

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CIVIL APPEAL NO. E204 OF 2022**

**SYNERGY GASES (K) LIMITED.....APPELLANT**

**VERSUS**

**JAK ENTERPRISES COMPANY LIMITED.....RESPONDENT**

*(Being an appeal against the Judgment and decree of Hon. J. B. Kalo (CM) delivered on 27<sup>th</sup> October 2022 in Mombasa Chief Magistrate’s Court Civil Suit No. 531 of 2016, Synergy Gases (K) Limited v JAK Enterprises Limited)*

**JUDGMENT**

1. The background of the appeal is the claim by the Appellant in *Mombasa High Court Civil Suit No. 126 of 2012* through an Amended Plaintiff dated 17<sup>th</sup> February 2015 and the claim by the Respondent in *Mombasa Chief Magistrates Civil Suit No. 867 of 2012* through the Plaintiff dated 12<sup>th</sup> April 2012. The two claims were consolidated to form *Mombasa CMCC No. 531 of 2016* where the Respondent’s claim was treated as a counterclaim in the consolidated proceedings.

2. The Appellant on the one hand averred that on or about 14<sup>th</sup> July 2009, it entered into an oral agreement with the Defendant whereof it was agreed upon between the parties that in consideration of the Plaintiff supplying various industrial gases which it deals in, the Defendant would pay the agreed costs for the said gases and return the empty cylinders within the agreed period of time. That it was a further term of the said agreement that in consideration of the Plaintiff allowing the Defendant to part with possession of the gas cylinders, the Defendant would deposit with the Plaintiff Kshs. 1,535,000 as a lien for the said gas cylinders.
3. The Appellant further averred that on diverse dates between the years 2009 and 2012, the Plaintiff supplied the Defendant several consignments of gas and gas cylinders on the Defendant's promise to return the empty gas cylinders as per the agreement. That upon supplying the said gases and cylinders, the Defendant refused, ignored and/or neglected to return the empty cylinders within the agreed stipulated time or at all as a result of which the Plaintiff suffered loss and damage.
4. The Appellant in the proceedings prayed for judgment to be entered against the Defendant for Kshs. 12,144,362, interest on the amount from July 2009 till payment in full, costs and interest of the suit at court rates, and any other/further order that the court deemed fit to grant.
5. In its Counterclaim, the Respondent on the other hand averred that at all material times, the parties were bound by the terms and/or covenants for supplying industrial gas by virtue of an oral agreement entered between the Plaintiff and the

Defendant on or about the 14<sup>th</sup> day of July 2009. That it was one of such terms and understanding that the Plaintiff was to initially deposit a refundable sum of Kshs. 1,535,000 in respect of 307 empty gas cylinders before commencement of the contract for gas supply and further that the Plaintiff was to subsequently make orders for the supply and take delivery of gas upon return of the empty gas cylinders in exchange with duly filled gas cylinders within the limit of the value of the deposit sum held by the Defendant.

6. The Respondent averred that it was one of such further terms and understanding that the Plaintiff was only to be strictly supplied with the filled-up gas cylinders after having made payments in respect of the invoices raised by the Defendant as per the orders placed by the Plaintiff for gas supply. That on or about 3<sup>rd</sup> March 2012, in breach of the said contract, the Defendant failed and/or refused to supply gas to the Plaintiff in respect of the 288 gas cylinders duly returned for refill and the Defendant further refused to make refunds of the initial deposit sum made in respect to the said 288 empty cylinders delivered to and retained by the Defendant.
7. The Respondent prayed for judgment against the Defendant wholly for general damages for breach of the contract, special damages as pleaded (loss of business of Tshs. 18,000,000, travel expenses from Zanzibar to Mombasa of USD 133 and Mombasa to Zanzibar of Kshs. 8,088, cost of hiring boat to ferry gas cylinders from Pemba to Shimoni Mombasa of Tshs. 3,500,000, cost of hotel

accommodation of Kshs. 3,000, boat waiting charges of Tshs. 1,500,000, and deposit for 288 empty gas cylinders of Kshs. 1,435,000), specific performance of the contract, costs of and incidental to this suit and interest thereon at 14% per annum until payment in full, and any further relief that the court deemed fit and just to grant.

