



**Mabati Rolling Mills Limited & another v Kariuki (Civil Appeal
E333 of 2023) [2025] KEHC 6656 (KLR) (14 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6656 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E333 OF 2023**

JM NANG'EA, J

MAY 14, 2025

BETWEEN

MABATI ROLLING MILLS LIMITED 1ST APPELLANT

MACHE HARDWARE STORES LIMITED 2ND APPELLANT

AND

FREDRICK KARIUKI RESPONDENT

(Being an appeal against the decision and Decree of Hon Edward Oboge (SRM and Adjudicator) delivered in Nakuru SCCC NO. E579 of 2023 delivered on 26th October, 2023)

JUDGMENT

1. The Respondent by a Statement of Claim dated 7th July, 2023 and amended on 14th August, 2023 filed the above stated suit against the Appellants herein seeking a sum of Kshs. 997,925/= together with costs and interest being alleged loss occasioned to him by the Appellants owing to supply of low quality iron sheets to him contrary to warranty and representation that the same were of merchantable quality. It is averred that the Respondent entered into an agreement with the 2nd Appellant, as agent of the 1st Appellant in distribution of the latter's products, by which he purchased and received delivery of versatile charcoal grey iron sheets worth Kshs. 286,425/=.
2. Sometime after delivery, the Respondent realized that the iron sheets had started changing colour and accuses the Appellants of breaching the agreement as regards their warranty of the quality of the iron sheets.. This caused the Respondent to incur further expenses in purchasing necessary materials and labour costs all amounting to Kshs. 771,500/=, to replace the faulty iron sheets.
3. The 1st Appellant traversed the Claim through a Response dated 25th July, 2023, asserting inter alia that it is a stranger to the Respondent with whom there was no contractual relationship. It also denied manufacturing or supplying the goods and/or any agency relationship with the 2nd Appellant. It is



- further argued that the lower Court lacked jurisdiction to entertain the claim as all avenues had not been exhausted, including reference of the dispute to the Competition Authority created under the [Competition Act](#).
4. The 2nd Appellant in its Response dated 21st August, 2023 also denied liability by contending among other averments that it was not the manufacturer of the iron sheets in issue and , in any event, the purported breach occurred several years after purchase.
 5. The matter proceeded to hearing at the conclusion of which the Court found in favour of the Respondent and awarded him the sum claimed of Kshs. 997,925/= as well as costs and interest computed from the date of judgement.
 6. The Appellants are dissatisfied with the decision and jointly bring this Appeal raising 21 grounds of appeal in their Memorandum of Appeal dated 23rd November, 2023 which may be condensed into two as follows;
 - a. That the lower court erred law in finding that the Respondent's action is in tort and not Statute barred under the [Limitation of Actions Act](#), and further in finding that it generally had jurisdiction to determine the matter.
And;
 - b. That the learned trial Magistrate/Adjudicator erred in law by finding the Appellants liable for the claim against the weight of evidence.
 7. The Appellants therefore pray that the decision delivered on 26th October, 2023 be set aside and the Respondent's Claim dismissed. They further pray that the costs of the Claim in the lower court as well as in this Appeal be awarded to them.
 8. I shall consider the two Grounds of Appeal together . The Appeal was canvassed by way of written submissions duly filed by learned Counsel for the parties.

Appellants' Submissions

9. The Appellants filed written submissions dated 10th February, 2025. They contend inter alia is that the trial Magistrate/Adjudicator erred in finding that the Claim against the 1st Appellant which it holds to be in the nature of tort, was not statute barred under Section 4 (2) of the [Limitation of Actions Act](#). It is submitted that the claim against the 1st Appellant is misplaced as the roofing sheets were bought independently from a third party. According to the Appellants, the 2nd Appellant sold the roofing sheets not as an agent but as independent entity.
10. Regarding the manufacturer's liability, reliance is placed on the famous English case of Donohue vs Stevenson All ER I where the Court held that for a Claimant to sustain a claim of negligence the duty of care must be shown to be owed to the plaintiff and further that the duty was breached by the defendant. Further reliance was placed on Kenya Breweries Ltd vs Godfrey Odoyo [2010] eKLR as was cited in Coca-Cola East Africa Limited & another vs Boniface Kyene & Another [2018] where the Court opined that a manufacturer owes the duty of care when manufacturing a product to ensure it reaches customers in the form in which it left the manufacturer.
11. In support of the position that the trial court erred in faulting the 2nd Appellant over iron sheets it had not manufactured, the Appellants submit that liability cannot be ascribed to manufacturer unless it can be proven that the distributor altered or misrepresented the product before sale .



