



**Treasure Industries Limited v Kihiu (Civil Appeal E236 of 2024)
[2025] KEHC 6339 (KLR) (15 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6339 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E236 OF 2024
FN MUCHEMI, J
MAY 15, 2025**

BETWEEN

TREASURE INDUSTRIES LIMITED APPELLANT

AND

PIUS KIHU RESPONDENT

*(Being an Appeal from the Judgment and Decree of Hon. L. Kombe Matawi (RM/
Adjudicator) delivered on 5th July 2024 in Thika Small Claims Court SCCC No. E990 of 2023)*

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Thika Resident Magistrate/Adjudicator in SCCC No. E990 of 2023 whereby the trial court dismissed the appellant's claim for breach of contract for supply of goods as well as a subsequent application dated 30th July 2024 seeking to set aside the said judgment among other orders..
2. Dissatisfied with the court's judgment delivered on 5/7/2024 and ruling delivered on 26/08/2024 appellant lodged this appeal citing 4 grounds of appeal summarized as follows:-
 - a. The learned trial magistrate erred in law and in fact in dismissing the appellant's claim without scrutinizing all the documents produced in evidence.
 - b. That the learned Magistrate erred by dismissing the appellants application dated 30th July 2024 to set aside judgment.
 - c. The learned trial magistrate erred in law and in fact by failing to appreciate the appellant's subsequent application to set aside his judgment.
 - d. That the learned Magistrate erred in awarding costs to the respondent.



3. Parties disposed of the appeal by way of written submissions.

The Appellant's Submissions

4. The appellant submits that before the court below, it sought judgment to be entered against the respondent for breach of contract for the sale and supply of goods valued at Kshs. 389,177/- in the trial court. The appellant argues that the respondent despite knowing and trading with it has never reported it for falsifying claims or allegations of any debts being forced on him. The appellant argues that a mere denial by the respondent of trading with it would not suffice without further evidence. To support its contentions, the appellant relies on the case of *Mugunga General Stores vs Pepco Distributors Limited* (1987) KLR 150.
5. The appellant argues that part of the agreement was that the respondent was given leeway to get the animal feeds and pay at a later date in any prescribed form. Thus the appellant argues that it exercised good faith while entering into a contract with the respondent since he was already its employee and thus the majority of the payments made by the respondent were in cash. The appellant further submits that the respondent made payments through M-PESA through its KCB M-PESA pay bill between the months of February 2016 to December 2016 which reflect on the appellant's bank statement, a fact that the respondent conveniently left out while submitting his bank statements as documentary evidence. The appellant submits that it was ready to produce the same bank statements of 2016 as proof of consideration issued by the respondent in exchange of the good supplied, but the trial court rejected their oral application on 28th June 2024.
6. The appellant further submits it carried out various salary deductions on the respondent's salary to aid in reducing the respondent's debt once goods are supplied to him on credit at the express request of the respondent. The respondent later begged the appellant not to make deductions every month but rather twice or thrice in the year. The appellant argues that the fact that the respondent made several payments which are evidence of a contractual relationship between them. To support its contentions, the appellant relies on the case of *Ali Abid Mohammed vs Kenya Shell & Company Limited* (2017) eKLR and submits that a contract need not be in writing but can be inferred from the conduct of parties.
7. The appellant refers to the cases of *Benson Kang'ara t/a Pinkstone Enterprises vs Nairobi City County* (2019) eKLR and *Kabuito Contractors Limited vs Karuri Civil Engineering (K) Limited* (no citation given) and submits that all the delivery notes were either signed by the respondent or his representatives and at no point did the respondent dispute the authenticity or validity of the delivery notes and invoices during the period, while being supplied with the feeds.
8. The appellant submits that the respondent lied to the trial court that he does not know its witness, the credit control officer nor any other of its employees. The respondent admitted that he was an employee of the appellant. The appellant argues that the respondent is sly, untruthful and untrustworthy in his claims.
9. The appellant refers to the case of *Hydro Water Well (K) Limited vs Sechere & 2 Others* (sued in their representative capacity as the officers of Chae Kenya Society) Civil Suit E212 of 2019 [2021] KEHC 22 (KLR) and submits that the principal remedy under common law for breach of contract is an award of damages, with the purpose of damages being to compensate the injured party for the loss suffered as a result of the breach rather than to punish the breaching party.
10. The appellant argues that the trial court did not afford himself the chance to sufficiently analyse the documentary evidence showing existence of a valid contract between the parties and delivery of goods



