



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ISIOLO

CIVIL APPEAL NO. E026 OF 2025

SAALA HOTEL

LTDAPPELLANT

VERSUS

CATHERINE NDURU

STANLEYDEFENDANT

JUDGMENT

1. The Respondent sued the Appellant herein before the trial Court for Ksh. 149,492 being the cost of goods supplied and not paid for. In a judgment delivered on 30/5/2025 the trial Court returned a finding in favour of the Respondent. The Appellant herein was aggrieved and moved this Court via the Memorandum of Appeal dated 30/6/2025.

Grounds of Appeal

2. The Appellant has listed the following grounds.

1) That the Lower Court erred in fact and in law by finding that Halima Fugicha (a purported 2nd Defendant) was liable, despite the fact that vide a Ruling dated 22nd November, 2024, the Lower Court had already struck her out as a party in the suit.

- 2) That the Lower Court relied on evidence that the Plaintiff/Respondent had not filed in Court or served the Defendant/Appellant, and in particular the referenced "Original Receipts Book" that the Court said was produced
- 3) That the reliance on evidence that the Appellant had not had opportunity to see, scrutinize and cross-examine on was very prejudicial to the Appellant.
- 4) That the Lower Court erred by finding in the Plaintiff/Respondents favour, despite the fact that the plaintiff:-
 - a) Did not file/produce any invoices.
 - b) Did not produce any delivery notes.
 - c) Did not produce any communication between herself and the Defendant for any balances owed or any other communication at all.
 - d) Did not call any witnesses who could verify her account.
- 5) That the Court erred by relying on handwritten notes as proof of debt owed, despite the fact that those notes themselves did not have any acknowledgment of debt owed by the Defendant/Appellant.
- 6) That the Court erred in failing to consider the Appellants/Defendants Witnesses testimony or the Defendants Submissions at all, and ONLY relied on the Respondent/Plaintiff testimony as the absolute truth despite the lack of evidence.
- 7) That the Court erred by finding that the failure by the "2nd Defendant" to testify was fatal, despite the fact that the 2nd Defendant had been struck out from this suit.

8) *That the Lower Court erred by agreeing with the Respondent/Plaintiff that the erstwhile struck out 2nd Defendant was the Respondents contact and principal agent, despite the fact that no evidence to that effect was provided/produced in Court at all.*

3. The Appeal proceeded by way of Written Submissions.

Appellant's Submissions

4. It is the Appellant's Submissions that the trial Court relied on the Respondent's statement and handwritten notes as of proof of debt owed; that none of the documents presented proved any debts; that the documents authenticity was not proved. It is further stated that the trial Magistrate erred by relying on the "original receipt Book", yet the said book was not filed in Court or served on the Appellant.
5. It is further submitted that without documentary evidence to corroborate the Respondent's testimony which was the only evidence presented, the Court ought not to have inferred that any debt existed. The Appellant argues that a decision ought not to be based on unsupported, and improperly adduced evidence.
6. The Appellant further faults the trial Court for determining that failure to summon the then 2nd Defendant, one Halima Fugicha, left the Respondent's testimony largely unchallenged, yet the 2nd Defendant had been struck off from the suit. In this the regard, the Appellant has relied on the

decision of the court in the case of ***Hellen Njeri vs Wachira Murage & Anr [2015] e KLR*** .

7. It is the Appellant's final submission that the requirements of **Section 107** of the Evidence Act on the burden of proof was not met.

Respondent's Submissions

8. It is the Respondent's Submissions that, through the invoices marked as **PEX 1 (a) to (1) (e)**, she proved that specific farm products were supplied and received, by the Appellant's Agents and were acknowledged through the various signatures as they appear on the bottom part of the invoices.

9. It is further pointed out that the Respondent kept her own records showing the supply of vegetables, receipts of payment, and any outstanding balances. It is submitted the Respondent's own record complied with the remittance by the Appellant, as can be seen on the respondent's *Mpesa* statements, and thus corroborating the Respondent's testimony on the outstanding amount.

10. It is the Respondent's further Submission that no objections were raised to the respondent's production of hand-written documents and consequently the documents were admitted in evidence. In this regard the decision of ***Justice Abusili in the case of Be Energy Ltd vs. Dorine Emily Akinyi [2024] KLR*** has been relied on.

11. On the failure to call Halima Fugicha as a witness, it is submitted that the Court was making reference to her testimony as a contact person on the part of the Appellant, and not in her capacity as a party or non-party to the suit.

