

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI

MILIMANI LAW COURTS

HCCA NO. E1280 OF 2024

BETWEEN

KINPASH ENTERPRISES

LIMITED.....APPELLANT

VERSUS

DESBRO (KENYA)

LIMITED.....RESPONDENT

(Being an appeal from the Judgment of the Chief Magistrate's Court at Milimani Commercial Courts (Hon. B.M. Cheloti) delivered on 4th October 2024 in CMCC No. E469 of 2020)

JUDGMENT

- 1.** The Respondent herein, who was the Plaintiff before the Lower Court, sought judgment against the Appellant (then the Defendant) for USD 94,635.34, together with interest from June 2016 until payment in full and costs of the suit.
- 2.** The Respondent pleaded that it manufactures and supplies various products including chemicals, paints, inks, plastics, rubber, leather, cosmetics, soaps, detergents and paper products.

3. It averred that at all material times the Appellant was its customer and that between April 2016 and June 2016, it supplied the Appellant with goods at the Appellant's request.
4. The Respondent asserted that the goods were delivered to the Appellant and the Appellant acknowledged receipt by signing and stamping delivery notes. Invoices were issued in respect of the supplies but the Appellant failed to settle the outstanding balance of USD 94,635.34.
5. The Respondent relied on letters dated 24th January 2020 and 14th February 2020 and emails in which the Appellant allegedly acknowledged the debt.
6. The Appellant filed an Amended Statement of Defence denying the Respondent's.
7. The Appellant admitted having received goods from the Respondent but denied owing the amount claimed. It maintained that it had already paid all sums due and that the Respondent had not particularized its claim.
8. The trial court entered judgment in favour of the Respondent for the said amount together with interest and costs.
9. Aggrieved by the said decision, the Appellant filed the present appeal.

Evidence Before the Trial Court

10. At the hearing, the Respondent called **PW1, Suman Kumar Sennik**, who adopted his witness statement and

produced documentary evidence including invoices, delivery notes and correspondence.

- 11.** PW1 testified that the Respondent had supplied goods to the Appellant and that the accounts had been reconciled.
- 12.** The Appellant called **DW1, Dipan Patel**, who adopted his witness statement and produced documents including bank records. DW1 acknowledged that the Respondent had supplied goods to the Appellant but maintained that payment had been made.
- 13.** During re-examination, DW1 conceded that not all bank statements had been produced.
- 14.** The defence case was then closed and the matter proceeded by way of written submissions. At the time the trial court prepared its judgment, the Defendant had not filed submissions.

Decision of the Trial Court

- 15.** Upon considering the pleadings, evidence and documents before it, the trial court found that the Respondent had supplied goods to the Appellant and that the goods were received by the Appellant. The trial court also found that the Appellant had not produced sufficient documentary evidence to demonstrate payment.
- 16.** The trial court held that the burden of proving payment lay upon the Defendant under **Sections 107, 109 and 112 of the Evidence Act.**

17. The court concluded that the Defendant had failed to prove payment and entered judgment for the Plaintiff as follows:

- a) *The Defendant to pay the Plaintiff USD 94,635.34;***
- b) *Interest at court rates from July 2016 until payment in full;***
- c) *Costs of the suit.***

The Appeal

18. The Appellant filed the present appeal raising several grounds which may be summarised as follows:

- a) *The trial court erred in finding that the Respondent had proved its claim.***
- b) *The trial court improperly shifted the burden of proof to the Appellant.***
- c) *The trial court disregarded documentary evidence demonstrating payment.***
- d) *The trial court relied on invoices that were not acknowledged.***
- e) *The judgment was against the weight of evidence.***

19. The appeal was canvassed by way of written submissions.

Appellant's Submissions

20. The Appellant submitted that the Respondent failed to prove delivery of goods corresponding to the claimed invoices.

21. The Appellant relied on **Section 107 of the Evidence Act**, which provides:

“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.”

22. It argued that the Respondent was required to prove supply of goods, acknowledgment of receipt and non-payment.

23. The Appellant submitted that many invoices relied upon by the Respondent were not acknowledged by stamp or signature.

24. The Appellant also contended that invoices alone cannot prove delivery.

25. Reliance was placed on ***E.P. Communications Limited vs. East Africa Courier Services Limited [2019] eKLR*** where the court determined the factors that establish delivery of goods.

26. The Appellant further argued that it produced evidence of payment including bank statements and a schedule of payments totalling **KES 15,563,909**.

27. According to the Appellant, once evidence of payment was produced, the evidential burden shifted to the Respondent.

28. The Appellant relies on ***Mbuthia Macharia vs. Annah Mutua Ndwiga, [2017] eKLR*** where the Court held:

“The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of the trial, depending on the evidence adduced...”

