Cool Joint Electronics Ltd v B.S. Mohindra & Co. (K) Ltd (Civil Appeal 279 of 2019 & 670 of 2017 (Consolidated)) [2024] KEHC 4612 (KLR) (Civ) (6 May 2024) (Judgment)

Neutral citation: [2024] KEHC 4612 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 279 OF 2019 & 670 OF 2017 (CONSOLIDATED)

CW MEOLI, J

MAY 6, 2024

BETWEEN

COOL JOINT ELECTRONICS LTD ..... APPELLANT

AND

B.S. MOHINDRA & CO. (K) LTD ..... RESPONDENT

AS CONSOLIDATED WITH

CIVIL APPEAL 670 OF 2017

BETWEEN

COOL JOINT ELECTRONICS LTD ..... APPELLANT

AND

B.S. MOHINDRA & CO. (K) LTD ..... RESPONDENT

(Being an Appeal from the Ruling of Hon. E. Wanjala (SRM) delivered on 23rd May, 2019 in Milimani CMCC No. 3230 of 2006)

JUDGMENT

1. Two consolidated appeals are before the court for determination. HCCA No. 670 of 2017 (the first appeal) and HCCA No. 279 of 2019 (the second appeal), were consolidated pursuant to directions given by the court on 25th September, 2023. The consolidated appeals arise from the same suit, namely Milimani CMCC No. 3230 of 2006. The first appeal emanates from the judgment delivered on 9th

November 2017 whereas the second appeal resulted from the ruling subsequently delivered by the same court on 23rd May, 2019.

2. The suit in the lower court was brought by B.S. Mohindra & Co. (K) Ltd the plaintiff in the lower court (hereafter the Respondent) by way of the plaint dated 6th April 2006, against Cool Joint Electronics Ltd, the defendant in the lower court (hereafter the Appellant). The claim was for the sum of Kshs. 1,427,849.10 arising from alleged breach of contract in respect of supply of electronic goods.

3. It was pleaded in the plaint that sometime on or before the trading period ending 30th April, 2005 the Respondent sold and delivered an assortment of electronic goods to the Appellant upon its request. It was further pleaded that subsequently, the Appellant issued a total of seven (7) cheques to the Respondent as payment thereon, but which cheques were dishonoured upon presentation for payment. That in the process, the Respondent incurred surcharge costs in the sum of Kshs. 3,500/- on all the returned cheques. The Respondent claimed against the Appellant the outstanding balance on the delivered goods together with compensation for the surcharged costs.

4. On being served with summons, the Appellant entered appearance and filed the statement of defence dated 8th May, 2006 denying the key averments in the plaint and liability. The Appellant stated that the cheques issued constituted holding cheques intended to be exchanged for cash. That the Respondent retained the cheques at all material times.

5. The suit proceeded to full hearing during which the Respondent and the Appellant each called one (1) witness. By a judgment delivered on 9th November, 2017 the trial court awarded the Respondent the sum of Kshs.1,087,349.10 together with bank charges in the sum of Kshs. 3,500/- as against the Appellant.

6. Thereafter, the Appellant filed the Notice of Motion dated 11th April, 2019 (the Motion) seeking to set aside the warrants of attachment of movable property as well as the execution proceedings commenced by the Respondent. The Appellant further sought an order to compel the Respondent to meet the auctioneer's costs arising from the said execution process. The Motion was opposed by the Respondent.

7. Upon hearing the parties thereon, the trial court by way of the ruling delivered on 23rd May, 2019 allowed the Motion and consequently ordered for the issuance of fresh warrants of attachment and sale, taking into account the sums already paid by the Appellant to the Respondent, on the decree.

8. Aggrieved with both the judgment and ruling above, the Appellant filed the consolidated appeals.

9. The appeal first filed was against the trial court's judgment, was premised on the following grounds, per the memorandum of appeal dated 4th December, 2017:

> " 1. That the Learned Magistrate erred in law and fact in failing to find that the respondent had not proved its claim on a balance of probabilities as required by Section 107 of the *Evidence Act* Cap. 80 of the Laws of Kenya.
>
> 2. That the Learned Magistrate erred in law and fact in failing to find that the respondent failed to lead direct evidence to prove its claim as required by Section 63 of the *Evidence Act* Cap. 80 of the Laws of Kenya.
>
> 3. That the Learned Magistrate erred in law and fact in failing to find that the failure to call Mr. Das as a witness to the case militated against proof of the respondent's case and the provisions of section 119 of the *Evidence Act* Cap.

80 of the Laws of Kenya ought to have been invoked in dismissing the suit for want of proof.

4. That the Learned Magistrate erred in law and fact in failing to find that the respondent did not lead evidence to prove the supply and delivery of goods to the appellant as required by law.

5. That the Learned Magistrate erred in law and fact in failing to find that the suit would invoke the taking of accounts between the parties of which she had no jurisdiction to do so as the same would invoke an expert accountant in-accordance with settled law.

