

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL APPEAL NO. 96 OF 2022

NZOIA SUGAR COMPANY
LIMITED.....APPELLANT

VERSUS

R.M PATEL & PARTNERS
LIMITED.....RESPONDENT

(Appeal from the Judgment dated 16/06/2022 delivered in Eldoret Chief Magistrate’s Court Civil Case No. 140 of 2020 by Hon. R. Odenyo – Senior Principal Magistrate)

JUDGMENT

1. This Appeal arises from the Judgment rendered in the Court case referred to above. In the suit, the Appellant was the Defendant, while the Respondent was the Plaintiff.
2. The suit was instituted by way of the Complaint filed on 10/02/2020 through **Messrs Mathai Maina & Co. Advocates**, in which the Respondent pleaded that it had sold to the Appellant various types of machinery, and also rendered services to the Appellant on various dates out of which the Appellant was indebted to the Respondent at the aggregate sum of Kshs 12,443,727.75/-, inclusive of interest. The Respondent pleaded that despite notices and reminders, the Appellant has refused or failed to settle the said debt. The Respondent also filed respective Witness Statements and a bundle of documents comprising a demand letter, invoices, delivery notes and Local Purchase Orders (LPOs). The Respondent also filed a Further bundle of documents comprising correspondence between the parties and Statements of Accounts.
3. The Appellant, through **Messrs Chiggai & Co. Advocates**, filed the Statement of Defence dated 19/02/2021, whereof it basically denied the claim. However, by the amendment made to the Defence on 3/11/2021, the Appellant eventually admitted being indebted to the Respondent but only to the tune of Kshs 5,972,751.17/-, and also denied any accrual of interest thereon.
4. After close of pleadings, the matter proceeded to trial wherein the Respondent (as Plaintiff) called 2 witnesses while the Appellant (as Defendant) called 1 witness. The witnesses also adopted their Witness Statements. Thereafter, the trial Court, by its Judgment delivered on 29/08/2009, entered Judgment against the Appellant for the sum of Kshs 7,989,746/-, with **Eldoret High Court Civil Appeal No. 96 of 2022**

interest from the date of filing suit. Aggrieved by the decision, the Appellant preferred this Appeal on 4 grounds as follows:

- i) That the Learned Magistrate erred in law and in fact by failing to appreciate that the burden of proof lay squarely on the Plaintiff.
 - ii) That the Learned Magistrate misdirected himself in finding that there was no evidence proving that the Defendant in the matter had made partial payments of Kenya Shillings Four Million, Three Hundred and Fifty Two Thousand and Forty Four and Seven Cents (Kshs.4,352,044.78/=) out of the total Kshs.10,324,795.95/= that was owed to the Plaintiff by the Defendant to go towards the settlement of the debt owed to the Plaintiff
 - iii) That the Learned Magistrate misdirected himself on the assessment of Kenya Shillings Seven Million Nine Hundred and Eighty-Seven, Seven Hundred and Forty Six and Eighty Five Cents (Kshs.7,987,746.85/=) being the amount due and owing to the Defendant in the matter.
 - iv) That the learned Magistrate erred in law and in fact in awarding the Plaintiff the sum of Kenya Shillings Seven Million Nine Hundred and Eighty-Seven, Seven Hundred and Forty Six and Eighty Five Cents (Kshs.7,987,746.85/=) as opposed to Kenya Shillings Five Million Nine Hundred and Seventy Two, Seven Hundred and Fifty One (Kshs.5,972,751/=) contrary to the evidence on record.
5. I will now recount the testimony of witnesses and evidence adduced before the trial Court.
6. **PW1** was **Sylvia Wamboi Waiguru**, who described herself as an Officer Administrator at the Respondent. She testified that the Respondent would pay the due amounts and the Appellant would, in turn, reduce the Appellant's indebtedness by that amount, and that the last amount according to the statements of account was Kshs 7,989,746.85/-, which was accruing interest on a monthly basis, and had thus risen to Kshs 12,413,727.75/-. She observed that the Appellant was only acknowledging part of the debt. In cross-examination, she stated that all the amounts paid by the Appellant are captured in the statements she had produced but she could not tell whether any more money was paid between 2019 and the date he was testifying. She stated that the Court should enter judgment for the acknowledged amount of Kshs 5,972,752.17, and make

a determination on the balance, and maintained that since the matter was filed in Court, the Appellant has not paid any money.

