



REPUBLIC OF KENYA



**Eunice Abiero t/a Small Eutec Supplies v Joybrowns Investment Ltd (Civil Appeal E042 of 2024) [2025] KEHC 6774 (KLR) (20 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 6774 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
CIVIL APPEAL E042 OF 2024  
A. ONG'INJO, J  
MARCH 20, 2025**

**BETWEEN**

**EUNICE ABIERO T/A SMALL EUTEC SUPPLIES ..... APPELLANT**

**AND**

**JOYBROWNS INVESTMENT LTD ..... RESPONDENT**

*(Being an appeal from the Ruling and Order of Hon. Koech C. Patricia R M/  
Adjudicator delivered on 25th July 2024 at Migori SCCCOMM/E084/2024)*

**JUDGMENT**

1. This appeal arises out of a claim for recovery of debt being Kshs. 834,040/=plus costs of said recovery amounting to Kshs. 100,000/=. According to the claimant they entered into an agreement with the Respondent for supply of goods on diverse dates between September 2022 and January 2023 for which goods payments were to be made on delivery and in any event not later than 14 days after the said delivery. That the Respondent filed a response to the statement of claim and admitted existence of the agreement.
2. That when the Respondent failed to pay the balance of Kshs. 824704.00/=the Claimant and the Respondent agreed on 5<sup>th</sup> June 2023 that the Respondent was to pay the said sums by 5<sup>th</sup> July 2023.
3. The Respondent disputed owing the amount claimed and said that the outstanding debt between her and the Claimant was Kshs. 235,280/= at most as she would pay the Claimant either through bank transfer, Mpesa, or sometimes cash to the Claimants employees and that sometimes she used to pay the agents/ employees of the Claimant their salary on the understanding that the Respondent would deduct the monies from payments to e remitted to the Claimant.
4. The Adjudicator found that the Respondent having committed by signature that she owed Kshs. 824,704/= and that she was to pay by 5<sup>th</sup> July 2023 was bound by that agreement unless it is proved



- that the agreement was entered into by fraud, misrepresentation, illegality, duress or whatever defense he or she might have.
5. The Adjudicator therefore entered judgement for the Claimant in the sum of Kshs. 779,704/= together with costs and interest from date of filing the suit. The claim of Kshs. 100,000/= being costs of debt recovery was declined.
  6. The Appellant was dissatisfied by the judgment and decree of the Hon. Adjudicator and lodged the appeal herein vide Memorandum of Appeal dated 8<sup>th</sup> August 2024 on the following grounds:-
    1. That the Trial Magistrate erred in law and fact by admitting an otherwise defective affidavit in verifying the correctness of each averment in the statement of claim.
    2. That the Trial Magistrate erred in law and fact by drawing an inference that a valid contract existed between the Appellant and the Respondent for the supply of goods yet in fact none existed.
    3. That the Trial Magistrate erred in law and fact by disregarding the glaring coercion and undue influence in so far as an agreement of admission between the parties is concerned
    4. That the Trial Magistrate erred in law and fact by by disregarding the Appellant's financial statements tabulating how the payments were made and what exactly was still owing if any.
    5. That the Trial Magistrate erred in law and fact by disregarding the absence of any evidence of the alleged lump sum payments.
    6. That the Trial Magistrate erred in law and fact by failing to interrogate the plaintiff's evidence in the absence of a rebuttal as had been alleged by the Respondent.
    7. That the Trial Magistrate erred in law and fact by by prematurely shifting the burden of proving the existence of a contract and alleged owed money to the Appellant.
    8. That the Trial Magistrate erred in law and fact by failing to appreciate that the plaintiff had failed to prove its claim for the grant of the orders.
    9. That the Trial Magistrate erred in law and fact by failing to consider in good faith the Appellant's submissions and the authorities to which his attention was drawn.
    10. That the Trial Magistrate erred in law and fact by entering judgement in favour of the Respondent in the term of excessive and unfounded sum of Kshs. 779704/=
  7. Reasons wherefore the Appellant prays that this court issues orders that:
    1. The appeal is allowed with costs
    2. The judgement delivered on 25<sup>th</sup> July 2024 be reversed, varied or set aside.
    3. The Respondent filed a notice of Preliminary objection dated th November2024 raising objection to the jurisdiction of this court on the grounds the appeal contravenes the provisions of Section 38 of the Small Claims Court; that the appeal from Small Claims Court should lie only on matters of law; that all the 10 grounds of appeal are matters of fact; that the appeal does not lie on matters of law; that the appeal ought to be struck out.
  8. This appeal and the Preliminary Objection were canvassed concurrently by way of written submissions. Both parties complied and filed their respective submissions dated 20<sup>th</sup> November 2024 for the Appellant and 7<sup>th</sup> November 2024 for the Respondent.