6. That the Learned Magistrate erred in law and fact in failing to find that the respondent's witness had no authority to testify or act for the respondent in terms of order 9 rule 2(c) of the Civil Procedure Rules 2010 and in failing to dismiss the case for want of proof.

7. That the Learned Magistrate erred in law and fact in failing to find that the appellant had made payments of sh. 50,000 on 25/6/2015 to the respondent as evidenced by a bank slip that was not taken into account and sh. 151,363 on 28/6/2017 to the respondent's advocates which was not taken into account.

8. That the Learned Magistrate erred in law and fact in failing to find that the respondent had in its account included a debt of sh. 317,162.28 that belonged to Malde Drapers while the appellant was a body corporate with capacity to sue and be sued in its own name and enter into contracts and become liable in its own name.

9. That the Learned Magistrate erred in law and fact in awarding costs and interest against the appellant." (sic)

10. In the second appeal, the Appellant filed the memorandum of appeal dated 24th May, 2019 to challenge the impugned ruling, on the grounds hereunder:

"1. That the Learned Magistrate erred in law and fact in failing to find that the judgment of the court having been silent as to the rate of interest applicable and based on section 26(2) of the *Civil Procedure Act* Cap. 21 the court was deemed to have ordered interest at 6% p.a. on the principal sum.

2. That the Learned Magistrate erred in law and fact in failing to find that the execution by the respondent was premature and irregular as the judgment in the matter was more than one year old but and the respondent had not prior to proceeding to instruct the auctioneer issued a notice to show cause to the appellant as required by order 22 rule 18 of the Civil Procedure Rules, 2010 and the court further erred in ordering fresh warrants of attachment and sale to be taken in disregard of the said provision.

3. That the Learned Magistrate erred in law and fact in failing to find that the respondent having commenced flawed execution and the court having so found in setting aside the execution it should have been ordered to meet the costs of execution due if any to the auctioneer and to pay the appellant the costs of the application as costs follow the event based on Section 27 of the *Civil Procedure Act*, Cap. 21.

4. That the Learned Magistrate erred in law and fact in failing to find that the respondent's advocate had been paid sh. 151,363 on 28/6/2018 ; sh. 50,000 paid to the respondent on 25/6/2013 and sh. 317,164 had been wrongly included in the appellant's account while the same belonged to an entity known as Malde Drapers and which out to have been deducted from the principal sum.

5. That the Learned Magistrate erred in law and fact in making an adverse interference against the respondent that it had failed to co-operate on the joint reconciliation of accounts without any evidence to that effect and despite the appellant having placed before the court its tabulations and supporting documentation." sic

11. The consolidated appeals were canvassed by way of written submissions. Counsel for the Appellant anchored his submissions on the decision in Selle & Another V Associated Motor Boat Company Ltd & Others, [1968] EA 123 regarding the power of courts on a first appeal. On the merits of the appeal, counsel cited the decision in Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another [2004] eKLR and Section 107 of the *Evidence Act* on the bearer of the burden of proof in claims of a civil nature. Counsel proceeded to submit that the Respondent did not tender sufficient evidence to support its claim, as the witness who testified on its behalf could not verify the alleged transactions not having been in the employ of the Respondent when the alleged dishonoured cheques were issued.

12. Counsel asserted that the Respondent intentionally refused to call its accountant at the time, one Mr. Das, as a witness to confirm the averments upon which the claim was based. That consequently, the trial court erred by finding for the Respondent. Furthermore, counsel for the Appellant faulted the trial court for entertaining the evidence of the Respondent's witness, in the absence of any indication that he had been given authority to testify on behalf of the Respondent. Reliance was placed inter alia, on the decision in Microsoft Corporation v Mistumi Computer Garage Ltd & Another [2001] KLR 470 where the court found that an affidavit sworn on behalf of a corporate body ought to be sworn by an officer thereof.

13. Additionally, counsel faulted the trial court for not considering all payments made by the Appellant to the Respondent, and for taking into account a payment tabulation by the Respondent regarding a debt owing from an entity distinct from the Appellant herein. On those grounds, the court was urged to allow the first appeal accordingly.

14. Counsel for the Appellant filed separate submissions in respect of the second appeal. Therein, he argued that the trial court fell into error by not determining that in the absence of any specific interest applied in the impugned judgment, the interest applicable would be the statutory 6% p.a. provided for under Section 26 of the *Civil Procedure Act* (CPA). He echoed in the decisions rendered in Sanam Investments Ltd v Pointex (K) Ltd & 2 Others (2004) eKLR.

15. Further, counsel urged the court to find that the trial court erred by failing to find that the execution process was prematurely commenced, in view of the absence of issuance of a prior notice to show cause as required after a period of over one (1) year since the date of judgment, pursuant to Order 22, Rule 18(1) of the Civil Procedure Rules (CPR). He cited the decision in John Muhanda Muya & Another v Stanley K. Kuria & Another [2013] eKLR in that regard.

16. Counsel similarly reiterated his earlier submissions regarding payments already made by the Appellant as well as the payment in respect of a debt owed by a separate entity. It was counsel's closing submission that the trial court wrongly inferred that the Appellant had been uncooperative in the joint

reconciliation of accounts, in the absence of any evidence to that effect. For these reasons, the court was urged to allow the second appeal, with costs.

