



Chairman BOG, Mbaikini High School & another v Simecor Merchants 2002 Limited & 2 others (Civil Appeal 67 of 2020) [2024] KEHC 10724 (KLR) (16 September 2024) (Judgment)

Neutral citation: [2024] KEHC 10724 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 67 OF 2020
FR OLEL, J
SEPTEMBER 16, 2024**

BETWEEN

THE CHAIRMAN BOG, MBAIKINI HIGH SCHOOL 1ST APPELLANT

THE PRINCIPAL, MBAIKINI HIGH SCHOOL 2ND APPELLANT

AND

SIMECOR MERCHANTS 2002 LIMITED 1ST RESPONDENT

MUNYAO MUA 2ND RESPONDENT

PATRICK MUTULA 3RD RESPONDENT

(Being an appeal from the Judgment of Hon B.Bartoo (SRM) delivered on 22nd October 2020 in the Machakos Chief Magistrate Court Civil suit No. 201 of 2012)

JUDGMENT

A. Introduction

1. This appeal challenge's the judgment/decree of Honourable B. Bartoo, Senior Resident Magistrate delivered on 22nd October 2020 in Machakos Chief Magistrate court case no. 201 of 2012, where she awarded the 1st respondent a sum of Kshs 1,700,195.00/= being sums owed for goods supplied to the school, and dismissed the appellants claim filed as against the 3rd party who are the 2nd and 3rd Respondents in this Appeal.
2. The 1st Respondent had filed their claim seeking a sum of Kshs 2,000,195.00/= (Two Million one hundred and ninety-Five shillings only) being the sum of money owing and payable by the Appellant school on account of books, building Material and other stationary supplied/sold to the said Appellants at their request and instance between the period September 2010 and March, 2011 and which despite demand, the Appellants had failed and/or neglected to pay. The respondent called



two witness to support their case and produced their bundle of documents to prove that indeed the won a tender which had been advertised and the goods supplied were received and signed for by the Appellants agents and therefore were justified to claim payment the same.

3. The appellant on his part did file a statement of defense where they denied owing the 1st respondent and sum of money on account of goods supplied and in the alternative averred that if any supply of books, stationary and building equipment were supplied, then the same were supplied in breach of Applicable procurement procedures, procurement laws and without the knowledge and/or approval of the BOG of the school, its authorized infrastructure committee (SIC), who were in charge of E.S.P projects and thus such supplies if made, were irregular, illegal and null and void. The Appellants further averred that the said supplies were made without local purchase orders and as a consequence were a grant plan perpetrated by the 1st Respondent, the then principal (2nd Respondent) and the then school bursar (3rd Respondent) and reiterated that they were not liable to settle the same.
4. The Appellant subsequently during the primary proceedings did file third party proceedings to enjoin the 2nd and 3rd respondent and during the proceedings called three (3) witnesses to rebut the 1st Respondent's case. The 1st third part, who was the former school principal also testified and defended the events that occurred during his tenure as the principal of the Appellant school.
5. The trial Magistrate did consider all the evidence tendered and vide her judgment dated 22nd October 2020, did find that the 1st respondent had proved his case on a balance of probability and proceeded to enter judgment in his favour to the tune of Kshs 1, 700,195.00/= plus costs and interest. Being completely dissatisfied by the said judgment/decreed the Appellant filed their Memorandum of Appeal, where they raised the following grounds of Appeal;
 - a. That the learned Magistrate erred in law and in fact in finding that the 1st respondent's claim for special damages of Kshs 1,700,195.00/= was proved on a balance of probabilities despite the evidence on record that the 1st respondent purported to supply goods and proceeded to invoice goods never supplied to the school.
 - b. That the learned magistrate erred in law and in fact in finding that the 1st respondent had proved his claim for special damages of Kshs 1,700,195.00/= despite the evidence on record of forgery of the chairman's signature and a catalogue with additional prices different from the prices initially agreed upon.
 - c. That the learned Magistrate erred in law and in fact in finding that the 1st respondent had proved his claim on a balance of probability in disregarding the procedure involved in the adjustment of the prices of goods mid-way in the course of the contracting period.
 - d. That the learned Magistrate erred in law and in fact in finding that the 1st respondent had proved his claim on a balance of probabilities by failing to subtract the payments already received by the 1st respondent from the sum claimed.
 - e. That the learned Magistrate erred in law and in fact in finding that the 1st respondent's claim was proved on a balance of probability of Kshs 1,700.195.00/= without a basis for the same.
 - f. That the learned Magistrate erred in law and in fact in dismissing the claim against the Third parties despite the evidence on record which proved that the 2nd and 3rd respondents benefited from part of the purported supply of goods and materials.
 - g. That the learned Magistrate erred in law and in fact in awarding costs to the Respondents.



