



REPUBLIC OF KENYA



**KENYA LAW**  
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**Njuguna t/a Femfa Auctioneers v Industries & 2 others (Civil Appeal  
84 of 2023) [2025] KEHC 10320 (KLR) (3 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10320 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL 84 OF 2023**

**REA OUGO, J**

**JULY 3, 2025**

**BETWEEN**

**FRANCIS GITAU NJUGUNA T/A FEMFA AUCTIONEERS ..... APPELLANT**

**AND**

**PREMIER FOOD INDUSTRIES ..... 1<sup>ST</sup> RESPONDENT**

**BHAVYA EXPORTERS & IMPORTERS ..... 2<sup>ND</sup> RESPONDENT**

**NEW NYANZA WHOLESALERS ..... 3<sup>RD</sup> RESPONDENT**

*(An Appeal From The Judgment And Decree in Bungoma CMCC No.  
219 Of 2021 Delivered By Hon. Tom. M. Olanda on the 13/7/2023)*

**JUDGMENT**

**Background**

1. According to the plaint dated 6 August 2021, the 1st Respondent supplied the 2nd Respondent with goods as detailed in paragraph 6 of the plaint. The agreement between them stipulated that the 2nd Respondent would sell the goods and pay the 1st Respondent for the value of the goods sold. The goods were supplied between 29<sup>th</sup> October 2020 and 30<sup>th</sup> November 2020. On 28<sup>th</sup> December 2020, agents of the 1st Respondent discovered that the 2nd Respondent had disappeared, leaving behind goods and properties belonging to various business entities at the premises. The 1st Respondent's agents reported the matter to Bungoma Police Station. The 1st Respondent found that a court order had been issued to the Bungoma Police, allowing the appellant to access the 2nd Respondent's premises to remove the goods therein in *PMCC MISC E001 and E002 of 2021, Kimilili Francis Gitau Njuguna T/A as Femfa Auctioneers and Samir Investment v Patel Bharvya, and Francis Gitau Njuguna T/A Femfa Auctioneers and New Nyanza Wholesalers Limited v Patel Bharvya,*



2. The 1st Respondent's advocates wrote to the appellant and the 3rd Respondent, requesting that they preserve the goods belonging to the 1st Respondent, warning that any sale of these goods would have legal consequences. The 1st Respondent later learned that the 3rd Respondent had instructed the appellant to levy distress for rent against the 2nd Respondent. The appellant proceeded to proclaim the 2nd Respondent's goods. The 1st Respondent claims that the appellant illegally proclaimed the goods supplied to the 2nd Respondent, which were stored in the 3rd Respondent's premises, leased to the 2nd Respondent. The 1st Respondent stated that the appellant failed to list the proclaimed goods, lumping all assorted items together in the proclamation notice, which subsequently caused the 1st Respondent to suffer a loss as it could not trace the goods it had supplied to the 2nd Respondent that were on the premises at the time of the proclamation. The 1st Respondent maintained that the appellant is legally required to account for every item proclaimed and for the returns received in respect of each auction. However, the appellant refused, failed, or neglected to account for the goods proclaimed. It is the 1st Respondent's assertion that the order obtained on 8th January 2021 was used to break into the premises and cart away the 1st Respondent's property. The 1st Respondent stated that the appellant and the 3rd Respondent failed to provide information on the whereabouts of the goods carted away from the premises of the 3rd Respondent. The 1st Respondent sought orders against the appellant, 2nd and 3rd Respondents for the return of the goods under the name and brand PEPTANG as particularised in the plaint and in the alternative payment of the value of Kshs1,360,896.72, being the value of the goods and general damages. The 1st Respondent also sought a declaration that the Proclamation Notice by the appellant dated 15th December 2020, used obtaining orders dated 8th January 2021 in *PMCC MISC E001 and E002 of 2021*, Kimilili Francis Gitau Njuguna T/A as Femfa Auctioneers and Samir Investment v Patel Bharvya, and Francis Gitau Njuguna T/A Femfa Auctioneers and New Nyanza Wholesalers Limited v Patel Bharvya in respect of breaking into the premises was illegal, making it null and void and that the attachment and seizure of the 1st Respondent's goods by the appellant and 3rd Respondent were also null and void.
3. The appellant and 3<sup>rd</sup> respondent filed a joint defence denying the 1<sup>st</sup> Respondent's claim. They sought to have the suit dismissed with costs.
4. An interlocutory judgment was entered against the 2nd Respondent on 22nd May 2023 for failure to file a defence. The 1st Respondent proceeded with its case against the appellant and the 3rd Respondent. After hearing the parties, the trial magistrate, in a judgment dated 10th August 2023, entered judgment against the appellant, ordering them to return the goods or, alternatively, to pay the value of the goods amounting to Kshs. 1,360,886.72, along with a declaration that the attachment and seizure of the 1st Respondent's goods by the appellant and the 3rd Respondent was null and void.
5. The appellant, aggrieved by the said judgment, filed a memorandum of appeal and has listed the following grounds of appeal;
  1. The Learned magistrate erred in law and facts in finding that the appellant was liable to the 1st respondent for the goods when no evidence to attribute liability was produced
  2. The Learned Magistrate erred in law by holding that the plaintiff had proved their case on a balance of probabilities in absence of evidence to that effect.
  3. The Learned Magistrate erred in law and fact by finding that the attachment and seizure of the 1<sup>st</sup> respondent's good was null and void when in fact there was no evidence seizure of any goods.
  4. The learned trial Magistrate erred in law and fact in not observing that the suit before him was once that was filed in abuse of the due process of law.