17. The Respondent naturally defended both the trial court's judgment and impugned ruling. By way of his submissions addressing both appeals contemporaneously, counsel for the Respondent for starters, urged the court to strike out grounds 2, 5, 6, 7 and 8 of the grounds of appeal on the first appeal, for raising matters neither pleaded, canvassed nor in issue before the trial court. Relying here on the decision in Thomas Openda v Peter Martin Ahn [1982] eKLR where grounds of appeal raising new issues were struck out. Counsel further urged the court to strike out grounds 4 and 7 of the first appeal on the basis that they were contradictory.

18. On the merits of the appeal, the Respondent's counsel defended the trial court's decisions. More specifically, counsel contended that the Respondent's witness was competent and tendered reliable evidence, and sufficient to show that the material goods were supplied to the Appellant. Counsel further refuted the assertions that sums relating to a debt owed by a separate entity were included in the suit, terming this a new ground of appeal which ought not to be entertained by the court.

19. Regarding the question whether the trial court ought to have appointed an expert accountant to assist in determining the claim in question, it was counsel's contention that parties are bound by their pleadings and that the Appellant herein never raised any issue about the appointment of an expert accountant. Hence such an issue could not arise for determination on appeal. Reference was made to the decision in *Ndishu & Another v Muriungi (Civil Appeal 3 of 2020)* [2022] KEHC 2 (KLR) (21 January 2022) (Judgment) where the court emphasized the principle that a court could only determine matters arising from parties' pleadings.

20. On the subject of costs, counsel citing the case of Cecilia Karuru Ngayu v Barclays Bank Of Kenya & Another [2016] eKLR submitted that costs are awarded at the discretion of the court and that costs follow the event. On these premises counsel urged that the consolidated appeals be dismissed with costs and to uphold the decision of the trial court.

21. The Respondent did not address the second appeal specifically in its submissions.

22. The court has considered the record of appeal in respect of the consolidated appeals, the pleadings and original record of the proceedings as well as the submissions by the respective parties. The consolidated appeals constitute first appeals. The Court of Appeal for East Africa set out the duty of the first appellate court in Selle v Associated Motor Boat Co. [1968] EA 123 in the following terms:-

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.
>
> An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this 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.
>
> In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

23. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See Ephantus Mwangi & Another v Duncan Mwangi Wambugu [1982 – 1988] IKAR 278.

24. The appeals are essentially challenging the judgment by the trial court, rendered in favour of the Respondent and against the Appellant; and the ruling delivered on 23rd May, 2019 arising from execution proceedings thereof. The court therefore deems it prudent to begin with the first appeal, challenging the judgment in the suit. The court proposes to contemporaneously deal with the grounds of appeal therein.

25. The Respondent's claim against the Appellant was primarily seeking payment allegedly outstanding on the material goods supplied by it to the Respondent. The Respondent therefore pleaded as follows under paragraphs 3 and 4 of the plaint: -

> " 3. The Plaintiff's claim against the Defendant is for Kshs. 1,424,349.10/ being the balance on account of the purchase price of assorted electronic goods sold and delivered to the Defendant at the Defendant's request by the Plaintiff for the trade period ending April 30th, 2005. Further particulars are well within the Defendant's knowledge.
>
> 4. In purported part payment for the said goods, the Defendant issued the Plaintiff with several cheques which cheques were presented for payment but returned unpaid by the Defendant's bankers. The Defendant has knowledge of the said dishonor.
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> The particulars of the cheques are as follows:
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> i. Cheque for Kshs. 321,451.20 dated 18/11/2004.
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> ii. Cheque for Kshs. 145,666.40 dated 26/11/2004.
>
> iii. Cheque for Kshs. 192,982/- dated 30/11/2004
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> iv. Cheque for Kshs. 82,851.03 dated 30/11/2004.
>
> v. Cheque for Kshs. 50,000/- dated 13/03/2005
>
> vi. Cheque for Kshs. 245,380.50 dated 24/03/2005.
>
> vii. Cheque for Kshs. 300,000/- dated 29/03/2005
>
> The Plaintiff was surcharged the sum of Kshs. 3,500/- being Kshs. 500/- per cheque as bank dishonor charges which the Plaintiff claims from the Defendant." sic

26. In its brief statement of defence denying the averments in the plaint and liability, the Appellant averred as follows under paragraph *3*:

> " 3. Paragraphs 3 and 4 of the plaint are denied and the plaintiff put to strict proof thereof. The defendant avers that the cheques issued were holding cheques which were to be exchanged in cash and which were inadvertently held by

the plaintiff. The defendant denies that the plaintiff incurred loss for the unwarranted presentation of the holding cheques." sic.