to the respondent. Further, the appellant submits that it was not granted an opportunity to produce all documentary evidence especially its bank statements showing payments made by the respondent. The said bank statements show the respondent having made various payments of Kshs. 9,000/- on 8th February 2016, Kshs. 12,600/- on 11th March 2016, Kshs. 5,000/- on 1st April 2016, Kshs. 6,000/- on 21st June 2016, Kshs. 9,000/- on 19th July 2016, Kshs. 15,000/- on 26th July 2016, Kshs. 10,000/- on 7th December 2016 and Kshs. 8,000/- on 28th December 2016.

11. The appellant argues that at the time of filing the claim its credit control officer was unable to get authorization to acquire all the invoices and delivery notes from the director of the company in time, as the director was away on official duty. Further, the appellant submits that it needed to liaise with KCB to acquire all the relevant bank statements showing the respondent's payments and get permission from the board and its other clients whose transactions appear on those bank statements to disclose transactions involving its clients due to data protection infringements, an exercise which took a lot of time. Thus, the appellant submits that it was unable to produce all the required documentation that would further consolidate its claim on time. The appellant argues that the said circumstances were beyond its control and it would be unfair for it to be condemned unheard. The appellant relies on the case of *China Wu Yi Construction Co. Ltd vs Joseph Muchina Muchemi & Another* [2021] eKLR and submits that its hands were tied as the trial court declined to grant it time to avail the necessary documents and entered judgement without critical documentary evidence.
12. The appellant submits that the outcome of the claim would have varied if its documents were allowed to be produced. Thus the appellant urges the court to not allow it to suffer prejudice due to a technicality that can be resolved under Article 159 of *the Constitution* of Kenya. The appellant argues that parties had not closed their cases at the time of the application and therefore no party would suffer prejudice if the documents were allowed to be produced. To support its contentions, the appellant relies on the cases of *Kiai Mbaki & 2 Others vs Gichuhi Macharia & Another* [2005] eKLR and *P.H. Ogola Onyango t/a Pittsconsult Consulting Engineers vs Daniel Githegi t/a Quantalysis* [2005] eKLR.
13. The appellant relies on Section 78 of the *Civil Procedure Act*, Order 42 Rules 27, 28 and 29 of the Civil Procedure Rules and the cases of *Mohammed Abdi Mohamud vs Ahmed Abdullahi Mohammed & 3 Others* (2018) eKLR and *Florence Akinyi Odula vs Akamba Public Road Services Ltd & Another* (2014) eKLR and submits that the appellate court has powers to take additional evidence as the documents in question are directly relevant to the matter before the court as it relates to the actual history of transactions between the parties and it will assist the court to determine the case to finality.

The Respondent's Submissions.

14. The respondent submits that the appellant is appealing against the judgment of the trial court dated 5th July 2024 and the ruling dated 26th August 2024 in a single appeal contrary to the provisions of the *Civil Procedure Act* and Rules. The respondent argues that the best approach would have been to file the two appeals separately and seek the consolidation of the two for consideration before the court.
15. The respondent relies on Order 42 Rule 1 of the Civil Procedure Rules, Section 38(1) of the *Small Claims Court Act* and the cases of *Joseph Karibu Kabuki vs Yusuf Ibrahim Ismael* [2003] KEHC 839 (KLR) and *Odinga & Another vs Independent Electoral and Boundaries Commission & 2 Others; Aukot & Another (Interested Parties) Attorney General & Another (Amicus Curiae)* [2017] KESC 42 (KLR) and submits that a judgment being dissimilar from a ruling as a decree flows from judgment and an order from a ruling, the appellant ought not to have conflated the two in their memorandum of appeal subject to which the appeal would naturally be rendered fatally and incurably defective worthy of being struck out. It ought to have been clear from the memorandum of appeal whether the appellant was appealing against the judgment and decree of the lower court or the ruling and orders issued



