

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT ELDORET**  
**CIVIL APPEAL NO E050 OF 2022**

**HARMO ENGINEERING & BUILDING CONTRACTOR .....**  
**APPELLANT**

**VERSUS**

**SANTRAM HARDWARE WHOLESALERS LTD .....**  
**RESPONDENT**

*(Being an appeal arising from the decision of Honorable Naomi Wairimu  
Senior Principal Magistrate in Eldoret Chief Magistrate's Court Civil Suit No.  
656 of 2014 made on 25<sup>th</sup> March, 2022).*

**Coram: Justice R. Nyakundi**  
**M/s Anassi Momanyi & Co Advocates**

**JUDGMENT**

**Background**

- 1.** The brief background of this appeal is that the Appellant was sued by the Respondent in Eldoret CMCC No. 656 of 2014. The facts at the trial court were that the Respondent filed the suit against the Appellant herein alleging that it supplied to the Appellant construction materials on diverse dated during the year 2012 to the tune of Kshs. 2,541,700/= based on a long standing business relationship and a mutual understanding on the commitment by the defendant to honor the credit terms of payment.
- 2.** The Respondent at the trial court averred that despite receiving goods on credit the Appellant dishonored his commitment to pay and instead became elusive and on different occasions issued bouncing disputes totaling to Kshs. 1,900,000/= to the Respondent as payment.

3. The Appellant entered appearance at the trial court and admitted that the Respondent supplied the said materials save for the fact that the total amount was paid.

4. The matter was fully heard and the court in considering the matter in totality and spoke in the following terms:

*“I would therefore make a finding that the Plaintiff has proved his case on a balance of probabilities as is required by law and therefore find in favour of the Plaintiff in the amount of Kshs. 2,541,700 as claimed in the plaint together with interest from the date of filing suit until payment in full. Since costs follow the cause the Plaintiff shall have costs of the suit herein which shall be assessed at the registry.”*

5. The Appellant has since approached this court through a Memorandum of Appeal dated 31<sup>st</sup> March, 2022 in which the following grounds were laid out:

- a. The Honorable Magistrate erred in law and fact in concluding that the Respondent had proved its case to the requisite standard.
- b. The Honorable magistrate erred in law and fact in awarding the Respondent damages in the absence of evidence showing that the Respondent had supplied the appellant with goods worthy the award.
- c. The Honorable magistrate erred in law and fact in concluding that in the absence of a suit by the appellant against the alleged recipient of goods the appellant was under a duty to settle indebtedness on account of goods it denied receiving.
- d. The Honorable magistrate erred in law and fact in proceeding on the premise that the claim was admitted contrary to the amended defence.
- e. The Honorable magistrate erred in law and fact in totally disregarding the amended defence.
- f. The Honorable magistrate erred in law and fact in failing to note that Santram Hardware Wholesalers Limited and Santram Traders

Limited are two separate legal entities and that Santram Hardware wholesalers limited could not competently pursue a claim for and on behalf of Santram Traders Limited.

g. The judgment of the subordinate court as a whole is legally and factually erroneous and it ought to be set aside.

6. The Appellant as a result sought the following reliefs:

- a. The setting aside of the judgment.
- b. Costs of the Appeal.

7. The appeal was canvassed by way of written submissions which I have endeavored to summarize as hereunder:

### **Appellants Written Submissions.**

8. Learned Counsel Mr. Momanyi appearing on behalf of the Appellant filed written submissions dated 24<sup>th</sup> June, 2025. By way of background, it is submitted for the Appellant that the Respondent through its agent/witness gave evidence whereby he alleged that goods were supplied by Santram Traders Limited and Sanatram Hardware Wholesalers Limited at the Appellant's request. That he produced invoices and delivery notices in being cross examined by the Appellant's counsel on who received the goods and evidence that the person or motor vehicle into which the goods were loaded had any relationship with the appellant he was tongue tied. That in a nutshell he was unable to state who received the goods and the basis upon which he received the goods without authorization from the appellant who denied receipt of goods.

