



**Kenya Adhesive Products Limited v East African Packaging Industries Limited (Civil Appeal E101 of 2022) [2024] KEHC 16914 (KLR) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 16914 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E101 OF 2022  
F WANGARI, J  
OCTOBER 31, 2024**

**BETWEEN**

**KENYA ADHESIVE PRODUCTS LIMITED ..... APPELLANT**

**AND**

**EAST AFRICAN PACKAGING INDUSTRIES LIMITED ..... RESPONDENT**

**JUDGMENT**

1. This is an Appeal from the Judgment and Decree of Hon. V. Muthoni, Resident Magistrate delivered on 06/06/2021 arising from Mombasa CMCC No. 1527 of 2001. The Appellant pleaded that the trial court erred and misapprehended evidence in arriving at the finding that the Appellant who was the Plaintiff, failed to prove its case on a balance of probabilities.
2. The Appellant in the lower court pleaded that there was an oral agreement between the parties herein, where the Plaintiff was to deliver to the Defendant, products manufactured and supplied by the Plaintiff. The Defendant was supplied with the products between January to December, 2019. Kshs. 558,448 remained unsettled despite the demand to settle, hence the filing of the claim.
3. The Defendants denied the claim and put the Plaintiff to strict proof thereof. The matter proceeded for hearing and the Plaintiff's suit was dismissed, hence the filing of this appeal.
4. The court directed that the appeal be canvassed by way of written submissions. Only the Appellant filed its submissions which I have considered.

**Analysis**

5. This being a first Appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a Trial Court, unlike the Appellate Court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.



6. In *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

7. Firstly, I have perused through the Record of Appeal filed. It is incomplete. Page 6 and 8 of the lower court proceedings are missing. These proceedings are the evidence of the Plaintiff and the Respondent witnesses. I have also perused the filed Record of Appeal and note that the Witness Statements of the Plaintiff and Defence witnesses were not filed. Further, page 2 and 4 of the lower court judgment was not filed.

8. In the absence of the above, it is impossible to evaluate the evidence adduced in the lower court. I however note that in page 9 of the lower court proceedings, the Plaintiff did not cross examine the Defendant’s witness.

9. Further, an issue had been raised in the lower court on the capacity of the Plaintiff to bring the suit. Though the determination of the issue is missing from the records, I proceed to deal with this issue at the appeal stage.

10. Order 4 Rule (1) (4) of the Civil Procedure Rules. The Order deals with particulars to be contained in a Plaint, and states that: -

4(1) (4) “Where the Plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.”

11. I am aware that this court has pronounced itself that the above provision should not be used as a procedural technicality. However, even though the Resolutions of the Company may be missing, there ought to be evidence to show that the company was aware that the suit has been filed, even though it was by way of a letter or a company seal.

12. In the case of *Leo Investments Ltd v Trident Insurance Company Ltd* (2014) eKLR Odunga, J was in agreement with the decision of Kimaru J in the case of *Republic vs. Registrar General and 13 Others Misc. Application No. 67 of 2005* [2005] eKLR where the court stated: -

“...such a resolution by the Board of Directors of a company may be filed at any time before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. Its absence is, therefore, not fatal to the suit.”

13. It was further held by the court in the *Leo Investment* case (*supra*), that failure to file the Resolutions at the filing of suit stage can be cured by filing the same before the suit is fixed for hearing. The same was not done in this case. The Plaintiff witness said he did not find it important to file the authority in court. The Plaintiff had an opportunity to right its wrongs but the same was not done. I find that the suit ought to have been dismissed at the lower court stage.

### **Determination**

14. In the upshot, this court orders as hereunder;



- a. The Plaintiff having had no locus standi in filing the suit in the lower court and filing this appeal, the appeal is dismissed.
- b. No orders as to costs.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 31<sup>ST</sup> DAY OF OCTOBER, 2024.**

.....

**F. WANGARI**

**JUDGE**

In the presence of;

N/A by the Appellant

Wanjohi Advocate h/b for Katiku Advocate for the Respondent

M/S Salwa, Court Assistant

