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# Three Star Contractors v Prejapatis t/a Ajay Vendanah Enterprises (Civil Appeal 3 of 2020) [2025] KEHC 11087 (KLR) (24 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11087 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT BUNGOMA**

**CIVIL APPEAL 3 OF 2020**

**REA OUGO, J**

**JULY 24, 2025**

**BETWEEN**

**THREE STAR CONTRACTORS ........................................................ APPELLANT**

**AND**

**DHARMESH PREJAPATIS T/A AJAY VENDANAH ENTERPRISES ........................................................................ RESPONDENT**

***(Being an Appeal from the Judgment and Decree at the Chief Magistrate's Court in Bungoma, CMCC No. 43 of 2014, delivered by Hon. E.N. Mwenda, Senior Resident Magistrate on 13th December 2019)***

## JUDGMENT

1. The Appellant was sued by the Respondent/Plaintiff vide Plaint dated 3rd February 2014. The Respondent/Plaintiff's case was that on diverse dates in the month of May and June 2013, they entered into a contract for the purchase of goods worth Kshs. 2,725,650/= and that the Appellant paid Kshs. 1,000,000/= as a deposit, after which the Respondents alleged that they delivered binding wires to the Defendant/Appellant vide invoices Nos. 00099 and 00098 for the sum of Kshs. 1,725,650/=, which delivery was duly acknowledged by the Appellant through delivery notes. The Respondent asserted that the Appellant issued them with a post-dated cheque of Kshs. 1,725,650/=/=, which was never honoured, but later paid an additional sum of Kshs. 100,000/= leaving a balance of Kshs. 1,625,650/=. The Respondent averred that this balance was never paid despite demands and notice of intention to sue. The Plaintiff/ Respondent sought for judgment in the sum of Kshs. 1,625,650/= together with costs and interest of the suit.

2. The Defendant/Appellant entered appearance on 20th February 2014 and filed his Statement of Defence dated 3rd March 2014, together with a Counter-Claim filed on even date. He denied the averments in the Plaint and put the Plaintiff to strict proof, stating that he only stopped the cheque dated 14th June 2013 on 30th July 2013 after the Plaintiff failed to deliver the materials as agreed.

3. In his Counter-Claim, the Appellant's case was that on or about 14th May 2013, he made a purchase order of building materials totalling to Kshs. 2,725,650/= which the Plaintiff was to deliver to him on or before 14th June 2013 and that he made a cash deposit of Kshs. 1,000,000/= to the Plaintiff's Account in DTB Bank Bungoma when the Plaintiff changed his mind and insisted that the entire balance of Kshs 1,725,650/= must be paid before delivery, prompting him to issue a post-dated cheque for 14th June 2013. It was his case that after issuing the said cheque, the Plaintiff asked him to deposit a further Kshs. 100,000/= to enable him deliver the materials which he again failed to do despite several demand notices issued, for the Plaintiff to supply the materials which led to their instructing client Bungoma Municipal Council issuing him with a show-cause letter dated 3rd July 2013 to give reasons why the contract should not be terminated. He therefore sought in his Counter-Claim the sum of Kshs. 1,100,000/=.

4. The Respondent filed a reply to the defence and Counter-Claim dated 24th March 2014 where they denied the averments in the said pleadings stating that they delivered the materials to the construction sites at Mwamba Dispensary at Lugari and Mukhaweli Primary School and termed the Counter-Claim as an afterthought with forgeries aimed at defeating the Plaintiff's claim of payments in the sums of Kshs. 1,625,650/=.

5. The matter proceeded to trial, which culminated in a judgment in favour of the Respondent for the sum of Kshs. 1,625,650/=, where the court found that the Appellant was in breach of a contract for sale and dismissed his Counter-Claim with costs to the Respondent.

6. Aggrieved by this judgment, the Appellant appealed against the Judgment and Decree vide Memorandum of Appeal dated 7th January 2020 and sought costs of the Appeal on the following grounds: -

    1. The learned trial Magistrate erred in law and in fact when he failed to find that the documents relied upon by the Plaintiff were not admissible under the *Evidence Act*.

    2. The learned trial Magistrate erred in law and in fact when he constructed, interpreted and even blamed the Appellants as the one in breach of a contract yet no evidence was adduced or at all.

    3. The entire judgment is contrary to known principles that courts should not import a meaning or imply terms to a hopeless transaction or a contract.

    4. The learned trial Magistrate failed to resolve and analyse the issues raised by the defence in respect of the conduct of the Plaintiff/Respondent and only relied heavily on the Plaintiff's version of evidence.