5. The learned trial magistrate erred in law and fact by allowing the suit against the appellant when in fact no company resolution was filed and produced as evidence authorizing the instant suit being filed against the Appellant
6. The learned trial magistrate erred in law and fact by relying on the testimony of the witnesses of 1<sup>st</sup> respondent when they did not have capacity to testify against the appellant.
7. The learned trial magistrate misconstrued the evidence, facts and law and as a result arrived at a wrong conclusion.
8. The learned trial magistrate erred in law and facts by shifting the burden of proof to the appellant.

The appellant prays for:

- a) The judgment of 13.7.2023 in *Bungoma Civil Suit NO. 219 of 2021* and the decree allowing the plaintiff's suit be set aside and in its place an order be made dismissing the said suit.
  - b) The Appellant be granted costs of this appeal and costs in the lower
6. Parties canvassed the appeal by way of written submissions. The appellant submitted as follows: there was no evidence adduced by the 1st Respondent to attribute liability for the goods on the part of the appellant. From the statement of George Nyagaya, the 2<sup>nd</sup> Respondent ferried the goods out of the premises at night and has since relocated to an unknown place. The appellant cannot be held liable to the 1<sup>st</sup> Respondent for the goods. It was further submitted that the 1<sup>st</sup> Respondent did not prove its case on a balance of probability. According Martin Maina the 1<sup>st</sup> Respondent witness he did not know that he had to prove that the appellant and 3<sup>rd</sup> Respondent had committed a tort against them. It was further submitted the trial magistrate erred in holding that the attachment and seize of the 1<sup>st</sup> Respondent goods was null and void when there was no evidence of seizure of the goods. Further there was no evidence that the 1<sup>st</sup> Respondent supplied the goods to the 2<sup>nd</sup> Respondent as there was no delivery notes produced in evidence. The appellant also argued that the trial Magistrate erred in law and fact by allowing the suit against the appellant when there was no company resolution filed authorising the filing of the instant suit. A company can only be sued in its own name with the sanction of its Board of Directors or by a resolution in general of special meeting ( see case of *East African Portland Cement Ltd v The Capital Markets Authority & 5 Others* and case of [\*Kenya Commercial Bank Limited v Stage Coach Management Ltd\*](#) (2014) eKLR). It was submitted that the 1<sup>st</sup> Respondent's witness therefore did not have the capacity to testify against the appellant. The document called Authority to swear affidavits in the 1<sup>st</sup> Respondent's Supplementary Affidavit is not a resolution of the company to file suit against the appellant.
  7. The appellant further submitted that the trial Magistrate erred in law and fact by shifting the burden of proof on the appellant yet the provisions of section 107 of the [\*Evidence Act\*](#) Cap 80 Laws of Kenya provides that whoever desires any court to give judgment as to any legal right or liability must prove the facts exists and the burden lies on the said person. It was also submitted that the appellant was not privy to the contract between the 1<sup>st</sup> Respondent and 2<sup>nd</sup> Respondent.
  8. The Respondent responded as follows: The appellant has raised a new issue on appeal, namely that the company lacked the capacity to sue. This issue was not raised before the trial court and therefore cannot be raised on appeal. The 1<sup>st</sup> Respondent relied on the authority given to Martin Mutuku in the supplementary record of appeal dated 10/1/2023 and the authority given to Alfred Mugesia dated



