



**Obor Technologies Kenya Limited v Kiragu (Civil Appeal  
E196 of 2023) [2024] KEHC 7620 (KLR) (20 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7620 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E196 OF 2023  
EM MURIITHI, J  
JUNE 20, 2024**

**BETWEEN**

**OBOR TECHNOLOGIES KENYA LIMITED ..... APPELLANT**

**AND**

**JULIUS KIRAGU ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. L. W. Maina  
Mouti (RM) delivered on 19/10/2023 at Meru SCCCOM/ E296 of 2023)*

**JUDGMENT**

1. By a statement of claim dated 7/8/2023, the Respondent herein, the Claimant in the trial court, sued the Appellant herein, seeking the sum of Ksh. 69,920 being the cost of iron sheets, special damages of Ksh. 10,000 and costs plus interest at court rates. The Claimant pleaded that on or about the 25<sup>th</sup> November 2021, the Respondent, while acting for and on behalf of A.C.K Mbeti Church bought iron sheets from the Appellant at a value of Ksh. 69,920. The Respondent was issued with receipt no. 00605 upon payment of the sum agreed, and the Appellant assured him that the iron sheets would be delivered to his premises as he had requested. The Appellant failed and/or refused to deliver the iron sheets which prompted the Respondent, through his advocate to issue a demand notice on 27/6/2023.
2. The Appellant herein, in its response to the claim dated 28/9/2023 denied either owing the Respondent any money or engaging in any business or financial venture with him.
3. Upon full hearing of the claim, the trial court entered judgment at the sum of Ksh. 69,920 in favour of the Respondent together with costs and interest.

**The Appeal**

4. On appeal, the Appellant filed its memorandum of appeal dated 7/11/2023 raising 6 grounds as follows:



1. The Learned magistrate erred in law by failure to find that there existed an Agreement/contract between the Appellant and the Respondent is enforceable in law.
2. The Learned magistrate erred in law by failure to find that there was a contractual obligation between the Appellant and the Respondent.
3. The Learned magistrate erred in law and fact by failure to find that the Plaintiff/Respondent herein has failed to adduce evidence in support of his case.
4. The Learned magistrate erred in law and fact by not considering the Appellants evidence of receipts in comparison to the receipts adduced by the Respondent.
5. The Learned magistrate erred in law and fact by failure to find that the Plaintiff failed to adduce evidence of proof of payment to the Appellant herein for sale and supply of iron sheets.
6. The Learned magistrate erred in both law and fact by her failure to hold that the Plaintiff was not entitled to the remedies sought.

### Submissions

5. The Appellant did not file any submissions.
6. The Respondent urges that the Appellant's evidence was tainted with illegalities, irregularities and the same was only manufactured to defeat his claim. He urges that the Appellant's grounds of appeal are based on factual issues which were conclusively decided by the trial court, and cites *Mwangi v Kibiu* (Civil Appeal 16 of 2023) [2023] KEHC 18643 (KLR) (28 April 2023) (Judgment). He invites the court to find that the appeal is bad in law as it does not disclose any points of law thereby offending the provisions of Section 38 (1) of the *Small Claims Court Act*. He urges the court to expunge the documents at pages 17, 18, 20, 23, 25, 31, 35 and 36 of the record, as they were not part of the evidence adduced before the trial court and have only been illegally, unlawfully and unprocedurally introduced at this stage. He urges that the Appellant has not proved any shred of evidence over the alleged fraud and forgery of the receipt and as such, the same remains unchallenged and genuine, and cites *Vijay Morjaria v Nansingh Madhusingh Darbar & Another* (2000) eKLR and *Kinyanjui Kamau v George Kamau* (2015) eKLR. He urges the court to accede to his cry for justice by dismissing the appeal with costs.

### 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 an appeal lies to the High Court on a point of law and that the decision 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 Respondent, this involves the re-evaluation of the evidence. In *Peter Gichuki King'ara v IEBC & 2 Others* (2014) eKLR, the Court of Appeal (Visram, Koome (as she then was) & Odek, JJ.A.) 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 Julius Kiragu adopted his witness statement dated 7/8/2023 together with the list of documents as his evidence in chief.

12. On cross examination, he stated that,

“Obor Technologies did give me documents but they did not give me an invoice just a receipt. I did pay the sums. I paid in cash form. I was only given a receipt but they did not deliver the document sheets. I did visit the office myself at Makutano. I was never given any after receipt over and above what I was only the first receipt. I was never given a delivery note they just promised to deliver but failed to deliver. The account is for Obor Technologies at Family Bank. (Cex 1) the quotation (Dex 1) is from Stanbic Bank. My receipt has my identity card and tell number. I made my order on 25<sup>th</sup> November, 2021. I sent my demand letter in 2023. I have gone to Obor Technologies on several occasions but they are yet to settle. I spoke to the Manger at the Respondent who has yet to send the material. I gave my money to the Respondent. The claimant letter was sent to Obor Technologies but no postal address. My claim is against Obor Technologies.”



