



**Veteran Pharmaceuticals Limited v Ondeyo & another (Civil Appeal
E127 of 2022) [2023] KEHC 18959 (KLR) (Civ) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18959 (KLR)

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

CIVIL

CIVIL APPEAL E127 OF 2022

JN NJAGI, J

JUNE 15, 2023

BETWEEN

VETERAN PHARMACEUTICALS LIMITED APPELLANT

AND

AGGREY NYAKUNDI ONDEYO 1ST RESPONDENT

**SOLOMON NDEI MALUTI (BOTH T/A ROSEGATE INVESTMENTS) 2ND
RESPONDENT**

*(Being an appeal from the judgment and decree of Hon.B.J.Ofisi, Resident
Magistrate, in Nairobi SCC COMM Civil Suit No.82 of 2021 delivered on 10/5/2021)*

JUDGMENT

1. The Appellant is a pharmaceuticals company involved in the supply of medical goods. It was their case that on diverse dates up to the March 4, 2017 they supplied medical goods worth Ksh 422,191.90/= to the Respondents. That the Respondents on various occasions issued 7 cheques of various amount in settlement of the amount all of which were rejected on presentment on account of insufficient funds as a result of which the Appellant incurred bank charges of Ksh 21,000/= on the rejected cheques. The Appellant then instituted suit at the Milimani Small Claims Court to recover a total sum of Ksh 443,191.90/= plus interest at the rate of 14% per annum.
2. The claim was denied by the Respondents on the ground that the goods were never requested by the Respondents neither were they delivered. They however did not call any evidence in the case. After a full trial, the Adjudicator dismissed the Appellant's claim for lack of proof. The Appellant was dissatisfied with the judgment and filed this appeal.
3. The grounds of appeal are that:



1. That the learned Magistrate erred in law by dismissing the Appellant's suit with costs.
 2. That the learned Magistrate erred in law and in fact in finding that there was no proof that the Respondents owed the Appellant while stamped copies of the invoices were duly adduced in court, evidence which were uncontroverted.
 3. That the learned Magistrate erred in law and in fact by addressing issues not raised by the Respondents in their defence.
 4. That the learned Magistrate erred in fact and in law by shifting the burden of proof upon the Appellant to proof the Respondent's case.
4. The appeal was canvassed by way of written submissions.

Appellant's Submissions –

5. The Appellant through the firm of JM Mugo & Co Advocates, submitted that the Appellant's witness, Jane Kimani PW1, in her evidence in court produced the invoices and statement of account that were sent to the Respondents by the Appellant. That the invoices were duly stamped to have been received by the Respondents. That the Respondents did not dispute the stamps on the invoices nor did they refute the contents of the said documents. Therefore, that the evidence on the invoices remained uncontroverted. On this proposition the Appellant relied on the case of *[Kenafri Diaries Manufacturers Ltd v Christian Partners Development Agency \(CPDA\)](#)* (2021) eKLR where Justice Muigai found that the Defendant had acknowledged receipt of the goods by signing and stamping the delivery notes. The Appellant also cited the case of *[Treadsetters Tyres Limited v Country Motors Limited](#)* (2009) eKLR where Justice Lesiit similarly held that the signature and stamp of the Defendant on the invoices was proof that the Plaintiff had supplied the goods claimed. Similar holdings were cited in *[Isaac Mugweru Kiraba t/a Isamu Refri-Electricals v Net Plan East Africa Limited](#)* (2018)eKLR.
6. The Appellant submitted that the statement of accounts dated March 1, 2018 and November 8, 2018 clearly shows that the amount owing to the Appellant as at the said dates was Ksh 442,191.90/=. That this evidence was not controverted by the Respondents and was overwhelming to proof that they did supply and deliver the subject goods to the Respondent who failed to pay. That as this was a business transaction, the Appellant was owed interest from the date of filing suit until payment in full. The Appellant urged the court to set aside the judgment of the learned Adjudicator and substitute it with one for the Appellant as sought in the plaint.

Respondent's Submissions –

7. The Respondents did not file any submissions in the appeal.

Analysis and Determination –

8. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. In *[Selle & Another vs Associated Motor Boat Co Ltd & Others](#)* [1968] EA 123, this principle was enunciated thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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..."

