Petro Oil Kenya Limited v Branded Fine Food Limited (Civil Appeal E117 of 2021) [2023] KEHC 21861 (KLR) (25 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21861 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E117 OF 2021

OA SEWE, J

AUGUST 25, 2023

BETWEEN

PETRO OIL KENYA LIMITED ..... APPELLANT

AND

BRANDED FINE FOOD LIMITED ..... RESPONDENT

(Being an Appeal from the Judgment/decree of Hon. M. L. Nabibya (PM) delivered on the 22nd July, 2021 in Mombasa CMCC Suit No. 1858 of 2016)

JUDGMENT

1. This is an appeal from the judgment and decree passed by the lower court (Hon. M.L. Nabibya, PM) in Mombasa CMCC No. 1858 of 2016: Petro Oil Kenya Limited v Branded Fine Foods Limited. The appellant had sued the respondent vide a Plaint dated 10th October 2016, which was later amended on the 7th September, 2018. The appellant's cause of action was that in the month of January 2012, it entered into an implied and/or expressed contract with the respondent for the supply of petroleum products for which the respondent was to pay an agreed price on account.

2. The appellant further averred that in the months of January, February and March 2012, it supplied the respondent with goods worth Kshs. 609, 559.10 at the respondent's request, but that the respondent failed to pay as agreed. Accordingly, on the 14th March 2013, the appellant's legal officer, Irene W. Nyutu wrote a letter to the respondent demanding for the immediate payment of the amount due; and upon failure by the respondent to pay, the appellant opted to file the lower court suit, claiming for special damages in the sum of Kshs. 609, 559.10/= as well as interest thereon and costs of the suit.

3. The Plaint was thereafter amended, with the leave of the Court, to indicate, at paragraph 3 thereof that the goods were supplied in the month of February 2011; and in response thereto, the respondent filed an Amended Statement of Defence on 10th March 2020. While the respondent admitted that the appellant supplied it with fuel in the month of February 2011, it denied that the goods supplied

were worth Kshs. 609,559.10 or any other amount and put the appellant to strict proof thereof. At paragraph 4 of its Amended Defence, the respondent asserted that the appellant supplied it with fuel worth Kshs. 819,421.59 which it duly paid for vide cheque numbers 00225, 00226, 45073, 45074, 45075 and 45076 in the sum of Kshs. 150,000/=, Kshs. 150,000/=, Kshs. 150,000/= and Kshs. 73,921, respectively; and therefore that there is no debt owing in respect of the fuel supplied in the month of February 2011.

4. The respondent further denied having received any letter dated 14th May 2013 or any other date demanding for immediate payment and indicated, at paragraph 9A of its Amended Defence that it would raise a preliminary objection on points of law that the appellant's suit, as amended was incompetent and fatally defective as it was barred by the *Limitation of Actions Act*. There is however no indication in the proceedings of the lower court that this issue was ever raised in limine by the respondent.

5. Upon hearing the parties, Hon. Nabibya, PM, rendered her judgment on 22nd July 2021, dismissing the appellant's suit with costs. She took the view that:

> " The total deposits in favour of the plaintiff were in excess of ksh. 823,921/- according to the presented evidence. There is no evidence that the cheques were dishonoured.
>
> Therefore, if the claim is for ksh. 609,559.10/- invoices produced to prove the claim are for ksh. 388,000/- and the total payments made is to the tune of ksh. 823,921/- as proved by the defendant, it means that there are no monies owed to the plaintiff by the defendant.
>
> The plaintiff's claim can only be said to be devoid of merit and I dismiss it. Costs to the defendant."

6. Being aggrieved by that decision, the appellant filed this appeal on the following grounds:

   (a) That the learned magistrate erred in law and in fact by finding that the business relationship between the appellant and the respondent commenced on January 2012 despite evidence showing that it commenced on 30th July 2007.

   (b) That the learned magistrate erred in law and in fact by relying on extrinsic evidence namely, an account opening form for Nakumatt Holdings Limited which was neither produced in evidence by either party nor formed part of the court record.

