



**Frametech Equipment Limited v Joseph Nzioki Mwanthi t/a Joe Mwanthi & Co. Advocates
(Civil Appeal E450 of 2021) [2024] KEHC 15247 (KLR) (Civ) (29 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15247 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL APPEAL E450 OF 2021**

**RC RUTTO, J
NOVEMBER 29, 2024**

BETWEEN

FRAMETECH EQUIPMENT LIMITED APPELLANT

AND

**JOSEPH NZIOKI MWANTHI T/A JOE MWANTHI & CO.
ADVOCATES RESPONDENT**

*(Being an appeal from the judgment delivered by Hon. D.W. Mburu (SPM)
on 9th July 2021 in Milimani Commercial Court No. 179A of 2016)*

JUDGMENT

1. This appeal arises from a judgment and decree entered in Nairobi Milimani Commercial Court No. 179A of 2016. The genesis of the suit is a Plaintiff dated 21st March, 2016, whereby the Appellant sued the Respondent for allegedly issuing him with as post-dated cheque number 000259 for Kshs 140,625/= that was dishonored. The Appellant sought for loss and damages of the principal sum of Kshs 140,625/=, interest and the costs of the suit.
2. The Appellant claimed that the Kshs 140,625/= was a soft loan advanced to the Respondent. The Appellant further stated that the Respondent in settlement of the said loan, drew a cheque of the said amount in favour of the Appellant which he deposited. However, that the cheque was dishonored for insufficient funds.
3. In a response dated 23rd December 2021, the Respondent denied the Appellant's claim. He averred that the sum of Kshs 140,625/= was for the sale of office photocopier by the Appellant to the Respondent. He further averred that the Appellant failed to deliver the said photocopier to the Respondent and therefore the Respondent failed to make arrangements to have sufficient funds in his account resulting in the cheque being dishonored.



4. During the hearing, both parties testified and after hearing and analysis of the evidence presented before court, the trial court dismissed the suit with costs.

The Appeal

5. Aggrieved by the decision of the trial court, the Appellant lodged the memorandum of appeal dated 29th July 2021 based on three (3) grounds of appeal, re-produced verbatim herein as follows, THAT: -
 - a. The learned magistrate erred in finding that the Plaintiff had failed to prove on a balance of probabilities their claim against the Respondent and introduced extraneous issues.
 - b. The learned magistrate erred in failing to rule on the prayer for Kshs 140,625/= as loss and damage despite the Respondent's admission of issuing a cheque that was dishonored.
 - c. The learned magistrate erred in ordering the Appellant to pay costs of the suit.
6. The Appellant prayed for the following reliefs, THAT: -
 - a. The Judgment of the trial court dated/delivered on 9th July 2021 in Civil Suit No. 179A of 2016 at Milimani be set aside.
 - b. This Court do vary the trial court's decision and enter judgment as prayed in the plaint dated 21st March, 2016.
 - c. This honorable Court do award the Appellant costs of the appeal.
 - d. This honorable Court do make such further or other orders as it may deem just and expedient.
7. The Court directed that the Appeal be canvassed by way of written submissions. The Appellant filed its submissions dated 28th June, 2024 while the Respondent's submissions were dated 4th July, 2024.

Appellant's submissions

8. The Appellant identified three issues for determination as follows:
 - (1) whether the issuance of cheque constitutes an acknowledgement of debt;
 2. whether the Plaintiff's failure to deliver a photocopier affected the obligation of the Defendant to honour the cheque; and
 - (3) whether the Defendant was liable to pay the amount of Kshs 140,625 to the Plaintiff.
9. On the first issue the Appellant submitted that the issuance of the said cheque by the Respondent was prima facie evidence of an acknowledgment of debt. He relied on Section 3 (1) of the *Bills of Exchange Act* that provides that the issuance of a cheque implied that the drawer (Respondent) acknowledged the debt and intended to settle it through the cheque. To support his argument, it cited the case of *Palm Oil Transporters Ltd V Kenfreight E.A Limited [2021] eKLR*.
10. It was the Appellant submissions that the dishonored cheque did not negate the acknowledgment of debt but served as evidence of the Respondent's failure to fulfil the payment obligation.
11. On the second issue, the Appellant submitted that the claim that the cheque was issued for delivery of a photocopier was unsubstantiated. He further submitted that the debt did not arise from goods to be delivered but a soft loan granted to the Respondent. It urged that the Respondent's remedy lied in a separate claim for breach of delivery of goods but not refusing to honour the cheque. He further submitted that there was no agreement regarding delivery of a photocopier in exchange for the cheque.



12. On the third issue, the Appellant submitted that the Respondent was liable to pay the said amount since the dishonored cheque was a clear indication that the Respondent failed to meet his financial obligation. He urged the court to allow the Appeal.

