

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILLIMANI LAW COURTS
CIVIL APPEAL NO. E942 OF 2024

PINNACLE CONCRETE PRODUCTS LTD..... APPELLANT
VERSUS

GAS & GO PETROLUM LTD.....
RESPONDENT

(BEING AN APPEAL FROM THE JUDGMENT/DECREE DATED
31st JULY 2024 ISSUED BY HON KIONGO KAGENYO (RM-
ADJUDICATOR) SITTING DATED IN NAIROBI MILLIMANI
COMMERCIAL SCCCOMM NO E1773 OF 2024)

ARISING FROM
PINNACLE CONCRETE PRODUCTS
LTD.....PLAINTIFF

VERSUS
GAS & GO PETROLEUM LTD..... DEFENDANT

J U D G M E N T

A. Introduction

1. The Appellant filed his claim before the small claims court and averred that the respondent was their client, who on diverse dates between 1st January 2020 and 26th May 2020 did order for and they did supply them with various concrete products, Which were partially paid for leaving a balance of **Kshs.291,291/=** for which demand for payment had been made, but no response received. The Appellant thus sort for judgment of this sum plus costs and interest of the suit
2. In their response to the statement of claim, the respondent denied owing the Appellant any sum of money and further noted that though the Appellant has alleged that he supplied goods to the respondent between the period of 01.01.2024 to 26.05.2020, they only produced delivery notes produced Number 536 and 541 dated 16.05.2024 and 12.05.2020 respectively, without accounting for the prior products alleged to have been delivered between January 2020 to March 2020. Be that as it may, the respondent reiterated that they never received any goods from the Appellant and put them to Strict proof thereof.

3. The respondent further noted that the Appellant had only produced one invoice dated 20.05 2022, seeking a sum of **Kshs.214,035/=**, which was inconsistent with the sum demanded in the suit. Since there was discrepancy between the invoice raised and sums claimed and further since the said invoices were not supported by local purchase order (LPO) and/or communication between the parties, it was doubtful if the claim filed was genuine and thus prayed the said suit be dismissed.
4. Before the trial court the Appellants witness adopted his witness statement and produced all the documents filed as Exhibits to support his case. He further stated that his firm manufactures cement-based products, primarily paving blocks known as Cabro and other related Concrete products and did on demand supply the respondent with the said products. He relied on three invoices produced dated 06.01.2020, 12.03.2020 and 26.05.2020 all totaling to **Kshs.407,891/=** but stated that part of the said amount had been paid by the respondent and what he was demanding was the balance of **Kshs.291,291/=**.

- 5.** Under cross examination, PW1 insisted that his claim was genuine and further emphasized that all deliveries were signed by the client / respondent who took possession of the delivered items, and did not once complain about the quality of the said goods. He further confirmed that the parties had exchanged several correspondences and demand was also issued, but the respondent had ignored to settle the same.
- 6.** The Appellant did not call any other witness and closed their case at that point. The respondent too opted to close their case without calling any witness. The parties filed their respective submissions and upon considering the evidence adduced and submissions filed the trial magistrate did hold that the Appellant had not proved his case to the required standard and thus dismissed his claim and ordered each party to bear their own costs.
- 7.** The Appellant, being dissatisfied with the said award, filed their memorandum of Appeal dated 13th August, 2024, raising seven (7) grounds of appeal, namely: -

- a) That the learned trial magistrate erred in law and in fact in finding that the Appellant had failed to demonstrate the indebtedness by the Respondent.**
- b) That the learned trial magistrate erred in law and in fact by finding that there existed a business relationship between the Appellant and the Respondent but concluded that the Appellant did not prove the debt owed by the Respondent despite the evidence produced in court.**
- c) The learned trial Magistrate erred in finding that the Appellant failed to prove non payment of the debt despite the evidence filed by the Appellant.**
- d) The learned trial Magistrate erred in finding that the Appellant failed to prove non payment of the debt despite the Appellants witness testimony and evidence which was not rebutted by the Respondent.**
- e) The learned Magistrate, erred in law by concluding that the Appellant failed to prove its case beyond reasonable doubt instead of the required standard of balance of probability.**
- f) The learned trial Magistrate erred in law and in fact by totally ignoring and**

failing to consider any of the claimant's evidence, testimony and submissions in coming up with its judgment.

g) The learned trial Magistrate erred in law and in fact by failing to consider the Appellants case despite the fact that this was the Appellants case and not the Respondents.

8. The Appellant thus did pray that this Appeal be allowed, the judgment of the trial court be set aside and judgment be entered in their favour as prayed for in the statement of claim. The Appellant also prayed for costs of the primary suit and costs of this Appeal.

B. Analysis and Determination

9. I have considered this appeal, submissions, and the impugned judgment. I have also considered the decisions relied on and perused the trial court's record. This being an appeal from the Small Claims Court, it is important to point out that **Section 38 of the Small Claims Court Act** provides that appeals from the said court shall be only on issues of law. It provides thus:

Section 38

1.A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.

2. An appeal from any decision or order referred to in subsection (1) shall be final.”

10. It is clear from the aforementioned provision that the jurisdiction of this Court from the Small Claims Court will only lie on matters of law and not on factual issues. An appeal limited to matters of law does not permit the appellate court to substitute the tribunal's decision with its own conclusions based on its own analysis and appreciation of the facts.

11. In **John Munuve Mati Vr The returning officer, Mwingi North Constituency & 2 others (2018) eKLR**, what amounts to “**matters of law**” was described as;

(38) The interpretation or construction of the constitution, statute, or regulations made thereunder or their application to the sets of facts established by the trial court. As far as facts are concerned, our engagement with them is limited to background and context, and to satisfy

ourselves, when the issue is raised, whether the conclusions of the trial judge are based on the evidence on record or whether they are so perverse that no reasonable tribunal would have arrived at them. We cannot be drawn into consideration of the credibility of witnesses or which witnesses are more believable than others; by law, that is the province of the trial court.