- h. That the learned Magistrate erred in law and in fact in failing to find that the 1st respondent had failed to prove his case on balance of probabilities.
 - i. That consequently the learned Magistrate decision occasioned a miscarriage of justice.
6. The Appellants urged that this court finds that this Appeal is merited and proceed to set aside the entire judgment of the trial court and instead substitute the same with an order dismissing the primary suit with costs to the Appellant.

B. Evidence at Trial

7. PW1 Simon Kioko Kitheka, the 1st respondent's Managing director testified that the Appellant school did advertise for a tender in May 2010 for supply of hardware material, which tender was advertised externally. They made their Application and included their price catalogue of the required items and on 4th June 2010, were notified that their application had been successful. He signed the tender notification in acceptance of the tender offer made and returned the said acceptance on 5th June 2010. Thereafter they kept supplying goods to the school and would be paid in bits. After reconciliation the amounts which remained unpaid was Kshs 2,000,195.00/=, which they were seeking. PW1 produced his claim supporting documents including the price catalogue, letter of notification of the award and the tender acceptance form.
8. Upon cross examination, PW1 confirmed that they provided the catalogue of the costing involved, and issues relating to the amendments of the same could only be answered by his operations manager. The notification of the award was signed by the secretary to the tender committee and in the tender contract all terms and condition of the agreement were captured including pricing of goods to be supplied. Further he was not personally involved in the delivery of the goods supplied and also did not have any document changing the pricing of goods to be supplied. In re-examination PW1 confirmed that the tender was advertised either in a daily Newspaper and/or school Notice board and all supplies were made to the school and not the 2nd or 3rd respondent's herein
9. PW2 Enock Kimeu Dick testified that between the year 2010 to 2011, he was employed by PW1 initially as driver and later rose to become his manager. He was the one in charge of daily operations and they were in the business of general construction and general supply of books, chemicals, text books and building materials. The Appellant school was their customer and were undertaking constructions works. The school would sometimes call for supplies or provide LPO's and the respondent company would supply the goods requested for and have the delivery note signed. He proceeded and produced a bundle of delivery notes as Exhibit P5 and copies of invoices as Exhibit P6.
10. PW2 confirmed that he did not have invoice No 33 and that invoice No 30 and 36 were similar, thus he could withdraw one as filing both was a mistake. Similarly invoice No 41 and 43 Were also the same and one could be withdrawn. Also invoice No 51 was for steel trappers and they did not have the delivery note for the same as they were already being used within the construction site within the school. After reconciliation it was PW2 contention that the appellant owed the 1st respondent the sum claimed. Upon cross examination PW2 stated that he was the one who applied for the school tender and signed the tender documents. The tender document had a comprehensive price list, which they had attached and the appellant had accepted their bid and awarded them the tender.
11. PW2 further confirmed that the tender was subject to provisions of PPDA and supplies were made subject to LPO/LSO provided and the appellant's agents would also at times call them and request for goods to be supplied. During implementation of the tender, they had written to the appellant and informed them of price increase (Exhibit P8). The said letter did not elicit a written response from