7. **PW2** was **Peter Aluko Otieno**, who introduced himself as a Sales Manager at the Respondent. He stated that the parties entered into a contract, and reiterated that the Respondent rendered services and sold parts to the Appellant, and that while some invoices had been paid, and some have not. He stated that once the Respondent received an LPO, it would supply the items, and the delivery note would be signed upon delivery, after which the Respondent would issue an invoice and when the Appellant paid, the same would be entered with a negative mark. He insisted that the outstanding amount was Kshs 13,443,727.75/-, excluding interest, which the Respondent did not charge. In cross-examination, he stated that there were two contracts entered into by the parties, one for supply of disc grade on 6/11/2016, and the second, dated 9/01/2016, for timber valued at Kshs 7,500,000/-. He stated that they would supply invoice and statements to the Appellant, and that for purposes of this suit, they did not charge interest. He maintained that all the monies paid by the Appellant were credited in the account, but he could not recall the last time that the Respondent made any payment.

8. On the part of the Appellant, its witness, **DW1**, was **Maxwell Onyango**, who introduced himself as an accountant therein. He agreed that there were two contracts, that the Appellant used to make periodic payments to the Respondent, sometime electronically and sometime by cheque. He contended that whichever amount was due, the Respondent paid without interest no matter how long it took to pay. He testified that while the Appellant acknowledges the debt, it has an issue with the alleged interest of Kshs 4.4 million. According to him, as at the date that he was testifying, the Appellant owed only Kshs 4,830,073.79/-. In cross-examination, he conceded that in his statement, he had acknowledged a debt of Kshs 5,972,751.17 as owing to the Respondent, and agreed that no payment had been made to the Respondent since 29/03/2022, and also, that the amount appearing in the statement is the same figure appearing in the Amended Defence. He agreed that the Respondent supplied the items on various dates some which are not reflected in the two contracts. He also agreed that the warranty services rendered were not captured in the two contracts, and also that there were other services rendered by the Respondent but which were outside the two contracts.

9. The Appeal was then canvassed by way of written Submissions. The Appellant's Submissions is dated 11/04/2025, while the Respondent's is dated 7/04/2025.

Appellant's Submissions

10. Counsel for the Appellant, after recounting the law, submitted that with its Amended Defence, it also filed a copy of the Agreement for supply of 6 blade disc bedder between the parties, copy of the Agreement for supply and delivery of a 165 horse power tractor, and also a copy of a Supplier Statement. He submitted that, although it is the Respondent who took it upon itself to file the Record of Appeal, the version filed was incomplete as it had left out the Supplier Statement. He then cited **Section 107(1)** and **109** of the **Evidence Act** regarding the burden of proof being on the Respondent, and contended that the Plaintiff had failed to discharge that burden. He also conceded that the Appellant had, in its Amended Defence, admitted owing Kshs 5,972,751.17 as supported by the Supplier Statement. He also appreciated that the Respondent had produced a total of 28 exhibits including of copies of Invoices and Delivery Note, and also a Statement of Account indicating that the Appellant owed the sum of Kshs 7,989,746.85/-. He however faulted the trial Court for failing to also appreciate that the Appellant, too, had produced a Supplier Statement, which indicated the amount owing as only Kshs 5,972,751.17. He also pointed out that it had been the Respondent's case that the Appellant owed it a sum of Kshs 12,443,727.75/- as per the Plaintiff, but that the Respondent had, in its Submissions before the trial Court changed tune and, instead, prayed for the lesser amount of Kshs 7,989,746.85/-. He faulted the trial Court for failing to consider these discrepancies even after **PW1** and **PW2** testified that the amount owed was Kshs 12,443,727.75/-, and despite the Respondent failing to explain the sudden reduction of the claim to Kshs 7,989,746.85/-, from Kshs 12,443,727.75/-
11. Counsel submitted further that the trial Magistrate misdirected himself in finding that there was no evidence proving that the Appellant had made partial payments. He urged that in the Plaintiff, the total amount claimed was Kshs 8,019,964/-. He urged further that it is not in dispute that the Respondent supplied to the Appellant the above services as per the Invoices produced but that the Appellant made partial payments totaling Kshs 2,800,000/-, which thus means that the balance due was only Kshs 5,219,964/-. He thus faulted the trial Magistrate for holding that the Appellant had failed to prove that it made the partial payments yet the Supplier Statement was on record. Counsel then pointed out that while **PW2** testified that the outstanding amount,