6/8/2021. It was argued that both authorities were signed and sealed with the company seal. Reliance was made on the case of *Spire Bank Ltd v Land Registrar & 2 Others* (2019) where the court held as follows;

“It is essential to appreciate that the intention behind order 4 rule 1 (4) was to safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf. This was to address the mischief of unauthorized persons instituting proceedings on behalf of corporations, and obtaining fraudulent or unwarranted orders from the court. The company’s seal that is affixed under the hand of the directors ensured that they were aware of, and had authorized such proceedings together with the persons enlisted to conduct them. And where evidence was produced to demonstrate that a person was unauthorized, the burden shifted to such officer to demonstrate that they were authorized under the company seal. With this in mind, we dare say that the provision was not intended to be utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized”.

9. It was further submitted that George Nyagaya did not testify, and therefore the court cannot rely on his evidence (see *Kenneth Nyaga Mwige v Austin Kiguta & 2 Others* [2015] eKLR). Relying on Order 43 Rule 32, the 1st Respondent sought that the court in addition to the issues raised in the memorandum of appeal the court make a finding on the following issues : that Principal – Agent relationship and the liability of the Principal for illegal actions of the Agent can be handled as 2<sup>nd</sup> issue for determination and the effect of the current Advocate failure to obtain leave of the Court on coming on record and therefore, being strangers to the proceedings. There was evidence of delivery of the goods to the 2<sup>nd</sup> Respondent. The appellant, after obtaining the break in orders, found some goods that had expired and some that had not, and he retained them without providing an account. The appellant’s evidence in court contradicted his written statement.
10. It was further submitted that the 2<sup>nd</sup> Respondent was the agent of the 3<sup>rd</sup> Respondent. He had a legal duty under Rule 12g of the *Auctioneers Rules 1997* to provide an itemised proclamation stating the value of the goods, which he did not. It was argued that, being an agent of the 3<sup>rd</sup> Respondent, the appellant could not escape liability ( see *C.Y.O Owayo v George H. Zephania Aduda T/A Aduda Auctioneers & another* [2007] eKLR). It was submitted that the relationship between the appellant and the 3<sup>rd</sup> Respondent is one of Principal-Agent. The Principal can be held liable for the actions of the agent, and they can be held jointly and severally liable. The appellant admitted to have attached the goods belonging to the 1<sup>st</sup> Respondent and failed to account for the same. The appellant and 3<sup>rd</sup> Respondent failed to show the goods they seized and are still holding. The illegal action of the Appellant by failing to act as per the law placed him responsible for the 1<sup>st</sup> Respondent’s goods. It was further submitted that the Appellant failed to comply with Rule 12 & 18 of the *Auctioneers Rules*; he did not identify the assorted goods he proclaimed and their value. The appellant admitted that three years later, he had not sold the items he attached. The 1<sup>st</sup> Respondent argued that the Appellant did not adduce evidence of the products recovered during the break-in. The Respondent’s final submission was that the appellant’s counsel is not properly on record. There was no compliance with the provisions of Order 9 Rule 9 of the *Civil Procedure Code*. For this submission, the 1st Respondent relied on the following cases: *John Langat v Kipkemoi & 2 Others* [2013] and *Peter Kamau Ngugi & another v Grace Akinyi Oloo & Another* [2021] eKLR.
11. The 3<sup>rd</sup> Respondent submitted through their counsel orally that on the issue that the 3<sup>rd</sup> Respondent as the Principal should be held liable, that the 1<sup>st</sup> Respondent has not filed a cross-appeal, and such