Respondent’s Submissions

- 29.** The Respondent submitted that the trial court correctly found that it had proved its case on a balance of probabilities.
- 30.** The Respondent argued that it produced sufficient documentary evidence including invoices, delivery notes, RTGS records, and correspondence acknowledging the debt.
- 31.** The Respondent maintained that the Appellant made only partial payments.
- 32.** The Respondent further argued that proof of payment was within the Appellant’s exclusive knowledge and therefore fell within **Section 112 of the Evidence Act**, which provides:

“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.”

- 33.** The Respondent submitted that the bank statements produced by the Appellant to establish payment did not meet the evidentiary requirements of **Section 177 of the Evidence Act** because they were not certified by the bank as true copies of the original.
- 34.** Reliance was placed on ***Guardian Bank Limited vs. Skyflyers Travel and Tours Limited [2007] eKLR*** and ***National Industrial Credit Bank Limited vs. Auto Fab Limited [2006] eKLR*** on the admissibility of bank documents.
- 35.** The Respondent further submits that the payments reflected in RTGS slips had already been accounted for in the Respondent's statement of account and therefore did not settle the outstanding debt.
- 36.** The Respondent argued that the Appellant failed to provide credible evidence proving full settlement of the invoices.
- 37.** The Respondent relied on ***Raila Odinga & 5 Others vs. IEBC & 3 Others, [2013] eKLR*** where the Supreme Court held:
- "...the legal burden rests on the petitioner, but, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting."***
- 38.** Accordingly, the Respondent submitted that the Learned Magistrate properly evaluated the evidence and correctly concluded that the Respondent had discharged

its legal burden while the Appellant failed to discharge the evidential burden.

Analysis and Determination

39. This Court, as a first appellate court, is obligated to reconsider and re-evaluate the evidence and reach its own independent conclusions. In ***Mwanasokoni vs. Kenya Bus Services Ltd, (1982-88) 1 KAR 278*** where the Court of Appeal held:

“An appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence, or on a misapprehension of the evidence, or the court acted on wrong principles.”

40. The standard of proof in civil matters is proof on a balance of probabilities. In ***Miller vs. Minister of Pensions, [1947] 2 All ER 372*** the Court explained:

“That degree is well settled. It must carry a reasonable degree of probability... If the evidence is such that the tribunal can say ‘we think it more probable than not,’ the burden is discharged; but if the probabilities are equal it is not.”

41. The commonly paraphrased line from the above cited case is: **“A win however narrow... A draw is not enough.”**

42. Similarly, the Supreme Court in ***Odinga & Another vs. Independent Electoral and Boundaries Commission & 2 Others; Aukot & Another*** [2017] eKLR held:

“Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and remains constant through a trial with the plaintiff, however, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting...”

43. It was not disputed that the Respondent supplied goods to the Appellant and that the Appellant received those goods.

44. The central question is whether the Appellant proved that payment was made for the goods supplied. Under Sections 107, 109 and 112 of the Evidence Act, the burden of proving payment rests on the party asserting it.

45. While the Appellant produced certain bank records, the trial court found that the documents did not sufficiently demonstrate that the alleged payments related to the invoices in dispute.

46. The trial court also observed that the Appellant did not produce complete statements of accounts from its dollar account reflecting payments to the Respondent.

- 47.** The question therefore becomes whether the trial court misapprehended the evidence or applied the wrong legal principles.
- 48.** Having carefully reviewed the pleadings, the evidence on record, the submissions of the parties, and the applicable law, the Court finds that the trial court correctly identified the central issue as whether the Defendant had proved payment for the goods supplied.
- 49.** I find that the trial court correctly applied the law regarding the burden of proof and evaluated the documentary evidence presented by the parties.
- 50.** The Appellant did not produce sufficient documentary evidence to demonstrate full settlement of the invoices forming the basis of the Respondent's claim.
- 51.** Consequently, this Court finds no basis upon which to interfere with the findings of the trial court.
- 52.** Accordingly, I make the following orders:
- a) *The appeal is dismissed.***
 - b) *The judgment of the Chief Magistrate's Court delivered on 4 October 2024 in CMCC No. E469 of 2020 is upheld.***
 - c) *The Appellant shall bear the costs of the appeal.***

DATED

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MARCH, 2026.

HON. W. A. OKWANY
JUDGE
12/03/2026

FOR APPELLANT Ms Wairimu for Kabugu

FOR THE RESPONDENT Ms Monjogu for Ms Kendi

COURT ASSISTANT Abdirizak

30 days stay of execution grated.

File closed

ORIGINAL