9. It is further submitted for the Appellant that the Respondent's own witness confirmed that Santram Traders Limited and Santram Hardware Wholesalers Limited were two distinct and separate legal entities, and further admitted that the cheques in question were issued prior to any supply of goods. On its part, the Appellant gave evidence through its agent/witness who denied that any goods were ever supplied to the Appellant, and further that the persons alleged to have received the goods were not agents of the Appellant. It is submitted that the Appellant

had issued post-dated cheques in contemplation of a future supply of goods which was ultimately never made.

**10.** On the question of the burden of proof, learned counsel submitted that the burden lay squarely upon the Respondent as the party asserting the claim, pursuant to Section 107 of the Evidence Act. Counsel further submitted that the Respondent equally stood to lose in the event it failed to discharge that burden, as contemplated under Sections 108 and 109 of the same Act.

**11.** Counsel identified the following issues for determination as captured hereunder:

- i. Whether the case was proved to the requisite standard;*
- ii. Whether the Respondent was entitled to damages;*
- iii. Whether the Appellant ought to have sued the alleged recipients of the goods allegedly supplied by the Respondent;*
- iv. Whether the claim was admitted in the amended defence; and*
- v. Whether Santram Hardware Wholesalers Limited could maintain a suit on account of goods allegedly supplied by Santram Traders Limited*

**12.** Learned Counsel submitted on the first two issues. He urged that the Respondent wholly and totally failed to discharge the burden of proof placed upon it, and that the suit ought to have been dismissed for failure to prove the case on a balance of probabilities. Counsel submitted that the moment the Appellant denied receipt of the goods, the Respondent was placed on notice of the necessity to prove, by cogent evidence, that the Appellant indeed received the goods allegedly supplied.

**13.** On the order for the goods, it is submitted for the Appellant that no order or local purchase order was placed before the court to demonstrate that goods were ever ordered. Counsel pointed out that the Appellant, being a limited liability company, can only transact business through written requests under seal, and that no such written request for the supply of

goods was ever proved to have been made by the Appellant in this matter. It is accordingly submitted that the claim fails on that score alone.

- 14.** On the supply or delivery of the goods, learned counsel submitted that for the Respondent to succeed on this limb, it was incumbent upon it to establish that goods were delivered to the Appellant and that the Appellant duly acknowledged receipt thereof by signing and stamping the delivery notes. It is submitted that from the delivery notes produced in evidence, none bears the signature and stamp of the Appellant. Counsel drew the court's attention to the fact that apart from delivery note number 796, which the Appellant's witness admitted to having signed, all other delivery notes were neither endorsed by the Appellant nor by any of its recognized agents or employees. Critically, it is submitted that the Respondent's own witness, testifying on 27<sup>th</sup> October 2020, admitted under cross-examination that none of the delivery notes were endorsed by the Appellant or its agents. Learned counsel accordingly submitted that the Respondent failed to prove delivery of goods to the Appellant by production of cogent evidence.
- 15.** On the supply of goods on credit, it is submitted for the Appellant that the Respondent failed to establish that goods were supplied on credit and that payment therefor remained outstanding. Counsel further submitted that the Respondent failed to establish the nexus between the cheques and the invoices, and notably failed to produce any other goods that could be shown to have been paid for through the sum of Kshs. 2,500,000/= deposited into its account. It is submitted that the party who stands to lose if it fails to prove a separate supply of goods as consideration for the said payment is the Respondent. Learned counsel submitted that nothing was produced to controvert the Appellant's position that the cheques were replaced by a payment of Kshs. 2,000,000/= and a further subsequent payment of Kshs. 500,000/=.
- 16.** On the lack of invoices, learned counsel submitted that the Respondent further failed to tender invoices to prove non-payment for any goods. It is

submitted that the failure to produce invoices is instructive. That if goods were truly supplied on credit, invoices ought to have been availed. Counsel dismissed as untenable and unbelievable the excuse that the invoices could not be produced because they were in the Appellant's possession, submitting that at the very least, coupon copies ought to have been tendered.

