



**B Braun Pharmaceuticals EPZ Limited v Aquamist Limited (Commercial Appeal E235 of 2023)  
[2024] KEHC 12054 (KLR) (Commercial and Tax) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12054 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL APPEAL E235 OF 2023  
PM MULWA, J  
OCTOBER 3, 2024**

**BETWEEN**

**B BRAUN PHARMACEUTICALS EPZ LIMITED ..... APPELLANT**

**AND**

**AQUAMIST LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The respondent commenced suit against the appellant before the Small Claims Court vide a statement of claim dated 31<sup>st</sup> May 2023. It claimed that on diverse dates between 2022 and 2023, it supplied various units of water to the appellant's office totaling Kshs. 85,371.12. The amount remained unpaid. It prayed for judgment for the said sum plus the claim's costs and interest.
2. The appellant vide its response to the statement of claim dated 28<sup>th</sup> June 2023 acknowledged the respondent was its supplier but denied owing the claimed amount.
3. After the trial the learned adjudicator found the respondent had proved its case, by providing the statements of accounts for the period in dispute and entered judgment against the appellant in the sum of Kshs. 85,371.12 plus costs and interest.
4. Dissatisfied, the appellant filed the instant memorandum of appeal dated 14<sup>th</sup> September 2023 raising the following grounds:
  - i. That the learned trial adjudicator erred in law by failing to find that the respondent had not discharged its burden of proof on the required standard.
  - ii. The learned trial magistrate erred in law by shifting the burden of proof upon the appellant contrary to the well-established known legal principles



- iii. That the learned adjudicator erred in law by ignoring the applicable provisions of the law, appellant's submissions and judicial authorities cited.
  - iv. That the learned adjudicator erred in law by failing to find that the respondent's statement of accounts could not be the basis of establishing liability on the part of the appellant.
  - v. The learned adjudicator erred in law by failing to find that the respondent's statement of accounts could not be a basis for establishing liability on the part of the appellant.
  - vi. The learned adjudicator erred in law by misconstruing and ignoring known legal principles and rules of evidence.
5. The appellant thus prayed for orders:
- i. That the appeal be allowed
  - ii. That the judgment and decree of the trial court delivered on 25th August 2023 be set aside and the same be substituted with a judgment dismissing the respondent's statement of claim dated 31st May 2023.
  - iii. The costs of this appeal and costs at the trial court should be awarded to the appellant.
6. The appeal was canvassed by way of written submissions. The appellant filed written submissions dated 3<sup>rd</sup> February 2023. The respondent did not participate in this appeal despite being properly served.
7. In its submissions the appellant avers the appeal is purely on points of law in compliance with the provisions of Section 38 of the Small Claims Court.
8. It is the appellant's case that the learned adjudicator went beyond the scope of her jurisdiction and misdirected herself by allowing the respondent's claim against the weight of evidence tendered by the parties and applicable legal principles. It faults the learned magistrate for ignoring critical evidence it had adduced during the hearing.
9. It was submitted that the respondent bore the legal burden of proof throughout the trial, to prove on the required standards that the appellant owed them on account of supply of water. And that the respondent failed to discharge that legal burden by failing to adduce invoices and delivery notes.
10. The appellant argues that a statement of account without invoices cannot be used to infer liability. Reliance was placed in the case of *E.P. Communications Limited v East Africa Courier Services Limited* (2019) eKLR.

### **Analysis and determination**

11. In light of the evidence adduced before the trial court and, and taking into consideration the grounds of appeal as well as the submissions filed herein, I frame the following two issues for determination:
  - i. Whether the respondent discharged the burden of proving its case on a balance of probabilities, and
  - ii. Whether the learned trial adjudicator erred in her judgment.
12. As the first appellate court, this court will evaluate, assess and analyze the extracts on the record and make its own conclusion, bearing in mind it did not have a chance to hear the witnesses (see *Selle & Anor vs associated Motor Board Company Ltd* (1968) E.A 123).



13. At the trial court the respondent alleges it supplied water to the appellant's office, but the respondent failed to pay for the water supplied and the balance owing is Kshs. 85,371.12. In support of its claim, the respondent produced a statement of accounts in which as of 15<sup>th</sup> March 2023, the statement of Account showed that the invoiced amount was Kshs. 254,789.42 out of which a sum of Kshs. 169,418.30 had been paid, and the balance due was Kshs. 85,371.12/=.
14. In its defence the appellant denied owing the amount. Its witness Collins Njite, the Senior Accountant, stated that in claiming payments the respondent was required to provide the original invoice and the correspondence delivery note for each order. According to the witness the appellant paid all the invoices submitted to it by the respondent. Further, the appellant disputed the first entry of 31<sup>st</sup> May 2021, that is 1600000926 of Kshs. 58,516.36 with the detailed customer document.
15. I note that this amount has been added to the total invoiced amount. During the trial, the respondent did not expound or adduce evidence of how the amount was arrived at. There were no invoices adduced.
16. Sections 107 and 109 of the *Evidence Act* provide that whoever alleges must prove. The burden of proof is therefore on the person who wishes the court to believe the existence of a fact. The statement of accounts as provided demonstrates that there was a contract for the supply of water to the appellant. This position has not been denied. The respondent was therefore supposed to prove that amounts remained unpaid despite the supply.
17. The court in the case of *East Produce Kenya Limited v Christopher Astiado - Civil Appeal No. 43 of 2001* held as follows:

“It is trite law that the onus of proof is on he who alleges and in matters where negligence is alleged the position was well laid in the case of Kiema Mutuku –v- Kenya Cargo Hauling Services Ltd 1991 where it was held that ‘there is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence.’”
18. I agree with the appellant's position that the issue in dispute is similar to a claim for special damages. It is trite law that special damages must be pleaded and specifically proved. To prove the indebtedness the respondent adduced the statement of account. In my view such statement alone cannot be used as sufficient evidence to prove and confer liability on the appellant.
19. Section 37 of the *Evidence Act* states:

“Entries in books of account regularly kept in the course of business are admissible whenever they refer to a matter into which the court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability.”
20. The Court of Appeal in the case of *Five Continents Ltd v Mpata Investments Ltd [2003] eKLR* held:

“The plaintiff mainly relied on the accounts analysis to show the defendant's indebtedness. That accounts analysis was apparently prepared by the plaintiff for use in this suit. It is not itself a book of account regularly kept in the course of business. Even if it were, such a statement would not alone be sufficient evidence to charge the defendant with liability...It follows that the accounts analysis on which the learned judge relied has no evidential value.”



- 21. Guided by the above decision, I find the respondent failed to prove on a balance of probability the indebtedness of the appellant. I thus find that the learned adjudicator erred in holding that the statement of accounts was sufficient proof of liability and subsequently erred in shifting the burden of proof to the appellant.
- 22. In the case of Mbogo and Another v Shah [1968] EA 93 where the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
- 23. Given the above, and having found that the learned adjudicator erred in law, I find the appeal is merited. I allow the appeal and set aside the judgment in the Small Claims Court dated 25<sup>th</sup> August 2023. In lieu thereof, I substitute the same with an order dismissing the statement of claim. Costs of the appeal shall be to the appellant, which I assess at Kshs. 20,000.00.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 3<sup>RD</sup> DAY OF OCTOBER 2024.**

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**P. MULWA**  
**JUDGE**

In the presence of:  
Mr. Njuguna for appellant  
N/A for respondent  
Court Assistant: Carlos

