Wakaba v Prosper Industries Limited (Civil Appeal 146 of 2023)
[2025] KEHC 12524 (KLR) (3 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12524 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL 146 OF 2023

RC RUTTO, J

SEPTEMBER 3, 2025

BETWEEN

JAMES MATHU WAKABA ..... APPELLANT

AND

PROSPER INDUSTRIES LIMITED ..... RESPONDENT

(Being an appeal from the judgment delivered by Hon. J.A Agonda (P.M) on 16th November 2022 in Ruiru SPMCC No. E046 of 2020)

JUDGMENT

1. This appeal arises from the judgment and decree entered in Ruiru Magistrates Court Civil Case No. E046 of 2020. The suit originated from a Plaint dated 11th December 2020, in which the Respondent sued the Appellant for allegedly failing to pay outstanding arrears amounting to Kshs.2,916,200. The claim was based on a mutual understanding between the parties for the supply of chicken layers.

2. In the Plaint, the Respondent sought, among other reliefs, an order for specific performance of the mutual agreement and a further order compelling the Appellant to pay the sum of Kshs.2,916,200, together with interest from the date the amount became due until payment in full.

3. In his response dated 9th February 2021, the Appellant admitted that the Respondent had supplied him with chicken feed, layers, complete meals, and chick mash, which he claimed to have paid for in full. He denied owing any outstanding debt specifically for the supply of chicken layers.

4. At the hearing, both parties testified and each called one additional witness. Upon evaluating the evidence presented, the trial court found in favor of the Respondent and entered judgment against the Appellant for the sum of Kshs.2,856,200, along with costs of the suit and interest at the court's rate from the date of judgment until payment in full.

5. Aggrieved by the decision of the trial court, the Appellant filed a Memorandum of Appeal dated 5th December 2022. The Appellant challenges the trial court's judgment on eleven grounds, asserting that the learned Magistrate erred both in law and fact by failing to consider the Appellant's defence, evidence, and submissions that raised triable issues. The Appellant further contends that the court improperly admitted and relied on the Respondent's invoices and statements of account despite notable discrepancies, and disregarded testimony and documents showing payment for goods upon delivery. Additionally, the Appellant argues that the court mischaracterized payments of Kshs.30,000 as settlement of arrears rather than payment for undelivered goods, effectively re-wrote the parties' agreement, and unfairly expected a former employee of the Respondent to possess official records. The Appellant also disputes the court's conclusion that the Respondent was not paid, despite evidence of full payment, and criticizes the judgment for containing general statements.

6. Based on the foregoing grounds, the Appellant prayed that the appeal be allowed with costs of the s appeal and of the suit in the subordinate court.

7. The appeal was heard by way of written submissions. The Appellant's submissions are dated 7th June 2024, while the Respondent's submissions are dated 1st July 2024.

Appellant's Submissions

8. The Appellant begins by outlining the background of the case before the trial court. He submits that the trial court failed to consider his submissions, documentary evidence, and cited authorities, ultimately arriving at an erroneous decision requiring him to pay the Respondent Kshs.2,916,200 plus interest and costs. He argues that this finding was made without proper evaluation of his evidence, contrary to the requirements of Order 21 of the Civil Procedure Rules.

9. In relation to Grounds 4, 5, and 6 of the Memorandum of Appeal, the Appellant contends that the trial court admitted into evidence statements of account that contained material discrepancies. Specifically, he points out that some invoices lacked signatures and were never received, yet the corresponding amounts were credited as arrears to his account. He further notes that certain invoices were signed by individuals unknown to him, a fact that was admitted by the Respondent during the hearing.

10. To support his argument, the Appellant cites Gas Kenya Limited v Amber Enterprises Limited [2020] eKLR, asserting that the Respondent failed to prove, on a balance of probabilities, how the total amount claimed was arrived at, given the inconsistencies in the supporting documents. He submits that the Respondent improperly shifted the burden of proof onto him by requiring him to identify individuals he did not know and to validate discrepancies, despite the burden of proof resting with the Respondent.

11. In addressing ground 7 of the Memorandum of Appeal, the Appellant submits that the trial Magistrate placed undue emphasis on a payment of Kshs.30,000 made to the Respondent, interpreting it as an admission of liability. He clarifies that the payment was made for a specific order that was to be delivered and was not related to the alleged arrears. He argues that the trial court's interpretation was erroneous and did not amount to an admission of the total claim. In support, he relies on Cannon Assurance (Kenya) Limited v Maina Mukoma [2018] eKLR.

12. The Appellant further submits that the trial court's judgment effectively re-wrote the agreement between the parties by relying on assumptions not reflected in the actual terms or obligations agreed upon. In support of this position, he cites South Nyanza Sugar Company Limited v Leonard O. Arera [2020] eKLR. Regarding Ground 9, he argues that the trial court failed to consider the testimony of his witness DW2. He contends that the court improperly expected DW2, a former employee of the

Respondent, to produce sales summaries for the relevant period, despite having left employment in October 2020. The Respondent, who was in possession of the documents, failed to produce them.