- appellant accepting the proposed changes in price. He had not tampered and/or altered the invoices produced into evidence and again acknowledged that invoice No 30/36, 41/43 were all similar and amounted to double invoicing.
12. PW2 further confirmed that some of the delivery notes contained items that were not tendered for and for which they did not have LPO's. Also, some of the delivery notes were signed and others were not signed, but he also urged the court to note that he had personally delivered a majority of the goods invoiced and at not time had he dealt with the inspection committee. All the delivery notes were signed after the goods delivered had been inspected. In re examination PW2 confirmed that they procedurally bid for the school tender and emerged successful. All their goods were delivered to the school and the delivery notes signed by the appellants authorized agents. They goods were not delivered to a different construction site as alleged. After delivery the appellant would have cheques drawn in the respondent's favour.
 13. DW1 Benjamin Mutura Ngatho testified that he was the current principal of the Appellant school and when he reported to the said school, he found the construction project was on going and became aware of the primary suit which had been filed. He went through the school file and noted that a tender had been flouted and it was won by the 1st respondent. Both the school secretary and BOG chairperson made a notification of award to the 1st respondent through their letters dated 4th June 2010 and 3rd July 2010. He further noted that there was confusion regarding the name of the company as the supplier who accepted the tender was Simcor Merchant 2002 and not Simcor Merchant 2002 Limited. The 2nd notification also expressly stated that order for material would be made by LPO/LSO, and while the 1st respondent had some LPO/LSO to support part of his claim, their set of LPO/LSO was not complete and in other instances they were missing.
 14. DW1 further stated that the invoices after 10th October 2010, were not supported by LPO's. The school's infrastructure committee should also have been the ones to initiate the purchase of goods, through LPO's, and also dealt with Inspection and acceptance of material supplied. This was not the case and he had noted various discrepancy in the delivery notes as some had not been signed, others had been signed by various persons including the 3rd respondent, PTA secretary and other persons who were not infrastructure committee members and also some did not indicate the Motor vehicle that delivered goods and/or order number. All these discrepancies pointed to a conspiracy.
 15. DW1 also faulted the 1st respondent for not giving the school credit for payment of Kshs 300,000/= paid in November 2011. The 1st respondent had also unilaterally changed the prices of goods supplied without approval granted for the same by the infrastructure committee. He produced Exhibit D8, being their reconciled accounts and urged the court to find that all invoices issued after 18th October 2010, be reviewed and a total of Kshs 606,982/= be deducted therefrom on account of figures overcharged. None delivered goods also amounted to Kshs 794,840/= and this figure too ought not to tabulate as owed by the appellant. In total if all disputed amounts were removed the valid claim of the 1st respondent would amount to Kshs 505,437/=.
 16. Upon cross examination, DW1 confirmed that he joined the school in January 2012, and was not present when the transactions were carried out. The 1st respondent had won the tender award and he believed that only items delivered, which tallied with the LPO's were genuine. Some of the delivery noted were signed by the 2nd respondent, but other delivery for subsequent transferred were not signed and/or stamped. He also confirmed that in November 2011, they had made a partial payment of Kshs 300,000/= to the 1st respondent. The 2nd and 3rd respondent in this Appeal were the school principal and bursar respectively but was not sure if they were members of the school's tender committee. Due to issues arising from this construction the 3rd respondent had been sacked by the school board and



- the 2nd respondent demoted and transferred to a different school. DW1 also confirmed that despite the price increase, majority of the goods supplied were paid by the school.
17. During re-examination DW1 stated that the 2nd respondent as the school principal was supposed to be aware of the provisions of PPDA and should have advised the implementation committee accordingly. There were inconsistencies as to how the goods were received as the school did not have a storekeeper, and those who signed the delivery notes were not members of the implementation committee. In fact it was the grounds man who was the one receiving the goods and made entries in his exercise book. Despite all these inconsistencies, he had come across documents from the acceptance committee, advising the principal to pay the respondent. The payments made were irregular in light of the revealed irregularities as the 2nd respondent had a duty to ensure they got value for money.
 18. DW2 Mary Nduku Muasya testified that she had worked as the school secretary since 2003 and worked with the 2nd and 3rd respondents who were the school principal and bursar respectively during the period the tender issues arose. Several contractors had been contracted to supply goods during construction works which were ongoing within the school and the 1st respondent did supply building material to the school and she on instructions of the 2nd respondent did also sign some of the delivery notes. Others too were signed by the 3rd respondent on behalf of the school. The delivery notes which she signed were No 117 (stamped and signed) while on delivery notes No, 019, 020 and 021, she appended her signature thereon but had not have the school stamp. She did not see the material listed in the delivery notes and could therefore not tell if the same were delivered to the appellant.
 19. She further confirmed that during construction, they had a board committee dealing with the project and it was the said committee who were authorised to give the supplier LPO before the goods were supplied. Not all delivery notes produced had LPO's attached, which corresponded with deliveries made. DW2 also denied receiving the letter increasing the price catalogue and nor was she aware if the tender committee approved the same. Upon cross examination DW2 confirmed that she had signed the four deliver notes but had forgot to stamp some of them. Other delivery notes were signed by the gateman, Janet Makau and one Mr Wambua who was the school's Laboratory assistant and they did so to assist the accounts office/bursar, who authorized them to received good in his absence. DW2 further denied being in collusion with the 2nd respondent to defraud the appellant and she believed the goods signed for were supplied/delivered.
 20. In re-examination, DW2 confirmed that it was the 3rd respondent who directed them to sign the delivery notes, but she had not inspected the goods delivered and this was a lapse which could be blamed on lack of proper instructions given by the 2nd and 3rd respondents and they were the persons who should be held responsible should any lapse be unearthed. DW3 Justus Kasina testified that he was the current school bursar of the appellant school, who took over from the 3rd respondent and they had contracted an auditor, who had gone through the project accounts and unearthed several irregularities, which were that; the project books were not properly kept and in other instances there were double payments made for goods supplied. The 3rd respondent had authorized them to sign for delivery of goods supplied and they did so in some instances, without cross checking if indeed the goods had been supplied. Further he had analysed the LPO's and delivery notes and found out that there was a price variance which had not been authorized by the tender committee and all these malfeasance lead to the construction not being completed due to lack of material and funds.
 21. Upon cross examination, DW3 confirmed that he joined the appellant school as an accounts clerk in March 2010 and subsequently arose to be the school bursar. He was not a member of the tender committee and therefore was not privy to their deliberations on price increment. DW3 also confirmed signing several delivery notes, and that signified acceptance/confirmation of goods delivered. Payments