- by the lower court. Not both as is the instant case. The respondent argues that the appellant took a liberal approach in their interpretation of Order 42 Rule 1 of the Civil Procedure Rules by inferring a conjunctive meaning to the word “or” and thereby rendering their appeal irrelevant and confusing.
16. The respondent submits that it emerged during cross examination of the appellant’s witness that they had not attached invoices that backed up their claim and neither did they attach all invoices from the year 2015-2018 on the basis that they were bulky and they opted to attach only samples. The appellant sought leave of the court to include additional documents which was opposed on the grounds that the move was intended to seal loopholes that had emerged during cross examination. The trial court held that it would be unfair to allow the appellant to provide documents shown to be missing during cross examination and both parties had the opportunity to present the issues that arose at the submissions stage. The trial court in its judgment held that the appellant did not provide evidence of cash payments via M-PESA and direct KCB bank deposits which would have shown and evidenced a connection between the parties herein, there was part payment made and that indeed the respondent was indebted to the appellant. The trial court further held that production of invoice and account statements were insufficient to prove his indebtedness and it was on that basis that the claim was dismissed.
 17. The respondent submits that the instant appeal and record of appeal contains additional records that are post judgment thereby making it uncertain whether the instant appeal is an appeal from the judgment of the lower court dated 5th July 2024 or an appeal from the ruling dated 26th August 2024. The respondent argues that there were no credible grounds which on merit would legitimize the appellant to be granted leave to file additional documents. The respondent argues that the appellant was indolent in the prosecution of their case and is attempting to patch the case on appeal.
 18. The respondent relies on the cases of Archer *Archer & Another vs Archer & 2 Others (Civil Application No. E058 of 2021)* [2022] KECA 9 (KLR) (21 January 2022) (Ruling) and Mohammed Abdi Mahamud vs Ahmed Abdullahi Mohammed & 3 Others [2018] eKLR and submits that the appellant did not raise the issue of not availing the bundle of documents due to their heavy or bulky nature and proceeded to confirm to have complied with Order 11 clearly confirms that they did not see the need of the alleged documents and only became important after they realised they could be used to seal loopholes. Thus the appellant seeks to prejudice him by seeking to file additional documents which are an afterthought after it emerged during cross examination in the lower court that they had not availed the said documents. The respondent further submits that the reason given for not adducing the additional evidence was that the invoices were too bulky. Consequently, it can be inferred that the said evidence was within the possession of the appellant but chose with reasons best known to them, not to adduce the said evidence.
 19. The respondent submits that the filing of additional evidence is an afterthought and an attempt to patch up the appellant’s case and afford them a fresh chance at the cherry pie notwithstanding the same will be prejudicial to him. The respondent argues that he will be prejudiced by delay and increased costs. Further, the case prejudices him from getting further employment as long as the current case is ongoing as his work as a quantity control based on trust as he is responsible for safeguarding the secret mixing formula of the feeds.
 20. The respondent refers to Section 106(B)(4) of the *Evidence Act* and submits that the appellant did not attach a certificate of electronic evidence to produce MPESA statements and KCB Bank statements. The respondent further submits that the appellant has not moved the current court to adduce additional evidence on appeal.



Issues for determination

21. The main issues for determination are:-
 - a. Whether the appeal is incurably defective.
 - b. Whether this court has jurisdiction to hear this appeal.
 - c. If this court finds it has jurisdiction, whether the appeal has merit.