- 17.** Learned counsel further submitted that the learned magistrate erred both in law and fact in several respects: first, in shifting the burden of proof to the Appellant; second, in holding that the Appellant ought to have sued Wilfred Onsate and Bonfica Arita for acknowledging receipt of the goods; third, in holding that the Appellant's witness admitted endorsing a non-existent delivery note dated 7<sup>th</sup> November 2012 when no such delivery note was presented before the court; and fourth, in ignoring the amended defence dated 16<sup>th</sup> June 2021 and thereby proceeding on the erroneous premise that the supply of goods had been admitted.
- 18.** It is further submitted that goods worth Kshs. 740,000/= emanating from Santram Traders Limited could not possibly form part of the Respondent's claim, and that this sum ought to have been excluded since the Respondent lacked capacity to file suit for and on behalf of Santram Traders Limited, a separate legal entity.
- 19.** On whether the Appellant could competently sue persons alleged to have received the goods, learned counsel submitted that since the goods allegedly supplied did not belong to the Appellant, it could not sue persons who were allegedly supplied with those goods, as it had no capacity or locus standi to do so. It is submitted that had such an attempt been made, the case would have been dismissed with costs.
- 20.** On whether the claim was admitted, it is submitted for the Appellant that the Appellant did not, in its defence, admit the Respondent's claim, and that it was therefore wrong and erroneous for the learned magistrate to arrive at a conclusion that the claim had been admitted.

- 21.** On whether Santram Hardware Wholesalers Limited could sue for and on behalf of Santram Traders Limited, learned counsel submitted that the two entities are distinct and separate legal entities, and that neither could maintain a suit on behalf of the other, nor sue on account of goods supplied by the other. It is submitted that despite it being evident from the invoices and delivery notes that goods worth Kshs. 740,000/= were allegedly supplied by Santram Traders Limited, the learned magistrate erroneously found that the Respondent had capacity to sue on account of another company, a separate legal entity. Counsel submitted that the magistrate ought to have found otherwise but erroneously failed to do so.
- 22.** In conclusion, learned counsel prayed that the appeal be allowed, the lower court suit be dismissed, and that costs of both the appeal and the subordinate court proceedings be awarded to the Appellant.
- 23.** As at the time of writing this Judgment, I had nothing on record filed on behalf of the Respondents herein.

### **Analysis and Determination**

- 24.** This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike an appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand. I am guided by the decisions in ***Peters v Sunday Post Limited [1958] EA 424*** and ***Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123***, which remain the authoritative statements on the duty of a first appellate court in this jurisdiction. Accordingly, while this court has the power to depart from the findings of the trial court, it will do so only where such findings are based on no evidence, founded on a misapprehension of the evidence, or where the trial court has acted on wrong principles of law.
- 25.** It is in ***Kiilu & Another-v- Republic (2005) 1 KLR 174*** where the Court of Appeal stated: -

*“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court’s own decision on the evidence. The first appellate court must itself weight conflicting evidence and draw its own conclusions.*

*It is not the function of a 1<sup>st</sup> appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusion. It must itself make its own finding. Only then can it decide whether the Magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had advantage of hearing and seeing the witnesses.”*

**26.** Having reviewed the record of appeal and the written submissions filed by the Appellant, the following issues commend themselves for determination:

- i. “Whether the Respondent discharged the burden of proof to the requisite standard;*
- ii. Whether the trial court erred in its appreciation and application of the law on the burden of proof;*
- iii. Whether Santram Hardware Wholesalers Limited had the legal capacity and locus standi to maintain a claim for goods allegedly supplied by Santram Traders Limited, a separate and distinct legal entity; and*
- iv. What orders should issue.”*