   (c) That the learned magistrate erred in law and in fact by failing to consider all invoices produced in evidence by the appellant to support its claim for Kshs. 609,599.10 against the respondent.

   (d) That the learned magistrate erred in law and in fact by making a finding for a rounded off figure of Kshs. 388,000/= as the appellant's claim against the respondent despite evidence to the contrary vide assorted fuel orders and invoices.

(e) That the learned magistrate erred in law and in fact by finding that the respondent made an overpayment of Kshs. 436,142.00 of the monies owed to the appellant despite:

(i) the respondent tacitly conceding indebtedness of Kshs. 609,599.10 on 5th March 2012;

(ii) the respondent not filing a counter-claim for the alleged overpayment inferring that the payments related to other transactions but for the claimed period; and,

(iii) the respondent not producing evidence, such as remittance advices, to prove that the cheques issued to the appellant totalling Kshs. 323,922.59 were endorsed to the appellant pursuant to invoices sent by the appellant for February 2011.

7. Accordingly, the appellant prayed that the appeal be allowed and that the judgment of the lower court be set aside and substituted with judgment in favour of the appellant as prayed in the Amended Plaint. The appellant further prayed that the costs of the lower court suit and the appeal be awarded to it.

8. The appeal was urged by way of written submissions, pursuant to the directions given herein on the 26th May 2022. Thus, Mr. Masore for the appellant filed his written submissions on 8th July 2022. He relied on Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123 as to the role of the first appellate court such as this. He then proceeded to faulted the decision of the lower court in terms of the Grounds of Appeal which he distilled into two; namely, that the trial court's analysis was faulty and flew outside the pleadings and the evidence tabled before it; and that the lower court misdirected itself on the evidentiary standards of proof in civil cases.

9. Thus, Mr. Masore impugned the lower court's finding that the subject business relationship commenced on January 2012 notwithstanding the appellant's evidence in that regard and in disregard of the pleadings that the claim was for the supplies of February 2011. He argued that, with such misapprehension of facts the court was bound to come to the wrong conclusion. Counsel further pointed out that the trial court again erroneously relied on a non-existent account opening form for Nakumatt Holdings Limited; which was neither produced by any party to the proceedings nor is it on the court record.

10. Further to the foregoing, Mr. Masore faulted the lower court for what he termed "cherry-picking" of 50 undisclosed invoices totalling to Kshs. 387,779.00 notwithstanding that the appellant produced 92 invoices whose figures matched and were transposed from Fuel Orders made by the respondent itself per the Plaintiff's Exhibit 6 to prove its entire claim of Kshs. 609,559.10. He pointed out that a breakdown thereof was also provided by the appellant by way of the Plaintiff's Exhibit 8 and relied on Finejet Limited v Five Forty Aviation Limited [2020] eKLR to support his assertion that the appellant's evidence in this regard was not rebutted at all by the respondent; and therefore amounted to unassailable proof of the entire sum claimed.

11. In respect of the assertion by the respondent that it overpaid the appellant for the fuel supplied in the month of February 2011, Mr. Masore urged the Court to note that no counterclaim was filed in respect of the alleged overpayment of Kshs. 209,826/=; and that the respondent's attempt to justify the same was by way of cheques issued in February and March 2012. He further pointed out that no Fuel

Orders were availed to buttress the respondent's narrative that it received fuel worth Kshs. 819,421/= in February 2011 and not Kshs. 609,559/=.

12. Mr. Masore also made reference to the respondent's assertion at paragraph 9A of its Amended Defence that the suit was incompetent, fatally defective and barred by *Limitation of Actions Act*, and pointed out that the respondent never raised the issue as a preliminary objection or in response to the appellant's application for amendment of Plaint or during the trial. He further pointed out that no Cross-Appeal was filed by the respondent challenging the trial court's jurisdiction. He consequently argued that the issue of limitation is not open for scrutiny in this appeal. He relied on Twaher Abdulkarim Mohamed v Independent Electoral & Boundaries Commission (IEBC) & 2 Others [2014] eKLR in support of his submission and urged the Court to allow the appeal.