13. On re-examination, he stated that,

“The document I have adduced is a sale cash receipt and I don’t deal is a quotation.”

14. RW1 Robert Kimathi Gitonga adopted his statement dated 10/10/2023 together with the documents filed therewith as his evidence in chief. He testified that,

“The Manager of 2021 was myself sum 2021 when the company came to me. Sales as done from our office and all documents. The sale cash receipt has never been issued by us and we issue a delivery note was also issued. I reported the cash receipt does not come from us. We did not trespass.”

15. On cross examination, he stated that,

“The post address code for Obor Technologies is 61759. My phone contact is 0714XXXXXXX and 0757XXXXXXX. Obor has a branch in Meru at Makutano area but I don’t know the general area where it was. I have never received any documents from the claimant. But I did read a document no whatsapp on my contact. We did not have a sales Manager in Meru. The documents I have issued are samples. Rex 1 is sold to Clinton Mutembei and he sales officer is Clinton Mutembei. Rex 2 customer is Odhiambo Ogola and Sales Officer is Steve Ogolla Odhiambo. Rex 3C (30<sup>th</sup> November, 2023) the stamp indicate Obor Technologies and stamp therein. The customer is Odhiambo Ogola and Sales person is Steve Ogolla Odhiambo. The ETR (Rex 4) do not have the names of the customers I signed the deduction on the documents and the same stamp does not appear on the claimant sales cash receipts. The stamp bear no differences. The Cex 1 has the customer’s name and identity number and telephone details. It does have a sale offer and it does has a receipt number and it is signed by sales offer and customer. We closed our Meru Office last month but we were operational in Meru as at 25<sup>th</sup> October, 2021. I have never raised the issues before the claimant. I have not reported to police on the issues of fraud.”

16. On re-examination, he stated that,

“It is possible that the receipt is a forgery. It is impossible to authenticate a real/fake stamp. We never stamp quotations. The ETR bears the issues of tax paid. The claimant has not adduced an ETR receipt. Everything is paid via address issued. They has never meet such documents.”

### **Analysis and Determination**

17. Before delving into the merits of the appeal, the Appellant is accused of introducing new documents at this appellate stage, which were not part of the trial court’s record. The court notes that the Appellant’s list of documents dated 10/10/2023 contains 2 samples of Quotation documents, sample of Sales Delivery Note, sample of receipts and sample of its Sales Book. In the Record of Appeal however, the Appellant has annexed copies of Identity Cards for Nicholas Kithinji Murugu, Odhiambo Stephen Ogola and Clinton Mutembei at pages 18, 25, 31 and 35 thereof. The quotations at pages 17 and 23 of the Record of Appeal are at variance with the one in the Appellant’s list of documents. The documents at pages 17, 18, 19, 23, 25, 28, 31, 32, 35 and 36 of the Record of Appeal are hereby expunged from the record.



18. The gist of this appeal, as can be deciphered from the 6 grounds of appeal is whether the Respondent proved his case on a balance of probabilities.
19. CW1 Julius Kiragu testified on cross examination that,  

“Obor Technologies did give me documents but they did not give me an invoice just a receipt. I did pay the sums. I paid in cash form...I was never given a delivery note they just promised to deliver but failed to deliver...My receipt has my identity card and tell number. I made my order on 25<sup>th</sup> November, 2021.”
20. The Appellant maintained that the sale cash receipt produced by the Respondent was indeed a forgery without producing the genuine sale cash receipt for comparison and authentication. This court must find that, in the absence of any other evidence to the contrary, it is more probable than not that the sale cash receipt produced by the Respondent was issued by the Appellant to the Respondent upon payment for the iron sheets.
21. RW1 told the court that its postal address is 61759 which is properly captured on the stamp on the sale cash receipt produced by the Respondent. The court discerns the major similarities between the sale cash receipt and the quotations produced by the Appellant, from the company’s logo, the postal address of XXXXX-00100 Nairobi and the PIN number. RW1 further confirmed that the Appellant had a branch in Makutano – Meru at the material time.
22. This court finds that the Respondent, proved on a balance of probabilities, that he purchased iron sheets from the Appellant, which were never delivered as agreed despite having made full payment.

### **Orders**

23. Accordingly, for the reasons set out above, this court finds that the appeal is without merit and it is dismissed.
24. The appellant shall pay the costs of the appeal to the Respondent.  
Order accordingly.

**DATED AND DELIVERED ON THIS 20<sup>TH</sup> DAY OF JUNE 2024.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances:-

Ms. Luvai for the Appellant.

Mr. Kariuki for the Respondent.

