



**Pramukh Cash and Carry Limited v Charles Ojwang Milamba t/a Milamba Stores
(Civil Appeal E053 of 2022) [2024] KEHC 1340 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1340 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL APPEAL E053 OF 2022
DO OGEMBO, J
FEBRUARY 15, 2024**

BETWEEN

PRAMUKH CASH AND CARRY LIMITED APPELLANT

AND

CHARLES OJWANG MILAMBA T/A MILAMBA STORES DEFENDANT

*(Being an appeal arising from the Judgment of the Hon. J.P. Nandi,
PM in Bondo PMCC No. E33 of 2022 delivered on 4th November 2022)*

JUDGMENT

1. The appellant was sued by the Respondent for a sum of Kshs. 941, 605/= plus interest at 14% p.a from 9-7-2016 till payment in full and costs of the suit. In a judgment of the court delivered on 4-11-2022, the appellant was wholly dismissed.
2. Aggrieved, the appellant has filed an appeal against the judgment of the court. The Memorandum of appeal filed herein and dated 15-11-2022 lists the following grounds: -
 1. That the learned trial magistrate erred in law and fact by making a finding that there were no goods delivered to the Respondent on 9-7-2016 by the appellant.
 2. That the learned trial magistrate erred in law and fact by making a finding that he amount owed to the appellant could not have been determined without a credit note.
 3. THAT the learned trial magistrate erred in law and in fact by holding that there were underhand dealings involving the Respondent employees on the supply of goods that were done by the appellant.



4. That the learned trial magistrate erred in law and fact by making a finding that the Respondent could not make payments because there was no delivery note or LPO to support the order.
5. That the learned trial magistrate erred in law and in fact by making a finding that the appellant did not disclose how the Respondent requested for the goods to be supplied since there was no LPO produced.
6. That the learned trial magistrate erred in law and fact by making a finding that there was no delivery note or evidence of receipt of goods by the Respondent.
7. That the learned trial magistrate erred in law and in fact by failing to find that the Respondent had made part payment of Kshs. 10,000/= for the goods that were supplied by the appellant.
8. That the learned trial magistrate erred in law and fact by failing to find that the Respondent admitted that the goods were supplied but could not pay due to the problems caused by his employees.
9. That the learned trial magistrate erred in law and fact by failing to properly analyse the evidence and submission by the appellant hence arriving at a wrong decision.
10. That the learned trial magistrate erred in fact and law by making a finding that the Respondent could only make a payment for the goods supplied when there was a delivery note and LPO when there was no evidence of such contact, express or implied.
11. That the learned trial magistrate erred in law and fact by failing to find that the Respondent had admitted that the goods were received and invoices signed by his employees who have since left employment.
12. That the learned trial magistrate erred in law and fact by failing to find that the documents produced by the appellant showed that the goods were received stamped and signed by the Respondent and his/her employees.
13. That the learned trial magistrate erred in law and fact by making a finding that the appellant witness, PW2 was not a credible witness.
14. That the learned trial magistrate erred in law and in fact by arriving at a decision which was against the weight of the evidence in court.

2. The appellant prays that the judgment and decree of the trial court be set aside and that the appellant's prayers contained in the amended plaint dated 20-9-2021 be allowed. The appellant also prays for costs of the case before the lower court and also of this appeal. This appeal is opposed.

This appeal was canvassed by way of written submissions.

3. In the submissions of the appellant, it was submitted that on credibility of PW2, the said witness confirmed that as the driver he delivered the said goods and that Respondent and his workers confirmed and signed for same (paragraph 50). That this confirms that the goods were supplied and received, and that the invoices (Exh 1 + 04) showed that same were received in good condition and quantity. It was also noted that there was no evidence that some goods were returned and so the issue of credit note



did not arise. That delivery notes were not a requirement between the parties in their business and that the invoices was evidence of delivery.

4. That the Respondent confirmed that the goods were received by employees who had left employment. Relying on *Japheth M. Wepukhulu Vs Fred Simiyu* [2020]eKLR, it was noted that the standard of proof was on a balance of probabilities, which the appellant met by the evidence of PW2 who delivered the goods.
5. Counsel also submitted that the invoices submitted showed 160,800/= and 790,805/=, totaling 951,605/=, and already paid of 10,000/= leaving a balance of 941,605/=. And if some goods were returned, it can only mean then delivery was done.
6. Further, that there was no proof of any underhand deals involving employees. Counsel distinguished the situation with that in *E.P. Communications Ltd Vs E.A. Courier Services Ltd* [2019]eKLR, in that in that case, there was no proof of delivery and that in the present case, the Respondent admitted that the goods were delivered. And that in any case, the Respondent did not produce any contract or any previous delivery note. Regarding the part payment of Kshs. 10,000/=, it was submitted that the evidence was on the paybill statement produced by PW1.
7. The Respondent on the other hand, submitted that the 2 issues for determination are whether the appellant proved on a balance of probabilities that he delivered the good listed in invoice numbers 57476 and 57477, and whether the appellant proved that the Kshs. 10,000/= was part payment of the goods allegedly delivered to the Respondent.
8. That the appellant produced invoices showing it delivered goods worth Kshs. 951,605/= to the Respondent. That the 2 had a long standing business relationship.
9. That the testimony of the Respondent he would personally record the delivery notes accompanying the invoices and make payments 5 days after delivery and that without delivery notes, he could not ascertain if the goods were supplied to effect payment. That the appellant never showed any local purchase order received regarding the goods listed on the invoices, nor any delivery notes to show that the Respondent received the said goods.
10. Counsel relied on the case of *E.P. Communications Ltd -Vs- E.A. Courier services Ltd* [2019]eKLR in which the Hon. Justice F. Gikonyo held in part;