had also been made for the supplies made and that was done in consultation with the Board of Governors. Further the said payments factored in the new prices and that signified the fact that the appellant had agreed to the price list changes made. In re-examination DW3 admitted that there were errors made when they signed delivery notes without verifying if indeed goods had been delivered and also reiterated that there was no commonality/agreement to increase the price of goods supplied. That had been a unilateral decision of the 1st respondent.

22. The 1st, third party / 2nd respondent in this Appeal, Mr Jonathan Mua Munyao testified that he was the current principal of Katelembo centre for excellence Boys High school and previously was the principal of the appellant school. He confirmed that he was familiar with the tender issued to the 1st respondent and the school infrastructure committee (SICO) had instructed different staff members to receive the goods purchased, which they would verify weekly by checking on the store records and site visits. As the school secretary to the board, he ensured the SICO and the BOG were well briefed of what was happening and had all deliberations minuted. It was also to be noted that all payments were approved at their SICO monthly review meeting, which was held in the presence of a representative of the District Education office and thereafter cheques issued signed by all the three mandatory signatures. Such payments cheques also would not go out without the authority of the appellants Board of Governors. On transfer he did hand over all these records to DW1, when he took over the running of the school. The appellants board had also acknowledged owing the 1st respondent a sum of Kshs 2,000,000/= and in the last board meeting he attended it had been agreed that they would settle this sum by paying the 1st respondent a sum of Kshs 400,000/= in five tranches.
23. In cross examination the 2nd respondent herein reaffirmed that the tender awarded to the 1st respondent was proper and all legal procedures followed in awarding the same. He was referred to the discrepancies in the name of the 1st respondent as they appeared in the pleadings and the school documents but he maintained that the 1st respondent was one entity and he could not tell the difference between a business name and company name. Further he also confirmed that the SICO was fully constituted and oversaw all aspects of the construction project and there was also an acceptance committee, which would oversee delivery of construction equipment, which had been ordered for.
24. The 2nd Respondent acknowledged that there were some LPO's that were signed, did not have the school stamp and other discrepancies appeared in the delivery notes, but countered the same by stating that the project undertaken was massive and the relevant committees had confirmed what was actually delivered. He also denied usurping the powers of any of the school committees and had only acted within the powers confined by law and acted as secretary to the BOG and as the link between the various committees overseeing the project, to which he was a member.
25. The 2nd respondent further confirmed that the 1st respondent made several deliveries to the school pursuant to the contract they had, and the said material was received by different school official, who were mandated to do so. While it was appropriate for the school to issue LPO's for all goods ordered, there were instances where emergency supplies were needed and they would call the 1st respondent to supply the items needed. It was not irregular to make such orders and the delivery notes for goods delivered would be signed in acknowledgment of the same. Further he had noted that the 3rd respondent had misappropriated some money and an audit was initiated by the school board and the 3rd respondent dismissed during his tenure as the school principal. As far as he was concern that was the only hiccup/challenge he had during implementation of the project.
26. Further the 2nd respondent confirmed that he had handed over management of the school to DW1, upon transfer in March 2012 and per the records as at then, the balance owned to the 1st respondent was Kshs 2,000,000/= and the school board had approved that this debt be settled by paying the 1st



respondent through several instalments. This was captured in the board minutes handed over to DW1. He reiterated that he had done no wrong as the BOG had approved all payments made with respect to the contract. In re-examination the 2nd respondent reiterated that the project and payments were above board and by the time he left the school, the BOG and school PTA committee were making arrangements to settle the debt due. As regards the change of prices, they had consulted with the District supplies officer, who gave them the current price guidance index, which was presented to the tender committee and they accepted the same.