9. The Appellant submitted that the Preliminary Objection is devoid of merit as the court has jurisdiction to hear and determine the appeal. The Appellant relied on the decision in *Grace Mwenda Munjuri vs Trustees of the Agricultural Society of Kenya* [2017] ECLR in which it was held that a preliminary objection cannot be raised on matters that are contested and which are subject to the determination of the court.
10. It was further submitted that it is the court to determine whether the grounds of appeal are on points of law or fact after delving into the proceedings, the judgment and grounds of appeal together with submissions.
11. The Appellant associated with the Supreme Court Ruling in *IEBC V Cheperenger & 2 Others* [2015] KESC (KLR) where Preliminary Objection was disallowed as follows:-
 

.....The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection – against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time , so it may be committed to only deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on merits.”
12. The Appellant beseeched the court to decline premature invitation and dismiss the preliminary objection as it has jurisdiction to re-evaluate and reconsider evidence and law before the trial court in totality and draw own independent conclusion.
13. The Appellant submitted that the issues raised in the submissions are issues of law which require full determination by the court.
14. On whether the Trial Magistrate wrongly inferred existent of a contract between the Appellant and the Respondent, the Appellant submitted that the law places a high value on ensuring parties have truly consented to the terms that bind them. The Respondent cited the authority in *Royal Bank of Scotland Vs Etridge (No. 2)* [2002] A. C. 773 where undue influence was defined as:-
 

the taking of unfair advantage, misuse of influence, abuse of trust and confidence and a connotation of impropriety.”
15. The Appellant contended that the Respondent used DCI to intimidate and coerce her into signing a purported agreement and as such there was glaring undue influence in the manner in which admission was made. The Appellant said in her testimony she disputed the amount claimed but she was told she would be jailed if she did not sign the agreement. She also testified that the agreement was written by the DCI Officers and she was forced to sign.
16. The Appellant cited the authority in *Samuel Kamau Macharia Vs KCB Limited ,Kenya Commercial Finance Company Limited*[2003] KEHC 725(KLR) to support the position that she was threatened with jail if she did not sign the agreement and the Trial Magistrate ought not to have drawn inferences as to existence of a contract.
17. The Appellant also submitted that the Trial Magistrate prematurely shifted the burden of proving the existence of a contract and alleged money owed when it was upon the Respondent who alleged to discharge the burden and standard of proof as provided under Sections 107,108 and 109 of the *Evidence Act*. The Appellant relied on the decision of the Court Of Appeal in *Antony Francis Wareham*



t/a AF Wareham and 2 Others v Kenya Post Office Savings Bank [2004] Eklr, in which the issue of burden and standard of proof was canvassed as follows:-

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 involved 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 the burden, the only evidence to be adduced is evidence of existence or non existence of the facts in issues or facts relevant to the issue . It follows 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”

18. The Appellant argued that there was no evidence as to existence of a contract between the parties was adduced before the Trial Court and instead the Trial Court relied on the admission through the agreement that had been signed at the DCI offices under coercion with threats to jail her. That additionally the Trial Magistrate disregarded the voluminous evidence in form of bank and Mpesa statements that had been produced by the Appellant as evidence that that she owed nothing. The Appellant submitted that the Trial Magistrate erred in refusing to admit the evidence pursuant to proviso to Section 32 of the *Small Claims Court Act*.
19. The Appellant further submitted that the Trial Magistrate erred in admitting a defective verifying affidavit which was improper, irregular and defective for various reasons including different dates on the claim and the list of documents, and erroneously signed by the Advocate instead of the Claimant Company Director and ought to have been struck out at first instance as it is a mandatory requirement and not a procedural technicality. The Appellant argued that Advocates are not allowed to swear affidavits or make declarations on contentious issues as was held in *Magnolia Pvt Limited Vs Pharmaceuticals (K) Ltd (2018) Eklr*
20. In the case of *Emanuele Emillio Villa Vs Valerio Bucciarelli [2004] KEHC 2154(KLR) Khaminwa J* expunged the affidavits in support of the application and verifying affidavits for reasons that they were not commissioned but ordered for properly sworn affidavits to be filed. The Appellant said the Statement of Claim is a nullity as it was drawn by the Advocate who was not a representative of the Claimant.
21. Respondent submitted that the Preliminary Objection challenges the jurisdiction of the court to hear and determine the appeal on the basis that all the grounds of appeal are matters of fact and offend the provisions of Section 38 of the *Small Claims Court Act* and the appeal does not lie the Appellant relied on the case of *Bashir Haji Abdullahi v Adan Mohammed NOORU & 3 OTHERS [2014] EKLR* and urged the court to dismiss the appeal.
22. The Respondent also relied on the authority in *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] EKLR* where the court stated :-

This is a second appeal. I am alive to my duty as a second appellate court to determine matters of law unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision it is perverse.



23. The Respondent argued that none of the grounds of appeal brings out any point of law as discussed in the case of Fidelity Insurance Compny Ltd V Korir (kehc 3365) and the appeal is defective and should be dismissed in toto.

