



REPUBLIC OF KENYA



**KENYA LAW**  
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**Paragon Electronics Limited v Apex Steel Limited (Civil Appeal 361 of 2019)  
[2023] KEHC 21872 (KLR) (Civ) (16 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21872 (KLR)

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

**CIVIL**

**CIVIL APPEAL 361 OF 2019**

**AN ONGERI, J**

**AUGUST 16, 2023**

**BETWEEN**

**PARAGON ELECTRONICS LIMITED ..... APPELLANT**

**AND**

**APEX STEEL LIMITED ..... RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. B. J. Ofisi  
(RM) in Milimani CMCC no. 704 of 2013 delivered on 7/6/2019)*

**JUDGMENT**

1. The respondent filed CMCC No 704 of 2013 *vide* the plaint dated February 15, 2013 seeking Kshs 1,935,756.00 in respect of an outstanding debt for goods supplied to the appellant together with costs and interest at court rates from the date of filing suit until payment in full.
2. The appellant filed and entered appearance but failed to file a defence within the stipulated time and default judgment was entered on July 4, 2013.
3. The appellant applied to set aside the *ex parte* judgment and filed a defence and counterclaim on March 4, 2017 stating that it was the respondent that owed the appellant Kshs 1,375,699.76 being an overpayment.
4. After hearing the suit, the trial court found that the respondent had proved its case and further that the appellant's counter claim for overpayment was not proved.
5. The trial court entered judgment in favour of the respondent against the appellant in the sum of Kshs 1,935,756.60 together with costs and interest from the date of filing suit until payment in full.



6. The appellant has appealed to this court on the grounds that the magistrate erred in fact and law in holding as follows;
  - a. That PW1'S testimony was inadmissible;
  - b. That the respondent's Finance Director , while quoting Paragon Holdings in the letter addressed to Paragon Holdings was actually referring to Paragon Electronics;
  - c. That goods were delivered by the respondent to the appellant, received by the appellant's employees and the respondent thus entitled to payment;
  - d. By concluding that the statement of account issued by the respondent in respect of the Rolling Mill Division of the respondent reflect the correct position with regards to the outstanding debt by the appellant;
  - e. By concluding that the delivery notes and invoicing adduced by the respondent in regards to outstanding amounts owed by the appellants are a true reflection of the amounts owe by the appellant;
  - f. By making findings on the basis that the appellant did not call any witnesses, yet the record shows that the appellant filed a witness statement and the witness testified; and
  - g. By failing to make a determination on the appellant's counter-claim.
7. The parties filed submissions and the appellant filed a rebuttal to the respondent's submissions.
8. The appellant submitted that its amended defense and counterclaim were not considered in the lower court judgement.
9. The appellant also submitted that the lower court judgment noted that the defense did not produce any witness and closed its case yet it had on record witness statements, a bundle of documents, and the proceedings reflect that the defendant's witness testified.
10. With regards to the evidence adduced, the appellant also submitted that the evidence by the respondent's only witness PW1, was inadmissible as it was hearsay. The court had also wrongly considered the evidence as "expert opinion". The court also allowed emails to be adduced as evidence without a certificate for electronic evidence, on documents filed by the respondent but not produced during the hearing which should be thus inadmissible. The application by the respondent to be allowed to produce the documents had been dismissed.
11. The appellant also submitted that the court erred in lifting the corporate veil making the appellant, Paragon Electronics, liable for claims against Paragon Holdings as the appellant had not been named on the respondent's invoices.
12. The respondent submitted that with regards to the appellant's averment that PW1'S evidence as tendered in the lower court amounts to hearsay evidence and the judgement flowing therefrom was flawed and improper; the court held that ,PW1, being the respondent's accountant was the sole custodian of the respondent's books of account and was well poised to testify as to the status of outstanding amounts owed by the appellant and was thus in a position to render a professional opinion. He therefore did not need to be the maker of an account related document to make the conclusion that money is owed. He only requires to be supplied by the relevant document for him to come up with a professional opinion.