    5. The learned trial Magistrate made findings that were extraneous and contrary to the weight of evidence the Appellant provided.

    6. The dismissal of the Counter-Claim was erroneous and was as a result of the misapprehension of facts.

    7. The Appeal was admitted for hearing by this Court and parties took directions to canvass it by way of written submissions.

**Appellant's Submissions**

8. Counsel for the Appellant submitted on three issues: whether the learned trial magistrate erred in law and facts by holding that the goods were delivered; whether the Plaintiff proved their case on a balance of probabilities in light of the gaps and contradictions in their evidence; and who shall bear the costs.

9. On the first issue, Counsel submitted that Section 28 of the *Sale of Goods Act* requires that a seller bears the duty to deliver goods and the buyer has the responsibility to accept and pay for them, citing the case of Pramukh Cash and Carry Ltd vs. Charles Ojwang Milamba (2024) eKLR where the High Court in Siaya held that delivery should be proved by way of a delivery note. It was submitted that of the 7 delivery notes produced, two of them Nos. 161 and 171 were not signed and there was no acknowledgement of the impugned receipt by the Appellant or his authorized agent, that the Appellant did not provide reasons for why the said notes were not signed and the trial court did not address itself on this issue but instead misguided itself in holding that an invoice was proof of delivery which was erroneous as held in the Pramukh Cash and Carry case (supra).

10. On the second issue, it was submitted that courts are moved by concrete evidence and cannot base their decisions on mere speculations and that from the evidence on record, the Respondents did not deliver the goods because the people listed as having received the goods were not their mercantile agents but were strangers to them as shown by his list of employees. It was further submitted that the Respondent's driver Patrick Madasi at paragraphs 6 and 8 of his statement, contradicted himself when giving his testimony by stating that the delivery notes were received by a person called Mohammed and that despite this, the trial court still dismissed the same as mere contradictions occasioned by human error and loss of memory. Counsel submitted further that the delivery notes that were signed had been signed by Joel Shibu and F. Osundwa, who were strangers and not employees of the Appellant and yet only Rodgers Murunga (DW1), one of the Appellant's directors was authorized to receive goods at the construction site thereby proving that the said goods were never delivered to them.

11. On the last issue, it was submitted that despite having agreed that the goods would be delivered at Mukhaweli Primary School, the Respondents said that they also delivered goods at Lugari Health Centre as testified by PW3, Patrick Madasi the driver, a place that was never agreed upon as the Appellant did not even have a site there. Counsel cited Section 30 of the *Sale of Goods Act*, which provides that when the place of delivery had been stated in a contract of sale, the goods must be delivered at that named place and submitted that the Respondent's actions amounted to breach of contract for having delivered the goods to Lugari Health Centre.

12. It was the appellant's submissions that the Respondent's case left many gaps and had numerous contradictions, which led to the trial court making a decision based on speculations and assumptions, and yet they were substantial to the issues for determination in this case. The trial magistrate did not establish the facts of the case at hand as expected of a court of law and cited the Court of Appeal decision in Abbay Abubakar Haji vs. Morain Agencies & Another (1984) 4 KCA 53 to this end. Counsel urged the Court to set aside the judgment of the trial court and to substitute it with an order allowing the Counter-Claim with costs in the appeal and the trial court.

**Respondent's Submissions**

13. Counsel for the Respondent submitted that the main issue was whether there was a delivery of goods and stated that PW3, the Respondent's driver testified that he delivered the goods at the Lugari Health Center and Mukhaweli Primary School and the delivery notes were signed by the authorized foreman Joel Shibu whose phone number was given to him by his bosses, the Respondent's directors; that the Respondent raised invoices totalling to Kshs. 2,725,650/=; and that although deliveries were done, no payments were made and therefore the Court ought to dismiss the Appeal and allow the Respondent to recover his monies for the said goods.

## Analysis and Determination

14. The duty of an appellate court is to reconsider the evidence, evaluate it independently, and draw its own conclusions, although it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect. (See Gitobu Imanyara & 2 others V Attorney General (2016) eKLR).

15. Having considered the evidence adduced before the trial record, the grounds of appeal and the rival submissions of the parties, the main issue for my determination is whether the Appeal is merited. In determining so, the Court will consider whether the Respondent was paid for and delivered the goods in the oral contract entered into by the Appellant.

