



**Kitui Flour Mills Limited v Kirimi & another (Civil Appeal  
E172 of 2023) [2024] KEHC 420 (KLR) (22 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 420 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E172 OF 2023  
EM MURIITHI, J  
JANUARY 22, 2024**

**BETWEEN**

**KITUI FLOUR MILLS LIMITED ..... APPELLANT**

**AND**

**MOSES KIRIMI ..... 1<sup>ST</sup> RESPONDENT**

**DAVEMWO BAKERY LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. L. W. Maina  
(RM) delivered on 3/10/2023 at Meru SCCCOM/ E299 of 2023)*

**JUDGMENT**

1. By an amended statement of claim dated 25/8/2023, the Appellant herein, the Claimant in the trial court, sued the Respondents herein, seeking the sum of Ksh.883,598, compensation and costs of the claim plus interest. The Claimant pleaded that on or about the 9<sup>th</sup> March 2023 at around 11.00 am, he received a call from one of the 2<sup>nd</sup> Respondent's director namely David Mwongera Mwikaria through telephone number 0722505568 ordering for 110 bags of 50 kgs each of Dola Home Baking Flour, 70 bags of 50 kgs of Dola home Bakers Flour, 30 bags of 10 kgs of Yellow Cooking star and 20 jerricans of 20 liters of Golden Drop cooking oil all amounting to Ksh.933,598. The goods were delivered to the Respondents on 10/3/2023 and 13/3/2023 together with an invoice for the amount owed. It was a term of the agreement that the amount would be due in 48 hours, but after the same remained unpaid despite several reminders, the matter was reported at the police station. It was then that the Respondents paid Ksh.50,000 only via their pay bill.
2. The Respondents herein, in their response to the claim dated 16/8/2023 denied ever taking goods on credit from the Claimant.



3. Upon full hearing of the claim, the trial court dismissed the Claimant's claim with costs to the Respondents.

### **The Appeal**

4. On appeal, the Appellant filed its memorandum of appeal dated 11/10/2023 raising 4 grounds as follows:
  1. The Learned Magistrate erred in law and fact by finding that the claimants did not prove their claim on a balance of probabilities.
  2. The Learned Magistrate erred in law and fact in finding that the claimants claim lacked merit contrary to the Law of Evidence.
  3. The Learned Magistrate erred in law and fact in finding that the claimants adduced inconsistent documents contrary to the evidence provided in court by the appellants.
  4. The Learned Magistrate did not look at the evidence on record in totality.

### **Submissions**

5. In its submissions filed on 18/12/2023, the Appellant urges that it proved its case on a balance of probabilities and cites *Evans Nyakwana v Cleophas Bwana Ongaro* [2015] eKLR, *William Kabogo Gitau v George Thuo & 2 Others* [2010] 1 KLR 526 and *Palace Investment Ltd v George Kariuki Mwenda & Another* [2015] eKLR. It urges that there was an oral agreement between itself and the Respondents for delivery of goods, and prays for the appeal to be allowed with costs.
6. The Respondents urge that the appeal herein does not meet the threshold intended under section 38 of the Small Claims Act that appeals to this court shall only be on matters of law and cite *Peter Gichuki Kingara v IEBC and 2 Others* [2014] eKLR, *Owners of Motor vessel "Lilian S" v Caltex Oil (Kenya) Ltd* [1989] KLR and *Mombasa Law Society v Attorney General & another* [2021] eKLR.

### **Duty of Court**

7. Usually, a first appellate court has duty to reevaluate the evidence and come up with its own independent finding bearing in mind that unlike the trial Court it did not have the benefit of taking evidence firsthand and observing the demeanor of the witnesses. The principles governing the first appellate court were set out *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123 where the Court stated as follows: -

“...An appeal to this court from the trial court is by way of retrial and the principles upon which the court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

8. The importance of minute consideration of the evidence in an appeal from a Small Claims Court is manifest from the provisions of section 38 (1) and (2) of the *Small Claims Court Act* No. 2 of 2016 that appeal lies to the High Court on a point of law and that the decision on is final, as follows:

“38. Appeals



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.”
9. It is trite that an appeal on a matter of law includes the inquiry whether the conclusions of the trial court are sound on the evidence availed before it and, therefore, with respect to counsel for the respondents, this involves the re-evaluation of the evidence. In the very decision cited by Counsel for the Respondents, *Peter Gichuki King'ara v IEBC & 2 Others* [2014] eKLR, the Court of Appeal (*Visram, Koome(as she then was) & Odek,JJ.A.*) where after considering the authorities held
- “Having established that we have jurisdiction to determine only issues of law as per the provisions of Section 85A of the *Elections Act*, to us the whole question of whether the trial Judge properly considered and evaluated the evidence and arrived at a correct determination that is supported by law and evidence with of course the usual caveat, that we did not see the witnesses demeanor is an issue of law.” [emphasis added]
10. Similarly, in *Stanley N Muriithi & another v Bernard Munene Ithiga* [2016] eKLR, the Court of Appeal (*Waki, Karanja & Kiage,JJ.A*) observed thus:
- “We hasten to observe, however, that failure on the part of the first appellate court to re-evaluate the evidence tendered before the trial court and as a result, arriving at the wrong conclusion is a point of law.”

## Evidence

11. CW1 James Kimathi adopted his witness statements recorded on 8/8/2023 and 25/8/2023 together with the lists of documents as his evidence in chief.
12. On cross examination, he stated that, “I did prepare my statements on 8<sup>th</sup> August, 2023 where as said I supplied goods on 10<sup>th</sup> March, 2023 my goods were delivered on 10<sup>th</sup> and 13<sup>th</sup> March, and invoice dated on 13<sup>th</sup> March, 2023. I did not issue a delivery note. Cex 4 is a delivery note. The invoice was generated by a computer (Cex 3). Delivery notes were written by hand. The 1<sup>st</sup> Respondent did call me (that is Moses Kirimi. In the invoice Cex3 the customer is known as a walk in customer. The customer reference is DEVMORE as a reference. A walk in client can be given at a consignment if only he/she has paid. Cex4 is an acknowledgement. The club name is Davmwo not Davemore and they did have an account with us and a delivery note with a reference number. In the delivery note (Cex8) it does not have a stamp of Devmwo Bakery. The delivery note is not computer generated as well. The delivery note does not show the company pin. There is no company pin on the delivery note. I have my statement of 25<sup>th</sup> August, 2023 it was Kshs. 50,000 paid by Jackline Mwenda on 1<sup>st</sup> May, 2023. I do have a CR12 for Davemwo but Jackline. I did not forge any documents at all. The mpesa statements are before the invoice we issue. I was the one dealing with them previously. Stephen is part of our witnesses.”
13. On re-examination, he stated that, “The invoice contains the customer details by a walk in customer. The customer number and reference is the customer. The customer referee is system generated. The customer was our customer though their town account and they failed to pay and they passed the credit limit and we closed their account. We did not invoice the Respondent through their account but a new on as used a name close to the one of “Devemwo” before “Devmore” because Damwo was



closed. The invoice are accompanied by delivery notes. The invoice was received by Moses Kirimi by the time he signed the invoice the goods were received. This delivery note Cex 8 just show the quantity and particulars of the goods. We don't put the pin on delivery notes but in the invoice. The delivery notes are generated either via system or manual. We generated a manual delivery note because it was late. Jackline Mwenda was a person employed by Devemwo who would make payments. The goods we delivered at Devemwo. The mpesa statement are on amounts prior to the invoices as it over one million shillings.”