8. The suit was heard in the trial court and judgment delivered on 27<sup>th</sup> October 2022 where the court found in favour of the Plaintiff/ Appellant against the Defendant/ Respondent for Kshs. 35,000. Judgment was also entered for the Defendant/ Respondent in its Counterclaim against the Plaintiff/ Appellant for Kshs. 1,535,000. The sum of Kshs. 35,000 shall be offset from the sum of Kshs. 1,535,000. The Plaintiff/ Appellant was to pay to the Defendant/ Respondent a sum of Kshs. 1,500,000 together with interest thereon from the date of filing suit until payment in full. The Defendant was also awarded costs of its Counterclaim to attract interest from the date hereof until payment in full.
9. Being dissatisfied, the Appellant appealed the judgment and decree through the Memorandum of Appeal dated 5<sup>th</sup> December 2022 on grounds that the learned magistrate erred in law and in fact in dismissing the Appellants suit, in allowing the Respondent's counterclaim with costs, in misapprehending and/or dismissing the evidence tendered by the Plaintiff, in awarding costs to the Respondent, and in awarding interest on costs to the Respondent.

10. The Appellant prayed for orders that the judgment delivered on 27<sup>th</sup> October 2022 be set aside save for the award of Kshs. 35,000 to the Appellant, and the same be substituted with a judgment for the Appellant as prayed in the plaint and a dismissal of the Respondent's counterclaim. That in the alternative, the suit be heard afresh before a different magistrate, and that costs of this appeal be paid to the Appellant.

### ***Submissions***

11. The appeal was canvassed by way of written submissions. The Appellant in their submissions dated 30<sup>th</sup> May 2025 argued that the law is well settled that where parties enter into a contract either orally or in writing and act upon it over time, the court will enforce the terms based on conduct and supporting documentation. That the oral agreement between the parties was confirmed by PW1 and supported by documentary evidence produced in court, as well as the Respondent. That the requirement for timely return of cylinders and the imposition of rental charges upon delay were stated in the delivery notes and reflected in the long-standing course of dealings.

12. The Appellant submitted that they clearly demonstrated the quantum of such loss but the Respondent did not produce any corresponding records or challenge the Appellant's calculations, thereby failing to discharge the evidentiary burden that shifted to it. The Appellant argued that according to the principles of bailment for

hire, the cylinders belonged to the Appellant but temporarily entrusted to the Respondent for limited use and failure to return them denied the Appellant the opportunity to reuse or redeploy its assets, justifying a claim for rental value and business loss.

13. The Appellant submitted that that the Respondent are not entitled to a refund for failure to prove that it returned all the gas cylinders promptly and in accordance with the agreement. That the deposit ought to have been applied toward offsetting the outstanding rental charges and the losses incurred by the Appellant as a result of the breach.
14. The Respondent in their submissions dated 2<sup>nd</sup> July 2025 argued that the trial court correctly applied the law and properly evaluated the evidence adduced in arriving at its decision. That the Appellant supplied gas cylinders to the Respondent who paid a deposit of Kshs. 1,535,000 which was intended as a lien to cover losses arising from unreturned or lost cylinders. That this position was expressly acknowledged by the Appellant's witness, and that the amount was not a purchasing price or a non-refundable sum. That once the commercial relationship between the parties ended, it was right for the deposit to be refunded to the Respondent.
15. The Respondent submitted that the claims by the Appellant of Kshs 3,623,653.30 as rental charges and Kshs. 7,540,709.54 as loss of business were special damages which needed to be strictly proved which the Appellant did not. The

Respondent cited the case of *Hahn v Singh, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P 717 and 721* which set out the principle of special damages. The Respondent stated that there was no concrete basis by the Appellant for imposition of the rental charges of Kshs. 400 per cylinder per month and that the production of receipts without context, computation or supporting testimony failed to meet the strict evidentiary threshold required to sustain a claim for special damages.

16. On costs, the Respondent argued that costs follow the eventual and successful party as provided under **Section 27** of the **Civil Procedure Act** and the guiding principles were set out in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* (2014) eKLR.