a prayer cannot be made now and that there was no company resolution to file the suit. The 3<sup>rd</sup> Respondent associated itself with the appellant's submissions dated 19<sup>th</sup> February 2024.

### **Analysis and Determination**

12. I have considered the grounds contained in the memorandum of appeal and the rival submissions by the parties and the evidence adduced before the trial court. The issues for determination are: whether the appellant's counsel is properly on record; whether the trial magistrate erred in law and fact in finding that the appellant was liable to the 1<sup>st</sup> Respondent for the goods which had been supplied to the 2<sup>nd</sup> Respondent; whether the trial magistrate erred in law and fact by allowing the suit against the appellant when no company resolution was filed by the 1<sup>st</sup> Respondent;
13. On whether the appellant's counsel is properly on record. The provisions of Order 9, Rule are clear that if there is a change of advocates in a matter, then the incoming counsel must file an application seeking to replace the previous counsel or file a consent on the same. Mr. Nyamu represented the 3<sup>rd</sup> Respondent in the lower court. Just after the judgment was read, he filed a Notice of appointment dated 7<sup>th</sup> August 2023, indicating that the appellant had appointed him to represent him. Is the firm of R.E Nyamu Advocates properly on record for the Appellant? The Court of Appeal in the case of *Tobias M. Wafubwa v Ben Butali* [2017] eKLR held that;

“Once a judgment is entered, save for matters such as applications for review or execution or stay of execution inter alia, an appeal to an appellate court is not a continuation of proceedings in the lower court, but a commencement of new proceedings in another court, ... Parties should therefore have the right to choose whether to remain with the same counsel or to engage other Counsel on appeal without being required to file a Notice of Change of Advocates or to obtain leave from the concerned court to be placed on record in substitution of the previous Advocate” [ emphasis mine]
14. Guided by the above Court of Appeal decision I find that this appeal is not a continuation of the lower court proceedings and having been instructed to file the memorandum of appeal the firm of R. E. Nyamu is properly on record so is the firm of Onyando and Company for the 3<sup>rd</sup> Respondent who filed a Notice of Appointment on the 18<sup>th</sup> November 2023.
15. On whether the trial magistrate erred in law and fact in finding that the appellant was liable to the 1<sup>st</sup> Respondent for the goods which had been supplied to the 3<sup>rd</sup> Respondent . The suit against the appellant, is stated paragraphs 15 to 21 and 22,26 to 29 of the plaint. There is no dispute that the 3<sup>rd</sup> Respondent instructed the appellant to levy distress against the 2<sup>nd</sup> Respondent. The 1<sup>st</sup> Respondent attached invoices and delivery notes to show that it had delivered various products to the 2<sup>nd</sup> Respondent for sale. The appellant and the 3<sup>rd</sup> Respondent were not part of the agreement between the 1<sup>st</sup> Respondent and 2<sup>nd</sup> Respondent , thus, there was no privity of contract between the 1<sup>st</sup> Respondent and the appellant.
16. Back to the allegation made by the 1<sup>st</sup> Respondent, I find as follows: there is no dispute that there is a letter of instruction dated 5<sup>th</sup> December 2020 from the 3<sup>rd</sup> Respondent instructing the appellant to levy distress for rent arrears against the 2<sup>nd</sup> Respondent for a sum of Kshs. 300,000/-. The appellant does not deny that he went to the premises that the 3<sup>rd</sup> respondent had leased to the 2<sup>nd</sup> respondent and proclaimed goods. There are two proclamations dated the 5<sup>th</sup> December 2020 for Kshs. 300,000/- and 5<sup>th</sup> December 2021 for Kshs 110,000/-. The appellant proclaimed goods he found at the premises, which he itemised in the said proclamations; however, he failed to give the value of the items proclaimed. The appellant admitted that he did not state the value of the items he proclaimed.