9. The Appellant called one witness in the case, Jane Njuhi Kimani, PW1 who testified that she is an accountant for the Appellant/Plaintiff She adopted her witness statement as her evidence in court. She stated in her statement that the defendants placed with them several purchase orders for the supply of medical goods. That once the Defendants made their order, the Plaintiff would prepare a consignment of the ordered goods and deliver the goods to the Defendants. That invoices were tendered alongside the delivery of the goods as payment was to be made within 30 days of delivery. That the Plaintiff supplied medical goods amounting to Ksh 422,191.90/=. That the Defendants on several occasions issued 7 cheques of various amount in settlement of the amount all of which were rejected on presentation to the bank on account of insufficient funds. That the plaintiff incurred extra costs of Ksh 21,000/= arising from rejected cheques. The witness produced the following documents in prof of his case:
 - (1) Statement of account dated 1/3/2018.
 - (2) Invoices to the 1st Defendant.
 - (3) Application to open a credit account dated 14/4/2014.
10. The witness said that the invoices were stamped by the defendant on delivery. She said in cross-examination that they had not filed any bank statement to prove that the cheques were dishonoured but that that position was not disputed. That page 4 of the statement of accounts dated 1/3/2018 confirmed that the cheques were dishonoured.
11. The Respondent in their statement of defence stated that the plaintiff charged the defendants for pharmaceutical products which were never requested for nor delivered to the defendants. They stated in the alternative that if the said goods were delivered they were neither the agreed nor requisitioned by the defendants. The Defendants/ Respondents however did not call any evidence in the case.
12. The learned Adjudicator dismissed the Plaintiff/Appellant's case on the ground that:

“...The stamped invoices were adduced in evidence however this court failed to establish whether the said cheques were dishonoured by the bank. A statement from the bank would have determined the correct status of the account.”
13. I have duly considered the grounds of appeal, the pleadings and the submissions by the respective advocates for the parties. The Appellant adduced evidence that they supplied the Respondents with the goods stated in the claim. They produced invoices that were duly stamped by the Respondents acknowledging that the goods were received. The Appellant further adduced evidence in their statement of account dated 1/3/2018 indicating that the 7 cheques were rejected.
14. Though the Respondents in their statement of defence denied that they requested for the claimed goods from the Appellant and alleged that they did not receive the goods, they did not give an explanation why they stamped the invoices acknowledging receipt of the goods. They did not produce any document to show that the goods were returned to the Appellant because they had not requested for them. They did not call any witness in the case. The effect of not calling evidence in a case is that the defence statements remain mere assertions and the evidence of the plaintiff remains uncontroverted - see Odunga J (as he then was) in the case of *Shaneebal Limited v County Government of Machakos* [2018] eKLR.



15. The statement of account produced by the Appellant showed that the 7 cheques were returned by the bank for there being insufficient funds in the Respondents' account. Upon adduction of that kind of evidence the burden of proof shifted to the Respondents to show that the 7 cheques were actually paid by the bank and were never rejected. They did not do so. In view of the fact that the Respondents stamped the invoices to acknowledge receipt of the goods and adduced no evidence that the 7 cheques were actually paid for by the bank, the evidence of the Appellant on supply of the goods and that the cheques were dishonoured remained uncontroverted. The Appellant had further proved that they had incurred extra costs of Ksh 21,000/= when the cheques were dishonoured by the bank. The trial court erred in demanding that the Respondents should have produced evidence from the bank to show that the cheques were dishonoured when the burden of proof had shifted to the Respondents to show that the cheques were actually paid. All in all, I find that the Appellant's case against the Respondents was uncontroverted as they did not call evidence in the case. Their assertions on denial of owing the money remained mere statements.
16. The upshot is that the Appellant had proved its case against the Respondents on a balance of probabilities. The judgment of the lower court is in the premises set aside and substituted with an order for judgment for the Appellant as prayed in the plaint together with costs of the suit and interest.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 15TH JUNE 2023.

J.N. NJAGI

JUDGE

In the presence of:

Miss Irungu for Appellant

Mr Malonya for Respondents

Court Assistant – Amina

30 days Right of Appeal.

