



REPUBLIC OF KENYA



KENYA LAW
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**Kenya Fire Appliances Limited v Gimco Limited (Civil Appeal
E854 of 2022) [2025] KEHC 6112 (KLR) (Civ) (15 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6112 (KLR)

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

CIVIL

CIVIL APPEAL E854 OF 2022

AC MRIMA, J

MAY 15, 2025

BETWEEN

KENYA FIRE APPLIANCES LIMITED APPELLANT

AND

GIMCO LIMITED RESPONDENT

(Being an appeal from the judgment and decree of Hon. E. M Kagoni, Principal Magistrate, delivered on 21st September 2022 in Nairobi CMCOM No.300 of 2019)

JUDGMENT

1. By a Plaint dated 18th July, 2019, Gimco Limited, the Respondent herein, sued Kenya Fire Appliances Limited, the Appellant herein in Nairobi [Milimani] Chief Magistrates Commercial Civil Case No. 300 of 2019 [hereinafter referred to as 'the suit'] for the sum of Kshs.1,983,367/05 plus interests and costs on account of management fees and Caretaker salaries arising from the Respondent's management of the Appellant's premises known as Mwanzo House in Nairobi.
2. The Respondent pleaded that it was engaged by the Appellant at a commission of 7.5% of the total monthly rent collected from the said house. That, the Respondent was tasked, under the contract, to market the property, get in tenants, to pay the service providers and engage a Caretaker whose salary would be paid by the Appellant. The Respondent then averred that the Appellant breached the terms of the contract by failing to pay the total management fees and the Caretaker salaries, thereby forcing it to pay the Caretaker salaries. Despite demand, the Appellant failed and/or refused to make good the Respondent's claim thereby resulting the institution of the suit.
3. In defending the suit, the Appellant filed a Defence dated 21st August 2019 wherein it denied the Respondent's claim in toto. The suit was subsequently heard by way of viva voice evidence where the



- Respondent called its Director one Simon Warui as its sole witness [PW1]. The Appellant did not call any witness. In a judgment rendered on 21st September 2022, the suit was allowed as prayed.
4. Aggrieved by the judgment, the Appellant filed a Memorandum of Appeal dated 21st October 2022 and preferred the following three grounds: -
 1. The learned Principal Magistrate erred in law and in fact in holding that the Respondent's evidence was not challenged during the hearing of the suit before the Principal Magistrate on 27th June, 2022.
 2. The learned magistrate erred in law and in fact by holding that the Respondent's invoice dated 22nd August 2016 of invoice number 8795 was sufficient evidence to prove the Respondent's case on a balance of probabilities.
 3. The learned magistrate erred in law and in fact by holding that the appellant owes the Respondent Kshs.1,983,367.05/=.
 5. On the directions of this Court, the appeal was canvassed by way of written submissions where both filed and exchanged accordingly. The Appellant's submissions are dated 10th March 2025 while the Respondent's submissions were dated 31st March 2025. Parties referred to decisions in support of their rival positions. The gist of the submissions will be ingrained in the latter part of this judgment.
 6. The High 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. vs. 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. This was the holding in *Mwanasokoni – versus- Kenya Bus Service Ltd.* (1982-88) 1 KAR 278 and *Kiruga –versus- Kiruga & Another* (1988) KLR 348).
 7. Having carefully perused the record, the submissions and the decisions referred to, the following two issues fall for determination:
 - (i) Whether there was a contract between the parties.
 - (ii) If the answer in [i] above is in the affirmative, whether the suit was proved.
 8. A consideration of each of the issues follow.
 9. The issue as to whether there was a contract between the parties is one which was admitted to by the Appellant. Paragraph 2 of the Defence attests to that. What is in dispute are the terms of the contract which largely falls within the ambit of the second issue.
 10. On closure of pleadings, the suit was heard. PW1 adopted his statement dated 18th July 2019 as his evidence-in-chief and produced the documents in the List of Documents as exhibits. PW1 was cross-examined and re-examined accordingly. On its part, the Appellant did not call any witness neither did it produce any documents nor was the witness statement adopted as evidence.
 11. The trial Court examined the case accordingly. Although it noted that the Appellant did not adduce any evidence at trial, the Court, rightly so, held that it was nevertheless duty bound to determine whether the suit was proved. The Court appreciated PW1's evidence and went through the exhibits including the invoice that yielded the sum demanded in the Plaintiff. This Court has also carefully perused the exhibits. The Invoice No. 8795 clearly demonstrates how the sum of Kshs. 1,918,367/05



was arrived at. On cross-examination by Counsel for the Appellant, PW1 responded to the questions in line with the exhibits.