This was not in compliance with Rule 12 (1) (b) of the *Auctioneers Rules 1997* which stipulates as follows, the auctioneer will prepare a proclamation in Sale Form 2 of the Schedule indicating the value of specific items and the condition of each item, such inventory to be signed by the owner of the goods or an adult person residing or working at the premises where the goods are attached or repossessed, and where any person refuses to sign such inventory the auctioneer shall sign a certificate to that effect.

17. The 1<sup>st</sup> Respondent argues that the appellant ought to have itemised the assorted goods and that, having admitted that there were expired goods and having seized some goods which the appellant has not accounted for, the appellant is liable. He who alleges a fact must establish the fact alleged ( see sections 107, 108 and 109 of the *Evidence Act* Cap . 80). The 1<sup>st</sup> Respondent has not demonstrated that the goods which were carted away were the goods they had delivered to the 3<sup>rd</sup> Respondent. Pw1, who testified, did not adduce any evidence to show that the appellant carried away their goods. He stated during cross-examination that they asked the appellant to supply them with the goods he processed, which he did not supply. The appellant's failure to account for the assorted goods without evidence that indicates that he actually carried away the 1<sup>st</sup> respondent's goods does not, in my view, make him liable to return or liable to pay for the value of the goods which the 1<sup>st</sup> Respondent supplied to the 2<sup>nd</sup> Respondent. The fact that the appellant did not state the value of the goods he proclaimed does not make him liable to compensate the 1<sup>st</sup> Respondent. It was the evidence of the appellant that the goods he found had expired. During cross-examination, he told the court that the goods were unga products and sodas, not goods belonging to the 1<sup>st</sup> Respondent. The goods were not goods that the 1<sup>st</sup> Respondent had supplied to the 2<sup>nd</sup> Respondent. It cannot be assumed that the goods he carried away were goods which the 1<sup>st</sup> Respondent had supplied to the 3<sup>rd</sup> Respondent. The 1<sup>st</sup> Respondent failed to demonstrate that the proclaimed good belonged to them or that any good which were held by the appellant belonged to them.
18. I note that the appellant stated he could not sell expired goods and has been holding them since 2020. The 1<sup>st</sup> Respondent has not established that the goods the appellant had or still has in his store were the goods they supplied to the 3<sup>rd</sup> Respondent. I find that the trial magistrate erred in holding that the appellant was liable to the 1<sup>st</sup> Respondent for the goods which were supplied to the 3<sup>rd</sup> Respondent. The trial court erred in shifting the burden to the appellant.
19. On whether the trial magistrate allowed the suit against the appellant to proceed without a company resolution that was filed by the 1<sup>st</sup> Respondent. I agree with the 1<sup>st</sup> Respondent that the appellant did not raise this issue before the trial court.
20. I find that the 1<sup>st</sup> Respondent did not prove its case against the appellant and therefore set aside the judgment and decree dated 13.7.2023 in *Bungoma Civil Suit NO. 219 of 2021*. The suit against the appellant in *CMCC No. 219 of 2021*, is dismissed with costs. The appellant is awarded the costs of the appeal.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 3<sup>RD</sup> DAY OF JULY 2025.**

**R.E.OUGO**

**JUDGE**

In the presence;

Mr. Mafunga h/b for Mr. Nyamu -For the Appellant

Miss Kungu h/b for Miss Kariuki For the 1<sup>st</sup> Respondent

3<sup>rd</sup> Respondent - Absent