13. On the issue of lifting the corporate veil, the respondent submits that the issue was never raised in the lower court and that the four invoices were drawn in the name of Paragon Holdings and not Paragon Electronics anchored on the belief that the two were sister companies. The goods were however delivered to and received by the appellant who signed against the corresponding delivery notes, though the appellant has not adduced any evidence to show that it paid for those received goods. The appellant did not dispute delivery of the goods. The appellant has also not adduced any evidence that it replaced the bounced cheque. The respondent wrote to Paragon Holdings inquiring of the bounced check, issued by Paragon Electronics, yet the appellant did not raise the issue regarding the addressee, thus the appellant is estopped from claiming that invoices issued were not meant for it.
14. On acceptance of deliveries, the respondent submitted that it was not obligated to inquire as to which of the appellant's employees was qualified to accept the deliveries which were all done in good faith and on the understanding that the appellant would pay as agreed, anchored on the great business relationship enjoyed by the parties. The respondent relied on the decision in *Telkom Kenya Ltd v Kenya Railways Cooperation* (2018) Eklr where the court held that:

“Persons contracting with a company and dealing with good faith may assume that acts within its constitution and powers have been properly and duly performed and are not bound to enquire whether acts of internal management have been regular . . . plaintiff was not under any obligation to inquire of the proper appointment or otherwise of the engineer.”
15. The respondent also submitted that the appellant was misleading the court by claiming that its witness testified in the lower court, since he was present but neither gave oral evidence nor produced any documents. It urged the court to find that the evidence adduced by the respondent in the lower court was uncontroverted.
16. On the trial court neglecting to make a decision on the counterclaim, the respondent submits that the issue was considered and featured in the judgment between pages 348 and 346 of the appellant's record of appeal. The respondent urged the court to take cognizance of the instances where the appellant has been dishonest, consider the evidence, and dismiss the appeal with costs to the respondent.
17. In rebuttal to the respondent's submissions, the appellant further submitted that the respondent's own accountant was not independent and could thus not render a professional opinion. Further, the accountant was neither delivering goods, receiving them or raising invoices and thus his evidence was not useful.
18. The appellant also submits that the averment by the respondent that they believed that Paragon Holdings and Paragon Electronics were sister companies was never raised in the lower court and should not be considered.
19. The respondent further submits that the claim that invoices raised and delivery notes were not objected to by the appellant is false as there is evidence to the contrary as well as emails.
20. This being the first appeal, the duty of the first appellate court is to re-evaluate the evidence before the trial court and to arrive at its own conclusion whether to support the findings of the trial court while bearing in mind that the trial court had the opportunity to see the witnesses.
21. The issues for determination in this appeal are as follows;
  - i. Whether the respondent proved its case.



- ii. Whether the appellant proved its counter claim.
  - iii. Who pays the costs of this appeal?
22. On the issue as to whether the respondent proved its case I find that the trial court was right in holding that the respondent had documents in support of the respondent's case issued to Paragon Holdings and not the appellant herein whose name is Paragon Electronics Limited.
  23. The respondent's witness was not the maker of the said documents and it was unsafe in the circumstances for the trial court to hold that the goods were supplied to the appellant herein who is alleged to be a sister company to Paragon Holdings.
  24. It is trite law that he who alleges a fact is duty bound to prove the same. Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence.
  25. Firstly, there was no evidence that Paragon Holdings which was supplied the goods was actually a sister company to Paragon Electronics the appellant herein.
  26. Secondly, the respondent's witness, PW1 was merely the custodian of the documents and therefore he was not in a position to prove that the goods were actually delivered as alleged.
  27. Thirdly, the respondent's employees who delivered the goods were not called to testify in this case and neither was appellant's employee who was alleged to have received the goods even named.
  28. I find that the trial court relied on documents issued to the appellant's sister company to reach a decision that the goods were supplied.
  29. In the circumstances, I find that the respondent did not prove its case to the required standard.
  30. On the issue as to whether the appellant proved its counterclaim, I find that it is not true that the appellant's witness testified.
  31. The appellant did not prove its counterclaim either since the appellant's witness did not testify although the statement was filed.
  32. I also find that the counterclaim was considered and featured in the judgment on page 349 of the appellant's record of appeal.
  33. I therefore find that both the respondent's case and the counterclaim were not proved and the trial court ought to have dismissed both of them.
  34. I accordingly allow the appeal and I set aside the judgment entered in favor of the respondent and I substitute it with an order dismissing the respondents suit.
  35. On the issue of costs of this appeal, since both the appellant's counterclaim and the respondent's claim failed, I direct that each party bears its own costs of this appeal and also costs of the original suit.

**Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 16<sup>th</sup> day of August, 2023.**

**A. N. ONGERI**

**JUDGE**

**In the presence of:**

.....for the Appellant

.....for the Respondent