16. It was not in contention that the parties in this case entered into an oral contract for the supply of materials for construction in the sum of Kshs. 2,725,650/=. According to the Appellant, they agreed that he pays a deposit of Kshs. 1,000,000/= and the balance of Kshs. 1,725,650/= was to be paid later upon delivery. According to the Appellant, the Respondent later communicated that their directors had changed their mind and insisted that the balance be paid in full before they supply the materials. It was on this basis that they issued a post-dated cheque No. 000078 in the said sum dated 14th June 2013. The Appellant on the other hand contended that the post-dated cheque was not honoured despite them delivering the said materials and even after several requests, the Appellant did not pay the balance except when he sent his wife sometime in August 2013 to pay an amount of Kshs. 100,000/= according to Timothy Sudi PW2's testimony which amount was meant to offset the balance as testified by Mr. Dharmesh PW1's. However, according to the Appellant, the said amount of Kshs. 100,000/= was never paid to offset the balance, but was paid as transport costs to facilitate the delivery of the materials to the site, which they still failed to do.

17. The Court must therefore determine whether the Respondent delivered the goods as agreed by the Appellant and whether they produced cogent evidence in support of this.

18. The Respondent asserted in their evidence that they delivered the materials to two sites in Lugari and Mukhaweli Primary school and testified through the testimony of PW2 and PW3 that the goods were received by the Appellant's foremen, Joel Shibu and F. Osundwa, according to the delivery notes they produced as exhibits. Patrick Madasi PW3, who was the Respondent's driver, stated in his evidence that one Mohammed also received the goods on behalf of the Appellant at their site in Lugari for the construction of a dispensary and signed the delivery note on 17th May 2013. Notably, PW3 stated that the delivery site was for construction of a dispensary while the Appellant DW1 asserted that their construction project was at Mukhaweli Primary School and stated that the alleged foremen who received the goods and signed them were strangers to him because he was the only one authorized to receive goods and sign the delivery notes as he was always at the construction site.

19. The two conflicting accounts of where and to whom the goods were delivered can only be done by examining the provisions of the *Sale of Goods Act* as to rules on delivery of goods under Section 30 as follows: -

    30. Rules as to delivery

        1. Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied,

between the parties; and apart from any such contract, express or implied, the place of delivery is the seller's place of business, if he has one, and if not, his residence:

> Provided that if the contract is for the sale of specific goods which, to the knowledge of the parties when the contract is made, are in some other place, then that place is the place of delivery.

2. Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

3. Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until the third person acknowledges to the buyer that he holds the goods on his behalf:

> Provided that nothing in this section shall affect the operation of the issue or transfer of any document of title to goods.

4. Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour; and what is a reasonable hour is a question of fact.

5. Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.

20. I have examined the delivery notes adduced into evidence by the Respondent/Plaintiff as P.Exh 2 (a) to (g) and noted a couple of issues as follows:-

    a. For the Delivery Note No. 154 dated 16th May 2013 in respect of Invoice No. 98 of 14th May 2013 at page 10 of the Record of Appeal, the authorizing person is recorded as Mohammed whose signature was appended but the date of authorization was not indicated. The delivery was then received by F. Osundwa on 16th May 2013 and duly signed with the delivery place indicated as Lugari.

    b. The next Delivery Note No. 155 was authorized, signed and dated 17th May 2013 by Dharmesh, PW1 the Respondent's director herein and is received and signed by Joel Shibu on 17th May 2013. The vehicle used for delivery was indicated as Registration No. KAQ 200Z.

    c. The third Delivery Note No. 156 was similarly signed and dated 17th May 2013 by Dharmesh and goods were delivered via Motor vehicle registration No. KAU 138G and received and signed by Joel Shibu. The place of delivery is not indicated.

    d. The fourth Delivery Note No. 157 was signed and dated 17th May 2013 by Dharmesh. The goods were delivered via Motor vehicle registration No. KBA 800A and received and signed by Joel on the same date. The place of delivery is not indicated.

    e. The fifth Delivery Note No. 161 for binding wire was merely signed and dated 25th May 2013 but no name of the authorizing agent was indicated. There was also no name and date indicated under the recipient section save for a signature which looks like the one previously signed by Joel Shibu. No place of delivery is indicated either.

    f. The 6th delivery Note No. 165 was merely signed by the authorizing agent but the name of the said agent was not indicated. The date and recipient are indicated as 28th May 2013 and Joel respectively.

g. The 7th and final delivery note No. 171 adduced into evidence was authorized by Dharmesh PW1, signed and dated 5th June 2013 for the delivery of 580 pieces of Y-10 and was delivered by motor vehicle Registration No. KBA 800A but neither signed nor dated under the recipient section.

21. From my analysis of the above evidence, it is discernible that the delivery notes were neither consistent nor properly detailed in terms of who authorised the deliveries, who received them, when and how they were delivered. In particular, Delivery Note No. 171 was never signed by the recipient, which raises doubt as to whether the said goods were delivered at all. Indeed, PW1 conceded on cross-examination that he gave a delivery note to his driver but never signed it. This evidence in itself impugns the authenticity of the said delivery notes, alongside the fact that some of them were never even signed by the recipient or his authorised agents.

