



**Manyonge v Alpharama Limited (Civil Appeal 13 of 2017)
[2023] KEHC 21466 (KLR) (Civ) (16 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21466 (KLR)

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

CIVIL

CIVIL APPEAL 13 OF 2017

AN ONGERI, J

AUGUST 16, 2023

BETWEEN

PATRICK JUMA MANYONGE APPELLANT

AND

ALPHARAMA LIMITED RESPONDENT

*(Being an appeal from the of Hon. K. I. Orange (SRM) in
Milimani CMC no. 2188 of 2011 delivered on 16/12/2016)*

JUDGMENT

1. The respondent sued the appellant in Milimani CMCC No 2188 of 2011 claiming Kshs 2,119,571/= with interest at 15% from February 2011 in respect of a loan the respondent had advanced the appellant which the appellant did not repay back.
2. The respondent in his plaint dated 20/6/2011 in the trial court averred as follows;
3. That the plaintiff is a company that runs a leather tannery in Athi River where raw skins and hides are processed to generate leather for local and export market.
4. At all material times there was a contract between the plaintiff and defendant as an independent contractor who would source and then supply raw hides and skins to the plaintiff to pay.
5. In the course of dealings, the plaintiff did on request of the defendant extend to him credit facilities with the sole purpose of enabling him buy greater volumes of raw hide and supply to the plaintiff and from which the money advanced would slowly be recovered from his supplies of raw hide as per mutual agreement.



6. The defendant was thus afforded the sum of Kshs 2,000,000 by the plaintiff as agreed between them and in turn he gave post dated cheques as guarantee of payment. However he has since failed and or refused to repay the amount as agreed despite demands made by the plaintiff for repayment.
7. As at February 2011 the amount of money outstanding on account of the defendants debt was Kshs 2,119,571 which amount continues to accrue interest at commercial rates of 15% per annum.
8. Despite demands and notice of intention to sue the defendant has persisted in default and has not made any payment on the outstanding sum.
9. The appellant filed a defence dated 3/9/2011 denying the plaintiff's claim which was amended on 23/6/2012 raising a counter claim of Kshs 813,240 for an unpaid invoice on delivery of raw hide and skin.
10. The respondent's evidence in summary was that the respondent and the appellant had a business relationship whereby the respondent would supply the appellant with raw hides and skin.
11. The appellant used to advance the respondent loans which would be repaid upon the supply of the raw hides.
12. The respondent stopped supplying the appellant with raw materials in 2009. The appellant advanced the respondent with a loan 500,000 in September 2009 and he defaulted in the repayment of the loan.
13. The appellant was claiming Kshs 2,119,571 while the respondent was claiming Kshs 813,240 for in respect of raw material delivered and not paid for.
14. The trial court found that the respondent had proved its case and the appellants counter claim was dismissed.
15. The trial Court also found that the delivery made on 9th October 2009 was paid for by the Respondent and the Appellant had failed to pay the loan advanced to him. The Respondent's agent had failed to present himself at the point of assigning quality and price to the material supplied and the court chose to go with the price assigned to the material by the Appellant.
16. The court further found that the advance had been settled upon delivery but the loan had remained unpaid. Consequently, the lower court found that the Respondent had proved its claim and the Appellant's counter claim had failed. The court proceeded to allow the Respondent's prayers: The sum of Kshs 2,119,571, interest on that amount at Commercial Rates of 15% per Annum from February 2011 till payment in full and the Cost of the suit.
17. The appellant was aggrieved with the judgment of the trial court and he has appealed to this court on the following grounds;
That the Magistrate erred in fact and in law in find:
 - a. Entering judgement for the Plaintiff/Respondent with insufficient evidence and in dismissing the Appellant's counter-claim backed by evidence;
 - b. Finding that the Plaintiff Respondent proved their case against the Defendant while the Defendant didn't prove his case against the Plaintiff;
 - c. Finding that there was a distinction between loans and advances which was a distinction without a difference;



