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Chege v Pewaki Enterprises Limited (Civil Appeal 518 of 2018) [2023] KEHC 21362 (KLR) (Civ) (10 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21362 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 518 OF 2018

CW MEOLI, J

AUGUST 10, 2023

BETWEEN

GERALD MUIGAI CHEGE .... APPELLANT

AND

PEWAKI ENTERPRISES LIMITED .... RESPONDENT

(Being an appeal from the judgment of Ofisi, J.B, RM. delivered on 11th October, 2018 in Nairobi CMCC No. 5429 of 2016)

JUDGMENT

1. This appeal emanates from the judgment delivered on 11th October, 2018 in Nairobi CMCC No. 5429 of 2016. The suit in the lower court was commenced by way of the plaint dated 11th August, 2016 and filed by Gerald Muigai Chege, the plaintiff in the lower court (hereafter the Appellant) against Pewaki Enterprises Limited, the defendant in the lower court (hereafter the Respondent). The Appellant's claim was based on alleged breach of contract in respect of supply of goods and sought the sum of Kshs. 1,846,860/-, damages, costs of the suit and interest.

2. The Appellant pleaded that on or about the 8th of February, 2016 the Respondent made and confirmed an order with the Appellant for supply of goods, namely 670 "short thirty feet" poles measuring 3"-4" feet and 850 "long ten" poles measuring 4"-5" feet (the material goods) at a cost of Kshs. 1300/- and Kshs. 240/- per pole, respectively. It was further pleaded that the cost of the material goods was payable upon notification that the material goods were in a deliverable state. Upon receipt of an order for supply from the Respondent, the Appellant put the material goods in a deliverable state and subsequently notified the Respondent of the same on or about 13th February, 2016. That on 15th February, 2016 however, the Respondent only accepted part of the goods, namely, 80 "short thirty feet" poles and 190 "long ten" poles but declined and/or refused to accept delivery of the remainder

of the consignment without a reasonable explanation, thereby occasioning the Appellant unnecessary costs in the sum of Kshs. 605,500/-.

3. It was averred that despite having indicated that it would offer compensation for the additional costs incurred by the Appellant in preparing and putting the material goods in a deliverable state, the Respondent failed and/or neglected to comply. It was further averred that the remaining portion of goods which the Respondent rejected could not be sold to a separate buyer and hence the Appellant suffered loss, hence the claim for general and special damages. Additionally, the Appellant averred that prior to the delivery of the material goods, the Respondent owed the sum of Kshs. 211,860/- out of which it only paid the sum of Kshs. 45,000/- but neglected to clear the outstanding balance.

4. The Respondent filed a statement of defence dated 22nd September, 2016 denying the key averments in the plaint and liability. The Respondent denied the existence of any contract for supply of the material goods or at all, between the parties. The Respondent further denied the averments in respect of breach of contract as made against it.

5. The suit proceeded to full hearing with the Appellant testifying and calling one (1) additional witness. The Respondent relied on the testimonies of two (2) witnesses. Upon close of submissions, the trial court in the judgment delivered on 11th October, 2018 dismissed the Appellant's suit with costs. Aggrieved with the outcome, the Appellant preferred this appeal which is based on the following grounds:

    1. That the learned magistrate erred in law and misdirected herself when she failed to consider the commercial customs, rights and general practices in the field of business the parties were engaged in.

    2. That the learned magistrate erred in law and misdirected herself when she failed to find that the Plaintiff had duly performed part of his duty as per agreement.

    3. That learned magistrate erred in law and misdirected herself when she failed to find that the Appellant had proved his case on a balance of probabilities.

    4. That the learned magistrate erred in law and misdirected herself when she failed to find that the Respondent was liable to pay for the losses incurred by the Appellant.

    5. That the learned magistrate erred in law and misdirected herself on the evidence and the law on the matters before her consequently making a wrong and erroneous decision to dismiss the Appellant's case.

    6. That the learned Judge erred in law and in fact and misdirected herself when she failed to find that dismissing the Plaintiff's case would occasion great prejudice and irreparable loss to the Appellant.

    7. That the learned Judge erred in law and misdirected herself when she completely ignored to consider the evidence adduced by the Plaintiff and his witness.

    8. That the learned magistrate erred in law when she failed to find that the Respondent's defence was frivolous and an abuse of the court process.

    9. That the learned Judge erred in law when she gave more weight to the Respondent's pleadings and submissions and completely ignored the Appellant's pleadings and submissions on the matter before the Court.

