



**Kithinji & another v Gwendo & 2 others (Civil Appeal E275 of 2021)  
[2023] KEHC 3094 (KLR) (Civ) (14 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3094 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E275 OF 2021**

**AN ONGERI, J**

**APRIL 14, 2023**

**BETWEEN**

**LILIAN MWARI KITHINJI ..... 1<sup>ST</sup> APPELLANT**

**PAUL MWAI KINGURU T/A LEALTA CAPITAL INVESTMENT ... 2<sup>ND</sup>  
APPELLANT**

**AND**

**STEVE BIKO GWENDO ..... 1<sup>ST</sup> RESPONDENT**

**GEORGE LUTTA T/A 1824 THE WHISKY BAR ..... 2<sup>ND</sup> RESPONDENT**

**WILSON KANANI ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the judgment and decree by Hon. Peter Muholi  
(P.M) in Milimani CMCC no. 3102 of 2017 delivered on 23/4/2021)*

**JUDGMENT**

- 1) The appellants filed CMCC no 3102 of 2017 against the respondents seeking payment of kshs 571,660 in respect of assorted wines and drinks which the appellants allegedly supplied the respondents on diverse dates and which the respondents failed to make full settlement.
- 2) The respondents denied the appellant's claim and said in their defence that all payments were fully settled.
- 3) The respondents filed a counter-claim against the appellants and demanded kssh 2,012,430 alleging that the sums were fraudulently received by the appellants in respect of fraudulent claims raised by the appellants.



- 4) At trial it was the appellants case that the defendant failed to make full settlement of invoices sent to it leaving a debt of Kshs 571,660 with the particulars being;
  - a. Invoice No 187 dated 24/12/15 for the sum of Kshs 76,860
  - b. Invoice No 131 dated 9/9/16 for the sum of Kshs 211,200
  - c. Invoice No 451 dated 11/09/16 for the sum of Kshs 149,400
  - d. Invoice No 132 dated 23/09/16 for the sum of Kshs 34,200
- 5) PW1 Paul Mwai Kinguru told the court that they did not exaggerate the invoices. He indicated that two people would ascertain the delivery namely the supervisor and the barman who counted the physical quantity. However, on cross-examination PW1 indicated that he was not a part of the audit process and there were no delivery notes that were issued. He told the court that he would offload the goods and the store person, supervisor and accountant would cross check and verify the physical goods and the invoice and then the store person would sign and delivery was accepted.
- 6) DW1 Steve Biko Gwendo told the court that it was and still is their business practice that when they receive an assortment of wines and spirits, the storekeeper has to prepare a store sheet containing the number of bottles of wine and sprits delivered on a particular date, the existing stock of each item and the total number of the wines and spirits after the delivery of the new stock. In his testimony he indicated that it was the delivery note indicating the goods delivered was stamped to show receipt of delivery and that the stamped invoices only indicate the receipt of the invoice and was done to help them track documents brought to their premises.
- 7) DW1 indicated that being served by a demand letter forced them to go back to their records and go through each invoice raised by the plaintiff and compare it with the stock sheet and it was there that they discovered that the appellant had been overpaid by invoicing for items that they had not delivered. He indicated that the appellants were irregularly and fraudulently paid Kshs 2,012,430.
- 8) The trial court heard the evidence by the appellants and the respondents and found that the respondents owed the appellants ksh 422,260/= while the appellants owed the respondents kshs 2,012,430/= and ordered that the appellants pay the respondents the difference of kshs 1,590,170/=.
- 9) The appellants are aggrieved by this decision and they have now filed this appeal on the following grounds:
  - a. The learned magistrate erred in law finding in favour of the respondent in the counterclaim based on the allegations of fraud for which the threshold of proof had not been achieved
  - b. The learned magistrate, despite making a finding that the stock sheets relied on by the respondents were inadmissible under section 37 of the *Evidence Act* still went ahead to rely on them
  - c. The learned magistrate erred in law in relying on the subject stock sheet to find liability against the appellants.
  - d. The learned magistrate erred in entering judgement for the respondent on a figure of Kshs 2,012,430 in the counter claim yet that figure was not arrived at in a credible process through reliable evidence.