13. On behalf of the respondent, Mr. Mwakireti relied on his written submissions dated 7th September 2022. He argued, first and foremost, that since the issue of limitation was pleaded at paragraph 9A of the respondent's Amended Defence, the lower court was under obligation to give it consideration and make a finding thereon. He submitted that such an issue can be raised on appeal because it goes to jurisdiction of the lower court. He relied on Yusuf Abdul v Sea Angel Sation Limited [2017] eKLR in which it was held that a suit filed out of time was an act of futility and that it did not matter that leave was granted or that the plaint was amended by an order of the court.

14. On the merits of the appeal, Mr. Mwakireti submitted that the appellant's evidence was so contradictory to the averments set out in the Amended Plaint that the lower court had no option but to dismiss the same. In his submission, the appellant relied on a written statement and documents filed before the Plaint was amended and therefore were in support of deliveries made in January, February and March 2012. He therefore pointed out that no Remittance Advice for February 2011 was exhibited; and that there was no basis for the appellant's claim of Kshs. 609,559.10. He also pointed out that the demand letter dated 14th May 2013 was in reference to fuel supplied in February 2012; and that PW1 confirmed in his evidence in chief and in cross-examination that no amount was owing for fuel supplied in February 2012.

15. Hence, Mr. Mwakireti submitted that, in view of all these contradictions in the Amended Plaint and in the evidence in support of the claim, the lower court cannot be faulted for coming to the conclusion that the appellant had failed to prove its case on a balance of probabilities. He urged the Court to uphold that decision. He pointed out that, having pleaded its case as one for special damages, the appellant was obliged to specifically prove its claim; which was not done. Thus, counsel urged for the dismissal of the appeal with costs.

16. This being a first appeal, it is the duty of this Court to re-evaluate the evidence placed before the lower court and make its own conclusions thereon, while giving due consideration for the fact that it did not have the advantage of seeing or hearing the witnesses (see Selle & Another v Associated Motor Boat Co. Ltd & Others, supra). Accordingly, I have re-examined the evidence presented before the lower court and note that, on behalf of the appellant, evidence was called from the appellant's accountant, Mr. Andrew Willy Mully (PW1). He adopted his witness statement dated 10th October 2016 in which he stated that the respondent entered into an implied and/or express contract with the appellant for the supply of petroleum products for which the respondent was to pay on account at an agreed price. He further stated that in the months of January, February and March 2012, the appellant, at the respondent's request, supplied the respondent with goods worth Kshs. 609,559.10 which the respondent failed to pay for.

17. Mr. Mully also adverted to the demand letter dated 14th May 2012 written under the hand of the appellant's Legal Officer, Ms. Irene W. Ngutu, demanding for payment of the outstanding sum. He

added that in spite of the respondent being served with the demand letter it refused, declined, ignored and/or neglected to make any payment, leaving the appellant with no alternative but to seek legal redress from the Court.

18. Mr. Mully also relied on his further statement dated 30th March 2021 and the Appellant's Supplementary List and Bundle of Documents filed therewith to demonstrate that the suit was not for the months of January, February and March 2012 as stated in his initial statement, but for the month of February 2011 only. He also conceded to some payments that were made by the respondent by cheque and set out the cheque numbers as 46045 for Kshs. 150,000/= dated 27th February 2012, 46046 for Kshs. 150,000/= dated 28th February 2012 and 46078 dated 2nd March 2012. He explained that since the respondent provided Remittance Advice for them and explained that they were payments for 2012, it followed that the invoices for February 2011 were still outstanding.

19. On behalf of the respondent, its director, Mr. Iqbal Valli Hussein (DW1), testified and adopted his witness statements dated 10th November 2017 and 9th March 2021. In the first statement, he conceded that the respondent purchased fuel from the appellant during the period from January to February 2012 worth Kshs. 874,931.30 which the respondent paid for as follows:

    (a) In January 2012 the appellant supplied fuel worth Kshs. 369,079.80 which was paid for on the 18th February 2012 vide cheques numbers 46045, 46046 and 46047 in the sums of Kshs. 150,000/=, Kshs. 150,000/= and Kshs. 69,079.80, respectively.