10. That the Judgment and Order of Court delivered on 11th October 2018 is wholly erroneous in law and fact, contrary to equity, judicial precedent and a gross miscarriage of justice." (sic)

6. The appeal was canvassed by way of written submissions. Counsel for the Appellant anchored his submissions on the decisions in Ganesh Engineering Works Limited & 3 Others v Yamin Builders Limited [2017] eKLR and Cabro East Africa Limited v Rosoga Investments Limited [2020] eKLR on the standard of proof in civil cases, which is a balance of probabilities. Counsel argued that the Appellant had established the existence of a contract for the supply and sale of goods between himself and the Respondent, notwithstanding the fact that the same was not in writing.

7. In support of his argument, counsel relied on the cases of Chairman B O G Goseta Secondary School v Margaret Busisa t/a Jomadi House of Design [2016] eKLR and Basco Products Kenya Ltd v Machakos County Government [2016] eKLR where the court discussed the principles relating to a contract for sale of goods. It was submitted that the trial court ought to have found that the Appellant on his part had fulfilled his contractual obligations by presenting the material goods to the Respondent in a deliverable state and hence the property in the said goods had passed to the Respondent. Here citing the cases of Dickson Maina Kibira v David Ngari Makunya [2015] eKLR and Haul Mart Kenya Limited v Tata Africa Holdings (Kenya) Limited [2019] eKLR regarding ascertainment of the intention of parties to a contract where such contract had not been reduced in writing.

8. Counsel contended that the trial court ought to have found that the Respondent was liable to accept the material goods and make good on payment thereof, relying on Isaac Mugweru Kiraba t/a Isamu Refri- Electricals v Net Plan East Africa Limited [2018] eKLR. That by virtue of the Appellant having incurred costs in delivering the material goods, some of which were subsequently rejected by the Respondent, the latter was obligated to reimburse the costs incurred in that respect in addition to the price of the material goods.

9. Regarding damages, it was the contention by counsel that upon demonstrating the loss suffered, the Appellant was entitled to the special damages pleaded and proved. He placed reliance on inter alia, James Wambua Kimila v Sinohydro Corporation Limited & another [2020] eKLR and Rhoda S Kiilu v Jiangxi Water and Hydropower Construction Kenya Limited [2019] eKLR on the applicable principles and in conclusion urged the court to allow the appeal.

10. The Respondent naturally defended the trial court's dismissal order. Counsel for the Respondent anchored his submissions on Section 107 of the *Evidence Act* on who bears the burden of proof in civil cases. Counsel also relied on the decision in Alton Homes Limited & another v Davis Nathan Chelogoi & 2 others [2018] eKLR to submit that no valid contract for supply and/or sale of goods existed between the parties herein. It was further argued that the Appellant did not tender sufficient evidence to support the averment that delivery of the material goods was accepted by the Respondent in response to the offer for supply of goods, culminating in a binding contract between the parties. He too cited the case of Dickson Maina Kibira v David Ngari Makunya [2015] eKLR. Counsel submitted that the Appellant did not demonstrate the submission that the trial court failed to consider the trade customs and practices between the parties herein. In the premises, the court was urged to dismiss the appeal with costs, and to uphold the decision of the trial court.

11. The court has considered the record of appeal, the pleadings and original record of the proceedings as well as the submissions by the respective parties. This is a first appeal. The Court of Appeal for East

Africa set out the duty of the first appellate court in Selle v Associated Motor Boat Co. [1968] EA 123 in the following terms:

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.
>
> An appeal to this court from a trial by the High 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.
>
> In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

12. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See Ephantus Mwangi & Another v Duncan Mwangi Wambugu [1982 – 1988] IKAR 278.

13. The appeal is essentially challenging the decision by the trial court to dismiss the Appellant's suit. The legal position is that the burden of proof in civil cases rests with the plaintiff at all material times, while the standard of proof is on a balance of probabilities. In Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91, the Court of Appeal stated in this regard that:

> " We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so 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 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." (Emphasis added).

14. The trial court after restating and analyzing the evidence before it concluded as follows in respect to the Appellant's suit:

> " On whether the parties entered into a contract section 3(1) of the *sale of goods act* provides as follows: "a contract of sale of goods of a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer or a money consideration called the price. Section 3(5) of the *sale of goods Act* provides that: "An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred."

In the case of Hulume Vs Coffee Marketing Board (1970) EA 155, the court held that "no term should be implied in a contract unless it was intended.

Having now carefully considered the available evidence I find that the plaintiff and defendant did not enter into a valid contract with express terms.

...

