



**Muchiri v Waaso Construction Limited (Civil Appeal E027 of 2025)
[2026] KEHC 1393 (KLR) (Commercial and Tax) (12 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 1393 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E027 OF 2025
JWW MONG'ARE, J
FEBRUARY 12, 2026**

BETWEEN

WILSON NJAGI MUCHIRI APPELLANT

AND

WAASO CONSTRUCTION LIMITED RESPONDENT

(Being an appeal from the Judgement and Decree of Hon. M. Malingu, SRM dated 31st January 2025 at the Magistrates Court at Nairobi, Milimani in Civil Case No. E4205 of 2023)

JUDGMENT

Introduction and Background

1. The Appellant filed suit before the subordinate court claiming that between 2020 and 2022, he supplied the Respondent with hardware materials on credit totaling Kshs.8,946,600.30/= to which the Respondent paid Kshs.4,221,180.00/= leaving an outstanding balance of Kshs.4,725,420.30/=. He claimed that the Respondent issued six post-dated cheques totaling Kshs.4,104,620/=. all of which were dishonoured on 24th January 2023 hence the suit through the Plaint dated 20th September, 2023 seeking this sum. The Respondent filed a Statement of Defence dated 16th October 2023, denying liability and averring that the Appellant had been paid in full. The Respondent further asserted that any alleged shortfall resulted from uncredited payments or double entries on the Appellant's statements.
2. At the trial, the Appellant testified on his own behalf but the Respondent did not call any witnesses or produce evidence. Having considered the pleadings, evidence and submissions, the trial court reduced the Appellant's claim by Kshs.3,650,000.00/= and thus entered judgment in his favour the sum of Kshs.1,075,420.00/= only. The Appellant is aggrieved with this decision hence the present appeal that is grounded in his Memorandum of Appeal dated 31st January 2025 where he seeks inter alia to set



aside the said judgment and that judgment be entered in his favour for the sum of Kshs.4,725,420.00/ = as pleaded in the Plaint.

3. The appeal has been canvassed by way of written submissions which are on record and which I have considered and I will be making relevant references to in my analysis and determination below.

Analysis and Determination

4. Since this is the first appeal, the court is enjoined by the provisions of section 78 of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) to evaluate and examine the subordinate court record and the evidence presented before it in order to arrive at its own conclusion. This principle of law was well settled in the case of *Selle v Associated Motor Boat Co. Ltd* (1968) EA 123 where the Court of Appeal outlined the duties of a first appellate court as follows:

[An appellate 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...

5. Even though the Appellant raises six grounds in his Memorandum of Appeal he has condensed the same to two issues for the court's determination:
 1. Whether the trial court erred by relying on documents filed by the Respondent that were never formally produced in evidence, authenticated by a witness, or subjected to cross-examination.
 2. Whether the trial court failed to properly analyze and assign probative value to the Appellant's evidence, including dishonoured cheques, invoices, and delivery notes.

Admissibility of unproduced documents

6. The Appellant submits that under section 35 of the *Evidence Act*, documents must be produced by a witness who can be cross-examined and that they do not become evidence simply by being filed or annexed to pleadings. That since the Respondent called no witnesses, the Appellant's evidence remained entirely uncontroverted and the trial court's reliance on these "unverified and legally inadmissible" documents violated the Appellant's right to a fair hearing under Article 50(2)(k) of *the Constitution*. On its part, the Respondent submits that that the trial court was right to consider the impugned documents filed in its defense, even though no oral testimony was called. That the documents were duly filed, served, and placed on the court record without dispute during the trial and that during cross-examination, the Appellant acknowledged receiving some of the payments reflected in those very documents. It relies on various authorities to argue that a court can consider any material on record where the existence of a document is acknowledged or uncontroverted and further, that under Order 11 Rule 3(2)(c) of the Civil Procedure Rules, the court has the discretion to rely on filed records to ensure the expeditious disposal of cases.
7. The effect of a defendant filing a defence and not calling any witnesses or producing evidence is now settled: the plaintiff's case remains unchallenged (see *Avtar Singh Bahra & Amarjit Kaur Bahra v Raju Govindji Ganatra T/A Sweetbite Manufacturers* [2001] KEHC 375 (KLR)) and *Motex Knitwear Limited v Gopitex Knitwear Mills Limited* [2009] KEHC 4017 (KLR). However, the plaintiff still has a duty to prove its case on a balance of probabilities as is required by law. This was held by the Court of Appeal in *Karugi & another v Kabiya & 3 others* [1983] KECA 38 (KLR) where it was stated



