



**Gitonga v Meru Highlands Dairy Limited (Civil Appeal E117 of 2023)  
[2025] KEHC 15207 (KLR) (27 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15207 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E117 OF 2023  
SM GITHINJI, J  
OCTOBER 27, 2025**

**BETWEEN**

**PHINEAS GITONGA ..... APPELLANT**

**AND**

**MERU HIGHLANDS DAIRY LIMITED ..... RESPONDENT**

*(An appeal from the Judgment/Decree of Hon. L.W Mouti (R.M) in  
Meru Small Claims Court Case No. E171 of 2023 delivered on 22/6/2023)*

**JUDGMENT**

1. This Appeal arises from the Judgment of the learned Resident Magistrate Hon.L.W Maina Mouti (C.M) delivered on 22.6.2023 in Meru Small Claims Court Case No. E171 of 2023, wherein the trial court entered judgment in favour of the Respondent herein at the sum of Ksh. 439,713.03 together with costs and interest.
2. Aggrieved by the said Judgment, the Appellant set forth the following grounds in the Memorandum of appeal dated 11<sup>th</sup> July, 2023;
  1. The Learned Magistrate erred in law and fact in finding that it was the willful duty of the Respondent to collect the proceeds of sale.
  2. The Learned Magistrate erred in law and fact in finding that the discrepancies in the statements was the Responsibility of the Appellant and no one else.
  3. The Learned Magistrate erred in law and fact in awarding the claim in its entirety ignoring the evidence by the Appellant.
  4. The Learned Magistrate erred in law and fact in her application and interpretation of the law regarding the suit.



5. The Learned Magistrate erred in law and fact in failing to consider and/or disregarding the Appellant's evidence, submissions and case law cited.
6. The Learned Magistrate's Ruling was biased in favour of the Respondent against the Appellant, is full of errors, against the weight of evidence and a travesty of justice.

### **Oral evidence**

3. CW1 David Gitonga, the Respondent's Operation Manager, adopted his statement dated 9/5/2023 as his evidence in chief and produced the documents filed therewith as exhibits 1 to 5. He told the court that they delivered milk to the Appellant on several occasions, demand for Ksh. 643,200 was made on 13/11/2020, but the payment was not done. The claim was for Ksh. 1,000,000 for various dates when milk was dispatched to the Respondent.
4. RW1 Phineas Mwiti, the Appellant herein, adopted his response filed on 8/6/2023 as his evidence in chief and produced the documents filed therewith as exhibits 1 to 3. He was employed by the Respondent as a salesman plying the Nakuru, Isiolo, Meru and Maua routes. He would sell the milk on cash, Mpesa, credit, cheque or pay bill, and the details of the customers were shared with the company. Once he took the consignment at the warehouse, he would sign the invoice and reconciliation, for accountability. They would sell on credit, but before sales, new customers would supply their identity documents, which were left with the company for processing.

### **Submissions**

5. The Appellant through the firm of Kiautha Arithi & Co. Advocates filed submissions dated 30/6/2025. Counsel submitted that the obligation to collect proceeds of sale squarely rested with the Respondent, and faulted the trial court for imposing such a duty on the Appellant in the absence of a contractual basis. Counsel cited *Promotions v Standard Group Plc (Civil Appeal E112 of 2023) [2025] KEHC 1693 (KLR) (Commercial and Tax) (21 February 2025) (Judgment)*, for the proposition that parties are bound by the terms of their contract and a court cannot rewrite contractual obligations. Counsel maintained that the Appellant's role was limited strictly to sales and distribution of the Respondent's milk within the assigned regions. Counsel argued that the Appellant was verbally terminated in October 2021 without notice, and cited *Peter Munywoki Nzivo v Nguya Construction & Mining Company Limited (2022) eKLR*. Counsel prayed for the appeal to be allowed, because it was evident that the trial court misapprehended the facts, misapplied the law and ultimately arrived at an erroneous decision.
6. The Respondent did not file any submissions.

### **Analysis and Determination**

7. This being a first appeal, the court is obligated to reconsider and re-evaluate the evidence adduced in the trial court and draw its own conclusions.
8. In *Selle & another v Associated Motor Boat Co. Ltd [1968] EA*, the court held as follows: "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. I have considered the appeal herein, the trial court's judgment which is the subject of this appeal as well as the submissions by counsel.
10. From the grounds of appeal, the issue for determination is whether the trial court's decision was erroneous.
11. The undisputed facts are that the Respondent engaged the Appellant, its salesman to supply milk to its vast clientele on diverse dates. While some customers would pay upfront, the Appellant contended that delivery would occasionally be done to others on credit, because they were known to the company, as the company retained their details. He stated that, "I would also get new customers and sell to them. They would give me their details so that I would sell to them. The persons were known to the company before I would sell them milk. Once I took the consignment at the warehouse, I would sign the invoice and reconciliation. Reconciliation was for accountability. The customer was not signing documents between sales representative and the company."
12. I am minded that the invoice dated 2/9/2022 is expressly addressed to the Appellant as the customer, for the sum of Ksh. 470,400.
13. The Respondent's Operation Manager was categorical in his testimony that once an order was made, the milk was delivered, the invoice was generated, and payment done.
14. I find that the Appellant was duty bound to ensure the milk supplied to him duly reconciled with the corresponding remittances made to the Respondent, as any shortfall would, in the circumstances, be recoverable from him personally.
15. Needless to state, it would be manifestly unreasonable to expect the Respondent to demand payment from 3<sup>rd</sup> parties who were not privy to its dealings.
16. The trial court is faulted for failing to consider the Appellant's submissions and authorities. That fault is misconceived because submissions cannot take the place of pleadings, and their non-consideration cannot in itself be a basis to overturn a trial court's decision. Moreover, the mere fact that the trial court was ultimately dissuaded by the submissions of the Appellant together with the authorities he cited does not imply that they were disregarded altogether.
17. For the foregoing reasons, I find that the appeal is in want of merit and it is hereby dismissed with cost to the Respondent.

**DATED AND DELIVERED AT MERU THIS 27<sup>TH</sup> OCTOBER, 2025**

**S.M. GITHINJI**

**JUDGE**

Appearances:-

Miss Mutema holding brief for Miss Kerubo for the Appellant.

Mr. Magare for the Respondent.

Mr. Kaba is holding his brief.