12. The Appellants continue to argue that there is even no proof that the Respondent was sold the iron sheets by the 2nd Appellant. It is pointed out that, in any event, the iron sheets in question had been in exclusive possession of the Respondent for 6 years and could have been tampered with during the period. I was referred to more case law in *Eastern Produce (K) Limited vs Rongai Workshop & Transporters Ltd* [2014] eKLR for the proposition that evidence to substantiate claims of breach of contract have to be produced to sustain such a claim. In *Kenya Power & Lighting Company Ltd vs Nathan Karanja Gachoka & Another* also cited by Counsel, it was held that courts must rely on expert evidence in technical claims to obviate mere allegations.
13. The Appellants also fault the trial court for wrongly applying the provisions of Section 16 of the *Sale of Goods Act* when there was no privity of contract between the Manufacturer and the Respondent.
14. It is further argued inter alia that the claim is statute barred as it was brought 4 years and 8 months after the cause of action arose in 2018, reference being made to the case of *Gathoni vs Kenya Co-operative Bank Ltd* [1982] KLR 102.

Respondent's Submissions.

15. The Respondent on the other hand opposes the appeal. He submits that the parties entered into a legally binding agreement for the sale and supply of the subject versatile charcoal iron sheets, expressed and implied terms and conditions of which are said to be governed by the *Sale of Goods Act*.
16. The court was referred to the provisions of Section 16 of the *Sale of Goods Act* which creates an obligation on a seller to ensure that goods sold are reasonably fit for the purpose for which the buyer has disclosed expressly or by implication. This entails an implied condition that the goods sold are of merchantable quality [(see *Magic Chemical INC vs Padip Enterprises (E.A) Limited* [2022] KECA 640 (KLR) and *Vivid Painting Equipment Solutions Limited vs Monica Ngotho T/A Identity Partners* [2019] eKLR cited and relied upon by Counsel)].
17. Referring to the judicial determination in *Stephen Kanini vs The Ark Limited* [2016] eKLR the learned Counsel for the Respondent therefore submit that there was breach of the implied condition that the iron sheets purchased were fit for purpose.
18. The Respondent further states that he specifically pleaded and strictly proved his special damages claim as per case law in *Francis Muchee Nthiga v David N. Waweru* [2014] eKLR and in *Omega Enterprises (Kenya) Limited & 2 Others* [2001] eKLR among other superior courts' decisions.

Analysis and Determination.

19. This being a first appeal I am required to reconsider the evidence adduced, evaluate it and draw my own conclusions bearing in mind that I did not hear and see the witnesses who testified{ (see *Selle & Another Vs Associated Motor Boat Company Ltd & Others* [1968] EA 123 }. The Court of Appeal for East Africa in *Peters vs Sunday Post Limited* [1958] EA 424 underscored the same principles delivering itself thus:
 - i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and



- iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.”
20. This is an appeal from the Small Claims Court. Section 38 of the *Small Claims Court Act* provides that:-
1. A person aggrieved by the decision or an order 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.
21. This court is therefore confined to addressing matters of law only. In *Watu Credit Limited vs Randu* [2024] KEHC 4430 the Court in addressing the issue of appeal from the Small Claims Court stated:-
- “..... an Appeal of this nature is on points of law. It can be pure points of law or mixed points of law but points of law it is. An appeal on points of law is akin to a second appeal to the court of Appeal. The duty of a second Appeal was set out in the case of *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited* [2020] eKLR: -
- “This is a second appeal. I am alive to my duty as a second appellate court to determine matters of law only 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. (See: *Stanley N. Muriithi & Another versus Bernard Munene Ithiga* (2016) eKLR).”
22. Having considered the record of appeal, the parties’ rival submissions and the authorities relied on the issues arising for determination are:-
- i. Whether the Small Claims Court was clothed with the jurisdiction to hear and determine the Respondent’s Claim.
 - ii. Whether the Claim was time barred.
 - iii. Whether the burden of proof was discharged.
 - iv. Whether there was a breach of any applicable terms conditions of sale and/or warranty.
 - v. Whether the appeal has merit.
 - vi. Who bears the costs of the appeal and the suit?
23. The Appellants raised objection in the lower to the effect that the Court lacked jurisdiction to entertain the dispute for the reason that it was not first referred to alternative dispute resolution mechanisms. Jurisdiction is a fundamental issue and it is trite law that without it, a court cannot proceed to deal with the matter. It is the Appellants’ submission that there are other avenues available as stipulated under Section 70 (A) of the *Competition Act*. For instance, it is contended that the Respondent should have first referred the complaint to the Competition Authority created under the Act.
24. Section 70A of the *Competition Act* provides for instances when the Competition Authority may initiate investigations into a complaint and enacts that:-
- “(1) Pursuant to the provisions this Part, the Authority may on its own initiative or upon receipt of information or a complaint from any person, government



agency, Ministry, or consumer body, initiate investigations into a consumer complaint.