27. The 3rd Respondent did not offer his evidence, and upon conclusion of the case, and after considering the evidence presented and submissions made, the trial court did enter judgment in favour of the 1st Respondent for the sum of Kshs 1,700,195.00/= plus costs and interest from the date of filing this suit until payment is made in full, hence this Appeal.

The Appeal

28. I have considered this appeal, submissions and the impugned judgment. I have also considered the decisions relied on and perused the trial court's record. This being a first appeal, it is by way of a retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence afresh and draw its own conclusions on it. The court should however bear in mind that it did not see the witnesses as they testified and give due allowance for that. (See *Selle v Associated Motor Boat Co Ltd & others* [1968] EA 123).

29. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal held:

“This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that 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 allowances in this respect.”

30. In *Nkuba v Nyamiro* [1983] KLR 403, the same court stated:

“A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”

I. Burden of Proof

31. The appellant in their memorandum of appeal has mainly challenged the trial Magistrate's finding on whether the 1st respondent did prove their case on a balance of probability and proffered that the trial Magistrate erred in awarding the 1st respondent Kshs 1,700,195.00/= as it was proved that the sum claimed was based on invoiced goods never supplied, forgery of the BOG chairperson signature, disregard of procurement procedures and midway unapproved change of the prices of goods supplied, which were not approved by SICO. It is trite law that he who alleges must prove. Indeed as stated by the Appellant, section 107 and 109 of the *Evidence Act* provide that;

107. Burden of proof

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 exist.



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.

109. Proof of particular fact

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.

32. The *Halsbury's Laws of England*, 4th Edition, Volume 17 at para 13 and 14 states that;

“The legal burden is the burden of proof which remains constant through a trial; it is the burden of establishing the facts and contentions which will support the parties case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied in respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is essential to his case. There may therefore be separate burdens in a case with separate issues.”

16. The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitution evidential burden. Therefore, while both legal and evidential burden initially rests upon the appellant, the evidential burden may shift in the course of trial depending on the evidence adduced. As to weight of evidence given, by either side during the trial varies; so will the evidential burden shift to the party who would fail without further evidence.”

33. The Question then is what amounts to proof on a balance of probabilities. Kimaru J in *William Kabogo Gitau v George Thuo & 2 others* (2010) 1 KLR 526 stated that;

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposite party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegation that he made has occurred.”

34. I also refer to *Palace Investments Ltd v Geoffrey Kariuki Mwendwa & another* (2015) eKLR, Where the judges of Appeal referred to “Denning J in *Miller v 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 the tribunal can say; we think it is more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where the parties.....are equally (un)convincing, the party bearing the burden of proof will loose because the requisite standard will not have been obtained.”



