



REPUBLIC OF KENYA



**Mburu & another v Shah (Civil Appeal E117 of 2022)
[2025] KEHC 4012 (KLR) (20 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 4012 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E117 OF 2022
F WANGARI, J
MARCH 20, 2025**

BETWEEN

PETER KARIUKI MBURU 1ST APPELLANT

CECILIA NYOKABI 2ND APPELLANT

AND

NEEMA SHAH RESPONDENT

*(Appeal against the judgment of Hon. G. Kiage, Senior Resident
Magistrate delivered on 05/08/2022 in Mombasa CMCC No. 908 of 2017)*

JUDGMENT

1. This is an appeal against the judgment of Hon. G. Kiage, Senior Resident Magistrate delivered on 05/08/2022 in Mombasa CMCC No. 908 of 2017. In the Memorandum of appeal dated 17/08/2022, the Appellants faulted trial magistrate for awarding judgment in favour of the Respondent for KShs. 2,206,000 and failing to find that the Appellants had proved their Counter-Claim by way of documentary evidence.
2. The Appellants prayed that the judgment and the subsequent decree be set aside and be substituted with a judgment in favour of the Appellants as per their Counter- Claim. The Appellants thereafter filed and served the Record of Appeal. It was directed that the appeal be canvassed by way of written submissions. Only the Appellants complied by filing the written submissions dated 22/10/2024.

Analysis and Determination

3. I have considered the said submissions together with the authorities relied upon by the Appellants as well as the law and in my respectful view, there is only one issue for determination which is whether the Appellant's appeal has merits. Corollary to this finding is the issue of costs.



4. This Court, as the first appellate Court, is enjoined to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of *Selle & Ano. v Associated Motor Boat Co. Ltd* (1968) EA 123). This Court, nevertheless, appreciates the settled principle that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings as was held in *Mwanasokoni vs Kenya Bus Service Ltd.* (1982-88) 1 KAR 278 and *Kiruga vs Kiruga & Another* (1988) KLR 348).
5. In summary, the case in the lower court was that the Respondent, who was the Plaintiff in the lower court sued the Appellants herein as the Defendants for Kshs. 6,103,000/= being money owed to her by the Defendants. It was averred that the Appellants and the Respondent had a longstanding business relationship where the Appellants would purchase in bulk, second hand clothes from the Respondent. The said goods would be sold in credit and the Appellants would pay for them later.
6. The Respondent averred that the Appellants failed to pay for the goods received and upon demand, they drew cheques that bounced. The cheques were issued in the name of one George Gona, who was the Respondent's husband and business partner before the marriage broke down.
7. The Appellants who are married denied having any money owing to the Respondent. The 2nd Defendant stated that she was a stranger to the proceedings. However, there is evidence on record to show that both appellants operated business together. They stated that the business deal was between the 1st Defendant and the 3rd Party, George Gona. Even though it was averred that 3rd Party proceedings would be instituted, nothing was done to that effect.
8. The 1st Defendant accused the 3rd Party for the sole and/ or contributory negligence for selling sub-standard goods and thereafter refusing to replace them nor refund the money in excess of the supplied goods. After reconciling the documents, it was realised that the Plaintiff owed Kshs. 2,397,000/= thus the claim in the Counter-Claim.
9. It is interesting to note that in the Statement of Defence, the 2nd Defendant denies being a party to the business relationship between the Plaintiff and the 1st Defendant and she stated that she was a stranger to the Plaintiff's allegations, yet in the Counter-Claim, both Defendants claim that the Plaintiff is indebted to them and jointly prayed for judgment against the Plaintiff.
10. Even though the Plaintiff claimed the dishonoured cheques amounted to Kshs. 6,103,000/=:, the cheques produced during evidence amounted to Kshs. 2,723,000/=:. On the other hand, the 1st Defendant testified that after it was realised that he had overpaid the Plaintiff, he instructed his bank not to honour the said cheques, but denied that they bounced due to lack of funds.
11. After hearing both parties, the trial court found in favour of the Plaintiff for Kshs. 2,206,000/= being the amount as proved via the post-dated cheques which bounced. The Defendant's counter-claim was dismissed as no material evidence on accounts were given as to how the Defendants arrived to that amount. The Defendants being dissatisfied with the said judgment filed this appeal.
12. I have perused through the written submissions by the Appellants. The Appellants submitted that the cheques having not been issued in the Respondent's name, the Respondent had no legal basis to have the judgment entered in her favour pursuant to Section 3 of the Bill of Exchange Act, hence no enforceable right had been created on her part.
13. The Appellants relied on the case of *Agricultural Finance Corporation v Lengetia Limited & Jack Mwangi* (1985) eKLR, where it was held that a person who is not a party to a contract, cannot enforce a contract. Further, the Appellant relied on the case of *Odera Obar and Company Advocates v Catherine*



Wangari Mburu (2019) eKLR, where it was held that the right of recourse against the drawer of a cheque accrues on the holder as provided for under Section 38 of the Bill of Exchange Act.