    (b) In February 2012 the appellant supplied fuel worth Kshs. 505,851.50 which was paid for on 9th March 2012 vide cheques numbers 46112, 46113, 16114 and 46115 in the sums of Kshs. 150,000/=, Kshs. 150,000/=, Kshs. 150,000/=, and Kdhs. 55,851.50, respectively.

20. He further stated that the respondent did not order for any fuel in the month of March 2012, and therefore no supply was made in the month of March 2012. Thus, it was the evidence of Mr. Hussein that the respondent does not owe the appellant any money for fuel supply. In his Supplementary statement dated 9th March 2020, Mr. Hussein admitted that the respondent purchased fuel from the appellant during the month of February 2011 worth Kshs. 819,421.59, which was duly paid for vide the cheques numbers 00225, 00226, 45073, 45074, 45075 and 45076, and therefore that no debt is owing in respect of fuel supplied in the month of February 2011. He consequently prayed that the suit be dismissed with costs.

21. From the foregoing, there is no dispute that the parties entered into an agreement dated 31st July 2007 whereby the appellant would supply the respondent with fuel on credit upon making an order; and that the appellant's invoices would then be settled by the respondent within agreed timelines. A copy of the agreement was produced before the lower court as part of the appellant's List and Bundle of Documents dated 10th October 2016 (at pages 9 to 12 of the Record of Appeal). There is similarly no dispute that, in accordance with that agreement, the respondent placed orders for fuel in the month of February 2011 which orders were honoured by the appellant and fuel supplied accordingly. This fact was expressly admitted by the respondent at paragraph 4 of its Amended Statement of Defence and paragraph 2 of the Supplementary Statement of Mr. Hussein.

22. It was however the contention of the respondent that it not only cleared its debt for the month of February 2011 but overpaid the appellant by some Kshs. 209,862/=. Accordingly, the key issue for consideration is whether the appellant proved its case before the lower court on a balance of probabilities. However, before delving into a discussion on the merits, it is imperative to pay attention

to the respondent's preliminary objection, which, as was pointed out by Mr. Mwakireti, was pleaded in the Amended Defence at paragraph 9A.

23. I entirely agree with the submission of Mr. Masore that having pleaded the issue of limitation, the respondent ought to have raised the issue in limine for a determination before the lower court before proceeding to prosecute its case. This is because it is trite that such a point that goes to the jurisdiction of the court ought to be raised and determined as early as possible. In Mukisa Biscuit Manufacturing Co Ltd v West End Distributors [1969] EA 696 it was held:

> " ...a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration....a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...".

24. In the case at bar, the Preliminary Objection entails a plea of limitation and therefore was a suitable point for consideration by the trial court. The record however shows that neither counsel nor the trial magistrate gave the matter any consideration. Thus, Mr. Masore now contends that, since the matter was not dealt with by the lower court it does not deserve the attention of the Court, seeing as no Cross-Appeal was filed by the respondent in that connection. Indeed, in Twaher Abulkarim Mohamed v Independent Electoral & Boundaries Commission (supra) the question was posed by Hon. Muriithi, J. and answered thus:

> " How about a situation where although a matter is raised before the trial court, it is not raised initially in the grounds of appeal and it is subsequently sought to be raised by the appellant or indeed by the Respondent? Does the want of an appeal by way of a memorandum of appeal under rule 34 in this case prevent the court from entertaining the point proposed to be raised by the respondents? I think the matter may be resolved by reference to the analogy of the principles for raising a new point on appeal which was not dealt with at the trial court. Although the point had been raised in the trial court, having not been raised in a memorandum of appeal by the respondent, it amounts to a new point taken in the course of the appeal, and the considerations of the ability to give the appellant a fair trial are paramount in the same way as with the new point not previously raised in the trial court."

25. It is nevertheless trite that the court has discretionary powers to allow a party to raise a new point on appeal, depending on the nature of the point and the circumstances of the case. Thus, in Securicor (Kenya) Ltd v EA Drapers Ltd & another [1987] eKLR, for instance, the Court of Appeal took the view that: -

> " ...Certainly the cases show that the discretion must be exercised sparingly. The evidence must all be on the record and the new point must not raise disputes of fact. The new point must not be at variance to the facts or case decided in the court below..."

