

**REPUBLIC OF KENYA**

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

**COMMERCIAL APPEAL NO. E006 OF 2025**

**BIDCO AFRICA LIMITED.....  
.....APPELLANT**

**VERSUS**

**KELLEN KENDI T/A KAGEMA ANIMAL  
FEEDS & KAGEMA STATIONERS &  
GENERAL SUPPLIERS.....  
RESPONDENT**

**(Being an Appeal from the Judgment and Decree of Hon.  
M. W. Kamau (RM/Adjudicator) delivered on 30<sup>th</sup> January  
2025 in Thika Small Claims Court SCCCOMM No. E903 of  
2023)**

**JUDGMENT**

**Brief facts**

1. This appeal arises from the judgment of Thika Resident Magistrate/Adjudicator in SCCCOMM No. E903 of 2023 which arose from a claim of supply of goods valued at of Kshs. 936,583.82/- whereby the trial court dismissed the appellant's claim on the grounds that the appellant did not prove its claim 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 failing to take into account or disregarding the evidence availed hence came to a wrong finding.
- b) The learned trial magistrate erred in law and in fact in finding that the appellant had failed to prove delivery of the goods despite the production of statements of account, invoices and delivery notes as evidence of supply.
- c) The learned adjudicator erred in shifting the burden of proof to the appellant by requiring it to disprove allegations of fraud raised by the respondent contrary to the principle that he who alleges must prove.
- d) The learned adjudicator erred in law and in fact in failing to consider that the respondent had admitted the existence of a business relationship with the appellant and did not provide evidence that it had settled the outstanding amount of Kshs. 936,583.82/-.

3. Parties disposed of the appeal by way of written submissions.

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

4. The appellant submits that the learned magistrate erred in law and in fact by disregarding or failing to properly consider the documentary evidence adduced namely the

account opening form, statement of accounts, invoices and delivery notes which

collectively proved the supply and delivery of goods worth Kshs. 936,583.82/-. The appellant further submits that it particularized in its statement of claim dated 13<sup>th</sup> June 2023, the supply of various consumer goods to the respondent between 13<sup>th</sup> April 2017 and thereabouts with the accounts remaining unpaid for about six years. Further during the hearing, its witness testified to the business relationship and the outstanding debt which was not rebutted with contrary documentary evidence by the respondent.

5. The appellant submits that RW1 stated that at the alleged time of closure of the shop, there was stock that was redistributed to other shops which leads credence that at some point goods were indeed supplied as the shop was not empty, fact admitted by RW2. The appellant further submits that there was no proof of a single payment showing that indeed a debt existed for the supplied amounts.
6. The appellant argues that although RW2 raised oral allegations of fraud by its unnamed employees, it did not produce any documents to support denial of receipt such as rejection notes or independent stock records. The trial court acknowledged the existence of the business relationship but dismissed the claim on the basis that it failed to establish to the court that they indeed supplied

the goods alleged without analysing the exhibits which included a signed delivery note. Further, RW2 in cross examination admitted that the usual sequence would be that after placement of an order, goods would be delivered, he would receive and sign for them, the driver

would go back to Bidco with the delivery notes and invoices would be sent to Kellen. The appellant submits that the testimony of RW2 aligned with its witness testimony and the documents produced to show order and delivery of disputed goods.

7. The appellant relies on **Section 107(1) of the Evidence Act** and the cases of **Thomas & Piron Grand Lacs Limited vs Kenya Builders & Concrete Company Limited [2025] KEHC 10472 (KLR)** and **Pramukh Cash and Carry Limited vs Charles Ojwang Milamba t/a Milamba Stores [2024] KEHC 1340 (KLR)** and submits that it discharged its burden by producing the account opening form, statement of account, invoices and delivery notes which detailed the goods supplied and deliveries made. The appellant further submits that the said documents were not challenged for authenticity or forgery by the respondent. The learned magistrate's failure to weigh the said documentary evidence against the respondent's bare denials contravenes the duty to evaluate evidence as mandated by Section 32 of the Small Claims Court Act.