27. At the trial, the Appellant called Titus Kasina Mwandikwa who was PW1 as a witness. Adopting his executed witness statement dated 21st August, 2014 as part of his evidence-in-chief he produced the Respondent's list and bundle of documents dated 21st August, 2014; the supplementary list and bundle of documents dated 29th March, 2017; and further supplementary list and bundle of documents dated 20th June, 2017 as P. Exhibits 1, 2 and 3 respectively. He also testified inter alia, concerning a certain supply of goods made to the Appellant, but that some invoices did not reflect these goods. He stated that during pendency of the suit, the Appellant made partial payments to the Respondent on the supplied goods, vide the following cheques:

i) Cheque No. 101041 for Kshs. 50,000/- dated 16/07/2007

ii) Cheque No. 000296 for Kshs. 100,000/- dated 3/12/2007

iii) Cheque No. 101177 for Kshs. 50,000/- dated 30/03/2008

iv) Cash deposit to Diamond Trust Bank on 25/06/2013 for the sum of Kshs. 50,000/-

28. He quantified the total sum of the above payments at Kshs. 250,000/-. That thereafter, the Appellant's lawyers made further deposits in the sum of Kshs. 87,000/- further bringing the total sums paid to Kshs. 337,000/- and leaving an outstanding balance of Kshs. 1,087,349.10 which sum was sought in the suit. The witness referred to the various cheques said to have been issued by the Appellant in the years 2007 and 2008, some of which were unpaid. Adding that between the period of December, 2007 and 2008, the Appellant issued the Respondent with holding cheques on the request that the said cheques remain unbanked. That this occurred during the post-election violence when the Appellant's business was struggling. It was his testimony that the statement of accounts in P. Exhibit 2 indicating a reconciliation of accounts undertaken by the Respondent's former employees (Daniel and Das) were incorrect.

29. In cross-examination, the witness stated that he joined the Respondent company on 4th December, 2007 working as an accountant at all material times. He further stated that although the cheques particularized in the plaint are for the year 2004, the sums sought constituted all outstanding payments as of the year 2005. That concerning the cheques particularized in the plaint, the cheque i) for Kshs. 321,451.20 though initially called back, was later replaced by another cheque issued by the Appellant on 6th December, 2004; while the cheque ii) for Kshs. 145,666.40 which was initially dishonoured, seems to have been later paid by the Appellant on 30th December, 2004 according to the Appellant's bundle of documents.

30. The witness further confirmed that cheque iv) for the sum of Kshs. 82,851.03 was equally paid on 28th December, 2004; whereas the cheque iii) for Kshs. 192,982/- was re-banked and paid in the month of April, 2005. According to the witness, the cheque for Kshs. 50,000/- (cheque v) was initially banked on 14th March, 2005 before being returned unpaid on 18th March, 2005. The witness testified that similarly, the cheque vi) for the sum of Kshs. 245,380.50 though banked on 20th April, 2005 was returned. That in respect of the cheque vii) for Kshs. 30,000/- the same was unpaid as of 28th April, 2005. The witness stated that from records, between the years 2007 and 2008 the Appellant whether by itself or through its lawyers, paid monies owed, leaving the balance claimed in the suit, but he was not aware whether the outstanding debts had been settled in full.

31. During re-examination, PW1 said that at the time of issuance of the cheques particularized in the plaint, the suit had not commenced. It was also his testimony that the payments later received from

the Appellant in or around the year 2008 did not constitute payment of the outstanding debts relating to the suit.

32. For the defence, Juma Shaban (DW1) identified himself as a Manager of the Appellant and testified that the parties herein had been engaged in business for a several years, during which the Respondent supplied the Appellant with various electronic products. The witness stated that from his knowledge, the Appellant did not owe the Respondent any of the monies sought in the plaint. Proceeding thereafter to adopt his witness statement as evidence and to produce the Appellant's list and bundle of documents dated 29th January, 2015 and further list and bundle of documents dated 22nd March, 2017 as D. Exhibits 1 and 2 respectively.

33. The witness testified that the cheque i) for Kshs. 321,451.20 from Barclays Bank was replaced by a cheque number 000002 from Oriental Bank; the cheque ii) for Kshs. 145,666.40 from Barclays Bank was similarly replaced by cheque number 000007 from Oriental Bank; cheque iv) for Kshs. 82,851.03 was equally paid by the Appellant; while cheques iii), v), vi) and (vii) were stopped due to financial challenges on the part of the Appellant, but that the Appellant later made payments to the Respondent in the total sum of Kshs. 788,362.50. That consequently, the Appellant had no outstanding debts with the Respondent.

34. In cross-examination, DW1 stated that upon supply of the requisite goods by the Respondent, the Appellant would issue post-dated cheques. And to his knowledge, the Appellant had no complaint regarding the goods supplied by the Respondent, on occasion on credit. That the cheques particularized in the plaint constituted part payment for goods supplied.