“The purpose of an invoice is that it is issued by a seller to request for payment for purchase. An LPO is sent by a purchaser to the seller to confirm, order and authorize the purchase. A delivery note is proof of delivery of good.”
11. That payments were only due to the appellant once delivery notes reached him, and without delivery notes, the Respondents would not ascertain if indeed the goods were supplied to him. That delivery notes were the only confirmation of goods received. Further, that even in the delivery notes produced, some items were marked as undelivered and in the evidence of PW1, credit notes would be issued. In this case, no such credit notes were shown.
12. It was further submitted that the appellant even failed to prove who received the invoices at the Respondent’s store. And that even PW2 who allegedly delivered the goods gave 3 different accounts of who received the invoices. First, saying the Respondent and on cross-examination saying he was not sure. And on re-examination, saying it was Respondent’s sister. That the appellant even failed to sufficiently prove the fact of whether the Respondent received the goods listed on the invoice.



13. On the issue of Kshs. 10,000/= as part payment, the Respondent denied same and put the appellant to strict proof.
14. The Respondent held that the appellant failed to prove his case on a balance of probabilities and urged that this appeal be dismissed.
15. This court is seized of this matter as a first appellate court. The jurisdiction of the first appellate court is well settled. In the celebrated case of *Selle and Another -Vs- Associated Motor Boat Co. Ltd and Others* (1968) EA 123, it was held by the Court of Appeal that it is to re-evaluate, re-assess and reconsider the evidence adduced and to come up with its own conclusions bearing in mind that the appellate court did not have the opportunity to hear the witnesses testify in the first instance, before the subordinate court. It is therefore imperative that this court considers the whole evidence and to arrive at its own conclusions.
16. From the record of proceedings, the case of the Plaintiff (appellant) commenced with the evidence of PW1, Kaushik P. Patel, a director of the Plaintiff company. He adopted his statement dated 21-12-2020 as his evidence. In the said statement, he had stated that the Plaintiff is a distributor of Pwani Oil Products and that on 9-7-2016, the Defendant ordered on credit for first moving consumer goods from the Plaintiff and same were supplied to the Defendant who acknowledge receipt of same by signing.
17. That first supply was of 790,805 as listed on invoice No. 57476 dated 9-7-2016, while the 2nd was of Kshs. 160,800/= as per invoice No. 57477, making a total of Kshs. 951,605/=. He went on that on 10-5-2018, the Defendant made a payment of Kshs. 10,000/= leaving a balance of Kshs. 941,605/= which was to be paid in 5 days after delivery.
18. On cross examination, he confirmed that they had done business for 10 years and never had problems before 2016. That 3 goods were not supplied. That the owner of the goods could sign and if he is absent then his agent can sign. He did not produce the pay bill showing the payments.
19. PW2 was Rama Wesonga Said, whose evidence was that he is a driver with the Plaintiff company. His testimony was also based on his record statement that on 9-7-2016 he delivered items to the Respondent's stores in Bondo. That the customer signed the invoices confirming delivery and left the customer with his copy. He said on cross examination that he was not present when the invoice was signed by the customer. He later said that there is a lady who confirmed and took the invoice and signed the same on re-examination.
20. The Defence witness, DW1 was Charles Ojwang Milamba. He also adopted his signed statement as evidence. In the statement, he had recorded that the appellant would supply him with prices on credit. That the terms of credit were that upon delivery of the goods, invoices would be raised and payments made. He denied the supplies of 9-7-2016 amounting to Kshs. 941,605/=. That in their agreement, there would be valid Local Purchase Order and Delivery notes duly acknowledged and invoices. He suspected a conspiracy between the Plaintiff and some of his former employees to defraud him.
21. In his evidence, he would personally record the delivery notes. That the invoice dated 9-7-2016 did not have any delivery notes and the signature on the same is not his and that since there is no evidence that he received the goods, he is not supposed to pay. That they ought to have received the delivery note first before paying the invoice. He also denied paying the Kshs. 10,000/= nor knowing who Otieno was.