Analysis and Determination

12. The mandate of this Court, as the first Appellate Court, is to review the evidence and arrive at its own findings, with allowance being made for the fact that the trial Court had the advantage of seeing and hearing the witnesses first-hand.
13. I have identified the following issues for determination in this Appeal:
 - a). Firstly, whether the Judgment should have been entered jointly and severally against the defendants;
 - b). Secondly, whether there was a contractual arrangement between the parties for supply of goods
 - c). whether there is any payment due to the Respondent.
14. On the first issue I agree with the Appellant that through the Ruling delivered on 22/11/2024, the trial Court struck off the then 2nd Defendant one **Halima Fugicha** from the suit, leaving the Appellant herein as the only Defendant. consequently, the entry of Judgment against the 2nd Defendant was erroneous. This ground of Appeal succeeds.
15. On whether there was any contractual arrangement for the supply of certain goods between the parties, the Appellant has argued that, there were no delivery notes nor invoices in proof of such supply. However, the Appellant's only witness (DW1) admitted that they received supply of fruits and vegetables, for which they paid for. She stated that the contractual arraignment was between the year 2023-2024. Her testimony therefore corroborated the plaintiff's testimony in this regard. Thus, notwithstanding the absence of delivery notes

a contractual arrangement between the year 2023 to 2024 was admitted to by the Appellant.

16. The Appellant has further argued that there were no invoices which ought to have originated from the respondents. However, I have seen a document which for purposes of proof qualifies as invoices. Plaintiffs **Exhibits 1 (1) to 1 (5)** indicate the date, particulars of produce supplied, and the value of the same goods.
17. The Respondent told the Court that she would supply fruits and vegetables, and the various personnel at the Appellant's premises would sign her invoices in acknowledgment. Although the names of the various signatories are missing, the authenticity of any of the signatures has not been contested by the Appellant. I am therefore satisfied that the respondent's testimony corroborated by the Appellant's witnesses plus the invoices were sufficient proof that the Respondent did supply the goods indicated in the said invoices. In this regard I rely on the decision of **Miller vs Minister of pensions (All ER 372)** cited by the Respondent where the Court gave guidance as follows: "The standard of proof is well- settled, it must carry a reasonable degree of probability. If the evidence is such that the tribunal can say; we think it is more probable than not" the burden is discharged but if the probabilities are equal, it is not."
18. The last issue is whether there are any payments due to the Respondent. By way of preliminary, I wish to point out two key issues that arise in this case on the aspect of *interalia* the amount being claimed. It is a well establish principle of law that parties are bound by their pleadings.

Secondly, on the onus of proof, the respondent in this case had the duty to prove that she supplied goods for which no payment was received. The burden would then have shifted to the Appellant to prove that they indeed paid for the goods. That is to say the evidential burden on the matter of payments was on the Appellant herein.

19. Back to the issue of pleadings, under **paragraph 5** of the plaint, the Respondent states that she supplied vegetables and fruits to the Appellants from the year 2021. However, the invoices she produced covers the period between December, 2023 to January, 2024, only. Though from her own calculations (PExb. 2(1) to 2(4)) it appears that some debts were carried forward, there is no evidence of supply, prior to December 2023.
20. The Respondent could not therefore purport to carry forward outstanding debts, without proof that vegetables and fruit that gave rise to these accrued debts were supplied .The Plaintiff's self-made statement alone are not prove of supply, in the absence of the invoices similar to **Exhibit 1 (1) to 1 (5)**. This remains the position notwithstanding that the *Mpesa* statements shows that Respondent was indeed receiving payment from the Appellant prior to December 2023.
21. In other words, the said payments do not disclose, the particulars of the goods supplied, and to relate this payments to the amount due without prove of supply of goods is speculative. Courts do not act on speculations. It was upon the Respondent to prove that she supplied fruits and vegetables to the Appellant prior to December, 2023.

22. In conclusion therefore, the Respondent failed to prove fully the value of goods supplied, for the Court to have been able to ascertain how much of the goods had been paid for and how much remained unpaid.
23. I agree with the Appellant that the standard of proof fell short and the conclusion of the trial court was therefore erroneous.
24. Consequently, the Judgment of the trial Court delivered on 30/05/2025 is hereby set aside, and is hereby substituted with an order that the Plaintiff's suit is dismissed.
25. Each party to bear their own costs, both in the suit, and this Appeal.

Dated, Signed and delivered at Isiolo, this 7th day of May, 2026

S. Chirchir
Judge

In the presence of:-
Roba Katelo-Court Assistant.
Mr. Mundia Mwangi for the Appellant
Mr. Mwirigi.M for the Respondent.