35. In re-examination, the witness stood by his witness statement.

36. The trial court after restating and analyzing the evidence concluded as follows in respect to the suit:

> "Based on the pleadings before court and the evidence from both the plaintiff and the defendant witness it is not disputed that assorted electronic goods were supplied by the plaintiff to the defendant in fact DW1 stated that he did not have a complain about the supply of goods which I understood him to state that he did not dispute that goods were supplied by the plaintiff to the defendant and on this I will find as such.
>
> ...
>
> I am convinced by the testimony of the plaintiff as supported by the documents which were also confirmed by DW1 with regard to the outstanding amount claimed, as at the time of filing the suit as Kshs. 1,424,349.10/= subsequent to filing the defendant made some payments of Kshs. 337,000/= which were credited as admitted by DW1 and the balance as per PW1 is Kshs. 1,087,349.10/=
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> ...
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> I find that the plaintiff has established that the defendant never fully paid the amount for the supplied goods and the balance outstanding as at the time of hearing was Kshs. 1,087,349.10/= and additional Kshs. 3,500/= being bank charges for the returned cheques as pleaded and proved.
>
> Based on the reasons above given I find that the plaintiff has established on a balance of probabilities that their claim against the defendant as prayed in the plaint, the upshot is that I enter judgement for the plaintiff against the defendant for Kshs. 1,087,349.10/= the outstanding amount for the goods supplied and an additional Kshs. 3,500/= for the bank

charges, interest at court rates from the date of filing the suit until payment in full, the plaintiff is also awarded costs of the suit.

It is so ordered." (sic)

37. The legal position is that the burden of proof in civil cases rests with the plaintiff at all material times, while the standard of proof is held on a balance of probabilities. In Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91, the Court of Appeal stated in this regard that:-

> " We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail." (Emphasis added).

38. The applicable law as to the burden of proof is set out under Sections 107, 108 and 109 of the *Evidence Act*. The Court of Appeal in Mumbi M'Nabea v David M.Wachira [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say:

> " In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:
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> > "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 exist." The above provision provides for the legal burden of proof.
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> However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:
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> > "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 shall lie on any particular person."
>
> The position was re-affirmed by the Court of Appeal in Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:
>
> > "Whereas under section 107 of the *Evidence Act*, (which deals with the legal evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any

particular fact may be cast on the person who wishes the Court to believe in its existence."

39. The latter statement alludes to the position that the legal burden of proof, unlike the evidentiary burden of proof does not shift. In reiterating the standard of proof, the Court of Appeal in Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another [2015] eKLR held that:

> " Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-
>
> > "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
> >
> > This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties... are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

40. Flowing from the above authorities, the duty of proving the averments contained in the plaint lay squarely with the Respondent. In Karugi & Another V. Kabiya & 3 Others (1987) KLR 347 the Court of Appeal stated that:

> " The burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendants' failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...--. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim." (Emphasis added)

41. It is not in dispute that the parties herein enjoyed a business relationship at all material times, on account of which the Respondent supplied assorted electronic goods to the Appellant in exchange for payment. It is equally not in dispute that the sums allegedly sought were in respect of goods already supplied to the Appellant. As the learned trial magistrate rightly pointed out, no complaints were raised by the Appellant regarding the quantity or quality of the goods supplied during the material dates.

42. PW1 who was an employee of the Respondent at all material times, gave evidence to the effect that initially, the sum owed to the Respondent by the Appellant was Kshs 1,424,349.10 for the trade period ending 30th April, 2005 which was the sum pleaded in the plaint. That subsequently and during the pendency of the suit, the Appellant made additional payments whose particulars were set out in the evidence of PW1 outlined above, totaling a sum of Kshs. 337,000/- thereby leaving a balance of Kshs. 1,087,349.10 which was payable to the Respondent.

43. DW1, while acknowledging that certain cheques were unpaid, stated that the same were replaced and that additional payments were eventually made regarding the goods supplied by the Respondent. All

in the total sum of Kshs. 788,362.50, and consequently, the Appellant had no outstanding debts with the Respondent as sought in the plaint.

44. Regarding PW1, the Appellant faulted the trial court for considering his evidence and yet (according to the Appellant) he was not a competent witness since he had no authority to testify on behalf of the Respondent, pursuant to Order 9, Rule 2(c) of the CPR, which expresses that:

> 2. The recognized agents of parties by whom such appearances, applications and acts may be made or done are-
>
> ...
>
> (c) in respect of a corporation, an officer of the corporation duly authorized under the corporate seal.

45. Reading the above Order in its entirety, it is apparent that it relates to persons who can apply to act as recognized agents in a matter, to act on behalf of a party, including advocates. In the court's view, this provision does not extend to persons called to testify in court as witnesses and the same is therefore inapplicable in the present instance.

46. Suffice it to say, Section 125 of the *Evidence Act*, Cap. 80 Laws of Kenya provides for the competency of witnesses in a general sense. It stipulates as follows:

> (1) All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause.
>
> (2) A person suffering from a mental illness is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them.

47. Under the above provision, it is clear that all persons are deemed competent to testify unless proven otherwise. In the present instance, the Appellant did not advance any credible material to challenge the general competence of PW1 as a witness. It is therefore the court's finding that PW1 was a competent witness within the meaning of section 125 of the *Evidence Act* and hence the trial court acted correctly by considering his testimony.