### **Whether the Respondent Discharged the Burden of Proof to the Requisite Standard**

- 27.** The Appellant has vigorously urged, through its grounds of appeal and written submissions, that the Respondent failed to prove its case to the requisite standard and that the trial court erred in entering judgment in favour of the Respondent. This court has carefully examined this contention against the record of the trial court.
- 28.** A critical starting point is the Appellant's own pleaded position at the trial court. The record discloses that upon entering appearance, the Appellant filed a defence in which it expressly admitted that the Respondent supplied it with the construction materials as alleged, but maintained that full payment had been made for the same as evidence from paragraph 4 of the amended statement of defence. The battleground at the trial court was therefore narrowed to a single factual question: whether the Appellant had in fact paid for the goods in full.
- 29.** It is a foundational principle of appellate procedure that a party is bound by the case it elected to advance at the trial court and cannot, as a matter of right, resile from admissions made in its pleadings by raising an entirely different and contradictory case on appeal. The Appellant cannot blow hot and cold. Having stood before the trial court and admitted delivery of the goods, it is not open to it to now come before this court and assert, for the first time, that the goods were never supplied at all. To allow such would be to fundamentally undermine the integrity of the trial process and to visit injustice upon the Respondent who shaped its conduct of the case on the basis of what the Appellant had admitted. This court declines the invitation to countenance such an approach.
- 30.** Turning to the Respondent's evidence, the trial court had before it a bundle of delivery notes, invoices, and two dishonoured cheques dated 22<sup>nd</sup> April 2013 and 16<sup>th</sup> January 2013 totalling Kshs. 1,900,000/=. The Respondent's director testified in support of this documentary evidence, and the plaintiff further produced a special ordinary resolution dated 11<sup>th</sup> July 2014 authorizing institution of the suit. Against this evidence, the Appellant adduced nothing by way of proof of payment, the document

described as funds transfer instructions referred to a transaction dated 6<sup>th</sup> February 2012, which the trial court correctly observed fell entirely outside the claim period of 7<sup>th</sup> October 2012 to 4<sup>th</sup> December 2012. The trial court's reasoning on this specific point was sound and is impenetrable on appeal.

- 31.** On the question of the burden of proof, Section 107 of the Evidence Act places the burden upon the person who asserts a fact. The Respondent, as the party asserting supply of goods and non-payment, bore the initial burden. This it discharged through documentary evidence and testimonial evidence, which remained unrebutted by virtue of the Appellant's failure to adduce any evidence. Under Sections 108 and 109 of the Evidence Act, the evidential burden then shifted to the Appellant to prove payment, a burden it wholly failed to discharge having closed its case without adducing much in evidence. The trial court cannot, in these circumstances, be faulted for finding in favour of the Respondent.

### **Whether the Trial Court Erred in its Appreciation and Application of the Law on Burden of Proof**

- 32.** The Appellant further urged that the learned magistrate erred in shifting the burden of proof to the Appellant in holding that the Appellant ought to have sued Wilfred Onsate and Bonfica Arita for acknowledging receipt of the goods, further in holding that the Appellant's witness admitted endorsing a non-existent delivery note dated 7<sup>th</sup> November 2012 and in ignoring the amended defence dated 16<sup>th</sup> June 2021.
- 33.** This court has considered these complaints. As has been demonstrated above, the question of burden of proof was correctly handled by the trial court given the state of the pleadings and evidence on record. On the amended defence, this court notes with concern that the trial court's judgment dated 25<sup>th</sup> March 2022 does not transparently address the amended defence filed on 16<sup>th</sup> June 2021, and to that limited extent, the Appellant's complaint has some basis. However, a careful reading of the

amended defence reveals that even in its amended form, the Appellant maintained that payment had been made in full, while at the same time denying the supply in the same amended defence. It did not resile from the admission of supply and delivery. The ignoring of the amended defence therefore did not occasion any miscarriage of justice in the substantive outcome. This ground accordingly fails.

### **Whether Santram Hardware Wholesalers Limited had Capacity and Locus Standi to Maintain a Claim for Goods Supplied by Santram Traders Limited**

- 34.** This is by far the most legally meritorious ground of appeal and the one that commends itself most strongly to this court. It raises a pure question of law upon which this appellate court stands on equal footing with the trial court and is therefore fully entitled to intervene.
- 35.** The elementary and unimpeachable principle of company law, authoritatively established by the House of Lords in **Salomon v Salomon & Co Ltd [1897] AC 22** and firmly embedded in Kenyan jurisprudence, is that upon incorporation, a company becomes a legal person entirely separate and distinct from every other person, natural or juristic. Each incorporated entity has its own legal personality, its own rights and obligations, its own capacity to sue and be sued. One company simply cannot sue on behalf of another, nor can it recover judgment for goods supplied by another company, regardless of the commercial relationship between them.
- 36.** The Court of Appeal emphasized the separation and the principles undergirding the piercing of the corporate veil, in the case of **Riccatti Business College of East Africa Limited v Kyanzavi Farmers Company Limited [2016] eKLR**. The court stated in part:
- “This Court in Victor Mabachi & Anor & Nurtun Bates Limited [2013] eKLR while dealing with the issue of the distinct legal entity of corporate bodies held that:*

