REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, AZANGALALA & J. MOHAMMED, JJ.A.)

CIVIL APPEAL NO. 59 OF 2014

BETWEEN

HON. ALFRED M. NDERITU…….....…APPELLANT

AND

MWEA RICE GROWERS MULTI PURPOSE

CO-OPERATIVE SOCIETY LIMITED ……..... RESPONDENT

(Being an appeal against the judgment & decree of the High Court of Kenya at Nairobi (Kimaru, J) delivered on 21st September 2012

in

HCCC NO. 302 OF 2003)

****

JUDGMENT OF THE COURT

Introduction

1. This is an appeal from the judgment of the High Court delivered on 21st September, 2012.

2. On 23rd May, 2003 the appellant filed a Plaint in the High Court seeking, *inter-alia*, judgment against the respondent herein for the sum of Kshs.12,846,723.75/=. According to the Plaint, the appellant had on diverse dates between the years 1999 and 2000 at the respondent's request, periodically advanced the Respondent money for various projects and needs; that he had also acted as the respondent's guarantor, undertaking to make good all claims from suppliers if the respondent failed and/or defaulted in payment on the understanding that the respondent was to pay back all monies so expended; that on diverse dates between the years 1999 and 2000 on the express and/or implied request by the respondent, distributed and marketed basmati paddy rice and related products belonging to the respondent to different millers; that this was to be at agreed rates and prices and that the respondent was to reimburse the appellant any costs and expenses he may incur in the distribution, delivery and marketing of the said basmati rice. The appellant therefore claimed the said amount terming it money advanced to the respondent for the projects

and needs, guaranteed credit for the Respondent as well as costs incurred by him in distributing, delivering and marketing the basmati paddy rice.

3. The respondent filed a statement of defence on 11th June, 2003. In the defence, the respondents admitted having been involved in a series of transactions with the appellant but denied owing the appellant the amount of Kshs.12,846,723.75/= or any other amount. The respondent averred that it is actually the appellant who owed it Kshs.11,843,614/= which amount the respondent had already sued for in Embu High Court Civil Case No. 20 of 2003

(hereinafter referred to as the Embu case).

4. In the Embu case which was subsequently consolidated with the Nairobi case, the respondent filed a lengthy plaint. The crux of the respondent's case from the said Plaint being that on diverse dates between the years 1999 and 2000 the respondent made deliveries to Kenya Millers Limited of Basmati Paddy Rice and the payments thereof were made to the appellant. However, according to the respondent, the appellant failed to remit the entire amounts paid to him by Kenya Millers Limited and had also made several deductions that were not agreed on between the parties. The respondent prayed for judgment of Kshs.11,843,614/= against the appellant.

5. In response thereto, the appellant filed a detailed defence in which he admitted that there were agreements between him and the respondent but denied receiving the monies indicated in the respondent's plaint. The appellant also denied owing the respondent as alleged by the respondent and termed the respondent's suit as an afterthought.

6. The two suits were consolidated and heard together. The High Court in its decision rendered on 21st September, 2012 held that the issues in dispute between the appellant and the respondent appeared to be arithmetic. The Court then sought to unravel the arithmetic behind the dealings of the appellant and the respondent. The Court determined that a total of Kshs.38,169,369/= was received by the appellant from Kenya Millers Ltd on behalf of the respondent for paddy rice delivered to Kenya Millers Ltd; that out of that amount the appellant made a direct payment of Kshs.12,604,000/= to the respondent; that from the amount paid to the appellant by Kenya Millers Ltd, he made payments to third parties for goods delivered and services rendered to the respondent of Kshs.10,238,784/=; that from the evidence on record the respondent was paid Kshs.4,445,420/= by Kenya Millers Ltd; that the appellant owed the respondent Kshs.10,881,157/=, being the balance after subtracting the amount directly paid to the respondent, the amount paid to third parties as well as the amount paid directly to the respondent by Kenya Millers Ltd from the amount of Kshs.38,169,369/=. The court therefore entered judgment for the respondent for the amount of Kshs.10,881,157/= which amount the court ordered was to be paid together with interest at court rates from the date of filing of the suit.