48. The Appellant further faulted the trial court for failing to find that the failure by the Respondent to call one Das, its accountant at the material time as a witness, constituted a grave error justifying the dismissal of the suit for want of proof. In retort, the Respondent argued that the Appellant's averment was unfounded since the said Das had left its employment by the time the suit proceeded for hearing.

49. Upon consideration of the rival positions taken, the court is satisfied that there was no mandatory requirement for the Respondent to necessarily call Das who was its former employee, to testify. In any case, the court has already found that PW1 who was an accountant and therefore privy to the facts in issue, constituted a competent witness. Besides, the transactions in question were documented at the material time. Sections 33(b) and 37 of the *Evidence Act* provide for this kind of situation, and there is no indication on the record that any objection was raised by the Appellant at the trial regarding the admissibility of the testimony of PW1.

50. This brings us to the more pertinent question at the heart of the first appeal. Namely, whether the trial court 's finding that the Respondent had proved its claim against the Appellant to the required standard was well founded; and consequently whether award of the sum of Kshs. 1,087,349.10 together with costs of the suit and interest thereon was justified.

51. As earlier stated, it was not disputed that the material goods were supplied to the Appellant by the Respondent; invoices and delivery notes to that effect are found in P. Exhibit 1. From a re-examination of the record, it is apparent that the Appellant issued the various cheques particularized in the plaint to the Respondent, which cheques were dishonoured/unpaid for one reason or another. Upon tabulation thereof, the court noted that the particularized cheques totaled a sum of Kshs. 1,338,331.13 and not Kshs 1,424,349.10 stated in PW1's testimony. Suffice it to say that PW1 admitted that subsequent to the filing of the the suit, the Respondent received a total payment in the sum of Kshs. 337,000/- leaving a balance of Kshs. 1,087,349.10/-. Which figure was challenged by the Appellant, through DW1, who stated that full payments were eventually made on the supplied goods. The trial court by its judgment awarded this figure of Kshs. 1,087,349.10/-.

52. Payments making good the cheques i) [Kshs. 321,451.20], ii) [Kshs. 145,666.40], iv) [Kshs. 82,851.03] and iii) [Kshs. 192,982/-] were admitted by both witnesses. What was in contention was whether payments were made on the remaining cheques, namely, cheques v) [Kshs. 50,000/-], vi) [Kshs. 245,380.50] and vii) [Kshs. 30,000]. PW1 stated that during the pendency of the suit, the Appellant made additional payments in the sum of Kshs. 337,000/- (contained on pages 32-34 of P. Exh. 1). Which sum subtracted from the total figure of Kshs. 1,338,331.13 alongside the sums earlier paid on the admitted first four (4) cheques totaling Kshs. 742,950.63) leaves a balance of Kshs. 258,381.13. This, to my mind constituted the outstanding balance owing to the Respondent from the Appellant. The court did not come across any proof, beyond oral assertions by DW1 that the outstanding balance of Kshs. 258,381.13 was settled by the Appellant.

53. Furthermore, whereas the Appellant argued in ground 7) of the appeal that the trial court did not consider the sum of Kshs. 50,000/- paid on 25th June, 2013 and the further sum of Kshs. 151,363/- paid on 28th June, 2017 similarly paid to the Respondent's advocates, the court observed that the Appellant did not tender proof or point to those specific payments in any of the defence exhibits. Additionally, while the Appellant claimed that the Respondent included a debt in the sum of Kshs. 317,162.28 that belonged to a separate entity, namely Malde Drapers, it did not support its assertion by proof that this sum was included in the monies sought by the Respondent against it, in the suit.

54. Overall, the court noted that the parties tendered various statements of account, delivery notes and invoices, without clearly ascertaining which of those related to the subject suit and which ones were in respect of other goods supplied but not related to the dispute. Furthermore, PW1 admitted before the trial court that on occasion, it would receive goods on credit, from the Respondent. In the absence of a proper presentation and explanation of the documentation to clarify which payments related to which transactions, the court found it difficult to match payments made with related transactions forming the substratum of the suit. The parties appear to have literally thrown their bundles of documents at the court and left it to the court to make sense of them. This is unacceptable.

55. That notwithstanding, the court is of the view that the Respondent had proved on a balance of probabilities that there were monies owing from the Appellant which remained unpaid as at the time of judgment. However, the court finds that the sum awarded by the trial court, namely Kshs. 1,087,349.10, was erroneous and could not be justified. Because PW1 had confirmed that the first four (4) cheques, though earlier returned unbanked were later honoured and the undisputed fact that further payments had been made by the Appellant, in the sum of Kshs. 337,000/- pending trial. The trial court therefore ought to have considered these payments and deducted them from the total amounts reflecting on the material cheques. As earlier tabulated by the court, the outstanding sum, whose settlement was not demonstrated by the Appellant, was Kshs. 258,381.13. This constituted the sum to which the Respondent was entitled, as well as the sum of Kshs. 3,500/- being the surcharged costs on the unpaid cheques, hence the grand total of Kshs. 261,881.13.