It is trite law that he who alleges must prove. Section 107(1) of the *evidence Act* provides that; "whoever desires any court to give judgment as to any legal right of liability dependent on the existence of facts which he asserts must prove that those facts exists".

Section 107(2) of the *evidence Act* provides that "when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person" Section 109 of the *evidence Act* further provides that "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 be on any particular person"

I have carefully looked at the invoices, photographs and correspondences tendered as evidence. It is my considered view that the plaintiff did not avail sufficient evidence to prove his case on a balance of probability. He failed to adduce evidence showing that the defendant was to pay costs for the losses incurred. The same has not been tabulated.

Consequently, the plaintiff's suit is dismissed with costs to the defendant. Orders accordingly." (sic)

15. The applicable law as to the burden of proof is set out under 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."

16. The latter statement alludes to the position that the legal burden of proof, unlike the evidentiary burden of proof does not shift. In reiterating the standard of proof, the Court of Appeal in Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another [2015] eKLR held that:

> " Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-
>
> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
>
> This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

17. From the foregoing guiding authorities, it is clear that the duty of proving the averments contained in the amended plaint lay squarely with the Appellant. The Appellant who testified as PW1 adopted his executed witness statement as part of his evidence-in-chief. He testified that he and the Respondent had previously engaged in business for about five (5) years and that on the material date, the Respondent had contacted him to place an order by way of a text message (SMS) . That the order was for supply of electric poles. The Appellant produced a copy of a letter dated 9.12.16 and two (2) invoices as P. Exhibits 1, 2 and 3 respectively.

18. PW1 further stated that when on 15.2.2016 the Respondent's driver came to collect the material goods, he stated that he could only take some of the said goods due to their weight. It was stated by the Appellant that the driver requested to be paid a sum of Kshs. 7,000/- to facilitate the weigh bridge charges and promising to return at a later date for the remainder of the material goods; that about three (3) days later, the Respondent's representative contacted the Appellant complaining about the quality of the goods delivered; and that upon visiting the Respondent's premises to fetch the goods that had been rejected, the Appellant's employees only found 465 out of the 3004 poles delivered to the Respondent, and consequently demanded that the Respondent's representative to pay the difference at his own convenience. PW1 said the the process of fetching the material goods, cost him by way of labour and related costs.

19. In cross-examination, the Appellant gave evidence that he was not present at the collection site on the material date but could confirm that the material goods were ready as per the order placed. He further stated that he did not have a proper breakdown of the amount sought but that his P. Exhibit 1 contained the price of the material goods. In re-examination, he stated inter alia, that he provided security for the Respondent's goods until 20.2.2016.

20. Patrick Kamau Munyua who was PW2 equally adopted his witness statement as his evidence. He stated that he was at all material times an employee of the Appellant and that on the material date, a driver acting on the instructions of the Respondent had gone to collect the material goods but only left with some of them, saying his truck was fully loaded. That no complaints were raised regarding the quality of the goods collected. In cross-examination, the witness testified that he was present on the date of collection but that he could not confirm the size of poles collected. He further testified that the Appellant provided security for the remaining goods and stated during re-examination that his work entailed ensuring the delivery of the material goods.

21. For the defence, Peter Kinuthia Kibunyi who was DW1 stated that he is a director of the Respondent and proceeded to adopt his witness statement as his evidence-in-chief. The witness testified that he had placed an order for supply of goods with the Appellant but that the same were not delivered on the agreed date (14.2.2016). Later on the instructions of the Appellant, he sent a driver to collect the goods on 15.2.2016 who discovered that the goods on site did not match the specifications on the order, but that he was left with no option but to collect what was available. That he made payments to the Appellant's bank account in the sum of Kshs. 45,000/- and issued a further cheque for the sum of Kshs. 45,000/- which he produced as D. Exhibit 1. According to DW1, there was breach of contract on the part of the Appellant, following which he terminated the contract by word of mouth.

22. In cross-examination, the witness stated that he informed the Appellant of the defective nature of the goods but that he did not return them. He further gave evidence that his driver inspected the goods before they were loaded onto the truck, and during re-examination sated that the goods which were delivered did not serve the intended purpose.

23. Peter Njenga who testified as DW2 stated that he was the driver who collected the goods on the material date. He stated that upon arriving at the collection site, he discovered that the goods did not meet the specifications given but that he had to collect them to avoid a futile trip. That when loading was done, no poles were left behind. In cross-examination, the witness testified inter alia, that upon discovering that the goods did not meet the order specifications, he informed DW1 who said that he would raise the issue with the Appellant. This marked the close of the defence case.