7. Aggrieved by that decision the appellant proffered this appeal. The memorandum of appeal listed a total of 27 grounds of appeal. The appeal was disposed of by way of written submissions with brief oral highlighting.

Submissions by counsel

The Appellant's Case

8. The appellant filed his submissions on 22nd August, 2016. In the Submissions, the appellant condensed the grounds of appeal into seven issues.

The appellant submitted that this being a first appeal it will be necessary for this Court to examine and re-evaluate the evidence adduced by the parties before the High Court. The appellant then delved into the seven issues.

9. The first issue was on the net weight of paddy rice delivered to Kenya Millers Ltd by the appellant on behalf of the respondent. The appellant submitted that contrary to the decision of the learned Judge that

478,302 Kgs of paddy rice was delivered to Kenya Millers Limited in the year 2000, the actual amount delivered, according to the appellant, was 472,292 Kgs. The difference of 6,010kgs, the appellant submitted, was the weight of the gunny bags used to deliver the rice which was deducted from the 478,302 Kgs. With regard to the net weight of the paddy rice delivered in 1999 the appellant contended that the same was 557,707 Kgs and not 548,089 Kgs as was held by the learned Judge. Therefore, according to the appellant, the total net weight of the paddy rice he delivered to Kenya Millers Ltd was 1,027,999kgs.

10. The second issue raised by the appellant was in regard to a finding of the learned Judge that he delivered, on behalf of the respondent, 70,721kgs of white pishori rice valued at Kshs.3,889,655/= to Kenya Millers Ltd. The appellant submitted that the learned Judge ought not to have dealt with delivery of the white pishori rice as the issue was *res judicata*. According to the appellant the respondent vide an application dated 9th November, 2004 sought leave to amend its plaint by inclusion of the issue of the white pishori rice; that that application was litigated and in a ruling dated 20th December, 2004 the application for leave to amend the plaint was dismissed. The appellant therefore argued that the issue of alleged delivery of the white pishori rice was *res judicata* when the matter came up for hearing and the learned Judge should have disregarded the same.

11. The third issue raised by the appellant was with regard to the finding of the learned Judge that paddy rice worth Kshs.38,169,369/= was delivered to Kenya Millers Ltd. According to the appellant the agreement between him and the respondent was that the paddy rice was to be delivered to Kenya Millers Ltd at Kshs.32/= per kilo. The appellant submitted that the learned Judge erred in finding that the paddy rice delivered to Kenya Millers in 1999 was delivered at Kshs.32/= per kg and in 2000 at Kshs.35/= per kg. The appellant further submitted that Kenya Millers Ltd purchased the paddy rice from him at Kshs.35/= during the 2 years; that the amount of Kshs.35/= was inclusive of transport costs of Kshs.3/= which was to be deducted; that the respondent was aware that the paddy rice was being delivered at Kshs.32/= and in its various invoices stated that the price was Kshs.32/=; that because of the erroneous finding of the learned Judge on the price of the paddy rice, his finding that in 2000 the value of the deliveries were worth Kshs.16,740,570/= was wrong. The appellant argued that in view of the fact that the learned Judge erred in his calculations of the weight of the paddy rice delivered in both 1999 and 2000, his finding on the total worth of the paddy price delivered pegged at Kshs.38,169,369/= was also wrong whether calculated at Kshs.32/= per kg or Kshs.35/= per kg. Lastly, on this issue the appellant submitted that the learned Judge erred in the inclusion of the sum of Kshs.3,889,655/= in the total sum of Kshs.38,169,369/=. The appellant argued that this claim for the white pishori rice was *res judicata*.

12. The fourth issue raised by the appellant was that the learned Judge failed to consider oral and documentary evidence in regard to the direct payments made to the respondent by the appellant; that the learned Judge in computing the amount of money that he paid directly to the Respondent left out some amounts. The said amounts the appellant submitted were paid vide four Bankers Cheques, numbers 6545, 6666, 6754 and 104804 of Kshs.2,000,000/=, 4,200,000/=, 2,500,000/= and 1,523,367/= respectively. The appellant further submitted that he produced copies of statements showing the payments and which, according to the appellant, were not disputed by the respondent.