The Law

22. The Court of Appeal while referring to a second appeal, which is essentially on points of law and thus similar to the duty of this court under Section 38 of the *Small Claims Court Act*, set out the duty of the second appellate court in the case of Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited [2020] eKLR as follows:-

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 that they should have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.

23. In distinguishing between matters of law and fact the Court of Appeal stated in Kenya Breweries Ltd vs Godfrey Odoyo [2010] eKLR as follows:-

I have anxiously considered the pleadings, the evidence on record, the judgment of the learned Senior Resident Magistrate and the judgment of the superior court, the grounds of appeal, the submissions of the learned counsel as well as the authorities to which we were referred. First, this is a second appeal. In a first appeal the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyse it, evaluate it and come to its own independent conclusion. In other words, a first appeal is by way of retrial and facts must be revisited and analysed a fresh. See *Selle and Another vs Associated Motor Boat Company Limited and Others* (1968) EA 123. In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two 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.

Whether the appeal is incurably defective.

24. A cursory glance at the memorandum of appeal reveals that the appellant seeks to appeal against the judgment of the Small Claims Court in SCCC No. E990 of 2023 delivered on 5th July 2024. However one of his grounds of appeal seeks to appeal against the ruling of the said court which was delivered on 26th August 2024 which sought the orders of setting aside the judgment dated 5th July 2024.

25. Section 38(1) of the *Small Claims Court Act* provides:-

A person aggrieved by the decision or an order of the court may appeal against the decision or order to the High Court on matters of law.

26. Further in Order 42 Rule 1 of the Civil Procedure Rules the law provides:-

Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.



The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative and such grounds shall be numbered consecutively.

27. The Supreme Court in *Odinga & Another vs Independent Electoral and Boundaries Commission & 2 Others; Aukot & Another (Interested Parties); Attorney General & Another (Amicus Curiae)* [2017] KESC 42 (KLR) elaborated on the disjunctive nature of the word “OR” and stated:-

The use of the word “or” clearly made the two limbs disjunctive under the Kenyan law.

28. It therefore follows that the appellant herein ought to have filed two separate appeals against the judgement and the ruling of the trial court instead of conflating the two as he has done herein. It is noted that out of the four (4) grounds in the memorandum of appeal, only one relates to the ruling delivered on 8th May 2024. The other three (3) grounds are challenging the judgment of the court delivered on 5th July 2024. As such, I am of the considered view that this appeal is in regard of the judgment and not the ruling.

Whether this court has jurisdiction to hear and determine this appeal

29. I have perused grounds (a) (c) and (d) in the memorandum of appeal which relate to this appeal. This first ground challenges the judgment of the court below for dismissing the claim while the third ground faults the magistrate for not scrutinizing the entirety of documents before the court and thus arriving at the wrong decision. The third ground faults the court for awarding costs to the respondent.
30. I have perused the judgment of the honorable Magistrate and noted the claim of the appellant was dismissed for lack of proof. The appellant had a duty of proving his case through evidence. These are matters of facts and not matters of law. Section 38(1) of the Small Claims Act provides that appeals from the Small Claim Court shall be on matters of law.
31. As regards awarding of costs to the respondent, Section 27 of the *Civil Procedure Act* provides that costs shall follow the event. The appellant lost the case and thus the respondent is entitled to costs.
32. Notwithstanding the issue of costs, this appeal is on matters of facts and as such, contrary to the provisions of Section 38 (1) of the Small Claims Act.
33. As regards the ruling delivered on 26th August 2024 in the application dated 30th July 2024, Section 75 of the *Civil Procedure Act* requires that leave of the court be obtained for appealing against an application of this nature. I have perused the record and has not traced any order for leave to appeal against the said ruling.
34. It is my considered view that this appeal in its entirety is misconceived and not properly before the court.
35. The appeal is hereby struck out with costs to the respondent.
36. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 15TH DAY OF MAY 2025.

F. MUCHEMI

JUDGE