8. The appellant submits that the trial court misdirected itself in law by requiring it to disprove the respondent's oral fraud allegations thereby wrongly shifting the evidential burden. The respondent's defence and RW2's testimony alleged a narrative of fraudulent dispatch of feeds by its sales manager and director but no particulars of fraud were provided nor were any documents tendered, a fact readily admitted in cross examination.
9. The appellant relies on **Section 109 of the Evidence Act** and the cases of **Langata Community & 13 Others vs Optiven Limited & Another [2025] KEELC 7209 (KLR)** and **Steyn vs Ruscone [2025] KEHC 6196 (KLR)** and submits that the respondent bore the burden to prove the fraud allegation with cogent evidence. RW2's testimony was vague, relying on hearsay about fraudulent dispatches without specifics or corroboration. The appellant submits that by faulting it for not disproving that, the court reversed the burden occasioning a miscarriage of justice. Further, on a higher standard the fraud claim failed for want of proof leaving its case intact.
10. The appellant relies on **Section 38 of the Small Claims Court Act** and the case of **Ogutu vs Anjichi (Civil Appeal E010 of 2024) [2025] KEHC 3875 (KLR)** and submits that this court is duty bound to re-evaluate the evidence and determine if the trial decision was merited, intervening where the judgment is against the weight of evidence or based on misdirection.

## **The Respondent's Submissions.**

11. The respondent submits that in a claim founded on the alleged supply of goods, the appellant's burden does not end at establishing that a commercial relationship existed between the parties. Rather, the claimant must go further and strictly prove on a balance of probabilities that specific goods were ordered, delivered, received by the defendant or its authorized agent and that payment remains

outstanding. The respondent argues that while it conceded that parties had previously transacted, such concession could not in law, amount to an admission that the disputed goods were in fact delivered or that the claimed sum of Kshs. 936,583.82/- was owed. To support its contentions, the respondent relies on the case of **Kuria Kiarie & Co. Advocates vs Kariuki Gathecha [2019] eKLR.**

12. The respondent refers to the case of **Pramukh Cash and Carry Limited vs Charles Ojwang Milamba t/a Milamba Stores [2024] KEHC 1340 (KLR)** and submits that invoices are unilateral documents generated by a seller and constitute demands for payment, not proof of delivery. In the instant case, the delivery notes relied upon by the appellant were seriously contested. The appellant failed to discharge the evidential burden imposed by Section 109 of the Evidence Act as it did not lead any

evidence to establish who allegedly received the goods, whether the signatures appearing on the delivery notes belonged to the respondent or any authorized agent, whether the deliveries were made to the respondent's business premises or whether the respondent placed the orders in the first place. Further, the appellant did not call any driver, transporter, warehouse personnel or independent witness to verify the alleged deliveries. Additionally no local purchase orders (LPOs) which ordinarily evidence authorization and intention to purchase were produced. No stock records, delivery schedules or contemporaneous business records from the respondent were tendered to corroborate receipt. To support its contentions, the

respondent relies on the case of **Trust Bank Limited vs Paramount Universal Bank Limited & 2 Others [2009] eKLR.**

13. The respondent submits that it did not seek judgment on the basis of fraud, nor did it lodge a counterclaim founded on fraudulent conduct. It raised the issue of fraud as part of its defence to explain and highlight the inconsistencies, irregularities and unreliability of the appellant's documentary evidence especially the disputed delivery notes and statement of accounts. The respondent argues that the learned magistrate did not make any positive or declaratory finding that the appellant committed fraud. The judgment demonstrates that the

court merely evaluated the appellant's documents in light of the challenges raised and found that the appellant failed to sufficiently authenticate or explain them. The respondent argues that once it challenged the authenticity, accuracy and reliability of the appellant's documents, the evidential burden naturally rested upon the appellant to prove that those documents were genuine and reliable. To support its contentions, the respondent relies on the case of **Charterhouse Bank Limited (under Statutory Management) vs Frank N. Kamau [2016] eKLR.**

14. Relying on the case of **Central Bank of Kenya vs Uhuru Highway Development Limited & 4 Others [2018] eKLR,** the respondent submits that court are entitled and obligated to test documentary evidence against challenges raised by the opposing party and where a claimant is unable to explain discrepancies or authenticate disputed documents, the court is entitled to drawn an adverse

inference. The respondent argues that the appellant's claim before the lower court did not fail because it proved fraud. It failed because the appellant did not prove delivery of goods and the existence of the alleged debt on a balance of probabilities as required by law.

15. The respondent submits that the appellant's claim was predicated on alleged supplies said to have been

made in the year 2017 yet the suit was instituted in 2023 representing an unexplained delay for nearly six years. While the claim may not have been statute barred under Section 4(1)(a) of the Limitation of Actions Act, the prolonged delay was a relevant factual consideration in assessing the credibility, reliability and contemporaneity of the appellant's evidence. The respondent argues that the learned magistrate was entitled to take into account the absence of a plausible explanation for the delay particularly in a claim founded on commercial transactions where contemporaneous records and prompt enforcement are ordinarily expected.