### ***Analysis***

17. The role of the first appellate court to reexamine and to reevaluate evidence to come up with its own findings was set out in ***Selle v Associated Motor Boat Co. (1968) E.A 123*** as follows: -

*“... 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 ...”*

18. I have considered the Record of Appeal dated 5<sup>th</sup> February 2024, the Supplementary Record of Appeal dated 14<sup>th</sup> May 2024 and submissions by the parties. The issues for determination are: -

*(a) Whether there existed a binding contract between the parties and its terms*

*(b) Whether the Appellant proved its claim for rental charges and loss of business*

*(c) Whether the Respondent proved its counterclaim for refund of the deposit*

*(d) Whether the award of costs and interest was proper*

19. On whether there existed a binding contract between the parties, it is common ground that the parties entered into an oral agreement in July 2009 for the supply of industrial gas cylinders. The law recognizes oral contracts and permits proof through conduct and documentary evidence. In *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] KECA 362 (KLR)*, the Court of Appeal affirmed that: -

*“The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”*

20. The evidence shows that the Respondent deposited Kshs. 1,535,000 as security for gas cylinders supplied. The characterization of that deposit is central. Both parties acknowledged it was security tied to the cylinders, not a purchase price.

The relationship bore characteristics of bailment for reward. The cylinders remained the property of the Appellant, temporarily entrusted to the Respondent for use. The deposit operated as security against loss or non-return.

21. On whether the Appellant proved its claim, the Appellant claimed Kshs. 12,144,362 including rental charges and loss of business. Claims for rental charges and loss of business constitute special damages. The law is settled that special damages must be specifically pleaded and strictly proved as held in *Hahn v Singh* [1985] KECA 129 (KLR) that: -

*“... special damages which must be not only claimed specially but proved strictly for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the acts themselves.”*

22. Upon re-evaluation of the record, the Appellant produced delivery notes and certain tabulations alleging rental at Kshs. 400 per cylinder per month. However, there was no written contractual term expressly providing for such rental, nor sufficient computation showing how the total figure was arrived at. There was also no independent documentary proof demonstrating actual loss of business of Kshs. 7,540,709.54.
23. The burden of proof rests upon the party asserting a claim under **Sections 107 to 109** of the **Evidence Act**. The burden remains on the plaintiff even where the

defence calls no evidence. In *Kirugi & Another v Kabiya & 3 Others* [1983] KECA 38 (KLR), the Court stated that: -

*“The burden on the plaintiff to prove his case remains the same, though it is true that, where the matter is not defended, or, as here, validly defended that burden may become easier to discharge.”*

24. The Appellant failed to strictly prove the pleaded special damages. The trial magistrate therefore cannot be faulted for dismissing the bulk of the claim.
25. On whether the Respondent proved its Counterclaim, the Respondent sought refund of the Kshs. 1,535,000 deposit on the basis that 288 cylinders had been returned and the commercial relationship had ended. The deposit, by the Appellant’s own witness, was security for return of cylinders. Once the cylinders were returned and absent proof of loss or damage equivalent to the deposit sum, the security became refundable.
26. The Appellant argued that the deposit should offset alleged rental charges. However, since the rental and business loss claims were not strictly proved, there was no lawful basis for retention of the deposit.
27. Courts do not rewrite contracts but enforce them as agreed, as held in *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another (supra)*. The agreement did not convert the deposit into liquidated damages. It remained security. The trial court’s award of Kshs. 1,535,000 to the Respondent was therefore supported by evidence. The judgment of the trial court is hereby upheld.

28. On costs of the appeal, I find no reason to deny the Respondent the costs of this appeal.

***Determination***

29. In the upshot, this court makes the following orders –

***a. The appeal lacks merit and is hereby dismissed.***

***b. Costs of the appeal awarded to the Respondent***

**Dated, signed and delivered virtually at Mombasa this 5<sup>th</sup> day of March, 2026**

.....

**HON. F. WANGARI**

**JUDGE OF THE HIGH COURT**

*In the presence of: -*

Mr. Maundu Advocate for the Appellant

Ms. Takkah Advocate h/b for Mr. Mutubia Advocate for the Respondent

Ms. Salwa, Court Assistant