12. The Appellant opted not to call any witness. Therefore, the factual issues it had raised in the Defence and on which contrary evidence was adduced by PW1, went on unrivaled. For instance, the Appellant did not adduce any evidence to controvert the Respondent's position that the Respondent was to employ a Caretaker whose salary was to be paid by the Appellant or to demonstrate that the amount sought in the Plaintiff was fictitious and a fraud. Further, there was no evidence on why the suit was allegedly time-barred neither was the suit's defectivity proved.
13. The concept of burden of proof in law has two limbs. There is the legal burden of proof and the evidential burden of proof. These concepts were discussed by the Supreme Court in Presidential Election Petition No. 1 of 2017 Raila Amolo Odinga & Another vs. IEBC & 2 Others (2017) eKLR. The Court alluded the legal basis for the legal burden of proof as Section 107 of the Evidence Act, Cap. 80 of the Laws of Kenya which states as follows: -
 1. 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.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
14. The Apex Court stated as follows when dealing with the evidential burden of proof: -
 - (132) Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and "remains constant through a trial with the plaintiff, however, "depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.
 - (133) It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce 'factual' evidence to prove his/her allegations of breach, then the burden shifts and it behooves the respondent to adduce evidence to prove compliance with the law.....
15. Therefore, it follows that the legal burden of proof is static and rests on the party instituting the matter throughout the trial. It is only the evidential burden of proof which may shift to the other party[ies] depending on the nature and effect of evidence adduced by the other party.
16. Applying the foregoing to this case, it was, hence, the Respondent who bore the legal burden of proof throughout the trial. It was also the Respondent who bore the initial evidential burden of proof up to a time when it would adduce evidence to call upon for rebuttal from the Appellant. The Respondent herein adduced evidence in support of its claim through PW1. Several exhibits were also produced. Since the Appellant admitted to the existence of a contract between the parties, but for its terms, and going by the evidence adduced by PW1, it is apparent that the evidential burden shifted from the Respondent to the Appellant. It was then incumbent upon the Appellant to lead evidence in rebuttal to what the Respondent alluded to. That, however, did not happen.



17. The trial Court found the claim proved. That is a decision wholly supported by this Court. Without any rebuttal and after the Respondent adduced evidence on a balance of probabilities that shifted the evidential burden to the Appellant, and without more, the claim has to succeed.
18. This Court has, however, noted the Appellant's attempt to challenge the Invoice No. 8795 in alleging manipulation of figures and irregular entries in its written submissions in support of this appeal. Whereas the Appellant is within its right to make such submissions, it ought to have either raised such queries at the trial by cross-examining PW1 or it would have adduced its own evidence to the contrary. The Appellant neither adduced any such evidence nor were those queries raised at the trial. That notwithstanding, this Court has scrutinized the alleged irregularities and is unable to make any finding on whether the figures were manipulated or were falsified without the advantage of first hearing the Respondent since such are factual matters. As the opportunity for the Appellant to do so is well past, the Appellant's submission must fall by the way side. The upshot is that the Appellant's bid to reverse the impugned trial Court's judgment fails.
19. Deriving from the above discussion, this Court now makes the following final orders: -
 - (a) The appeal is without merit and is hereby dismissed.
 - (b) The Appellant shall bear the costs of the appeal.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 15TH DAY OF MAY, 2025.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Miss. Kado, Learned Counsel for the Appellant.

Mr. Mugo, Learned Counsel for the Respondent.

Michael/Amina – Court Assistants.