- (2) The provisions of sections 31, 32, 33, 34, 35, 36, 37, 38, 39 and 40 of the Act shall apply mutatis mutandis to the investigation of consumer complaints under this Act.”

25. The stated provisions of the *Competition Act*, mandate the Authority to investigate prohibitions relating to restrictive trade practices, abuse of dominance or abuse of buyer power.

26. The Trial Court in its impugned judgment considered the arguments advanced by the Appellants as regards the Court lacking jurisdiction as per Sections 64 and 65 of the *Competition Act*. The court observed inter alia that section 64 allows an aggrieved party to institute recovery proceedings in the first instance in circumstances as obtain in this case without reference to any other body, particular where as admitted here the manufacturer is known.

27. Section 12(1) of the *Small Claims Court Act* further provides for the nature and pecuniary jurisdiction of the Court as follows:

“ 12. 12. Nature of claims and pecuniary jurisdiction.

1. Subject to this Act, the rules and any other law, the court has jurisdiction to determine any civil claim relating to –
- a. contract for sale and supply of goods or services;
 - b. a contract to money held and received;
 - c. liability in tort in respect of loss or damage cause to any property or for the delivery or recovery of moveable property;
 - d. compensation for personal injuries; and
 - e. set-off and counterclaim under any contract.”

28. The claim herein arises out of a contract for sale and supply of goods, within Section 12(1)(a) of the Act supra and therefore the trial court had jurisdiction to entertain the claim, also in light of the provisions of the section 64 of the *Competition Act*. I therefore fully agree with the learned trial Magistrate/ Adjudicator on the findings on jurisdiction and Issue (i) is accordingly decided in the affirmative.

29. In regard to the Appellants’ submission that the Claim was Statute barred, it was the Appellant’s contention that the claim was filed on 7th July, 2023 and being a claim allegedly in tort the period within which the Respondent ought to have brought the claim should have been within 3 years of the cause of action under the *Limitation of Actions Act*. The Appellants claim the purchase was on 30th October, 2017 and that the roofing sheets began fading after one year of purchase, therefore the claim was allegedly brought after 4 years and therefore beyond the limitation period.

30. The trial court is of the view that the cause of action arose on or about the year 2021 as the warranty produced by the 1st Appellant gave a cover of between 24 and 64 months , while the Respondent testified that the iron sheets started losing colour three and half years after installation.

31. The Claim was founded on breach of contract as already found. Clause 5 of the Statement of Claim was categorical that the Respondent and the 2nd Appellant entered into an agreement for sale of the versatile charcoal grey iron sheets which resulted in implied terms and warranty as to the quality thereof.



32. By dint of Section 4 (1) (a) of the *Limitation of Actions Act* , an action may not be brought after the end of six years from the date on which the cause of action founded on contract accrued. The question to be answered before this Court therefore is when did the Respondent’s cause of action accrue for purposes of Section 4(1)(a) of the Limitations of Action Act?
33. The Respondent testified that the iron sheets started losing colour three and a half years after installation within the warranty period as per the warranty produced by the 1st Appellant. The time, date or period for installation was not specified and the Court will proceed as though the same was done after purchase therefore on or about the month of October, 2017. The Cause of Action would therefore have arisen in the month of May, 2021. The statutory six-year period would therefore lapse sometime in May of 2027 or thereabouts.
34. Even if the Cause of Action would have arisen at the time of purchase of the product in question on 30th October, 2017, the 6-year limitation period would then have lapsed on 30th October, 2023. The claim was filed on 7th July, 2023, still within time.
35. In the premises I find no reason to interfere with Court’s decision that the claim was not statute barred in the circumstances.
36. On whether the burden of proof was discharged according to the legally accepted standards, Sections 107 of the *Evidence Act* provides regarding the legal burden of proof thus;
- “ 107 (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”.
37. Sections 109 and 112 of the *Evidence Act* address the evidentiary burden of proof.
- “ 109. 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.
112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him”.
38. The Respondent testified that he visited the 2nd Appellant who advised him that the iron sheets he needed were manufactured by the 1st Appellant which fact was admitted by the 2nd Appellant in court.. The 2nd Appellant proceeded to sell the iron sheets to Respondent, issuing an invoice dated 30th October, 2017 for 121 units of versatile charcoal grey iron sheets and ridges.
39. RW1 testified that the 2nd Appellant was a supplier of the 1st Appellant. RW2 in his testimony confirmed the iron sheets supplied were from the 1st Appellant.
40. As per the evidence in the lower court, a sample of the required iron sheets was taken to the 1st Appellant but no response was forthcoming as to the quality of the iron sheets. The photographs availed in Court by the Respondent in this regard were not discredited and the same argument cannot be raised in submissions. As determined in many decided cases, Submissions are not evidence but legal opinion. The Respondent supplied all the information regarding his complaint to the Appellants as requested which did not elicit a response as per the evidence adduced before the lower court.



