

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
CIVIL APPEAL NO. E209 OF 2025

COLLINS ONYANGO T/A

COLLJUSTO AUTO GARAGE APPELLANT

- VERSUS -

BARDING BOYS HIGH SCHOOL 1ST RESPONDENT

B.O.M. BARDING BOYS HIGH SCHOOL 2ND RESPONDENT

THE CHAIRMAN B.O.M.

BARDING BOYS HIGH SCHOOL 3RD RESPONDENT

THE SECRETARY B.O.M.

BARDING BOYS HIGH SCHOOL 4TH RESPONDENT

(Being an appeal from the judgment and decree of **Hon. E.N. Angima**

RM/Adjudicator delivered on the 24/9/2025 in the **Nyando MCCC No. E065 of**

2025, Collins Onyango T/A

Colljusto Auto Garage v Barding Boys High School & 3 Others)

J U D G M E N T

1. The appellant filed suit against the respondents vide a plaint dated **10/4/2025** seeking a declaration that the respondents were bound to pay him **Kshs. 531,350/-** for services offered, damages for breach of contract with interest as well as costs of the suit.

2. The respondents failed to enter appearance and the trial court entered interlocutory judgment on the **6/5/2025** before the matter proceeded on formal proof.
3. In its judgment, the trial court found that the appellant failed to prove his case and dismissed the suit and the appellant to bear his own costs.
4. Being dissatisfied with the said judgment/decree, the appellant lodged this appeal vide the Memorandum of Appeal dated **29/9/2025** raising ten (10) grounds of appeal that may be summarized into one as follows: -

‘The learned trial magistrate erred in law and fact by applying the wrong principles and misapprehending the evidence on record that she arrived at a wrong decision by dismissing the appellant’s suit before the trial court’.

5. The respondents did not participate in these proceedings despite service. In support of the appeal, the appellant submitted that he entered into an agreement with the respondents for supply of goods and services sometimes in **2023**. That no evidence was tendered to the contrary and as such the respondents were bound to pay him a sum of **Kshs. 531,350/-**.
6. That upon service of the pleadings, the respondents made a payment of **Kshs. 100,000/-** thereby acknowledging the existence of a contract between

the parties. That upon supply and offering of services as agreed between them, the respondents failed to make payments to the tune of **Kshs. 531,350/-** despite promising to settle the same. That consequently, there was breach of the contract for which he was entitled to the reliefs sought.

7. This being a first appeal, the Court is duty bound to evaluate the evidence before the trial court afresh and come to its own independent findings and conclusions. See **Selles & Anor vs. Associated Motor Boat Co Ltd & Others [1968] EA 123.**
8. The appellant's case before the trial court was rather clear. He alleged that sometimes in **2023**, he and the respondents entered into a contract for the supply of various goods and services to the tune of **Kshs. 531,350/-** which the respondents refused to settle.
9. The applicable law as to the burden of proof is set out under Sections 107, 108 and 109 of the *Evidence Act*. The Court of Appeal in **Mumbi M'Nabea v David M. Wachira [2016] eKLR** while discussing the standard of proof in civil liability claims in our jurisdiction had this to say:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each

party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the Evidence Act, Cap 80 Laws of Kenya provides as follows:

“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.” The above provision provides for the legal burden of proof.

However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:

“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.”

The position was re-affirmed by the Court of Appeal in Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:

‘Whereas under section 107 of the Evidence Act, (which deals with the legal evidentiary burden of proof), the burden of proof lies upon

the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

10. And in Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another [2015] eKLR, the Court of Appeal held that: -

“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 a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not. This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

11. From the foregoing guiding authorities, it is clear that the duty of proving the averments contained in the plaint lay squarely with a plaintiff in a suit. The appellant testified in support of his case adopting his statement as his evidence in chief wherein he reiterated the averments in his claim. The appellant further produced two invoices dated **18/3/2023** and **27/6/2023** in support of his claim and further a Local Service Order dated **6/3/2023** from the 1st respondent over the same. As earlier stated the appellant's claim remained uncontroverted as the respondents failed to take part in the proceedings despite service.
12. In its judgment, the trial court dismissed the appellant's suit on account that the appellant failed to prove that the invoices he produced were ever presented to the respondent. This is a flawed understanding and interpretation of the law.
13. Litigation in our country is rooted in the adversarial system that strictly dictates that courts must determine cases based on the pleadings and issues framed by the parties. A court cannot wander outside the issues pleaded or introduce new, unexpected issues, as this would violate the principles of fair trial and lead to "trial by ambush".

14. In the case of Leo Investment Limited v Mau West Limited & another [2019] eKLR, it was stated: -

“But what are the effect of failure by the appellant to tender evidence in rebuttal? The court in Shaneebal Limited v County Government of Machakos [2018] eKLR (supra) addressed this issue in paragraphs 24 to 29 and while citing other case laws it held that where no defence is filed but no witness is called to give evidence in support of the defence, it means that the defence renders the plaintiff’s case unchallenged. That where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.”

15. The evidence adduced by the appellant reached a *prima facie* standard and remained uncontroverted. Accordingly, I find that the appellant proved his case on a balance of probabilities. He was therefore entitled to the reliefs sought. There was no denial of the claim.

16. In the circumstances, the appeal is successful. The trial court's judgment dismissing the appellant's suit is hereby set aside and substituted with judgment in favour of the appellant against the respondents for **Kshs. 531,350/-** together with interest at court rate from the date of judgment until payment in full. The appellant will also get the costs of the appeal and the suit below.

It is so decreed.

DATED and **DELIVERED** at Kisumu this **6th** day of **March, 2026**.

A. MABEYA, FCI Arb

JUDGE