35. The 1st Respondent did on a balance of probability prove their case through the evidence tendered together with their claim supporting document all of which were produced as exhibits. PW1 and PW2 confirmed that indeed they did tender and were awarded a contract to supply building material to the appellants school and this evidence was confirmed by DW1 that the school made a notification of award vide their letters dated 04/06/2010 and 03/07/2010 signed by the secretary to the tender committee and the BOG chairperson respectively. PW2 who was the 1st respondent's operation manager did produce the bundle of LPO's, delivery notes and invoices for supplies made and justified their claim for Kshs 2,000,195.00/= being the amount which remain unpaid for supplies made.
36. DW1 disputes the sums claimed, but confirmed that he was not the school's principal when the transactions took place, and while there were discrepancies in the LPO's, delivery notes and invoices, it was his evidence in cross examination that, "It is true payments were done to the plaintiff in relation to supplies of hardware materials." Further it was his evidence during the said cross examination that, "We do not have a claim against the plaintiff over over payment." During further cross examination by the 3rd respondent's advocate, DW1 further admitted that, "There was a contract between the plaintiff and the defendant school. The plaintiff supplied and some payments were made..... Not all delivery notes were stamped by the school. Majority were increased prices were paid."
37. DW2 Mary Nduku Muasya, who was the school secretary also confirmed that she knew PW1 and PW2 and they did supply various building to the school and she did sign various delivery notes acknowledging receipt of goods supplied and on some occasions forgot to stamp the delivery notes using the official school stamp. She also confirmed in cross examination by the 3rd respondent's advocate that, "I confirm there was a tender between plaintiff and Defendant. Goods were supplied. The tender was proper." Finally, the 2nd respondent, who was the school principal, when the tender was issued and goods delivered was emphatic that everything was done above board by the school's BOG and SICO, which would meet weekly to verify the store records and visit the construction site. It was also his evidence that he had assigned staff various duties including receiving of goods supplied, and the data generated would be again submitted to the SICO to tally the delivery notes and goods delivered.
38. After the verification process, he would prepare payment advice, which would be signed by the SICO chairperson, chairman BOG, chairperson PTA, tender committee chair person and himself as secretary to the BOG. It was after this process that a cheque would be prepared and issued/signed by three bank signatories. It was therefore impossible to manipulate illegal payments to the 1st respondent without undertaking this verification process, which payment had also to be approved by the representative of the District Education office. During his last BOG meeting before handing over, the BOG had discussed the 1st respondent's pending bills and approved that he be paid by five instalments of Kshs 400,000/= each to settle the Kshs 2,000,000/= owed.
39. From the foregoing it is clear that the 1st respondent did prove their case on a balance of probability, that he indeed did supply building materials to the appellants school and was owed money on account of the same. Be that as it may from the evidence of PW2 and DW1 it is clear that a sum of Ksh 300,000/= had been paid and not credited to the appellants favour, which sum the trial court took into account and set off as against the sum demanded. Further PW2 did admit that invoices 30 and 36 and invoices 41 and 43 were similar, hence a duplication. The former invoices were for Kshs 48,100/=-, while the later invoices were a duplicate of Kshs 11,550/=-. The sum of Kshs 59,650/=- ought to have been further deducted from the decretal sum.
40. The evidential burden of proof therefore shifted on the Appellant to disapprove this evidence. The appellants' put up a gallant fight to try discredit the 1st respondent's evidence, but ended up raising a lot of smoke without any fire. The appellants case was that the tender was awarded in contravention of the



PPRA, not all delivery notes were accompanied by LPO's, some delivery notes were not stamped and the 1st respondent unilaterally raised tender prices mid-stream and therefore ought not to be paid goods at the increased price. The 3rd respondent who was the school principal then gave elaborate evidence on the approval for payment and payment process which involved the BOG, PTA chairperson, SICO and the District education office representative after which the payment cheque would be signed by three authorized signatories. Further he confirmed that in the last BOG meeting he attended the BOG discussed and passed a resolution that the 1st respondent be paid the Kshs 2,000,000/= owned through equal instalment of Kshs 400,000/=. DW1 also confirmed that the tender was properly awarded to the 1st respondent and despite the several irregularities noted, majority of the increased prices were paid.

41. The appellants did not file a counter claim or plead set off for what they alleged to have been payments made for over priced goods, and are further estopped by the doctrine equity from turning their back on such payments as their own chief witness admitted majority of such payment had been made. It is therefore too late in the day to claim otherwise. Secondly the 2nd respondent who was the former principal also confirmed that the SICO in consultation with the District supplies officer had considered the price adjustments and approved the same. Nothing therefore turns on this issue. Further all irregularities pointed out did not negate the contract and the said evidence just exposed the internal week systems of the appellant's school and strong suspicion that there could have been foul play, which was not proved.
42. The appellant submitted at length regarding the legal status of the 1st respondent, as to whether they were a limited company or a business name. The appellant's own witnesses acknowledged entering into a contract with the 1st respondent, goods were supplied and partial payments made. It is too late in the day to purport to now discover the "Saul to Paul -Damascus moment" and to purport challenge the legal status of the 1st respondent, while all long the appellant had been dealing with them, it is escapist and cannot hold. Further even if it were to be an issue both parties did not submit the tender contract signed by the parties the basis upon which such an inquiry would be made and therefore the appellant cannot escape from paying the debt due on this basis.

E. Disposition

43. The upshot having made the above analysis on the evidence adduced, I do find that this appeal is partially successful to the small extent that the sum of Kshs 59,650/= is further deducted of the decretal sum, on account of double invoicing. The decree awarded by the trial court in Machakos CMCC No 201 of 2012 dated 22nd October 2020 is therefore reduced to Kshs 1,640,545.00/=.
44. The 1st Respondent will have costs of the primary suit, plus interest at court rates from the date of filing the suit until date of payment of decretal amount in full.
45. The costs of this Appeal are awarded to the 1st respondent and the same are assessed at Kshs 250,000/ = all inclusive.
46. It is so ordered.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 16TH DAY OF SEPTEMBER 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 16th day of September, 2024.

In the presence of: -



Mr. Mulu for Appellant
No appearance for Respondent
Susan/Sam Court Assistant