*[A company] as a body corporate, is persona juridica, with a separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil."*

- 37.** The invoices and delivery notes attributable to Santram Traders Limited account for goods worth Kshs. 740,000/=. In respect of this sum, Santram Hardware Wholesalers Limited had no legal standing whatsoever to maintain a claim, to obtain judgment, or to be awarded damages. The capacity to sue for and recover the price of those goods vested exclusively in Santram Traders Limited as the entity that allegedly supplied them. The Respondent, Santram Hardware Wholesalers Limited, was a stranger to those transactions in the eyes of the law, and no degree of commercial proximity, common ownership, or shared branding between the two entities could confer upon it a right of action that the law reserves exclusively for the contracting party.
- 38.** The trial court made no mention whatsoever of the distinction between the two entities, asked no question about the Respondent's capacity to claim for goods supplied by Santram Traders Limited, and simply proceeded to award the full sum claimed as though the two companies were one and the same. A court has an obligation to satisfy itself on questions of standing and capacity, and all the more so where, as is here the documentary evidence on the face of the record itself disclosed the involvement of two separate legal entities. That obligation was not discharged. This court is bound in law to correct this error.
- 39.** Ground (6) of the Memorandum of Appeal accordingly succeeds. The sum of Kshs. 740,000/= attributable to Santram Traders Limited must be excised from the trial court's award.
- 40.** Having found as above, this court proceeds to vary the trial court's decree. The operative judgment under appeal is that of the Senior Principal Magistrate dated 25<sup>th</sup> March 2022 in which judgment was entered in favour of the Respondent in the full sum of **Kshs. 2,541,700/=**. This court has carefully perused the delivery notes and

invoices tendered in evidence before the trial court. It is evident from those documents, on their face, that goods worth **Kshs. 740,000/=** were supplied not by the Respondent, Santram Hardware Wholesalers Limited, but by Santram Traders Limited, a separate and distinct legal entity. The Respondent had no legal capacity to maintain a claim for that sum and it must accordingly be excised from the award. The decree of the trial court is therefore varied as follows: the judgment sum of **Kshs. 2,541,700/=** is reduced by **Kshs. 740,000/=**, leaving a revised judgment sum of **Kshs. 1,801,700/=** as the amount properly and sustainably recoverable by the Respondent. Interest at court rates shall continue to run on the revised sum from the date of filing of the suit in the subordinate court until payment in full.

- 41.** On the question of costs, the appeal has succeeded only on one ground out of the seven grounds raised, and has failed on all other grounds. In the circumstances, the fairest and most equitable order is that each party shall bear its own costs of this appeal. The costs order in favour of the Respondent in the subordinate court shall stand undisturbed.
- 42.** For the foregoing reasons, this court makes the following orders:
- a. The appeal is hereby partially allowed on Ground (6) of the Memorandum of Appeal only.*
  - b. The judgment and decree of the trial court dated 25<sup>th</sup> March 2022 is hereby varied. The judgment sum of **Kshs. 2,541,700/=** is reduced to **Kshs. 1,801,700/=** being the amount properly recoverable by Santram Hardware Wholesalers Limited in respect of goods supplied by it alone, exclusive of the **Kshs. 740,000/=** attributable to Santram Traders Limited, a separate legal entity which lacked the capacity to be represented in this suit.*
  - c. Interest on the revised sum of **Kshs. 1,801,700/=** shall continue to run at court rates from the date of filing of the suit in the subordinate court until payment in full.*
  - d. The appeal is dismissed on all other grounds.*

e. *Each party shall bear its own costs of this appeal.*

**43.** Orders accordingly.

**DATED SIGNED AND DELIVERED VIA CTS AND EMAIL AT ELDORET  
THIS 10<sup>TH</sup> DAY OF APRIL, 2026**

.....  
**R. NYAKUNDI**  
**JUDGE**