- d. Finding that the alleged loans/advances were issued to the defendant and ignoring the evidence of settlement through deliveries and shifting the burden of proof to the Defendant, and disregarding the evidence of the last Delivery despite the same being admitted;
 - e. Not applying himself to the facts that the Plaintiff only banked the Appellant's cheques after a year of issuance, long after the Defendant had supplied the Plaintiff and their business relationship had collapsed;
 - f. Finding that the Plaintiff was unilaterally allowed to fix the price of goods after their purchase; and
 - g. Laying reliance on the Plaintiff's submissions despite the Defendant's submissions contradicting the evidence, facts, law and issues before the Court.
18. The parties filed written submissions as follows;
 19. The Appellant submitted that the lower court failed to address itself to the terms of the loan agreement between the Appellant and the Respondent requiring the cheques issued by the Appellant to be banked a week after they were issued, yet they were banked after the agreement between the parties had lapsed.
 20. The Appellant also submitted that the lower court ignored the counterclaim of Kshs 813,240 for goods already supplied, yet the Respondent had acknowledged receipt of a consignment valued at Kshs 535,529.
 21. The Appellant also submitted that he has adduced sufficient proof that he had supplied the Respondent with enough material to offset the loan advanced to him and continued to pay the Appellant for deliveries after he cleared his debt.
 22. The Appellant also submitted that the Respondents claim for Kshs 2,119,471 was a special damage claim requiring the Respondent to adduce evidence demonstrating how the figure was arrived at. The Respondent had only shown an application for the loan allegedly advanced on 22nd May 2008, but failed to show evidence that the same was deposited into the Appellant's Account.
 23. On the issue of the interest of 15%, the Appellant submitted that the same was not contractual and the lower court should have applied the court rate of 12% instead.
 24. On the probative value of the Respondent's evidence as produced in the Lower court, the Appellant submitted that it was not direct evidence and in the absence of further evidence connecting it to what happened at the scene, the court could not draw a conclusion as to what happened. The evidence presented by the Respondent did not discharge its burden of proof. The Appellant had only dealt with one Mr. Rao whom the Respondent failed to call as a witness, yet called others who were not privy to the Parties' dealings. Further, no explanation had been tendered as to why the Respondent waited two years to Bank the cheques issued by the Appellant.
 25. On the issue of pricing of the goods delivered, the Appellant relied on Sections 10 (1) and (2) and sections 28 and 29 of the *Sale of Goods Act* and submitted that the Respondent unilaterally altered the price of good delivered from Kshs 813,240 To Kshs 535,529. He submitted that acceptance of the Appellant's invoice brought an obligation on the Respondent to pay the amount indicated.
 26. The Appellant thus urged the Court to allow this Appeal with costs.
 27. This being a first appeal, the duty of the 1st appellate court is to re-evaluate the evidence adduced before the trial court and to arrive at its own conclusion whether to support the findings of the trial court.



28. The issues for determination in this case are as follows
- i. Whether the respondent proved its case to the required standard.
 - ii. Whether the appellant proved his counterclaim.
 - iii. Who pays the costs of this appeal.
29. On the issue as to whether the respondent proved its case to the required standard, the respondent's evidence was that the appellant was advanced loans by the respondent as follows
- 24/4/2008 Kshs 500,000
- 22/5/2008 Kshs 500,000
- 11/12/2008 Kshs 1,500,000
- 12/9/2009 Kshs 500,000
30. The appellant's evidence was that he repaid all the loans granted through deliveries. He said on 2/9/2009 he was advanced Kshs 500,000. He supplied raw materials worth Kshs 1,317,516 and the respondent deducted Kshs 500,000 and paid him Kshs 498,941. On 10/10/2009 he raised an invoice of Kshs 813,240 which he was not paid.
31. The respondents said the appellant used to give them post-dated cheques as security for the loans. When they presented the cheques for payment they were dishonoured since the signatures were different and further that the loans were recovered from the raw materials delivered.
32. Upon considering the evidence on record, I find that it is not clear why the respondents continued to give the appellant loans if he was not delivering raw materials. It is also not clear how the figure 2,119,571 was arrived at.
33. I find that the respondent did not prove the case to the required standards.
34. He proved that he delivered goods which were not paid for which the respondent said were worth Kshs 813,240.
35. The Respondents admitted receiving goods worth Kshs 535,529.
36. I allow the appeal and set aside the judgment of the trial court.
37. Judgment is entered in favour of the Appellant against the Respondent in counter claim for Kshs 535,529 which was admitted by the Respondent.
38. There is no evidence that the parties agree the issue of interest to be charged.
39. Each party to bear its own costs of this appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 16TH DAY OF AUGUST, 2023.

.....
A. N. ONGERI

JUDGE

In the presence of:

..... for the Appellant



..... for the Respondent