22. I have further considered the fact that only one of the delivery notes indicated the place of delivery being Lugari, which, according to the Appellant, was not a site for their construction. Noting that this case was instituted by the Respondent who was the Plaintiff in the trial court, it was incumbent on them to adduce sufficient evidence to demonstrate that the goods procured by the Appellant were to be delivered at a specific site at the point of entering into the contract and that they were actually delivered and received by the authorised agent(s) of the Appellant. As the facts stand, no evidence was adduced by the Respondent to prove that they were instructed to deliver the materials at Lugari as his witnesses testified or even that the said Joel Shibu and F. Osundwa were authorized agents of the Appellant.

23. I note that the Respondent was not diligent enough to indicate the place of delivery on the Delivery Notes. The import of this is that it raises more questions as to whether the goods paid for by the Appellant were duly received at the agreed places or not. In his evidence, PW1, Mr. Dharmesh, conceded that the delivery notes did not indicate where the materials were delivered and that his vehicle was Registered as. KAU 138G which from the evidence was only used to deliver materials indicated under Delivery Note No. 156. I noted that there were other deliveries made using other vehicles, Registration Nos. KBA 800A and KAQ 200Z, which did not belong to the Respondent. PW1 admitted on cross-examination that the said vehicles belonged to the supplier, which to my mind could only mean that the Respondent should have called the supplier as a witness or, at the very least, the supplier's drivers to confirm and testify where the two vehicles delivered the said goods. Failure to do so meant that the Respondent did not discharge their burden of proof on a balance of probabilities on the issue of delivery and receipt of the goods.

24. In arriving at this conclusion, I am cognizant of the principles stated by Rajah JA in Britestone Pte Ltd vs Smith & Associates Far East Ltd [2007] 4SLR (R)855 at 59 thus: -

> " The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him."

25. Sections 107 to 109 of the Evidence Act provide thus: -

Section 107 of the Act provides;

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 exists.

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.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

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 lie on any particular person.

26. To buttress the above legal provisions, the Court of Appeal in Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, held that: -

> " As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

27. My consideration of the evidence adduced by the Respondent in support of their case that the materials were indeed delivered but never paid for is that it was insufficient in discharging the burden of proof in this matter. If indeed the Respondent's version was anything to go by, then he ought to have produced proof of instructions of place of delivery by the Appellant at the point of entering into the contract for sale and proof of delivery at that same place, particularly where the delivery was done by the suppliers and not his company, as had become apparent from the evidence on record. The Respondent's assertions that goods were delivered and signed for by people whom they did not exercise due diligence to confirm whether they were rightful agents of the Appellant or not worked to their detriment.

28. At it appears, the Appellant's assertions that the delivery site was Mukhaweli Primary School and not any other place is more plausible as they went ahead and adduced evidence through the letter or Notice to Show Cause from Bungoma Municipal Council which made reference to Mukhaweli Primary School as the site for construction that had stalled. My view is that since this was the Respondent's case, they ought to have adduced cogent evidence to discharge their burden of proof on a balance of probabilities, which they failed to do.

29. In arriving at this conclusion, I place reliance on the case of Technical Equipment International Limited vs National Water Conservation & pipeline Corporation (2013) eKLR, where it was held that:-

> " ...In this case the alleged agreement is only evidenced by a delivery note which is not stamped by the Defendant and whose signatories are not clear, and which, in any event, is disputed by the Defendant. There is actually no valid document before the court. It is for the Plaintiff to discharge the burden of proof by providing substantial evidence to support its claim of Kshs. 7,174,000/= from the Defendant. It is trite law that he who alleges must prove. See Section 107 of the *Evidence Act* (Cap 80) Laws of Kenya. See also CMC Aviation LTD VS Crussair LTD (No. 1) [1978] KLR 103at page 104 where the Court stated that proof is the foundation of evidence..."

30. I have on the other hand considered the Appellant's case and the documents he produced in evidence to rebut the Respondent's case and to assert their case. I find that DW1's account of what transpired between the parties was more plausible than that of the Appellants' witnesses, for the fact that he remained consistent in this case throughout the trial. PW2, the Respondent's salesperson, stated in his evidence that the Appellant sent his wife to pay an additional Kshs. 100,000/= to offset the remaining

contract price balance of Kshs. 1,725,650/= and stated that the Delivery Notes were signed by one Mohammed and Joel. However, in his statement dated 24th March 2014, he stated that sometime in August 2014, he bumped into the Appellant's wife, who then paid them Kshs. 100,000/= as part settlement of the owing balance when the cheque bounced. PW1 Mr. Dharmesh on the other hand stated that the Delivery Notes were received by Joel and F. Osundwa and not Mohammed. I find these contradictions by the Plaintiff/Respondent's own witnesses material to their case because they speak to the core issues of delivery and payment.