Respondent's submissions

13. The Respondent gave a brief background of the facts and the evidence tendered. He submitted that instead of the Appellant addressing itself to the grounds of appeal as set out in its memorandum of appeal, it crafted and addressed issues for determination as if it was submitting a fresh after the conclusion of trial before the subordinate court.
14. The Respondent submitted that, the Appellant had not demonstrated, how the trial court erred in the manner alluded to in the grounds of appeal. To buttress this point, the Respondent relied upon on Section 3 of the Bill of Exchange Act Cap 27 Laws of Kenya and the case of Paul Nzioka V Newton F. Kimanthi & 7 Others [2020] eKLR. He submitted that it is trite law that once a drawer of a cheque admits to issuing a dishonored cheque the burden of proof shifts to the said drawer to demonstrate good reason why the drawee should not have a judgment for the cheque amounts
15. The Respondent asserted that he discharged the said burden during trial. He submitted that his averments in the Statement of Defence were not controverted by the Appellant. Further, that he also adduced oral evidence which was in tandem with and in support of the Statement of Defence.
16. It was his submission that the Appellant sent a Demand Letter dated 23/4/2015 to the Respondent demanding payment of the Kshs140,625/= being payment for delivery of goods, and that the Appellant did not seek to amend or retract the contents of the aforesaid demand letter prior to the hearing and the trial court relied on the same.
17. The Appellant submitted that this Court should take note that the demand letter written by the Appellant's advocate was in regard to a purchase price, to the tune of the cheque amount, for goods allegedly delivered by the Appellant to the Respondent. In conclusion, the Respondent urges the court to dismiss the appeal with costs.

Analysis and Determination

18. This being a first appeal, this Court is reminded of the provisions of section 78 of the *Civil Procedure Act* and its duty is to re-evaluate and assess the evidence in order to 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 demeanor of the witnesses and hearing their evidence first hand. The foregoing duty was succinctly stated by the Court of Appeal in the case of *Selle v Associated Motor Boat Company Ltd* (1968) EA 123 and *Peters v Sunday Post Limited* [1985] EA 424).
19. After careful analysis of the record of appeal and the parties' submissions, the main issue for determination is: whether the Appellant proved his case on a balance of probability.
20. The burden of proof as per Sections 107 (1), 109 and 112 of the *Evidence Act*, Cap 80 Laws of Kenya is outlined as follows;

“Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.”



21. The applicable law as to the burden of proof is found in Sections 107, 108 and 109 of the *Evidence Act*. The Court of Appeal in *Mumbi M'Nabea v David M. Wachira* [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say:-

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

The above provision provides for the legal burden of proof. However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000* [2005] 1 EA 280 where it was held that:

“Whereas under section 107 of the *Evidence Act*, (which deals with the legal evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

22. In this instance, the duty of proving the averments contained in the plaint laid squarely upon the Appellant who testified that the case was about a bounced cheque on the basis that the Respondent borrowed money as soft loan on strength of their friendship. To support his assertion, he produced phone conversations but no certificate of electronic evidence. On his part the Respondent admitted issuing the Appellant with a postdated cheque for kshs. 140,625/= on the understanding that he would supply and deliver a photocopier to his office and on an understanding that the same would be banked by its due date and only upon delivery of the photocopier. Consequently, that the Appellant did not deliver the photocopier and proceeded to bank the cheque on its due date which cheque was dishonored as the defendant had not made arrangements.
23. Form the facts of the case, it is not in contention that the Appellant and the Respondent are known each other and that the Respondent gave the Appellant a cheque of Ksh 140,625. It is also not in contention that the said cheque was dishonored by the bank due to lack of sufficient funds. The contentious issue is whether the said cheque was for payment of a soft loan advanced to the Respondent by the Appellant or for payment of delivery of a photocopier to the Respondent.
24. Upon reviewing the evidence on record, and based on the assertion contained in the plaint, the Appellant only established the uncontested facts as stated above. To prove its case Appellant relied on the demand letter dated 23rd April, 2015 from himself to the Respondent. The demand is for kshs 140,625 which contents proved that the said monies were for delivery of goods to the Respondent



25. In determining this dispute, the trial court set out the issue for determination as; what was the purpose of the postdated cheque No. 000259. The trial court then proceeded to hold that parties did not back their assertion with any documentary evidence. The Respondent allegation that the cheque was for payment of a purchase are further backed by the Appellant's demand letter dated 23rd April 2015 and that the Appellant does not deny that the photocopier was not delivered.
26. I have taken the liberty to examine the demand letter by the Appellant to the Respondent and for which this case turns upon. In the letter dated 23rd April, 2015 the contents provided proved that the said monies were for delivery of goods to the Respondent. The letter provides in part that "you procured an order for goods worth kshs 140,625/- which goods were duly delivered to you in good order. Further upon delivery of the goods by our client you issued them with a cheque which they deposited only to be dishonored..."
27. This court notes that during cross examination the Appellant denied the contents in the demand letter, however despite this, the same were never expunged from the court record and formed part of the evidence. Instead, it is his copies of typed messages, claimed to be conversations between him and the Respondent regarding the repayment of the said loan that was disregarded for failing to meet the requirement of production of electronic evidence as stipulated under sections 106B(4) of the Evidence Act.
28. It is also noteworthy that the post-dated cheque did not expressly specify the reason for payment of the money. The Appellant asserts that the said money was for refund of a soft loan advanced to the Respondent, however, he does not address the issue of procurement of goods for kshs 140,625/- as contained in his letter of demand to the Respondent. He terms it as an error and blames it on the Firm of the Advocate who apparently are still the Firm of Advocate on record representing him in this Appeal.
29. As stated earlier, the standard of proof in civil matters is one on a balance of probability. In this instance, this court finds that the balance tilts in favour of the Respondent herein. Therefore, I do agree with the trial court finding that the Appellant presented no evidence to substantiate this claim thus failed to prove his case to the required standard.
30. Consequently, this court is satisfied that the learned trial magistrate correctly determined the matter as he did, and I find no reason to interfere with the said findings.
31. This appeal therefore fails in its entirety with each party bearing its costs.

Orders accordingly.

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 29TH DAY OF NOVEMBER 2024

For Appellant:

For Respondent:

Court Assistant:

