

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
CIVIL APPEAL NO. 364 OF 2024

**SILMART INVESTMENT
LIMITED.....APPELLANT**

VERSUS

**DR. DENNIS ONKUNDI.....
RESPONDENT**

**(Being an Appeal from the Judgment and Decree of Hon.
V. A. Ogutu (RM/Adjudicator) delivered on 7th June 2022
in Thika Small Claims Court SCCCOMM No. E127 of 2022)**

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Thika Resident Magistrate/Adjudicator in SCCCOMM No. E127 of 2022 whereby the trial court found that the appellant failed to prove its claim as against the respondent on a balance of probability.

2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 15 grounds of appeal summarized as follows:-
 - a) The learned adjudicator erred in law and in fact in finding that the respondent made payments of Kshs.

357,250/- and therefore did not owe the appellant the said sum.

- b) The learned trial adjudicator erred in law and in fact by assuming the opening balance on the customer's ledger/statement of account of Kshs. 413,050/- related to the period between January 2019 to July 2019.
- c) The learned trial adjudicator erred in law and fact by not appreciating that the respondent voluntarily made three separate payments between 1st and 3rd January 2019 to reduce the opening balance of Kshs. 413,050/- on the customer's ledger/statement of account.
- d) The learned trial adjudicator erred in law and fact by failing to appreciate that the invoice for periods prior to 2019 were not matters in issue and the opening balance was never disputed by the claimant when he made payments between 1st to 3rd January 2019.
- e) The learned trial adjudicator erred in law and in fact by determining without evidence on record that the respondent was not served with a demand letter for Kshs. 357,250/-.

3. Parties disposed of the appeal by way of written submissions.

The Appellant's Submissions

4. The appellant submits that it proved its suit against the respondent by adducing evidence to show payments owed to it by the respondent. Further, the respondent admitted to having a contractual relationship with them and indicated to the court that he had paid for the feeds during the said period. However, the respondent did not adduce any evidence to support his contentions. Relying on the case of **Raila Amolo Odinga & Another vs IEBC & 2 Others (2017) eKLR**, the appellant submits that they provided sufficient evidence to support their claim and the learned adjudicator erred by ignoring their evidence in the pleadings.

The Respondent's Submissions

5. The respondent relies on the cases of **William Kabogo Gitau vs George Thuo & 2 Others (2010) KLR 526; Miller vs Minister of Pension (1947) All ER 372** and **Hahn Singh Civil Appeal No. 42 of 1983 (1985) KLR 716** and submits that the appellant did not discharge the burden of proof as it pleaded a claim of Kshs. 357,250/- as set out in the customer ledger but did not avail any invoices, deliveries or other documents to support the claim.

6. The respondent refers to the case of **Ruth Musengya Mulatia & Another vs Gregory Nzioka Muthike Civil Appeal No. E157 of 2023** and argues that the appellant failed to file the decree of the subordinate court being appealed against in its record of appeal and therefore the appeal is incompetent and ought to be struck out.

Issues for determination

7. The main issues for determination are:-

- a) Whether the appeal is properly before the court.
- b) If so, whether the appellant proved its case on a balance of probabilities.

The Law

8. The Court of Appeal while referring to a second appeal, which is essentially on points of law and thus similar to the duty of this court under **Section 38 of the Small Claims Court Act**, set out the duty of the second appellate court in the case of **Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited [2020] eKLR** as follows:-

I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below considered matters that they should have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.

9. In distinguishing between matters of law and fact the Court of Appeal stated in **Kenya Breweries Ltd vs Godfrey Odoyo [2010] eKLR** as follows:-

I have anxiously considered the pleadings, the evidence on record, the judgment of the learned

Senior Resident Magistrate and the judgment of the superior court, the grounds of appeal, the submissions of the learned counsel as well as the authorities to which we were referred. First, this is a second appeal. In a first appeal the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyse it, evaluate it and come to its own independent conclusion. In other words, a first appeal is by way of retrial and facts must be revisited and analysed a fresh. See *Selle and Another vs Associated Motor Boat*

Company Limited and Others (1968) EA 123. In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.

Whether the appeal is defective.

10. **Section 38 of the Act** provides:-

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.

11. The Court of Appeal in Mwangi vs Wambugu [1984] KLR 453 commented of what amount to points of law as follows:-

A Court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding; and an appellate court is not bound to accept the trial Judge's finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.

12. Similarly in Peter Gichuki King'ara vs Independent Electoral and Boundaries Commission & 2 Others [2014] eKLR the court held that:-

Bearing in mind the above principles, the most contentious issues in this appeal is whether the grounds of appeal are matters of law or facts. Having established that we have jurisdiction to determine only issues of law as per the provisions of Section 85A of the Elections Act, to us the whole question of whether the trial Judge properly considered and evaluated the evidence and arrived

at a correct determination that is supported by law and evidence with of course the usual caveat, that we did not see the witness demeanor is an issue of law.

13. I have perused the grounds in the memorandum of appeal Nos. 1 - 13 and noted that the grounds relate primarily to questions of fact. The appellant is aggrieved that the learned adjudicator found that it did not prove its claim of Kshs. 357,250/- arising from the appellant supplying the respondent with assorted bags and animal feeds from 1st January 2019 to 16th July 2019. It is clear that in dismissing the appellant's case, the learned adjudicator considered the evidence presented in court in its entirety as well as the submissions of both parties and reached the conclusion that the appellant did not adduce evidence to support its claim.
14. It is evident that the grounds raised by the appellant are on matters of fact which will require this court to scrutinize and re-evaluate the evidence once more. **Section 38 of the Small Claims Court Act** provides for appeals from the Small Claims Court to the High Court only on matters of law.
15. The only matter of law raised in the submissions is the record of appeal was defective for being incomplete. **Order 42 Rule 13(4) of the Civil Procedure Rules** provides:-

Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them are not in the possession of either party have been served on that party, that is to say-

- a) The memorandum of appeal;**
- b) The pleadings;**
- c) The notes of the trial magistrate made at the hearing;**
- d) The transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;**
- e) All affidavits, maps and other documents whatsoever put in evidence before the magistrate;**
- f) The judgment, order or decree appealed from and where appropriate, the order giving leave to appeal.**

Provided that-

- i. A translation into English shall be provided of any document not in that language;**
- ii. The judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in (a), (b) and (f).**

16. On perusal of the record of appeal, the appellant failed to file the decree. On further perusal of the court record, the appeal was admitted and directions were given

by the court for the appeal to be canvassed vide submissions. Furthermore, the lower court record is before this court and the decree is contained therein.

17. It is my considered view that no prejudice will be occasioned to the respondent if the appeal is heard and determined using the record of appeal as it is. This court is guided by the decision in **South Nyanza Sugar Co. Ltd vs Daniel Obara Nyandoro (2010) eKLR** where the court stated:-

In my view, it will amount to miscarriage of justice for this court to strike out the appeal for the reason as advanced by Mr. Ogweno when the appeal had already been admitted and directions taken in the presence of counsel for both parties. In any event, the lower court record is before this court and no prejudice will be occasioned to the respondent by reference to the same. In addition, it will be against the spirit of the overriding objectives of the Civil Procedure Act as stated under Section 1A and 1B for this court to summarily reject the appeal for want of decree.

Therefore, it is my considered view that the appeal herein is not fatally defective for failure to file the decree.

18. Consequently, I find that this appeal has been filed contrary to the provisions of Section 38 of the Small Claims Act. It is therefore misconceived and incompetent.

19. This appeal is hereby struck out with costs to the respondent.

20. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 19TH DAY OF FEBRUARY 2026.

F. MUCHEMI
JUDGE