26. Moreover, it is significant that the point raised by the respondent touches on the jurisdiction of the lower court to handle the dispute. Needless to say that a court that proceeds without jurisdiction is

plainly acting in vain. The Court of Appeal had occasion to emphasize this point in Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR thus:

> " In common English parlance, 'Jurisdiction' denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae..."

27. The same position had been taken in Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd.(supra) thus:

> " Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given."

28. Accordingly, Hon. Nyarangi, JA added:

> " I think that is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction... Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."

29. I therefore take the view that, since an objection touching on the jurisdiction of the Court can be raised at any time, even on appeal, not much turns on Mr. Masore's submissions in this regard. Indeed, in Dubai Bank Kenya Limited v Kwanza Estates Limited [2015] eKLR the Court of Appeal held:

> " ...It would therefore have been prudent for the appellant to raise the question of jurisdiction before the superior court as that way this court would have had the benefit of reasoning of the superior court on the issue. However, we must now determine whether the issue of jurisdiction can be properly raised by the appellant at this stage. In Floriculture International Ltd v Central Kenya Ltd & 3 Others (1995) eKLR, the court held that the issue of jurisdiction can be argued at any time. The court remarked as follows:
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> > "It has been held in the case of Kenidia Assurance Co. Ltd v Otiende (1989) 2 KAR 162 that the normal rule that a party could not raise for the first time on appeal a point he had failed to raise in the High Court, did not, and could not apply when the issue sought to be raised de novo on appeal went to jurisdiction."
>
> The reasoning is that even where the question of jurisdiction is not raised that does not necessary confer jurisdiction on the court if it has none. Accordingly, we find that the appellants are not precluded from raising the jurisdictional issue for the first time on appeal having not raised it in the superior court..."

30. The point was restated by the Court of Appeal in Kenya Ports Authority v Modern Holdings [E.A] Limited [2017] eKLR thus:

> " We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage of the proceedings and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised:
>
> > "....at any time, in any manner, even for the first time on appeal, or even viva voce and indeed, even by the Court itself;
> >
> > - provided only that where the Court raises it suo motu, parties are to be accorded an opportunity to be heard."
>
> (See All Progressive Grand Alliance (APGA) v. Senator Christiana N.D. Anyanwu & 2 others, LER [2014] SC. 20/2013 Supreme Court of Nigeria). We agree with these authorities and, hold that the question of jurisdiction was properly raised before this Court because, as they say in Latin, ex nihilo nihil fit (out of nothing comes nothing)."

31. I have accordingly considered the respondent's argument that the suit was time barred. Mr. Mwakireti submitted that, since the subject matter before the court was founded on contract, the suit ought to have been filed by February 2017. He based his argument on the premise that the amendment of the Plaint introduced a new cause of action in contract with a limitation period of six years pursuant to Section 4(1)(a) of the *Limitation of Actions Act*; and therefore ought to have been filed by February 2017. I however have no hesitation in rejecting that argument for the reason that the amendment in question was done to an existing suit and it only targeted the name and address of the respondent's counsel and the date of the cause of action; which was amended from "January, February and March 2012" to "February 2011". The facts of the case remained the same as they had originally been pleaded. Hence, the suit having been filed in 2016, was brought within the limitation period.

32. It is therefore fallacious for the respondent to contend that a new cause of action accrued from the date of amendment. Indeed, it is noteworthy that the case of Yusuf Abdul v Sea Angel Station Limited (supra) that counsel relied on to prop up his argument, involved entirely different facts in that the suit was filed out of time and therefore incompetent ab initio; such that extension had to be applied whose validity was also impugned. In any case, the authority is merely of persuasive value and is certainly not binding on this Court.

33. More importantly, Order 8 Rule 3 of the Civil Procedure Rules recognizes that an amendment may nevertheless be allowed even where the limitation period has expired. It states as follows in Subrules (1), (2), and (5):

> " (1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.
>
> (2) Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.