14. CW2 Stephen Mukaria, the Claimant's accountant adopted his witness statement dated 8/9/2023 as his evidence in chief.
15. On cross examination, he stated that, “I am an accountant at Kitui Flour Millers where I have been since 2020. I do know the respondents herein, they were customers from 2020 to date. I do account with the Claimant. I have not produced a letter to show late payments in court. David Mwongera was the one who called on behalf of the company. And we did make deliveries. I am sure David called James. The delivery notes are prepared by me together with invoice. Anyone who claims to be the maker apart from me would be lying. An invoice is prepared together with a delivery note. Delivery note is done. Invoice is prepared when goods are being delivered. The respondent had been blacklisted hence they would not have made an order via DAVEMWO. We issue invoice in the names of a walk in customer on both invoices. The delivery note is not signed by the Respondent.”
16. On re-examination, he stated that, “The invoice are generated once someone makes an order if the system is not working we can prepare manual deliveries. Kirimi signed for the goods via. He did make a phone call. An invoice is generated once goods have gone to the customers. The customer is walk in customer who was blacklisted. A customer reference does not mean anything. The customer reference are different because they are system generated.”
17. RW1 Moses Kirimi, an employee of DevmwoCompany adopted his statement dated 5/9/2023 together with the documents filed therewith as his evidence in chief.
18. On cross examination, he stated that, “There is no company by the name DEVMORE but there is a company by the name Devmwowhich I work for. Cex3 - I am not the one who read the said documents. I have never reported that, that is not my signature. I am an accountant at the Respondents and I came to my company. I normally give a quotation and one it is delivered I gave my delivery notes and invoice. The invoice does not come with the delivery note. Davemwo has not instructed me to request them. I have never had any problem with Kitui Flour Millers. I don't know what issues the company has with Davemwo. I would get packages from Kitui Millers. I don't know what debts Davemwohad with the claimant. I don't know anyone by the name Jackline. She is not an employee of the company and I don't have issues with Jackline. Davemwohas two directors Mwoyira and another called Jennifer. I don't know of any problems of payments or payments by Jennifer or Jackline. I have not carried my identity with me. The signature is not mine in the invoices the signature in my statement was signed by me. The signature in my statement mine and so is the one in the Identity Card is also mine.”
19. On re-examination, he stated that, “The signature is Cex 4 (specimen acknowledgement is not mine. The one in the invoice Cex 3 is also not mine. I don't know Jennifer. She is a Director or Davemwobut I don't know about the payments of debts. I don't have a letter of authority but I am a respondent who has been sued in person. I don't know internal issues. I don't know Jackline or any money paid by her. I have never reported my forged signature.”
20. RW2 David Mwongera, a businessman and the owner of Davemo Bakery Limited adopted his witness statements recorded on 5<sup>th</sup> and 14<sup>th</sup> of September 2023 as his evidence in chief.



21. On cross examination, he stated that, "I am a director of DAEMWO Bakers and we are two directors for the company. I have not produced any board resolution/letter of authority. I have never dealt with Kitui Flour Millers in the said transaction in question (c). In the running account Cex 7 there is no Davemwo Company Limited and I don't know the people who have paid them. I have before conducted business with Kitui Flour Millers and I stopped working with them. I have never taken a debt with Kitui Flour Millers. I did not receive any documents from the DPP. The company is in Maua. Indeed and I did go to the CID Department. CID did not write the letter or DPP. I don't know of the said letter or contents therein. I have never seen the said letter (Cex5) and I have never complained about the said letter or contents thereto. The contents of the letter are falsehoods and I am yet to complain about the said contents. If we have an agreement then there is an agreement. We do just issue the bread but if you are new we give. An invoice can only be issued at the point of delivery. I know Moses Kirimi. He is my Accountant. I don't know if he had any invoice from me. The PIN in the invoice (Cex 3) is not me. The PIN is in my invoice (Dex 3 and 4) my pin is P0006248068. I was never a walk in customer. I don't know about the DCI charges. I don't recall any documents that I was shown that day. I don't know about Kshs. 50,000 being paid by any person. I don't know the proceedings after DPP."
22. On re-examination, he stated that, "I don't know about the DPP or letter from DPP or the contents therein. They never sent me with it. I don't know about any payments as alleged by the DPP. If there is a case against me I am ready to defend myself. I did go to CID but I don't recall about any documents that they gave me. I have never gone to ODPP. Dex 3 and 4 the Pin does appear being P051422304L Kitui is P000602486X. The pin shown to me in cross examination is that of the Claimant and in the claimant's documents (Dex 3) no Pin appears. In a shop one buys cash and leave with the goods. A walk in is a customer who pays cash. I know Moses Kirimi. I don't know his signatures. I had done business with Kitui Flour Millers before. I did not enter a credit agreement with the claimant before. DAVEMWO does not appear anywhere in but I paid once in page 3 and when I paid earlier. The documents just show cash payments. (Cex 5). I am the director of the company DAVEMWO. I did go to the DCI and I did not write a statement they just questioned me."