13. The fifth issue was that the Judge failed to consider evidence of indirect payments made to the respondent by the appellant; that in addition to the payments that the court held were made to third parties on behalf of the respondent, there were other amounts that the appellant also made on behalf of the respondent which amounts were left out by the Judge; that the payments amounting to Kshs. 9,156,787/= were to be recovered from the proceeds of the rice delivered and sold to Kenya Millers Ltd; that he adduced evidence that he had advanced to the respondent Kshs.5,500,000/= prior to the delivery of rice in 1999 on the understanding that the same would be recovered from the sale of the paddy rice. The appellant argued that this evidence was not referred to in the judgment and no reasons were given as to why the said evidence was not considered; that based on the amount of paddy rice he delivered to Kenya Millers Ltd on behalf of the respondent and the amount of money he paid directly and indirectly to the respondent as well as the amount paid directly to the respondent by Kenya Millers Ltd, he was entitled to claim for the difference between the sums paid by Kenya Millers Ltd for the paddy rice delivered and sold to them (Kshs.32,895,968/=) and the amounts directly paid for by Kenya Millers Ltd, the indirect

payments to third parties and the loans advanced to the respondent all totaling Kshs.44,436,283.50/=; the difference thereof being Kshs.11,540,315.50/=.

14. Lastly, the appellant contended that given the relationship between him and the respondent and the fact that he offered to assist the rice farmers, then the learned Judge erred in directing that the judgment amount be paid with interest. The appellant argued that the learned Judge did not state the reason why the interest had to be paid and why it was computed to be 14%.

Respondent's case

15. The first issue was with regard to the quantity of rice delivered to Kenya Millers Ltd during the years 1999 and 2000. On its part, the respondent submitted that according to the Plaint filed in the Embu suit it had pleaded that the amount of paddy rice delivered in 1999 was 565,277 Kgs which amount the respondent argued was not disputed by the appellant; that the learned Judge upon examination of documents availed by both the appellant and the respondent determined that the net weight of the paddy rice delivered in 1999 was 548,098kgs and not 565,277 or 557,707 as submitted by the appellant and respondent respectively; that no proper reason or evidence had been cited by the appellant to warrant setting aside the findings as to paddy rice delivered in 1999. On the amount of rice delivered in 2000, the respondent submitted that the Court after consideration of the delivery notes filed in court, properly made a finding that the net amount of rice delivered in 2000 was 478,302kgs. In arriving at that figure the respondent argued that the learned Judge had taken into consideration the issue of the weight of the gunny bags raised by the appellant.

16. On the issue of the value of the paddy rice delivered, the respondent submitted that the learned Judge was correct in finding that the value of the paddy rice delivered in 1999 was Kshs.17,539,136/=; that the price per kg of rice in 1999 was Kshs.32/= which when multiplied with the amount of rice delivered (548,098kgs) made a total sum of Kshs.17,539,136/=; that the price of paddy rice per Kg delivered in 2000 was Kshs.35/= and the value of rice delivered in 2000 was Kshs.16,740,570/= (478,302kgs X 35/=) as held by the court.

17. On the issue of white pishori rice the respondent submitted that in paragraph 7 of its plaint filed in the Embu case which after consolidation of the suits became the respondent's counter claim, it had pleaded the issue of the white pishori rice. The respondent further submitted that pursuant to that pleading it produced evidence showing that a total of 70,721 kgs of white rice was duly delivered to Kenya Millers Ltd valued at Kshs. 3,889,655/=; the respondent further submitted that the appellant in his evidence had actually admitted delivering the pishori rice to Kenya Millers Ltd and receiving payments thereof; that the issue of the white pishori rice was not *res judicata* as the appellant had contended because the issue was raised in its counterclaim constituted in its plaint filed in the Embu case. The respondent argued that since the ruling dismissing its application to amend the plaint did not strike out paragraph 7, then the issue of *res judicata* cannot arise as there was no final determination on the issue of white pishori rice and the High Court was therefore right in admitting evidence on the issue and making a determination thereon.