13. The Appellant submits that the trial court's disregard of DW2's testimony was prejudicial, as DW2 had firsthand knowledge of the business relationship between the parties and could have clarified key issues.

14. Lastly, the Appellant argues that the trial court erred in finding that the Respondent was an unpaid seller. He submits that despite conducting business with the Respondent for over five years, the Respondent had never exercised the rights of an unpaid seller. He further contends that the authenticity of the accounts, delivery notes, and invoices relied upon by the Respondent could not be verified or explained.

Respondents Submissions

15. The Respondent submitted that the Appellant had not specifically identified which paragraphs of his pleadings were allegedly disregarded by the trial court. It was argued that the matter proceeded to full trial, during which both parties were heard, and the court rightly placed greater weight on the oral testimony presented. The Respondent emphasized that pleadings alone do not constitute evidence unless the averments therein are supported by sworn testimony. In support of this position, reliance was placed on the case of CMC Aviation Ltd v Crusair Ltd (No. 1) [1987] KLR 103.

16. The Respondent further submitted that it had provided all necessary documentation, including forwarding the statement of accounts to the Appellant prior to filing the suit. Despite this, the Appellant declined to settle or reconcile the accounts. The Respondent argued that the Appellant should be estopped from denying liability, having made a partial payment of Kshs.30,000 towards the outstanding balance. It was also noted that both the Appellant and his witness admitted to receiving chicken feed from the Respondent. The Respondent contended that proof of payment is typically demonstrated through receipts, cheques, bank slips, or other material documentation, none of which were satisfactorily produced by the Appellant during trial. As such, the trial court was properly guided by the standard of proof on a balance of probabilities, and the Appellant's claim that he made full payment remained speculative. In support, the Respondent cited Wanjiru Gikonyo & 2 Others v National Assembly of Kenya & 4 Others [2016] eKLR.

17. Relying on Section 107 of the *Evidence Act*, the Respondent urged this Court to find that the trial court correctly analyzed the facts, identified the issues, and applied the appropriate standard of proof. The Respondent concluded by submitting that the appeal lacks merit and should be dismissed with costs.

Analysis and Determination

18. As this is a first appeal, this Court is guided by Section 78 of the *Civil Procedure Act*, which empowers it re-evaluate and reassess the evidence presented at trial and arrive at its own independent conclusions. It is well established that an appellate court is not bound by the findings of the trial court where it appears that the trial court failed to consider relevant circumstances or probabilities, or where its impression of a witness's demeanor is inconsistent with the overall evidence. This principle was clearly articulated by the Court of Appeal in Selle v Associated Motor Boat Company Ltd [1968] EA 123 and Peters v Sunday Post Limited [1985] EA 424.

19. Upon careful analysis of the record of appeal and the Appellant's submissions, key issue emerging for determination is whether the Respondent proved its case on a balance of probabilities.

20. The applicable legal framework on the burden of proof is found in Sections 107, 108, and 109 of the *Evidence Act*. In Mumbi M'Nabea v David M. Wachira [2016] eKLR, the Court of Appeal elaborated

on the standard of proof in civil claims as the balance of probabilities, meaning the court must determine which party's version of events is more likely to be true.

21. Section 107(1) of the *Evidence Act* places the legal burden of proof on the party asserting a fact, while Section 109 assigns the evidentiary burden to the person seeking the court's belief in a specific fact. The burden of proof may shift depending on who asserts a particular fact. See Maria Ciabaitaru M'mairanyi & Others v Blue Shield Insurance Co. Ltd, Civil Appeal No. 101 of 2000 [2005] 1 EA 280.

22. Accordingly, the duty of proving the averments contained in the plaint rested squarely on the Respondent.

23. The uncontested facts in this appeal are that the Appellant and the Respondent maintained a business relationship involving the supply of chicken feed. It is not in dispute that the Respondent fulfilled its obligation to supply chicken feed to the Appellant. The central issue in contention is whether the Appellant, who consistently received the supplies, has outstanding arrears amounting to Kshs.2,916,200/=.

24. During the hearing, PW1, a director of the Respondent, produced copies of invoices, a demand letter, and a statement of account for James Mathu Wakaba from Prosper Industries Limited. PW1 testified that the Appellant owed the Respondent Kshs.2,856,200/=, not Kshs2.916,200/=, as two cheques issued by the Appellant had been processed, thereby reducing the outstanding amount. Upon cross-examination, PW1 explained that the frequency of chicken feed purchases depended on the orders placed by the Appellant. He stated that the first invoice was issued on 27/6/2015 and the second on 11/8/2015, both of which remained unpaid. It also emerged during cross-examination that the Appellant disputed several invoices dated 23/4/2020, 27/5/2020, 20/5/2020, and 29/12/2017.

25. PW2, the Respondent's driver, testified that he delivered chicken feed to the Appellant and that no complaints were ever raised regarding incomplete deliveries. He confirmed that upon delivery, the recipient would sign both the delivery notes and the invoices.