excluding interest, was Kshs 12,443,327.75/-, **PW1**, while insisting that the amount due was Kshs 12,443,327.75/-, testified that the same included monthly interest on outstanding balance. He thus faulted the trial Court for failing to consider these discrepancies by the Respondent's witnesses.

12. He urged further that the two contracts earlier referred to contained clauses that exempted the Appellant from being charged interest. He therefore also faulted the Magistrate for finding that the Appellant's reliance on the contracts was unhelpful.

Respondent's Submissions

13. Counsel for the Respondent, on his part, similarly cited **Section 107** and **109** of the **Evidence Act** on the issue of burden of proof, and submitted that whereas the legal burden of proof is static and always rests on a Claimant throughout the trial, the evidential proof may shift to the other party depending on the nature and effect of evidence adduced by the Claimant. He cited authorities. In regard to proof in respect to the award of Kshs 7,987,746.85/-, Counsel submitted that the Respondent adduced 28 exhibits including Invoices, Delivery Notes, and LPOs, and pointed out that the Appellant admitted in its Amended Defence, that it owed Kshs 5,972,751.17/-.

14. He urged that the Statements produced indicate that, despite the claims by the Appellant that it only owed Kshs 5,972,751.15/-, the balance owed was actually Kshs 9,789,746.85/-. Counsel also pointed out that the Appellant failed to produce its List of documents that had been filed in Court. Regarding the admission of the debt of Kshs 5,927,751.15 by the Respondent, he cited **Order 13 Rule 2** of the **Civil Procedure Rules**, the case of **Choitram v Nazari (1984) KLR 327**, and also a Ruling earlier delivered in this matter by **E.K Ogola J.** He also submitted that the Appellant has never paid that sum Kshs 5,927,751.15 to date and therefore what is left for the Court to determine is the additional Kshs 2,014,995.85/-, being the difference between the decretal sum and the amount the Appellant acknowledged as owing. He cited further authorities.

Determination

15. As reiterated in a plethora of cases, this being a first appellate Court, it has the duty to evaluate, re-assess and re-analyze the evidence before the trial Court, and draw its own conclusion (see for instance, the case of **Kenya Ports Authority vs Kuston (Kenya) Ltd [2009] 2 EA 212**).
16. In this case, the claim was for payment for goods sold and services rendered. The issue that arises for determination is therefore **“whether the trial Court erred in finding that the Respondent proved its case, and thus entering Judgment against the Appellant”**.
17. In answering the cited issue, I may state that proof in civil cases is on a balance of probability and that the burden of proof is on the party alleging the existence of a fact which he wants the Court to believe. This is anchored in **Section 107 (1) and (2) of the Evidence Act**, which provides that **“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”**, and that **“when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”**.
18. What then constitutes proof on a balance of probabilities? In answering this query, **Kimaru, J**, in **William Kabogo Gitau vs. 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 opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”
19. The case herein was a straight-forward one. The Respondent’s case was simply that it supplied goods, and rendered services to the Appellant, first, at the sum of Kshs 7,984,120/-, and subsequently, further goods and services at the additional sum of Kshs 35,844/-, which sums had then accrued interest at the sum of Kshs 4,453,980.90, and which therefore totaled to the aggregate sum of Kshs 12,443,727.75. From my computation however, the above computation adds up to Kshs 12,473,944.90, and not Kshs 12,443,727.75 as pleaded in the Plaint. Be that as it may, I will go by that sum of Kshs 12,443,727.75 which is what was pleaded. The Respondent, to prove its case, produced LPOs, Delivery Notes, Invoices, and even Statements.