(5) An amendment may be allowed under subrule (2) notwithstanding that its effect will he to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment."

34. In the premises, I find no merit in the respondent's preliminary objection and affirm that the lower court had the requisite jurisdiction to hear and determine the suit.

On whether the lower court erred in dismissing the appellant's suit:

35. The appellant alleged that the respondent is indebted to it in the sum Kshs. 609, 559.10/= in respect of petroleum products sold and supplied in February 2011. The claim was pleaded as special damages but is in fact a claim founded in contract. Accordingly, the burden of proof was on the appellant to demonstrate not only that it supplied the products but also that it is yet to be paid for the products for Section 107 of the *Evidence Act* is explicit that:

(1) 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.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

36. Thus, the appellant produced documents, including Fuel Order, corresponding Invoices at pages 38 to 126 of the Record of Appeal to support its claim for Kshs. 609,559.10. In addition, the appellant produced a Statement of Accounts as the Plaintiff's Exhibit 8. The document is to be found at pages 31 to 35 of the Record of Appeal. It is evident from those documents that products were sold to the respondent by the appellant in the month of February 2011. The appellant further testified that, although he received three cheques from the respondent as set out in PW1's Supplementary Statement, those cheques were in respect of payments for February 2012. Thus, the appellant discharged its burden of proof.

37. As has been pointed out herein above, the respondent conceded that it had an arrangement with the appellant by which it would obtain products on credit and pay thereafter within agreed timelines. The respondent also conceded that it was supplied with petroleum products in the month of February 2011. It however contended that it had paid for all the goods supplied. In the circumstances, the evidential burden shifted to the respondent to prove payment. In this regard, Section 108 of the *Evidence Act* provides that:

The onus of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

38. Accordingly, in Antony Francis Wareham t/a AF Wareham & 2 others v Kenya Post Office Savings Bank [2004] eKLR the Court of Appeal held: -

"...we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or the Court on the basis of those pleadings pursuant to the provisions of order XIV of the Civil Procedure Rules. And the burden of proof is on the plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence

to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail..."

39. On the Respondent's behalf, DW1 testified that they had paid the appellant for the period of February, 2011 vide various cheques. The said cheques were never produced. Instead DW1 produced a statement of account from Diamond Trust Bank which did not, in my view, show with certainty that the cheques in question were drawn in favour of the appellant for the period of February, 2011. There was therefore no proof of payment of the debt or overpayment as alleged by the respondent.

40. It is significant that the trial court determined that only 50 invoices were exhibited that ranged from 14th February, 2011 to 28th February, 2011, see page 38-88 of the record of appeal. The court proceeded to calculate them and indicate that they amounted to Kshs. 387, 779.00/= and then rounded the sum off to Kshs. 388,000.00/=. It is apparent that the lower court completely ignored the first set of Fuel Orders at pages 141 to 196 all for February 2011 for the period 1st February 2011 to 12th February 2011. There is another set of invoices at pages 197 to 247 which appear to have been omitted as well. Then there is the inexplicable reference in the lower court's judgment to an account opening document from Nakumatt Holdings Ltd which reference seems to be out of context; and which counsel urged the Court to treat as a grave misdirection.

41. In the circumstances, and having taken into account the entirety of the evidence adduced before the lower court, I am satisfied that the appellant proved its case on a balance of probabilities; and that the lower court erred by dismissing the appellant's claim. Accordingly, the appeal is for allowing. The same is hereby allowed and orders granted as hereunder:

    (a) That the judgment of the lower court dated 22nd July 2021 be and is hereby set aside and substituted with judgment in favour of the appellant for Kshs. 609,559.10 together with costs of the suit as prayed in the Amended Plaint.

    (b) The appellant is further awarded interest on the sum of Kshs. 609,559.10 from the date of filing the lower court suit until full payment.

    (c) Costs of the appeal are hereby awarded to the appellant.

It is so ordered.

DATED SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 25TH DAY OF AUGUST 2023.

OLGA SEWE

JUDGE