24. The case of Matete V Sasala Self Help Group [2024] KEHC 2583(KLR) was also cited where it was stated:-

It is thus pertinent and incumbent upon the appellant to this court from the Small Claims Court to demonstrate that the court's jurisdiction is properly invoked so that it does not entertain appeals other than those contemplated by statute. To entertain an appeal that raises no question of law would be to usurp the jurisdiction not vested by law.”

25. The Respondent urged the court to dismiss the appeal with costs

### **Analysis and Determination**

26. The appeal from the small claims court is on issues of law only. This is pursuant to Section 38 of the Small Claims Court. It provides as follows:-

(1) A person aggrieved by the decision or an order Appeals. of the Court may appeal against that decision or order to the High Court on matters of law.

(2) An appeal from any decision or order referred to in subsection (1) shall be final.”

27. I have considered the grounds of appeal, the record of appeal and re-evaluated the evidence adduced before the trial court together with the rival submissions by both parties. I find the issue that crystalizes for determination is: -

Whether the Preliminary Objection should be upheld on the ground that the verifying affidavit is defective and that court does not have jurisdiction on account that grounds of appeal are issues of fact

28. What constitutes, points of law, has been settled. In the case Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696 where preliminary objection was defined as a pure 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.

29. The Respondent raised a preliminary objection on the jurisdiction of this court and in the case of Owners of Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1, Justice Nyarangi, JA as then was stated: -

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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

30. In the case of Mombasa Law Society v Attorney General & another [2021] eKLR, Justice E k Ogola, held :-

..... regarding the jurisdiction of the small claims court In R vs Big M Drug Mart Ltd (supra), the Court stated that both purpose and effect are important in determining



constitutionality. The purpose of the *Small Claims Court Act* is to deal with matters of a lower subject value in a cost effective way.

31. Proceedings in the Small Claims Court are governed by Section 32 of the *Small Claims Court Act*, which provides: -
- (1) The Court shall not be bound wholly by the Rules of evidence.
  - (2) Without prejudice to the generality of subsection (1), the Court may admit as evidence in any proceedings before it, any oral or written testimony, record or other material that the Court considers credible or trustworthy even though the testimony, record or other material is not admissible as evidence in any other Court under the law of evidence.
  - (3) Evidence tendered to the Court by or on behalf of a party to any proceedings may not be given on oath but that Court may, at any stage of the proceedings, require that such evidence or any part thereof be given on oath whether orally or in writing.
  - (4) The Court may, on its own initiative, seek and receive such other evidence and make such other investigations and inquiries as it may require
  - (5) All evidence and information received and ascertained by the Court under subsection (3) shall be disclosed to every party
  - (6) For the purposes of subsection (2), an Adjudicator is empowered to administer an oath.
  - (7) An Adjudicator may require any written evidence given in the proceedings before the Court to be verified by statutory declaration.
32. To realize the objectives of the Act and to achieve the statutory time limits in the Act the procedural technicalities alluded to by the Appellant ought to have been raised in the trial court for them to be canvassed and resolved. The Act gives latitude for claims to be brought in any form to avoid Claimants and Respondents being subjected to hardships in the course of seeking justice.
33. This Court is only to consider whether the grounds of appeal raised by the Appellant are issues of law and whether the court has jurisdiction to adjudicate over the same grounds of appeal as provided under section 38 of the *Small Claims Court Act*
34. The appeal herein raises 10 grounds which the Respondent contended were points of fact and therefore cannot be re-evaluated by the court since appeals from the SCC are supposed to be on purely points of law and not fact.
35. As alluded herein above the admission of the allegedly defective affidavits Section 32 allows the Adjudicator to use their discretion to admit evidence without consideration to the rules of evidence and the Court may decide even to allow a party to give evidence without taking oath.
36. On whether the Adjudicator drew a wrong inference as to existence of a contract the Appellant admitted in cross examination that they had a verbal agreement with the Respondent for supply of milk and according to her she owed only Kshs. 235,280/=. She did not however have evidence of payments made to the Respondent to the tune of Kshs. 12,027,665/= which was the value of milk so far supplied to her and for which they agreed that she owed a balance of Kshs. 834,040/=. If it is true that the Appellant was forced to sign acknowledging that she owed the Respondent then she ought to have availed the person who accompanied her to the DCI offices to corroborate her testimony. She failed to do so and she was still making payments towards the outstanding amount. There was no evidence she was coerced into signing that she owed the Respondent and this court cannot go into interrogating the



exhibits that were not scrutinized by the trial court as that would amount to re-evaluating issues of fact against the provisions of the Act. There was therefore evidence that made the Adjudicator to arrive at the conclusion that the parties herein had a contract for supply of milk and that the Appellant failed to pay for the said milk upon delivery or within 14 days of the said delivery.

37. This court finds that the appeal lacks merit and the same is dismissed with costs to the Respondent.

**SIGNED DATED AND DELIVERED AT MIGORI THIS 20<sup>TH</sup> DAY OF MARCH 2025.**

**A. ONG'INJO**

**JUDGE**

