

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISUMU**  
**CIVIL APPEAL NO. E043 OF 2025**

**GOHAR GLASS MART LIMITED ..... APPELLANT**  
**- VERSUS -**  
**LE SAVANNA COUNTY LODGES & HOTELS ..... RESPONDENT**

(Being an appeal from the judgment and decree of **Hon. F.M. Rashid PM** delivered on the 21/1/2025 in the **Ksm CMCC No. 306 of 2020, Gohar Glass Mart Limited v Le Savanna County Lodges & Hotels**)

**J U D G M E N T**

1. The appellant filed a claim against the respondent vide an amended plaint dated **15/5/2023** in which it sought payment of **Kshs. 1,684,164/-** being monies owed for building materials and labour supplied.
2. The respondent entered appearance and filed an undated statement of defence denying the averments made by the appellant and put it to strict proof.
3. The matter proceeded to trial and in its judgment, the trial court found that despite the fact that the respondent failed to call any witness in support of its defence, the appellant had failed to prove its case and proceeded to dismiss the appellant's suit.

4. Being dissatisfied with the said judgment/decree, the appellant lodged this appeal vide the Memorandum of Appeal dated 20/2/2025 and raised seven (7) grounds of appeal as follows: -

*a) That the learned trial magistrate erred in fact and in law by holding that the appellant did not avail any agreement and/or contract between them and the respondent on the quantity and price of the goods supplied when the existence of the same was not disputed by the respondent at trial or refuted through any credible evidence by the said respondent.*

*b) That the learned magistrate erred in fact and in law by imputing an assumption based on the facts presented before her that there existed a contract between the Appellant and the Respondent, which agreement the appellant did not file in court, when the existence of the said contract could be implied from the evidence presented by the Appellant.*

*c) That the learned magistrate erred in fact and in law in reaching a determination on the case before her that if at all there was any delivery done by the Appellant, the same would be initiated by a Local Purchase Order or a Local Supply Order signed by the*

*Respondent's agent or authorized staff and proceeding to dismiss the Appellants case on the grounds that the Appellant did not avail any Local Purchase Order signed and stamped by the Respondent, when the said issue was never raised at trial by the Respondent, the case having been undefended.*

*d) That the learned magistrate erred in fact and in law by dismissing the Appellant's case on the basis of undisputed and uncontroverted facts having allowed herself to descend into the arena of controversy and litigation by imputing facts into the circumstances of the case which were otherwise not disputed or raised by any party, particularly the Respondent herein, despite having correctly noted that the Appellant's testimony was uncontroverted as the Respondent did not call any witness at trial.*

*e) That the learned trial magistrate erred in fact and in law by relying on the plaint dated 29/7/2020 in determining that the disputed period was 2016 to 2018 in total disregard of the amended plaint dated 15/5/2023 in which the period in dispute was revised to 2011 to 2018, and which amendment was not refuted by the Defendant by way of an amended defense or otherwise.*

*f) That the learned trial magistrate erred in fact and in law by reaching a determination on the case before her that the Appellant did not avail a single delivery note as proof that indeed the goods were delivered and received by an authorized staff of the Respondent when the same was never a disputed fact in the case presented before her.*

*g) The learned trial magistrate erred in law and in fact by failing to consider the Appellant's evidence and submissions in making her determination hence arriving at an erroneous finding against the weight of evidence and facts on record.*

5. The appeal was disposed off by way of written submissions. However, as at the time of writing this judgment the only submissions on record were those of the appellant which I have carefully considered.
6. This being a first appeal, the Court is duty bound to evaluate the evidence before the trial court afresh and come to its own independent findings and conclusions. See **Selles & Anor vs. Associated Motor Boat Co Ltd & Others [1968] EA 123.**
7. The appellant called one **James Ngige** as **Pw1**. He testified that he was the appellant's accountant thus familiar with the intricacies of the case. He

adopted the statements dated 5<sup>th</sup> and 9<sup>th</sup> April 2024 as his evidence in chief and produced the list of documents dated 29/7/2020 as PExh1 – 9 and **Further List of Documents** dated 15/5/2023 as PExh10 – 23. It was his testimony that the respondent had reached out to settle the debt but failed to honour the proposed settlement. The appellant then closed its case.

8. The respondent did not challenge the appellant's evidence in cross-examination or by calling any witness in support of its defence. It is based on this evidence that the trial court proceeded to dismiss the appellant's suit basing its decision on the appellant's pleadings as contained in the plaint dated 29/7/2020. The trial court further held that the appellant had failed to produce a contract showing the agreement on the "*price of goods and services allegedly supplied*".
9. From the onset, I must reiterate that litigation in our country is rooted in the adversarial system that strictly dictates that courts must determine cases based on the pleadings and issues framed by the parties. A court cannot wander outside the issues pleaded or introduce new, unexpected issues, as this would violate the principles of fair trial and lead to "trial by ambush".
10. I state so because, it is evident from the record that the trial court based its decision on the pleadings by the appellant that had already been amended

vide the amended plaint dated **15/5/2023**. This is evident from the whole analysis and determination as detailed in in the trial court's judgment.

11. The foregoing notwithstanding, the appellant's case was that it supplied the respondent with building materials as well as labour which the respondent failed to pay for. It was thus upon the appellant to adduce evidence in support of its case as required by **Sections 107, 108 and 109 of the Evidence Act**.
12. The appellant appeared through Pw1 and testified on the matters contained in the Amended Plaint. He produced invoices and statements of monies owed by the respondent as **PExh1 – 9** and **PExh10 – 23**. This evidence was neither denied nor unchallenged by the respondent.
13. In the case of **Leo Investment Limited v Mau West Limited & another [2019] eKLR**, it was stated: -

*“But what are the effect of failure by the appellant to tender evidence in rebuttal? The court in **Shaneebal Limited v County Government of Machakos [2018] eKLR (supra)** addressed this issue in paragraphs 24 to 29 and while citing other case laws it held that where no defence is filed but no witness is called to give evidence in support of the defence, it means that the defence renders the*

*plaintiff's case unchallenged. That where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein, the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged."*

14. In the present case, apart from the amended plaint on record, the appellant called a witness who testified in support of its case. He produced documents which were neither denied nor challenged by the respondent. To that extent, the appellant had discharged its evidentiary burden of proof thereby requiring a rebuttal by the respondent. There was no rebuttal. In its judgment, the trial court went outside the case pleaded and proved before it and determined matters that were neither raised by the parties nor were before it.
15. Accordingly, I find that the appellant proved its case on a balance of probabilities and it was therefore entitled to the reliefs sought. The claim was clearly uncontested.
16. In the circumstances, the appeal is successful. The trial court's judgment dismissing the appellant's suit is hereby set aside and substituted with

judgment in favour of the appellant against the respondent for **Kshs. 1,684,164/-** together with interest at court rate from the date of filing suit until payment in full. The appellant will also have the costs of the appeal and the court below.

It is so decreed.

**DATED** and **DELIVERED** at Kisumu this 24<sup>th</sup> day of **April, 2026**.

**A. MABEYA, FCI Arb**

**JUDGE**