that, “The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof”. Likewise, failure by a defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard hence in *Gichinga Kibutha v Caroline Nduku* [2018] KEELC 3981 (KLR) the Court held that, “It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest.”

8. It is also now settled that evidence has to be formally produced for it to acquire the status of exhibits in a case. The Court of Appeal in *Kenneth Nyaga Mwige v Austin Kiguta & 2 others* [2015] KECA 334 (KLR) buttressed this position and held as follows in respect of formal production of documents in evidence:

18. The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record.

9. In this case, it is clear that even though the Respondent filed documents in the suit, the same never went through the three-tiered test outlined by the Court of Appeal above for the same to acquire the status of evidence that forms part of the judicial record. I am inclined to agree with the Appellant that it was indeed an error of law for the learned magistrate to rely on these documents to make factual determinations in her judgment. Further, the decisions cited by the Respondent are unhelpful to its case as the impugned documents were never part of the judicial record to begin with either by consent or otherwise and the Appellant was never given an opportunity to cross-examine the Respondent on the same. It is therefore my finding that the learned magistrate erred by relying on these documents filed but not produced by the defendant in arriving at her decision.

Evaluation of the Appellant’s evidence

10. As stated, even though the Respondent did not rebut the Appellant’s case by not availing witnesses or producing evidence, the latter still had a duty to prove his case to the required standard. From the record, the Appellant produced Invoices and Delivery Notes showing supplies to the Respondent and a Statement of Account detailing total invoices of Kshs.8,946,600.00/=, payments received of Kshs.4,221,180.00/= and the balance claimed of Kshs.4,725,420.00/=. He also produced bank-issued photostat Return Documents showing dishonored cheques from the Respondent; A letter that the Respondent wrote to the County Government of Trans Nzoia acknowledging the debt of Kshs.2,000,000.00/= owed to the Appellant and the Contract linking the Respondent’s project to the supplies. I find the Appellant’s evidence to be documentary, consistent, and uncontroverted by any properly adduced evidence from the Respondent and find that it was erroneous for the learned



magistrate to consider the Respondent's unproduced documents which legally should have carried zero evidential weight. It was an error to use those documents to discredit or offset the Appellant's otherwise unchallenged evidence without a proper evidential basis.

11. It was also a misapprehension of the evidence by the learned magistrate to conclude that Appellant did not produce evidence of the bounced cheques and yet the same were clearly produced as outlined above. The bounced cheques and admission letter strongly supported the existence and acknowledgment of the debt and the Respondent's failure to call witnesses meant the Appellant's evidence stood unchallenged. It is therefore my finding that the Appellant did prove his case on a balance of probabilities, but the trial court's reliance on unproduced documents led to an erroneous judgment.

Conclusion and Disposition

12. In the upshot, I find merit in the Appellant's appeal and the same is allowed. The subordinate court's judgment of 31st January 2025 is set aside and substituted with a judgment being entered in favour of the Appellant for the sum of Kshs.4,725,420.00/= plus interest at court rates to be paid from 31st January 2025 until payment in full. The Appellant is also awarded costs of the suit and this appeal.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 12TH DAY OF FEBRUARY 2026

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J.W.W. MONGARE

JUDGE

In The Presence Of

Mr. Muchiri for the Appellant.

Mr. Kimanzi for the Respondent.

Amos - Court Assistant

