

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT THIKA**  
**CIVIL APPEAL NO. E354 OF 2024**

**BENJO STEEL ENTERPRISES  
LIMITED.....APPELLANT**

**VERSUS**

**GODFREY KARIUKI MURAGE.....  
RESPONDENT**

**(Being an Appeal from the Judgment and Decree of Hon.  
J. K. Tawai (RM/Adjudicator) delivered on 9<sup>th</sup> December  
2024 in Ruiru Small Claims Court SCCCOMM No. E185 of  
2024)**

**JUDGMENT**

**Brief facts**

1. This appeal arises from the judgment of Ruiru Resident Magistrate/Adjudicator in SCCCOMM No. E185 of 2024 in a claim of indebtedness of Kshs. 567,000/- by the respondent and the trial court dismissed the appellant's claim on the grounds that the appellant did not prove its case on a balance of probabilities.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 8 grounds of appeal summarized as follows:-

- a) The learned adjudicator erred in law and in fact by finding that the appellant's documentary evidence of statement of accounts was not sufficient to prove that the respondent owed it Kshs. 567,000/-.
  - b) The learned trial magistrate erred in law and in fact when she declined to acknowledge the claimant's claim whereas the respondent did not table any evidence through response to negate his claim.
  - c) The learned adjudicator erred in law and in fact by awarding costs to the respondent as the respondent did not file a response and did not appear in court during the hearing.
3. Parties were directed to file written submissions however it is only the appellant who filed its submissions.

### **The Appellant's Submissions**

4. The appellant relies on the cases of **Motex Knitwear Limited vs Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002**; **Karuru Munyororo vs Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988** and **North End Trading Company Limited (carrying on the business under the registered name of Kenya Refuse Handlers Limited vs City council of Nairobi) [2019] KEHC 10180 (KLR)** and submits that where the defendant fails to call evidence the statements in the pleadings remain mere statement of facts and they lack any probative

value. The respondent in the instant case did not challenge the evidence thus the learned adjudicator was wrong in finding that the appellant did not provide sufficient evidence while it provided statement of accounts and invoices.

5. The appellant argues that the respondent should bear the costs of the suit as he defaulted in the repayment of the goods supplied and he was served with a demand letter.

### **Issues for determination**

6. The main issues for determination are:-
  - a) Whether the appeal is properly before the court.
  - b) Whether the appellant proved its case on a balance of probabilities.

### **The Law**

7. 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.**

8. 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.**

9. **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.**

10. I have perused the grounds in the memorandum of appeal and noted that the grounds relate primarily to questions of fact. The appellant is aggrieved that the learned adjudicator found that the statement of accounts it produced was not sufficient proof of indebtedness on part of the respondent. The learned adjudicator in

dismissing the claim considered that the appellant failed to adduce any invoice or delivery notes to show that it delivered the goods and the same remained unpaid. The grounds as raised by the appellant touch 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 that appeals to the High Court shall be only on matters of law.

11. The only issue of law raised by the appellant is on the issue of costs. The appellant argues that since the respondent did not file a response or appear in court, he should not have been awarded costs.

12. It is trite law that the issue of costs is a discretionary one that is awarded to a successful party. Furthermore, this discretion must be exercised judiciously and a party

cannot be denied costs unless it can be shown that they acted unreasonably.

13. **Section 33(1) of the Small Claims Court Act provides:-**

**The Court may award costs to the successful party in any proceedings.**

14. Before the lower court, the respondent herein was the successful party. It is also noted that the respondent filed his response to the statement of claim and attended court on three occasions in the matter. In fact the respondent's counsel applied for dismissal of the claim on several occasions. The court allowed the oral application and dismissed the suit with costs to the respondent. As such, the appellant was at fault for failing to prosecute its case which caused

the dismissal. They were rightly condemned to pay costs to the respondent who was present in court.

15. Accordingly, the appeal lacks merit and hereby dismissed with costs to the respondent.

16. It is hereby so ordered.

***JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 19<sup>TH</sup> DAY OF MARCH 2026.***

**F. MUCHEMI**  
**JUDGE**