The claim for interest however appears to have met a swift death when the Respondent's witnesses conceded that their transaction arrangements exempted the Respondent from being charged interest. Whatever the case, that portion of the claim was not even awarded by the trial Court.

20. On its part, the Appellant, in its Amended Defence, admitted owing only a sum of Kshs 5,972,751.17, which means that, excluding the aborted claim for interest, the amount that the trial Court was to determine proof thereof was only the difference between the principal sum of Kshs 7,984,120/- pleaded in the Plaint, excluding interest, and the admitted sum of Kshs 5,927,751.17, which was thus the figure of Kshs 2,011,368.83. The Appellant, on its part, contended that it had fully paid all amounts owing to the Respondent.

21. I note that the Appellant's Counsel, in his Submissions before this Appellate Court, submitted that the Appellant does not dispute the invoices produced by the Respondent, nor that the goods were delivered and services rendered as alleged by the Respondent. What the Appellant was therefore basically contending is that the Respondent had failed to factor or credit some of the payments that the Appellant had made hence the computation of the debt amount was wrong. Under these circumstances, the Appellant bore the evidentiary burden to demonstrate that indeed, the Respondent had failed to factor or credit those alleged payments made by the Appellant. The question is therefore whether the Appellant successfully demonstrated that the Respondent had indeed omitted to credit some of the payments that the Appellant did make.

22. I understand the Appellant's case to be that the trial Magistrate erred in failing to consider that there was on record a rival Statement produced by the Respondent, which indicated that the amount owing was only Kshs 5,972,751.17 as admitted in the Amended Defence. The Appellant contended further that the two contracts it produced were also ignored by the trial Magistrate. However, according to the trial Magistrate's Judgment, the Appellant never produced any documents as exhibits at the trial. The Respondent, in supporting this finding, contended that although the Appellant filed a bundle of documents, it never produced the same in evidence during the trial. This contention seems correct since the record does not capture the Appellant's witness, **DW1**, as having produced any exhibit at all.

23. Be that as it may, even assuming that the Appellant's Statement was deemed as produced in evidence, would it have demonstrated that the Respondent had omitted some of the payments

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allegedly made by the Appellant? I do not think so. Proof of the alleged “missed” payments could not have been demonstrated merely by way the Statement since a Statement only shows a summary of alleged debits and credits made in a running account. It is not by itself, proof of payment. The Appellant stated that it used to pay the Respondent sometimes electronically, and sometimes by cheques. The Appellant therefore ought to have produced proof of the actual alleged “missed” payments. What was so difficult in producing the cheques and/or the electronic payment print-outs or slips if at all they existed? The Court of Appeal, in determining a similar issue, in the case of **Five Continents Ltd v Mpata Investments Ltd [2003] eKLR**, held as follows:

“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 (see Section 37 of the Evidence Act). It follows that the accounts analysis on which the learned judge relied has no evidential value.”

24. The Appellant, as aforesaid, also faulted the trial Magistrate for ignoring the two contracts that the Appellant allegedly produced. Again, even assuming that those contracts were indeed produced as alleged, apart from the Appellant’s contention that the contracts contained clauses exempting the accrual of interest, and considering that the Appellant admitted that other or further services were rendered by the Respondent outside the realm of the contracts, the Appellant did not explain the relevance of the contracts in controverting the Respondent’s claim for the principal sum of Kshs 7,987,746.85 which was awarded by the trial Magistrate.

25. Under the circumstances set out above, and there being no evidence to controvert the Respondent’s claim, I do not find any grounds to fault the trial Magistrate for finding that the Respondent proved its case on a balance of probabilities.

Final Orders

26. In the premises, this Appeal is dismissed with costs to the Respondent.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 31ST DAY OF OCTOBER 2025
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WANANDA JOHN R. ANURO
JUDGE

Delivered in the presence of:

Ms. Sang for the Appellant

Mr. Maathai for the Respondent

Court Assistant: Brian Kimathi