16. The respondent argues that during the proceedings, it consistently denied receipt of the alleged goods and squarely challenged the authenticity and reliability of the documents relied upon by the appellant. The respondent submits that it was not in law required to prove payment of goods that were never proved to have been delivered. Under Sections 107, 108 and 109 of the Evidence Act, the burden remained firmly on the appellant to establish delivery and indebtedness on a balance of probabilities. To support its contentions, the respondent relies on the case of **Daniel Torotich arap Moi vs**

**Mwangi Stephen Muriithi & Another [2014] eKLR.**

The respondent further submits that the learned magistrate did not determine the matter on the basis of technicalities or the sheer volume of documents produced

by the appellant. The court correctly focused on the quality, credibility and probative value of the evidence rather than its quality.

17. The respondent submits that a critical issue that properly informed the trial court's dismissal of the appellant's claim concerns the integrity and evidentiary value of the delivery of documentation relied upon. The appellant's case was fundamentally premised on the assertion that goods were supplied and delivered to the respondent over a period of time thereby giving rise to the alleged indebtedness of Kshs. 936,583.82/-. However, the evidentiary material presented before the lower court did not demonstrate the actual movement of goods from the appellant's possession. The delivery notes relied upon by the appellant were not signed by the respondent or by any person shown to be its employee, servant or authorized agent. Instead the signatures appearing on the delivery notes were those of drivers contracted by the appellant itself, which fact was not disputed. The respondent argues that such documentation cannot constitute independent proof of delivery. A delivery note derives its probative value from acknowledgement of receipt by the purchaser or a duly authorized representative. Further, the appellant failed to call any receiving clerk, employee of the respondent or transporter to verify delivery. No evidence was adduced to establish the physical point of delivery, the identity of

the alleged recipient, the authority of such recipient or the existence of prior orders triggering dispatch.

18. The respondent further submits that it raised legitimate concerns regarding the credibility of the appellant's internal supply chain and documentation particularly in relation to the involvement of the appellant's managerial staff and transactions allegedly connected to the Tajan Thika outlet. Further the appellant did not lead any evidence to demonstrate how the chain of movement of goods operated in relation to the alleged supplies. No depot managers, warehouse personnel, credit controllers or logistic officers were called to testify. No internal stock movement records, dispatch logs or delivery confirmations were produced. Further no representative connected to Tajan Thika was called to clarify the role of that outlet in the alleged transactions. Thus the appellant failed to explain whether goods were actually released from its warehouse, whether they were dispatched to the respondent's premises or whether transactions attributed to it were in fact internal reallocations or diversions within its own distribution network. The respondent argues that once it questioned the integrity of the documentation, the evidential burden lay upon the appellant to demonstrate the transparency and legitimacy of its internal process.

19. The respondent submits that the appellant failed to explain how the alleged indebtedness arose. The appellant did not demonstrate that it had an approved credit facility that supplies were authorized with

such facility or that internal approvals were obtained before dispatch. It further failed to show how the alleged debt accumulated over time. The respondent argues that statement of accounts cannot create liability where delivery itself has not been proved.

### **Issues for determination**

20. The main issues for determination are:-

a) Whether the appeal is proper before the court.

b) Whether the appellant proved its case on a balance of probabilities.

### **The Law**

21. 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.**

22. 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.**

23. **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.**

24. 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 onus was on it to establish that they indeed transported and delivered the invoiced goods to the respondent. The learned adjudicator in dismissing the claim considered the evidence presented by both parties and their oral testimonies and their witnesses and found that the appellant ought to have proved that they delivered the goods to the respondent given the respondent denied being supplied with the invoiced goods. The learned adjudicator further established that the relationship between the parties intertwined as RW2 was an employee of the respondent and later an employee of the appellant, thus he was aware that the appellant was acting fraudulently by dispatching feeds in the respondent's name but were delivered to Tajan Thika and Bryainer Meru. The appellant did not counter the said arguments. 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. However, that is contrary to the jurisdiction of this court sitting as an appellate court pursuant to **Section 38**

**of the Small Claims Court Act** which provides for appeals only on matters of law. I find this appeal based on matter of facts not properly before this court.

25. Consequently, this appeal is struck out with costs to the respondent.

26. It is hereby so ordered.

***JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 30<sup>TH</sup> DAY OF APRIL 2026.***

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