- e. The learned magistrate erred in dismissing the appellants claim on invoice 451 on the basis of provisions of the *Stamp Duty Act* after the documents had already been produced and pretrial procedure closed
- 10) The parties filed written submissions as follows: the appellant in its submissions argued that allegation of fraud must be proved at a standard that is higher than that of a balance of probabilities but lower than beyond reasonable doubt. That in this matter the respondent elaborated its procedure of receiving supplies at the respondent's premises, that atleast 3 of the respondent's staff from different departments were involved and acknowledge the deliveries by stamping and signing the invoices. However, the respondent indicated that the alleged fraud was discovered by an undisclosed accountant. The exercise that was taken was not a forensic audit and there was no professional report that was prepared arising out of that exercise and the person who carried out the exercise was not presented in court.
- 11) The stock sheets that the respondent heavily relied on were not prepared by a witness availed in court and therefore the methodology that the respondents used to find fraud was therefore opaque. It was therefore the appellants argument that fraud herein was therefore not proved to the required standard and the magistrate erred in determining the same.
- 12) The appellant argued that at paragraph 51 of the impugned judgement the magistrate made an express finding that the store stock sheets were insufficient with regards to the provisions of Section 37 of the *Evidence Act*. The *Evidence Act* is clear that the entries in books of account regularly kept can be admitted as evidence but must be corroborated by other evidence. Alone they are insufficient to prove liability. It was the appellants contention therefore that stock sheets cannot be taken to be books of account and therefore Section 37 of the *Evidence Act* does not therefore apply to them. That using the stock sheets alone went contrary to Section 37 of the *Evidence Act*.
- 13) The appellant argued further that Ksh 2,012,430 was conjured without even examining the arithmetic used in arriving at it. That the trial court tool the figure suggested by the respondent hook line and sinker as there was no analysis and no criteria.
- 14) The appellant argued that the respondent failed to call a crucial witness who carried out the exercise that claimed fraud on the part of the appellant and it was wrong for the part of the trial court to find in favour of the respondent on reliance of such crucial evidence.
- 15) The 1<sup>st</sup> respondent submitted that the trial court was correct in reliance of the stock sheet that was produced as the respondents demonstrated that the appellant had been paid for goods not delivered. That the fraud was unearthed by the meticulous stock keeping formula devised by the respondent. It was argued that the respondents produced stock sheets and not a book of accounts as the appellant has tried to suggest. That the production of the stock sheets did not require an accountant as it demonstrated the goods invoiced were delivered and accounted for.
- 16) The 1<sup>st</sup> respondent further contended that section 19 of the *Stamp Duty Act* provides that no instrument chargeable with stamp duty shall be received in any proceeding whatsoever unless duty has been paid. The rejection therefore of invoice number 451 was on the basis of law. The said invoice did not belong to the appellant and there existed an instrument transferring the invoice to the appellant and the said instrument did not meet the legal threshold.
- 17) The 2<sup>nd</sup> and 3<sup>rd</sup> respondents in agreement with the 1<sup>st</sup> respondent submitted that the appellant at the trial court did not raise an objection to the production of the documents that were relied upon by the respondents. That the appellant cannot therefore allude at this stage that the documents were not properly produced.



- 18) They indicated that no forensic audit was required to establish whether an item was delivered or not. That it was done by simply comparing what was invoiced for and what was noted as having been delivered through the stock sheets.
- 19) It was submitted that the stock sheets were produced together with corresponding invoices from the appellants herein and as such the said stock sheets were corroborated by the appellant's own documents. That the admissibility of the documents produced by the respondent can only be challenged if they were illegally admitted or they failed some standard of the law but not on the fact or contents thereon as the appellants had the opportunity to challenge them during trial.
- 20) It was therefore their contention that the trial magistrate came to the correct conclusion after a proper evaluation of the evidence before it.
- 21) This being a first appeal, the duty of the first appellate court is to re-evaluate the evidence before the trial court and to arrive at its own conclusion whether to support the findings of the trial court. In *Selle & Another v Associated Motor Boat Co Ltd & Others* [1968] EA 123 it was held:-
- “I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. 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 demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v Ali Mohamed Sholan* [1955], 22 EACA 270 ).”
- 22) The issues for determination in this appeal are as follows:
- i. Whether the appellants proved their case to the required standard.
  - ii. Whether the respondents proved their counter-claim to the required standard.
  - iii. Whether the appeal should be allowed.
- 23) On the issue as to whether the appellants proved their case the trial court found that the documents produced by the appellants proved that they were owed only 422,260/=.
- 24) I find that the trial court was right in arriving at this finding since it is based on the evidence on record.
- 25) The respondents were also able to prove that the appellants had fraudulently obtained kshs 2,012,430 from them.
- 26) I find that the trial court was right in ordering the appellants to pay the respondents the difference of ksh 1,590,170/=.
- 27) I find that the respondents proved their counter-claim on a balance of probabilities and the judgment was properly entered in their favour.
- 28) I find that this appeal lacks in merit and I accordingly dismiss it with costs to the respondents.



DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS  
14<sup>TH</sup> DAY OF APRIL, 2023.

.....

**A. ONGERI**

**JUDGE**

**In the presence of:**

..... for the 1<sup>st</sup> Appellant

.....for the 2<sup>nd</sup> Appellant

..... for the 1<sup>st</sup> Respondent

..... for the 2<sup>nd</sup> Respondent

..... for the 3<sup>rd</sup> Respondent