- 12.** This Appeal turns on one question, which is whether, the Appellant discharged the burden of proof in proving his case. **Section 107(1) of the Evidence Act** 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.”

- 13.** There is however the evidential burden that is cast upon any party the burden of proving any fact which he desires the court to believe in its existence. That is captured in **Sections 109 and 112 of the Evidence Act**, thus:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of

that fact shall lie on any particular person.

“In Civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

The two sections carry forward the often-repeated evidential adage:

“he who asserts must prove”

14. In the case of **Evans Nyakwana Vs Cleophas Rwana ongaro (2015) eKLR** it was held that ;

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purpose of section 107(i) of the Evidence Act, Chapter 80 laws of Kenya. Furthermore, the evidential burden..... is cast upon any party, the burden of proving any particular fact which he desired the court to believe in its existence. That is captured in section 109 and 112 of the law that proof of that fact shall lie on any particular person..... The appellant discharged that burden and as section

108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side.”

15. I also refer to **Palace Investments Ltd Vs Geoffrey Kariuki Mwendwa & Another (2015) Eklr**, Where the judges of Appeal referred to **“Denning J in Miller Vs Minister of Pensions (1947) 2 ALL ER 372** discussing the burden of proof had this to say;

“That degree is well settled, it must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it is more probable than not; the burden is discharged, but if the probability are equal, it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where the parties.....are equally (un)convincing, the party bearing the burden of proof will loose because the requisite standard will not have been obtained.”

- 16.** The Appellant testified and produced all his documentary evidence to prove that indeed he was owed the sum of **Kshs.291,291/=** by the respondent for various concrete products supplied to them and not paid for. The respondent did not call any witness to rebut the Appellants evidence and thus deemed as unrebutted. Be that as it may, the trial magistrate did consider the evidence adduced and held that the Appellant was duty bound to point to court how the sum demanded of **Kshs.291,291/=** arose but failed to do so. He had also testified that the respondent had partially settled the sums owed through cheque payment, but also failed to avail the said cheque to enable the court work out the math's of what is due
- 17.** Lastly the trial Magistrate held that the Appellant had raised invoices that had ETR receipts that showed that all payments had been made in cash and the court cannot make a finding that the said invoices had not been paid. The Appellant had thus not proved his case and the same was dismissed with no order as to costs.
- 18.** The High court can interfere with a magistrates finding on an issue during an appeal when the

trial court's decision is deemed to be plainly wrong, its perverse or where the trial magistrate misappreciated the evidence presented and/or made on a fundamental error of law or fact in her evaluation of the evidence presented. See **Nkube v Nyamiro [1983] KLR 403.**

1. In the case of **shaneebal limited Vs County Government of Machakos (2018) eKlr** , Odunga J relied on the case of **Trust Bank Ltd Vs Paramount Universal Bank Ltd & 2 others Nairobi (Millimani) HCCS No 1243 OF 2001** where it was held that;

“it is trite that where a party fails to call evidence in support of its case, that parties pleadings remain mere statements of fact since in doing do the party fails to substantiate its pleadings and in the same vein the failure to adduce evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged”

19. The Appellant, as part of his evidence did produce unchallenged documentary evidence to prove that they did business with the respondent and that was confirmed by the trial court. The ledger

accounts produced as Exhibit 1 clearly showed that the value of business done between January 2020 to May 2020, was valued at **Kshs.570,851/=** out of which the respondent had paid a sum of **Kshs.279,580/=** but unfortunately this was ignored by the trial court , who wrongly faulted the Appellant for not producing copies of cheques paid by the respondent in part settlement of sums owed. This finding was an error as credit for sums paid were posted on the ledger and thus there was no need for the Appellant to produce a copy of the payment cheques to reconfirm payment.

20. Secondly the trial Magistrate erred in fact, in treating the ETR receipts attached to the invoice to have signified proof of payment yet issuance of the same is a standard legal procedure demanded by KRA as part of regular tax validation system to trace sales made by registered taxpayers offering Vatable services.

21. Finally on evaluation of the invoices submitted it is clear that the respondent paid for two invoices for sales made on 22.10.2019 valued at **Kshs.122,960/=** and for sales made on 12.03.2020 valued at **Kshs.156,600/=** but

failed to pay for the sales invoices dated 06.01.2020 valued at **Kshs.77,256/=** and the last invoice dated 26,05.2020 valued at **Kshs.214,035/=**. It is the last two invoices that totaled to the decretal sum claimed. Unfortunately the trial Magistrate failed to also critically evaluate this evidence and thus arrived at the wrong conclusion, that the Appellant had not proved its case, when the evidence and the facts pointed otherwise.

C. DISPOSITION

22. This Appeal therefore has merit and is allowed on the following terms;

- a) **The judgment/decrece of Hon. S. K. Kagenyo, R.M./Adjudicator issued in Milimani Small Claims Case No. E1773 of 2024 dated 31st July, 2024 is hereby set aside in its entirety and substituted with an order that judgment is entered in favour of the Appellant in the sum of Kshs.291,291/- plus interest from the date of filing the suit until date of payment in full.**

b)The Appellant will have costs of the primary suit and costs of this Appeal which is hereby assessed at Kshs.120,000/- all inclusive.

23. It is so ordered.

Dated, signed, and delivered in open court at **MARSABIT** this **19th** day of **JANUARY, 2026.**

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Team this **19th** day of **JANUARY, 2026.**

In the presence of: -

.....Appellant

..... Respondent

.....Court Assistant