41. The argument that the Respondent should have sought the Kenya Bureau of Standards' expert opinion to ascertain the quality of the iron sheets is neither here nor there. I am of the view that the standard and burden of proof were discharged by the Respondent in the circumstances.

42. There is the question as to whether there was breach of implied conditions as to quality and warranty. Section 16 of the Sale of Goods Act stipulates that:-

“No implied warranty as to fitness, except in certain cases

Subject to the provisions of this Act and of any Act in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows—

a. where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for that purpose:

Provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose;

b. where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality:

Provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which that examination ought to have revealed;

c. an implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade;

d. an express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.”

43. Pursuant to Section 16(a) of the *Sale of Goods Act*, it was the 1st Appellant duty to manufacture and offer for sale goods that are of merchantable quality. The same goes for the 2nd Appellant in its role of distribution. Since RW1 and RW2 confirmed the relationship between the Appellants it was their duty to procure and sell goods that were of merchantable quality and free from any defects, in material and form.

44. The evidence on record supports the Respondent's assertion that the iron sheets were of poor quality as they lost colour contrary to the Appellants' implied warranty.

45. In *Vivid Printing Equipment Solutions Limited Monica Ng'ong'oo t/a Identity Partner* [2019] eKLR the Court held that

“By virtue of the provisions of section 16 of the *Sale of Goods Act* Cap. 31 of the Laws of Kenya, where a buyer has made known to the seller the purpose for which goods are required



and the buyer relies on the seller skill, and the goods are such as are in the seller's business to supply, there will be an implied condition that the goods are reasonably fit for that purpose.

Regarding merchantability, indeed under section 16(b) of the Act, where the goods are bought by description from a seller dealing in goods of that description there will be an implied condition that the goods shall be of a merchantable quality provided that the defects noted on examination are not defects that would have been revealed in the examination.”

46. In *Prudential Printers Limited vs Carton Manufactures Limited* [2012] eKLR it was held that:-
- “A reading of Section 16 of the *Sale of Goods Act* shows there is no warranty or condition as to the merchantability of goods; the only time such a warranty will be implied is when the buyer relies on the skill and judgment of the seller or where the goods are bought by description from a seller dealing with such goods.”
47. The Respondent having described what he wanted, there was an implied condition that the iron sheets were of good quality. He relied on the expertise or skills of the 2nd Appellant and the 1st appellant as distributor and the manufacturer respectively. Yet within the warranty period the iron sheets colour changed. I accordingly concur with the lower court that the Appellants did breach the contract.
48. The 2nd Appellant submitted that it was not opposed to replacement of the iron sheets should the Respondent grant it an opportunity to inspect the same. The latter declined the offer and instead demanded payment of Kshs. 997,925/= being loss he suffered as a result of breach of the contract.
49. The Appellants contend that the warranty covered replacement of the iron sheets only and labour costs were not covered. RW1 pointed out that there may be damage to the timber during replacement of the iron sheets, hence other incidental costs. I must once again agree with the learned trial Magistrate in declining to compel the Respondent to accept replacement of the iron sheets and forfeit other incidental costs of the replacement.
50. There are costs associated with replacement of the iron sheets which include labour, new nails and even the timber used as it has been confirmed there may be damage thereto. The inconvenience of the Respondent being displaced from his home during the period is equally a factor. The Respondent availed receipts of purchase of timber, nails and labour procured for the replacement. The claim for Kshs 997,925/= as a special damage has been proven, the same not having been discredited by counter evidence.
51. In the premises, I find that the Appeal lacks in merit and is hereby dismissed with costs to the Respondent.

JUDGEMENT DELIVERED VIRTUALLY ON THIS 14TH DAY OF MAY 2025 IN THE PRESENCE OF;

J.M NANG'EA,

JUDGE.

Judgement delivered virtually on this 14th day of May 2025 in the presence of;

The Appellants' Advocate, absent.

The Respondent's Advocate, Mr Miruka.

The Court Assistant, Jeniffer.

J.M NANG'EA,



JUDGE.