24. Upon re-examination of the pleadings and material placed before the lower court record, the court is satisfied that contrary to the finding arrived at by the trial court, a valid contract was created between the Appellant and the Respondent for the supply of the material goods. This position is supported by the evidence tendered by the Appellant, namely P. Exhibit 1 being the letter dated 9.2.2016 specifying the quality/quantity of the material goods, prices and seeking confirmation by the Respondent's representative (DW1) of the said order. The confirmation was given by way of SMS which was admitted by DW1 in his oral testimony. The essentials of a contract, namely, offer, acceptance and consideration were established.

25. Having established the above, the provisions of the *Sale of Goods Act* Cap. 31 Laws of Kenya (the Act) are applicable to the parties. Section 3 provides thus:

    1. "A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price.

       ...

       (4) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but, where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

       (5) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred."

       Section 19 further provides that:

       (1) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.”

26. In the absence of any clear terms evidenced at the trial as to the time during which the parties intended for the property in the material goods to be transferred, the intention of the parties could be drawn from their conduct and the circumstances of the case. Section 20 of the Act also provides insight as to the manner of ascertaining the intention of the parties, as follows:

> “ Unless a different intention appears, the following rules apply for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer—
>
> (a) where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery or both be postponed;
>
> (b) where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until that thing be done, and the buyer has notice thereof;
>
> (c) where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until that act or thing be done, and the buyer has notice thereof;
>
> (d) when goods are delivered to the buyer on approval or “on sale or return” or other similar terms, the property therein passes to the buyer—
>
> (i) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction;
>
> (ii) if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of that time, or, if no time has been fixed, on the expiration of a reasonable time;
>
> (e) (i) where there is a contract for the sale of unascertained or future goods by description, and goods of that description, and in a deliverable state, are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer; and assent may be express or implied, and may be given either before or after the appropriation is made;
>
> (ii) where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodier (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

27. From the lower court record, it is clear that on the material date, DW1 sent his driver (DW2) to collect the material goods from an agreed site. From the evidence tendered, it is apparent that on the one hand, the Appellant averred that the goods delivered were in accordance with the specifications agreed upon, while the Respondent's witnesses took the position that the goods were defective and did not meet the specifications given in the order. It is noteworthy that no documentation was tendered by the Respondent to support the averments that the defects alleged regarding the goods was communicated to the Appellant.

28. That said, the burden of proof lay with the Appellant to demonstrate that the goods delivered were consistent with the order made both in quantity and quality. From the record, the Appellant did not tender any credible evidence to support this position. However, despite being dissatisfied with the goods delivered, DW2, who was the driver accepted part of the goods on behalf of the Respondent.

29. Under Sections 31 and 36 of the Act the Respondent was obligated to make payment for the goods upon acceptance of delivery. The former states; -

    (1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate.

    (2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole; and if the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.

    (3) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

30. Section 36 states that:

    The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

31. In the circumstances, the Respondent was obligated to pay for the goods accepted. In his testimony, DW1 stated that payments were made to the Appellant to that effect and this position was not denied by the Appellant. Moreover, in the absence of firm evidence as to the quality and quantity of the goods purportedly rejected by the Respondent and which remained on the collection site, the court is of the view that the Appellant did not demonstrate on a balance of probabilities the manner in which the contract was breached by the Respondent to entitle him to compensation. Indeed, the nature and extent of the loss allegedly suffered by the Appellant and attributed to Respondent was not well demonstrated.

32. Regarding the complaint that the trial court ignored the evidence and submissions by the Appellant, upon perusing the impugned decision, the court did not find any indicators that the trial court placed undue reliance on the evidence by the Respondent while overlooking the evidence and documentation filed by the Appellant.

33. As regards customs and general practices of the parties asserted by the Appellant, the evidence in the lower court, while revealing prior undisputed business engagement between the Appellant and

Respondent did not disclose the nature thereof. In any event, the Appellant did not demonstrate how this asserted background would have influenced the outcome of the trial.

34. In Karugi & Another V. Kabiya & 3 Others (1987) KLR 347 the Court of Appeal stated that:

> " [T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendants' failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...--. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim." (Emphasis added)

35. Flowing from the foregoing, the court finds that while the existence of a contract between the parties may have been established by the Appellant, he failed to prove to the required standard, the alleged breach of contract resulting in the loss alleged. Consequently, the appeal is without merit and is hereby dismissed with costs to the Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 10TH DAY OF AUGUST 2023.

C.MEOLI

JUDGE

In the presence of

For the Appellant: Mr. Gisemba

For the Respondent: N/A

C/A: Emily