56. In the premises, the court is satisfied that while the trial court arrived at a correct finding that the Respondent had proved its claim against the Appellant to the required standard, it is necessary to disturb the judgment sum, by setting aside the awarded sum of Kshs. 1,087,349.10 and substituting therefor the sum of Kshs. 261,881.13. To that extent, the first appeal has succeeded.

57. The second appeal relates to the impugned ruling delivered on 23rd May, 2019 in respect of the Motion dated 11th April, 2019. The Motion sought to set aside the warrants of attachment of movable property as well as the execution proceedings commenced by the Respondent, as well as an order to compel the Respondent to meet the auctioneer's costs arising from the said execution process. The Motion was supported by the grounds present on its face and the facts stated in the affidavit of the Appellant's General Manager, Shaban Jumah, stating that the sum indicated in the warrants issued in favour of the Respondent were not in accord with the judgment of the trial court; that the said judgment was silent on the rate of interest and hence the interest rate of 6% p.a. was applicable pursuant to the provisions of Section 26(2) of the CPA.

58. The deponent further stated that the execution process was premature since the judgment was delivered more than a year prior to commencement of the execution proceedings. Thus, the Appellant ought to have been served with a notice to show cause beforehand; that no party-to-party costs had been assessed and yet the Respondent had not sought leave of the court to commence execution proceedings in the suit; that no regular judgment had been drawn, signed and sealed by the court previously. For those reasons, the deponent deemed the execution process flawed and urged that the orders sought be granted and that the Respondent do bear the costs (if any) due to the auctioneers.

59. In resisting the Motion, the Respondent relied on the replying affidavit sworn by its Managing Director, Vihesh Mohindra, on 2nd May 2019 averring that the Appellant had only made part payment in 2018 on the principal sum awarded by the trial court, to the tune of Kshs. 450,000/- and that the outstanding balance thereon remained unsettled. The deponent further averred that there was no error in the warrants of attachment and hence the prayers seeking the setting aside of the said warrants were baseless. That the law at the time made provision for interest at the rate of 12% p.a. on liquidated sums and which interest rate was properly applied. That no notice to show cause was required to be served upon the Appellant owing to its disregard of previous court orders issued. That the Motion having been brought in bad faith, ought to be dismissed with costs.

60. Upon hearing the parties, the trial court by its ruling delivered on 23rd May, 2019 took into account the payments which had been made by the Appellant in the course of the proceedings (to the tune of Kshs. 500,000/-) and thus allowed the Motion in terms of order 3). Consequently, the trial court made an order for the issuance of fresh warrants of attachment taking into account the sum of Kshs. 500,000/- already paid by the Appellant towards settlement of the decretal amount, as of 6th May 2019.

61. Upon considering the grounds of appeal in respect of the second appeal, the court finds that ground 4) concerning complaints on earlier payments purportedly made by the Appellant and inclusion of the sum of Kshs. 317,164/-, a debt that allegedly was owed by an entity known as Malde Drapers, in the Appellant's account, was similarly raised in the first appeal , considered and determined by the court. That being the case, the court will proceed to address the remaining grounds under the following limbs.

62. The first limb touches on whether the interest of 12% p.a. was applicable in the suit, pursuant to the provisions of Section 26 of the CPR which states that:

    (1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such

principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.

(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum.

63. In CFC Stanbic Limited v John Maina Githaiga & Another [2013] eKLR the Court of Appeal while considering a situation where the interest rate was not specified, rendered itself thus:

> " Sections 26 and 27 of the *Civil Procedure Act*, [CPA], lay down the law relating to the grant of interest and the setting of effective dates thereof. The said provisions provide that the court has a wide discretion to grant interest and to determine the effective dates of payment of such interests".

64. In Shah v Guilders International Bank Ltd, [2003] KLR, the Court of Appeal stated regarding S 26 (1) of the CPA that :

> " This section, in our understanding, confers upon the court the discretion to award and fix the rate of interest to cover three stages, namely:
>
> (1) the period before the suit is filed;
>
> (2) the period from the date the suit is filed to the date when the court gives its judgment; and
>
> (3) from the date of judgment to the date of payment of the sum adjudged due or such earlier date as the court may, in its discretion, fix...."

65. The Appellant on the one part argued that in the absence of any specific interest rate stipulated by the trial court in the impugned judgment, the statutory rate of 6% p.a. ought to have applied. The Respondent on the other part supported the application of an interest rate of 12% p.a. The trial court did not address itself on this matter in its impugned ruling.

66. In the impugned judgment, the trial court had pronounced that interest on the judgment sum of Kshs. 1,087,349.10 plus bank charges in the sum of Kshs. 3,500/- totaling Kshs. 1,090,849.10 would accrue at court rates. On the face of it, the decree issued on 23rd February 2018 calculated the interest at 12% p.a. from 6th April, 2006 to 9th November, 2017 bringing it to a sum of Kshs. 1,717,744.67.

67. Clearly, the trial court did not pronounce a specified interest rate in its judgment. It followed therefore that pursuant to section 26(2) of the CPA, the interest rate of 6% p.a. was applicable. Consequently, the court is satisfied that the interest rate applied in calculating the interest payable in the decree and giving rise to the sums sought in the warrants of attachment, was erroneous.