31. Not only was it unclear on who exactly received the goods on behalf of the Appellant from the Respondent's own witnesses, the Court also finds it implausible that the amount paid in the sum of Kshs. 100,000/= was for offsetting the balance as they alleged. In other words, I find that the Appellant's assertion that the additional Kshs. 100,000/= was paid for transport costs as requested by the Respondent when he called them to follow up on why they had not delivered the goods truthful. This is because the same amount was paid on 15th July 2013 long after the post-dated cheque of Kshs. 1,725,650/= for the remaining balance had been issued on 14th June 2013, which could only mean it was for some additional service and not to offset a balance that had already been settled through the cheque. I stated so because from the evidence, it was apparent that by the time the Appellant was making this payment, the Respondent had already been paid the balance of the contract price in full, with the maturity of the cheque awaiting the delivery of the goods. PW1 testified that when he cashed the cheque, the same was dishonoured on 29th June 2013. There was therefore no possibility for him to cash a cheque for Kshs. 1,725,650/= on 29th July 2013 as payment of the balance price when he alleged that he had also received cash for Kshs. 100,000/= on 15th July 2013 to offset the same balance of Kshs. 1,725,650/=. It is clear that the sum of Kshs. 100,000/= could not have been for offsetting the balance but for transport costs as testified by the Appellant.

32. From the above, I find that the trial court erred in finding at paragraph 23 of the judgment as follows: -

> " ....The defendant's own conduct also undermined his narrative. It is not plausible that a contractor would pay a further 100,000/= to a seller who has already retained his 1,000,000/ = shillings and failed to deliver the goods. Rather the narrative by the Plaintiff's witnesses is more believable that they wanted to bank the post-dated cheque and the defendant was not in funds and therefore sent his director with a part payment. Indeed, this is shown as much by reducing the indebtedness by the said amount..."

33. In my view, the above analysis falls short of taking into account the timelines in the actions undertaken by the parties. This is because, by the time the Kshs. 100,000/= was being paid to the Respondent, the post-dated cheque had not yet been banked as shown by PW1's own evidence, in order to draw the conclusion that the Appellant had insufficient funds for the cheque to go through. The said cheque was banked only on 29th July 2013 by which time, the Kshs. 100,000/= had already been paid. Thus, this payment of Kshs. 100,000/= could not have been for offsetting the Appellant's indebtedness but must have been intended for some other additional service which as the Appellant testified, was for transportation costs.

34. Based on the foregoing, it is my finding that the Respondent entered into an oral contract for the supply of construction materials in the sum of Kshs. 2,725,650/=, which the Appellant paid him. 1,000,000/= upfront, and a further Kshs. 100,000/= was paid for transportation costs, and the Appellant issued them with a cheque of Kshs. 1,725,650/= as security for the balance of the contract price, but no construction materials were delivered as expected by the Appellant at his construction site in Makhaweli Primary School, in total breach of the contract for the sale of construction materials between the parties. In summary, the Appellant paid money, but goods were never delivered despite

numerous follow-ups, as demonstrated by the various correspondences adduced into evidence. He was therefore justified in cancelling the post-dated cheque and seeking a counterclaim in the sum of Kshs. 1,100,000/=

35. In the final analysis, I find that the Respondent did not prove his claim in the trial court on a balance of probabilities. I instead find that Appellant proved his Counter-Claim and therefore set the judgment and decree by the trial court aside and entered judgment in favour of the Appellant.

36. The Appeal is merited and is allowed. The claim by the Respondent for the sums of Kshs. 1,625,650/= is hereby dismissed, and the Appellant's counterclaim, which was duly proven, is therefore allowed in the sum of Kshs. 1,100,000/=. As costs follow the event as per Section 27 of the *Civil Procedure Act*, the Appellant shall have the costs of the suit in the trial court and this Appeal together with interests at court rates.

**DATED, SIGNED AND DELIVERED AT BUNGOMA ON THIS 24TH DAY OF JULY 2025.**

**R.E. OUGO**

**JUDGE**

In the presence of:

Mr. Sichangi - For the Appellant

Mr. Paul Juma h/b for Mr. Juma Waswa - For the Respondent

Wilkister C/A