/- in 2 instalments as stated by the claimant but stated that he did that on the instruction of Kenadu Enterprises who instructed him to send the claimant the said money vide Mpesa agent which he operates but could not send it via the agent number because he was in Homabay and the claimant was in Lamu and that how he ended up sending to the claimant the said amount of money using his personal line.



20. The respondent on the other hand in his submissions raised 3 issues to wit whether the claimant sued the right party, whether the claimant has proved his case on a balance of probability and who should bear the costs of the suit.

B. ISSUE FOR DETERMINATION.

- a. Whether the claimant sued the right party.
- b. Whether the claimant proved his claim to warrant grant of the reliefs sought in the claim.

C. Analysis And Determination.

Whether the claimant sued the right party.

21. During the hearing of the matter, an issue arose as to whom the claimant supplied the materials to the Respondent or a company known as Kenadu enterprises Limited.
22. The claimant during hearing insisted that he entered into an oral contract with the respondent to supply building material with the respondent herein and the claimant indeed supplied the said building materials.
23. The respondent on the other hand denied having entered into any agreement with the claimant for supply of materials and the only contact he had with the claimant it was when he was asked by Wilson to send to the claimant Kshs.235,000/= vide his mpesa agent but it was not possible owing to the distance and opted to send to him using his registered personal line.
24. The claimant despite the issue being raised during hearing, he has not addressed this in his submissions. The respondent on the other hand submits that the claimant sued the wrong party and relied on the locus classicus case of Salmon vs Salmon(1895-9) ALL ER 33 which held that a company is a separate legal entity and distinct from its membership and which for our purposes in this matter can sue and be sued in its own name.
25. Mr. Omuthe counsel for the respondent submitted that the claimant failed to produce any evidence to show that he entered into a contract with the respondent and that he admitted in cross examination that it is Kenadu enterprises limited that owed him Kshs.196,000/= and even admitted that the letter dated 28/12/2023 was addressed to Kenadu enterprises ltd and his name was among those owed by Kenadu Kshs.196,000/=
26. I must point out that to that extent I entirely agree with the respondent. As if that is not enough the claimant has produced delivery notes clearly addressed to Kenadu Enterprises Ltd and further that the fact that monies were sent by the respondent on instruction by Willis who is a representative of Kenadu at least from the delivery notes, does not confer any liability to the respondent. The explanation given as to why he sent the money to the claimant is credible.
27. Consequently, as a result of his own admissions and evidence by way of the delivery notes and the chief's letter dated 28/12/2023, he is owed by Kenadu Enterprises Ltd and not the respondent herein. He ought to pursue his claim with Kenadu and not the respondent.

Whether the claimant proved his claim to warrant grant of the reliefs sought in the claim.

28. It is also well settled that pleadings are the bedrock upon which all the proceedings derive from. It therefore goes without saying that parties are bound by their pleadings.



29. Parties are not allowed to depart from their pleadings and introduce new evidence that seems to be at variance with the pleadings before court. Any evidence, however cogent but tends to be at variance with the pleadings must be disregarded in toto.
30. This settled position was reaffirmed by the Court of appeal in the case of IEBC & Another vs Stephen Mutinda Mule & 3 others (2014)eKLR which cited with approval the decision of the supreme court of Nigeria in Adetoun Oladeji(NIG) vs Nigeria Breweries PLC SC 91/2002 where Adereji JSC expressed himself on the importance and place of pleadings;-

“...it is now trite principle in law that parties are bound by their pleadings and any evidence led by any of the parties which does not support the averments in the pleadings or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded...