68. The second limb of the second appeal relates to the question whether the execution process commenced prematurely, by dint of Order 22, Rule 18 of the CPR. The said provision reads as follows:

(1) Where an application for execution is made—

(a) more than one year after the date of the decree;

(b) against the legal representative of a party to the decree; or

(c) for attachment of salary or allowance of any person under rule 43, the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him:

> Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom the execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the court has ordered execution to issue against him:
>
> > Provided further that no such notice shall be necessary on any application for the attachment of salary or allowance which is caused solely by reason of the judgment debtor having changed his employment since a previous order for attachment.

(2) Nothing in subrule (1) shall be deemed to preclude the court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice.

69. The impugned ruling of the trial court did not address itself to the above matter. Be that as it may, the court observed that the decree in the suit was issued on 28th February 2018 whereas the warrants of attachment of movable property, were dated 5th April 2019. It is apparent that the warrants were issued slightly over one (1) year from the date of issuance of the decree, and judgment. Prior to that, the Respondent admittedly did not take out a notice to show cause. For the purposes of this case, save for the exception envisaged in sub-rule 2 of Order 22, Rule 18, the trial court upon receipt of the Respondent's application for execution brought more than one (1) year since the decree was issued, was obligated to issue notice to the Appellant to show cause why execution could not proceed. This procedure was not followed here and hence the warrants of attachment issued herein were premature.

70. Now to the third and final limb of the second appeal, raising the question whether the trial court made a correct order on costs, as provided for under Section 27 of the CPA. The said provision spells out the following:

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

> Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

71. It is trite that costs follow the event. This legal principle was reaffirmed by the Supreme Court in the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR when it held that:

> " The foregoing provision of the *Civil Procedure Act* has featured in judicial deliberations; and in Joseph Oduor Anode v. Kenya Red Cross Society, Nairobi High Court Civil Suit No. 66 of 2009; [2012] eKLR Odunga, J. thus observed:
>
> "...whereas this Court has the discretion when awarding costs, that discretion must, as usual, be exercised judicially. The first point of reference, with respect to the exercise of discretion, is the guiding principles provided under the law. In matters of costs, the general rule as adumbrated in the aforesaid statute [the *Civil Procedure Act*] is that costs follow the event unless the court is satisfied otherwise. That satisfaction must, however, be patent on record. In other words, where the Court decides not to follow the general principle, the Court is enjoined to give reasons for not doing so. In my view it is the failure to follow the general principle without reasons that would amount to arbitrary exercise of discretion ..." [emphasis supplied].
>
> It emerges clearly that, whether in this Court or any other superior Court, costs are awarded at the discretion of the Court or Judge. Indeed, as for the Supreme Court, Rule 3(5) of the Supreme Court Rules is the most pertinent, especially as it constitutes the governing framework for costs – and costs fall under the "inherent powers of the Court."

72. The Supreme Court concluded by stating that:

> Such a principle applies in other countries as well, as we learn from the comparative lesson. We draw, in this respect, from Halsbury's Laws of England, 4th ed Re-Issue (2010), Vol. 10, para. 16:
>
> > " The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice."

73. A reading of the impugned ruling of the lower court reveals that upon allowing the Motion, the trial court ordered that parties each bear their own costs in the circumstances. It is also settled that the award of costs lies within the discretion of the court. In the present instance, the court, upon taking into account the nature of the Motion and the prayers therein, is of the view that the trial court properly exercised its discretion in making the order on costs that it did.

74. Be that as it may, and in conclusion, the court finds that the Appellant has demonstrated that the warrants of attachment were prematurely issued, and that the interest rate applied in the decree giving rise to the impugned warrants of attachment was erroneous. The court is therefore persuaded to disturb the findings in the impugned ruling by the trial court.

75. In the result, the court will order as follows: -

    a. HCCA No. 670 of 2017 partially succeeds. Consequently, the sum of Kshs. 1,087,349.10 awarded in the judgment of the trial court of 9th November 2017 is hereby set aside and substituted with the sum of Kshs. 261,881.13 (being made up of the sum of Kshs. 258,381.13, and bank charges in the sum of Kshs. 3,500/-).

b. HCCA No. 279 of 2019 is allowed. Consequently, the ruling delivered by the trial court on 23rd May 2019 is hereby set aside and is substituted with an order allowing the Notice of Motion dated 11th April 2019.

c. The Appellant shall have 75% (seventy-five per cent) of the costs of the first appeal.

d. With regard to the second appeal, it is noted that the Respondent was not responsible for the preparation of the faulty decree, nor solely responsible for the premature issuance of warrants in execution in respect of which it has been ordered to pay the auctioneer's charges. Thus, the order commending itself is that parties shall bear their own costs in the second appeal.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 6TH DAY OF MAY 2024.

C.MEOLI

JUDGE

In the presence of:

For the Appellant: N/A

For the Respondent: Ms. Mbithe h/b for Mr. Lutta

C/A: Erick