22. This is basically is the evidence that was tendered by the 2 parties before the trial court. The *Evidence Act*, Cap 80, gives guidance on the issue of the burden of proof. 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.
23. And at Section 108 of the Act;
- “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.”
24. And finally, Section 109 of the Act, provides;
- “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.”
25. In this case, it is the plaintiff who claims a sum of Kshs. 951,605/= being a sum unpaid for goods delivered by the Plaintiff (appellant) to the Respondent. It is therefore the burden of the Plaintiff to prove that indeed the Respondent owe him the alleged sum. And the standard of proof required of the appellant is that of on a balance of probabilities.
26. Obviously, this 2 parties had a long standing contract of supply. This contract seem to have worked well between the parties until this issue came up. The Plaintiff/appellant demands payment for goods delivered and not paid for. The Plaintiff, case is based on 2 signed invoices as proof that the said goods were delivered and received by the Respondent. The Respondent, on the other hand, denies receipt on the alleged goods and that the sum claimed by the Respondent is not payable.
27. Being a contract of supply of goods first and foremost, it is incumbent upon the appellant to prove that the goods were delivered and received by the Respondent. Such delivery would ordinarily be proved by way of a delivery note which would show the goods delivered and received. The appellant herein has not shown any such delivery note. It is therefore not shown by way of evidence who received and signed for the goods.
28. An invoice on the other hand, is not proof of delivery and receipt of goods, but rather a demand for payment for goods alleged to have been delivered. This means that an invoice comes at the tail end of the transaction.
29. It is raised after the goods have been delivered and received and it is time for payment for the same. The appellant herein has only exhibited the 2 invoices in its claim for payment. No delivery note for the goods have been shown. The witness of the appellant (PW2) who claims to have been the one who delivered the goods to the Defendant/Respondent also gave a rather incoherent evidence. In his evidence in chief, he stated that he delivered the goods to the Defendant and left the customer with his copy. He makes no mention of his own copy of the delivery note. He even states that the customer signed for the goods. He however shows no evidence of the same. He goes onto say that even for the invoice, he was not present when the same was signed. His story changed to saying that a lady took the invoice and signed the same and that a signed invoice was handed over to him.



30. The Hon. Justice F. Gikonyo, faced with a similar situation in the case of E.P. Communications Ltd - Vs- East Africa Courier Services Ltd [2019]eKLR, and quoting from Alfred Ndogi Mata -Vs- Hellen Siemeko Adede [2005] eKLR cited by the Respondent, observed;

“The evidence show that a business relationship existed between the parties herein. There is also evidence that, goods were supplied to the Respondent during the business relationship on credit. However, 2 issues abound. Were the goods alleged to have been supplied actually supplied and received? And for the goods supplied and delivered, were they paid for by the Respondent?

The appellant produced invoices, LPOs and delivery notes. The purpose of an invoice is that it is issued by a seller to request for payment for purchase. An LPO is sent by Purchaser to the Seller to confirm, order and authorize the purchase. A delivery note is proof of delivery of goods.....”

31. I align myself absolutely with the above finding. In a contract of supply such as this, the appellant, being the supplier ought to have produced the relevant LPO’s (evidence of PW1) to confirm the order made by the Respondent. He ought to have also shown the delivery notes to show the actual goods delivered. He exhibited neither of these in evidence and also gave no explanation on the failure to do so. As the supplier and party to these contracts, these documents must have been retained by him for every supply and failure to produce or show them can only dent the claim of the appellant that the goods where delivered and received. And showing the invoices alone, which only are proof of demand for payment, cannot in any way fill the void left by failure to exhibit the relevant LPO’s and Delivery notes.
32. As to the admitted payment of the sum of Kshs. 10,000/=, again was their proof that the same was part payment for these deliveries? Absolutely none. The court takes note of the fact that the 2 parties had long standing business relationship. Obviously, many payments must have been made for the many transaction. In the absence of any evidence to show that the Kshs. 10,000/= was in fact part payment for these 2 contested deliveries, this court is unable to reach a conclusion that indeed they were. This claim therefore, unproven as it is, fails.
33. In view of the above observations, I am not convinced that the appellant (Plaintiff) has proved its case on a balance of probabilities against the Respondent as required by the law. This appeal therefore fails and is dismissed with costs.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 15TH DAY OF FEBRUARY, 2024.

D.O. OGEMBO

JUDGE

15.2.2024

Court:

Judgment read out in the presence of Mr. Onyango for Appellant and Osewe for Respondent is absent.

D.O. OGEMBO

JUDGE

15. 2.2024

Mr. Onyango:

We pray for 30 days stay.



D.O. OGEMBO

JUDGE

15.2.2024

Court:

Stay of execution ordered for 30 days.

D.O. OGEMBO

JUDGE

15.2.2024