### **Determination**

23. The gist of this appeal, as can be deciphered from the 4 grounds of appeal is that the Adjudicator failed properly to evaluate the evidence presented before her discretion, and arrived at conclusion that the appellant had not proved its claim against the Respondents and, consequently, dismissing the Appellant's claim.
24. On cross examination, CW1 stated that, "I did not issue a delivery note. Cex 4 is a delivery note. The invoice was generated by a computer (Cex 3). Delivery notes were written by hand...In the invoice Cex3 the customer is known as a walk in customer. The customer reference is DEVMORE as a reference. A walk in client can be given at a consignment if only he/she has paid...The club name is DAVMWO not DAVEMORE and they did have an account with us and a delivery note with a reference number. In the delivery note (Cex8) it does not have a stamp of Devmwo Bakery. The delivery note is not computer generated as well. The delivery note does not show the company pin. There is no company pin on the delivery note." On re-examination, he stated that, "...The customer was our customer though their town account and they failed to pay and they passed the credit limit and we closed their account. We did not invoice the Respondent though their account but a new one as used a name close to the one of "Devemwo" before "Devmore" because Damwo was closed. The invoice are accompanied by delivery notes. The invoice was received by Moses Kirimi by the time he signed the invoice the goods were received."



25. CW2 testified that although the 2<sup>nd</sup> Respondent had an account with the Appellant, it could not make an order via that account because it was blacklisted due to past late payments. That is why the details of the 2<sup>nd</sup> Respondent are captured in the 2 invoices as a ‘walk in customer’ and the customer reference as ‘DEVMORE’. He confirmed on cross examination that, “The delivery note is not signed by the Respondent.”
26. RW1 affirmed that he did not append his signature on the alleged delivery note adduced by the Appellant. RW2 admitted having previously conducted business with the Appellant but vehemently denied ever entering into any credit agreement with it. According to him, a walk in customer is the one who pays in cash. The claimant himself CW1 on cross-examination admitted that “A walk in client can be given at a consignment if only he/she has paid.”
27. As shown by the invoices adduced in evidence, the name “DEVMORE” that appears therein is certainly distinct from that of the 2<sup>nd</sup> Respondent. If the name was coined to circumvent its own blacklisting computer system, the appellant is seeking to benefit from its own wrong-doing. It is the Appellant’s own admission that the delivery note was not signed by the Respondents. So where is the proof of receipt of the deliveries, when the same is denied and Claimant therefore put to strict proof?
28. If the Appellant treated the defendant as a walk-in customer on account of previous blacklisting for failure to pay, it is improbable that the appellant would have accepted to deliver the goods on credit. The 2<sup>nd</sup> Respondent as a walk-in customer ought to have paid for the supplies in cash; and if there were any deliveries, there ought to have been an acknowledgment of receipt of the delivery by a signed Delivery Note.
29. On a balance of probability, this court finds that the evidence before the court did not support a finding that it is more probable than not that the Appellant did supply goods to the Respondents on the material time.

#### **Order**

30. Accordingly, for the reasons set out above, this court finds that the appeal is without merit and it is dismissed with costs to the Respondents.

Order accordingly.

**DATED AND DELIVERED THIS 22ND DAY OF JANUARY, 2024.**

**EDWARD M. MURIITHI**

**JUDGE**

**APPEARANCES:**

**M/S Selina Musungu & Co Advocates for the Appellant.**

**M/S Namachanja Wambulwa for the Respondent**