14. The Appellants submitted that the trial court erred in finding in favour of the Respondent yet there was no documentary evidence in support of the Kshs. 2,206,000/= awarded. The Appellants also faulted the trial magistrate for finding that the Appellants failed to produce documentary evidence in support of the counter-claim yet he ignored the documentary exhibits filed by the Respondent in support of their case.
15. The Appellants also submitted that the trial magistrate erred in failing to award costs to the 2nd Appellant yet the suit against her was dismissed. The Appellants prayed that the lower court judgment be set aside and be substituted with a judgment as per the counter-claim with interest, plus costs to the Appellants.
16. On whether the Respondent had the locus standi to file the suit, it is a fact which was admitted by the Appellants that the Plaintiff and one George Gona were married and business partners running a business christened ALWAYS SHINING. The 1st Defendant stated that it was the Plaintiff who introduced her husband to the 1st Defendant
17. From the Statement of Defence, on one hand, it is denied that the Plaintiff was privy to the contract but George Gona, but on the other hand, it is acknowledged that the Plaintiff supplied the Appellants with substandard goods and it was the Plaintiff who was indebted to the Defendants.
18. As stated in the case of Agricultural Finance Corporation (above), ‘a contract affects only the parties to it’. As stated herein above, the Plaintiff was privy to the contract as a co-business partner with the former husband, a fact which has been admitted by the Defendants. I find the Plaintiff had the legal standing to file the suit.
19. As to whether she had a right of recourse against the drawer of the cheque. I have perused through the Defendants documents. From the copies of the cash/cheque deposit voucher, the account name was Neema Shah/ George Gona Charo, account no. 01110xxxxxxxxx, Co-operative Bank, Kenyatta Avenue Branch. Further, the image return documents in page 15 – 18 indicates the customer names as Neema Shah and George Gona. The fact that the dishonoured cheques were drawn in favour of the joint account in the names of the Plaintiff and the ex-husband grants the locus standi to the Plaintiff. I find that she had accrued the rights under section 38 of the Bill of Exchange Act.
20. On whether the court erred by awarding the amount as per the dishonoured cheques, the Appellants submitted that the Respondent failed to submit documentary evidence in support of the claim. I make reference to the copies of cheques and the documents in pages 14 – 23. From the copies of cheque image return documents, the return reason is indicated as ‘Insufficient funds – Refer to drawer’.
21. Even though the 1st Defendant stated that she had instructed the bank not to clear the cheques, nothing would have stopped the bank from indicating such as the reasons for failing to clear the cheques deposited by the drawee. I find that the Plaintiff had proved that the total amount as per the presented copies of bounced cheques was Kshs. 2,206,000/=.
22. In regard to whether the trial court failed to consider the documents filed by the Defendants in support of the counter-claim, I have perused through the said documents and more specifically the bank statement filed. Though the Appellants did not include their evidence in the proceedings in the Record of Appeal, I deduce the contents of their evidence from the filed submissions both in the lower court and on appeal, and from the evidence analysis in the judgment subject to this appeal. I find that there is no evidence in support of the counter-claim.



23. As for the failure to award costs to the 2nd Appellant, I have perused through the judgment of the lower court at no time did the court dismiss the suit against the 2nd Appellant, instead, the court ordered that the amount awarded to the Plaintiff be payable by the 1st Appellant. Further, the counter-claim by the Defendants was dismissed with costs to the Plaintiff. I find no fault on the part of the trial court in its failure to award the 2nd Defendant costs.
24. The Respondent having not filed any submissions, I give no orders as to costs.
25. Following the foregone discourse, the upshot is that the following orders do hereby issue: -
- a. That the appeal is hereby dismissed as it has no merits.
 - b. That there are no orders as to costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 20TH DAY OF MARCH, 2025.

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F. WANGARI

JUDGE

In the presence of;

Saisi Advocate for the Appellants

N/A by the Respondent

M/S Salwa, Court Assistant