...infact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”
31. At the hearing of this claim, and during cross examination, the claimant did indicate that he supplied material worth Kshs. 329,172/= inclusive of transport.
32. In the pleadings and documentary evidence produced in evidence, the claimant claims Kshs.196,000/= having been paid Kshs.235,000/=. On the other hand in evidence he claims based on the materials he supplied worth Kshs.329,172/= and the respondent having paid Kshs.235,000/= vide mpesa the amount owed based on the admitted calculations would then be Kshs.94,172/=. This is not what the claimant is claiming.
33. Furthermore, it is incumbent to prove his claim against the respondent. The materials claimed to have been supplied had their different costs and just like he attempted to say with certainty the value of each type of material he supplied totalling to Kshs.329,172/= he in the same vein out to have explained how he arrived at a finding that the respondent owes him Kshs.196,000/=
34. The Respondent has vehemently denied entering into any contract with the claimant. To me it appears the only evidence the claimant is relying on to prove the purported contract is the 2 mpesa transactions contained in the mpesa statement produced as an exhibits.
35. To lend credence to the said Mpesa transactions, it is the claimant’s testimony that after he sent out the 2 demands at different times it is when the respondent sent money to him in part payment of the debt. A look at the transactions and the 2 sets of demand letters, one will realize that the demand letters are dated 26/6/2023 and 21/11/2023 whereas on the other hand the 2 transactions occurred on and 15/4/2023 and 29/7/23.
36. The demand letter dated 21/11/2023 indicates that the claimant received part payment leaving a balance of Kshs.200,000/= that by inference the part payment was the transaction made on 26/6/2023 which was for Kshs.135,000/=. That in essence meant the claimant was owed a total of Kshs. 335,000/=.
37. This then begs the question if the claimant was owed Kshs. 200,000/= as at the time the demand letter dated 21/11/2023 was being made why would he not claim Kshs. 200,000/= now?
38. In my view the Mpesa transactions and the demand do not follow the necessary follow of events as one was paid even before the demand was made. This gives credence to what the respondent said in evidence



- that he only sent money on the advice and instructions and/or on behalf of Kenadu enterprises and he had nothing to do with the debt owed to the claimant.
39. The claimant has also produced delivery notes dated 10/4/2023, 11/4/2023, 12/4/2023, 13/4/2023 and 15/4/2023. A cursory look of the said delivery notes I noticed the following. One they were all from Ali and addressed to Kenadu enterprises, all the delivery notes spoke of building materials (sand, water, ballast, blocks and round poll) and lastly, they were all received by Wilson and Wilson Omoko who appear as one and the same person if the handwriting is anything to go by.
 40. From the delivery notes it is clear as day that the claimant delivered the building materials to Kenadus Enterprises Limited and not the respondent herein and all the materials were received by one Wilson.
 41. Similarly, the Chief's letter dated 28/12/2023 is addressed to Kenadu Enterprises. The contents of the letter as can be deduced from the plain reading of the said letter addresses complaints of non-payment by Kenadu Enterprises and those listed as being owed by Kenadu, the claimant is one of them and he is owed Kshs. 196,000/=. A clear indication again that the amount claimed by the claimant, its mathematics notwithstanding is against Kenadu enterprises and not the respondent herein.
 42. The respondent in his testimony and while explaining how he sent the claimant Kshs.235,000/= said we certainty how he was instructed by Wilson to deposit to the claimant the said amount of money and since he was in Homabay county and the claimant was in Lamu county, it was not possible to deposit the money vide mpesa agent and that is how he ended up sending the amount of money to the claimant with his number.
 43. It is the finding of the court based on the foregoing that the claimant indeed supplied building materials as per the delivery notes to Kenadus enterprises ltd and not the respondent. His claim now lies with the Kenadus Enterprises and not the Respondent herein.
 44. The respondent's role was only limited to sending money to the claimant on instruction from Wilson who from the delivery notes it can me inferred that he was a representative of Kenadu enterprises Limited.
 45. The claimant never drew any nexus between the respondent and Kenadu enterprises and the contention that he never knew the relationship between Kenadu and the respondent falls flat on its belly. He ought to have been clear in his mind as to whom he was dealing with.
 46. I would not go into the details of Kenadu enterprises ltd and the ownership thereof as it was not raised in trial. The only issue that arose was whether there was a contract for delivery of building materials to the respondent.
 47. As I have already demonstrated above, the delivery was made and received by Wilson on behalf of Kenadu enterprises Limited and not the respondent.
 48. Whether there is any connection between the respondent and the said Kenadu Enterprises Limited that is a story for another day.
 49. As sure as day succeeds night, the claim is devoid of any merit and cannot be allowed to stand.

Conclusion And Disposition.

50. The upshot of the foregoing I make the following final orders;
 - a. The claim contained in the statement of claim dated 7th December 2023 is devoid of any merit and it is accordingly dismissed in toto.



- b. The respondent is awarded costs of the claim assessed at Kshs. 30,000/= all inclusive.
- c. Let the file be closed forthwith.

51. Orders accordingly.

DATED, SIGNED AND DELIVERED AT LAMU SMALL CLAIMS COURT THIS 6TH DAY OF FEBRUARY 2024.

HON. FLAVIAN.M. MULAMA

ADJUDICATOR/RESIDENT MAGISTRATE

LAMU LAW COURTS

LAMU

In the presence of:

Court Assistant:- Vivian Wambui.

Ms. Suheila Abdul Faraj for the claimant

Mr. Omudhe for the Respondent.