26. DW1, the Appellant, produced a response to the demand letter dated 19/10/2020 and statements of payments made to the Respondent. He testified that his first payment was a cheque for Kshs.98,000/= against an invoice of Kshs.100,000/=, for which a credit note of Kshs.2,000/= was issued. DW1 stated that the payments were made in advance to secure future supplies of chicken feed and maintained that he did not owe Prosper Industries any money. He asserted that the cheques issued were intended to facilitate supply, not to settle any debt, and claimed that the feed was not delivered as agreed. DW1 also testified that he was not provided with statements of account and was informed by the Respondent's director that such statements would only be issued through a court order.

27. DW2, a former salesman at the Respondent's farm, testified that he delivered an advocate's letter to the Appellant and collected cheques from him, which he then delivered to the Respondent. However, DW2 admitted that he had no documentation confirming that the cheques were paid, nor could he verify whether they were issued for the supply of feed or to settle outstanding balances.

28. In summary, the Respondent's case is that the Appellant owes a sum of Kshs.2,856,200/=. To support this claim, the Respondent relied on statements of account and outstanding invoices to demonstrate how the balance was calculated. Conversely, the Appellant submitted his own statement of account to show payments made to the Respondent, disputing the alleged arrears.

29. The central question at this stage is whether the Respondent discharged its burden of proof. As previously established, the standard of proof in civil claims is on a balance of probabilities. The Respondent filed documents that, on initial review, appeared to demonstrate the existence of outstanding balances. However, during cross-examination, the Appellant scrutinized these

documents, raising concerns about their reliability and pointing out inconsistencies. For example, the Appellant questioned the invoices dated 29/12/2017, which were allegedly delivered twice, as reflected in the statement of account. Additionally, the Appellant highlighted an invoice listed without a corresponding delivery note, and further challenged the invoices dated 27/5/2020 and 20/5/2020, which lacked details such as the name of the delivery person and the vehicle used for transportation.

30. In response to these discrepancies, the Respondent's witnesses offered explanations that, upon evaluation, I find to be credible and satisfactory. PW1 testified that it was not unusual for deliveries to occur more than once on the same day, especially given the oral nature of the ordering process. Once an order was placed, deliveries would follow promptly. Furthermore, even where delivery documentation lacked specific details, such as the name of the delivery person, the Appellant's agents nonetheless accepted the goods and signed the delivery notes and invoices. This conduct by the Appellant supports the Respondent's assertion that deliveries were made and accepted without objection.

31. In light of the evidence presented and the explanations provided, I am satisfied that the Respondent proved its claim on a balance of probabilities. The documentary evidence, coupled with consistent witness testimony, establishes that the Appellant received supplies and that a substantial portion of the debt remains unpaid.

32. The Appellant referred this court to the decision in GAS Kenya Limited v Amber Enterprises Limited [2020] eKLR, a persuasive authority. In that case, the court emphasized the significance of unexplained discrepancies in documentary evidence and held that such inconsistencies undermined the respondent's ability to discharge its burden of proof. The court concluded that the trial court had erred by failing to address the evidentiary gaps, ultimately allowing the appeal and dismissing the respondent's claim.

33. While the GAS Kenya case (supra) involved similar issues regarding discrepancies in documentation, the present case is distinguishable. Here, the Respondent addressed the concerns raised by the Appellant and provided plausible explanations during the hearing. The delivery process, though informal, was corroborated by witness testimony and supported by signed delivery notes. Therefore, unlike in GAS Kenya, the discrepancies in this case do not diminish the evidential value of the Respondent's documents. Accordingly, I do not find it necessary to rely on the persuasive authority cited, as the Respondent has sufficiently discharged its burden of proof.

34. It is equally important to evaluate the Appellant's case. While the Appellant raised several assertions in his defence, he failed to substantiate them with credible evidence. Under Section 107 of the *Evidence Act*, the legal burden of proof lies with the party who asserts the existence of a fact. Therefore, to effectively challenge the Respondent's claim, the Appellant was required to provide evidence supporting his position on a balance of probabilities. He claimed to have made advance payments via cheques and, in Paragraph 7 of his defence, stated: "The Defendant avers further that he did some cheques and they have gone through. The rest are post-dated cheques yet Plaintiff saw it fit to file suit." These assertions, however, were not supported by any documentary evidence. The Appellant did not produce bank statements, copies of the cheques, or any other material proof to confirm that the payments were made and processed. In the absence of such evidence, the court cannot be expected to speculate or infer facts that have not been proven.

35. In view of the foregoing, I am satisfied that the learned trial Magistrate properly evaluated the evidence and arrived at a sound determination. The trial court's findings were based on credible testimony and documentary evidence presented by the Respondent, while the Appellant's defence remained largely unsubstantiated. I therefore find no basis to interfere with the judgment of the trial court.

36. Accordingly, I find that the appeal lacks merit and is hereby dismissed with costs awarded to the Respondent.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 3RD DAY OF SEPTEMBER, 2025.

RHODA RUTTO

JUDGE

In the presence of;

.....for Appellant

.....for Respondent

Selina Court Assistant