18. On the issue of the direct payments made to it by the appellant, the respondent submitted that the total amount of money it received from the appellant in 1999 was Kshs.10,300,000/=. The respondent therefore argued that since the court determined that the price/value of rice delivered in 1999 was Kshs.17,539,136/=, then there was a balance of Kshs. 7,239,136/= owing to the respondent by the appellant. In the year 2000 the respondent submitted that the total amount paid directly to it by the appellant was Kshs.10,023,367.50/=. The respondent further submitted that during the same year it received a payment of Kshs.4,445,420/= directly from Kenya Millers Ltd. In total, the respondent submitted it received Kshs.14,468,787.50 from both the appellant and Kenya Millers Ltd in the year 2000. The respondent consequently argued that since the value of the paddy rice delivered in 2000 was held by the learned Judge to be worth Kshs.16,740,570/=, then there is a balance of Kshs.2,271,782.50/= in favour of the respondent for the transactions carried out in the year 2000 for the paddy rice. The respondent further argued that contrary to the assertions of the appellant, all the direct payments he made to the respondent were duly considered by the court.

19. On the indirect payment, the respondent submitted that there was nothing to indicate that the learned Judge erred in his finding on the indirect payments; that the amount the appellant is claiming as indirect payments allegedly not considered were properly considered by the court and found not to be proper expenses on behalf of the respondent as there was no proof of authority to spend and there was also no evidence of actual spending.

20. On the issue of interest the respondent contended that this is a matter of judicial discretion by virtue of ***Section 27 Cap 21 Laws of Kenya***. The respondent argued that there was no contention that the discretion was not exercised judiciously and therefore is the ground of appeal lacked merit. The respondent urged the court to dismiss the appeal for lack of merit.

Determination

21. We have considered the record, respective submissions by learned counsel of either side, the authorities cited and the law.

22. The Court's mandate on a first appeal is set out in ***Rule 29(1) of the Court's Rules*** namely to re-appraise the evidence and to draw inferences of fact. In ***SELLE V ASSOCIATED MOTOR BOAT COMPANY, [1968] E.A. 123 at p. 126,*** this court held:

> ***"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such appeal are well settled. 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 witness and should make due allowance in that respect. In particular this Court is not bound necessarily to follow the Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."***

23. On the first issue, the appellant contended that in the year 1999 the net weight of paddy rice he delivered was 557,707kgs and not 548,098kgs as was held by the learned Judge. In his judgment the learned Judge stated thus:

> ***"From documentary evidence adduced in court, it was established that the plaintiff received 548,098kg of paddy rice from the defendant in 1999…..This is the actual net kilogrammes of paddy rice that was delivered to Kenya Millers Ltd according to the delivery notes and payment schedules."***

24. We have perused the record of appeal thoroughly and nowhere have we come across any delivery notes or payment schedules referred to by the Judge. Further, a perusal of the proceedings in the High Court does not also reveal any mention of demand notes or production of the same by the witnesses who testified. The only documents which we have found which relate to the amount of rice delivered by the appellant to Kenya Millers Ltd are the Commodity Received Registers. These documents were produced by both the appellant and the respondent. The documents indicated the number of bags of the paddy rice delivered as well as the weight of the paddy rice delivered. However, upon a keen perusal of these documents, it is apparent that a good number of them are not legible. The court is therefore unable to determine with any degree of certainty the amount of rice delivered by the appellant to Kenya Millers Ltd. The appellant referred the court to a document titled *"summary statements"*. However we note that these documents were prepared by the appellant himself and therefore their probative value as to the amount of paddy rice delivered is thus diminished. The parties would have greatly aided the court if they had produced legible documents in Court or gone a step further to request Kenya Millers Ltd to prepare a statement clearly detailing the amount of rice delivered to it by the appellant. One of the cornerstones of the law of evidence in our judicial system is that he who alleges proves. It was incumbent upon the appellant to prove the exact amount of paddy rice he delivered to Kenya Millers Ltd. As we have pointed out above, this could have been easily achieved by the appellant requesting a statement from Kenya Millers Ltd. In the absence of evidence which could help this court to make its own finding of fact, this

court has no option but to agree with the finding of the High Court. Further, we must also keep in mind that this court did not have an opportunity of seeing the witnesses testify. In the case of ***DAMIANO MIGWI V TIMOTHY MAINA WAITUGI, [2009] eKLR,*** this court stated thus:

> ***"A first appellate court has a duty to reappraise the entire evidence on record and make its own findings of fact on the issues, while allowing for the fact that it had not seen the witnesses testify, before it could decide whether a trial court's decision could be supported".***

25. There is no basis to interfere with the finding of the court on the amount of paddy rice delivered. In any event it appears that the appellant only had an issue with the year 2000 which he submitted should have been 472,292 Kgs and not 478,320 Kgs, a difference of 6,010 Kgs. However in the year 2000 the appellant submitted that he delivered 557,707 Kgs as against the finding of the Court that 548,098 Kgs was what was delivered in the year 2000. This is a difference of 9,609 Kgs which clearly play in favour of the appellant.

26. The next issue is the price per kg of the paddy rice delivered to Kenya Millers Ltd by the appellant. According to the judgment of the High Court the price of the paddy rice per Kg for the year 1999 was Kshs.32/= and in 2000 it was Kshs.35/=. The appellant disputed this and argued that the agreed price for the paddy rice was Kshs. 35/= per Kg. Out of that, Kshs.3/- was to cater for transportation costs. The Respondent on the other hand argued that the price for 1999 was Kshs.32/= and in 2000 it was Kshs.35/=. The Respondent disputed the submission by the appellant that Kshs.3/= was to cater for transport costs. The respondent argued that the issue of transport costs of Kshs.3/= was never raised before the High Court. The respondent further argued that the appellant when testifying admitted that the transport cost was to be catered for by the respondent.

27. It seems clear that the price of the paddy rice delivered in 1999 is not in dispute as all the parties agree that the same was Kshs.32/= per Kg. What is in dispute is the price in 2000. Looking at the Remittance Advice from Kenya Millers Ltd, found in the respondent's list of documents before the High Court, it is also clear that the price of paddy rice delivered in the year 2000 was Kshs.35/= per kg. Some of these Remittance Advices are accompanied by Bankers' Cheques from Kenya Millers Ltd which correspond with amounts shown as due in the Remittance Advice. From the Remittance Advice and the corresponding Bankers' Cheques, it is plain that Kenya Millers Ltd paid Kshs.35/= per Kg. The appellant argued that out of that amount Kshs.3/= was to be deducted for transport costs. This appears to be an afterthought on the part of the appellant. Further, looking at the proceedings before the High Court, it is evident that the appellant during the examination in chief stated that the paddy rice would be transported by the respondent and the respondent would pay for the fuel. Based on the above, we do not see any basis for interfering with the learned Judge's finding on the price per Kg of rice delivered to Kenya Millers by the appellant.

28. The next issue was with regard to the white pishori rice and whether the learned Judge was right in considering and making a determination on it. The appellant argued that this issue was *res judicata* and that the learned Judge erred in dealing with it. This argument by the appellant was based on the fact that when the respondent made an application seeking leave to amend its plaint filed in the Embu case, the application was declined. The respondent, through the amendment, sought to bring to the fore clearly the issue of the white pishori rice. However, at paragraph 7 of the Plaint the respondent mentioned the issue of white pishori rice and averred that the total price of the white pishori rice delivered was Kshs.16,530,220/= out of which the appellant paid 14,668,787.50/= leaving a balance of Kshs.3,889,655/=. It is plain that this calculation is wrong. It seems clear that the respondent in his plaint mixed up amounts for the paddy rice delivered in 2000 and the white pishori rice. It is this error that the respondent sought to rectify through the amendment. Effectively therefore although the respondent pleaded the issue of the white pishori rice it completely left out the amount delivered but stated the price as being Kshs.3,889,655/=. However, the respondent's witnesses stated during the trial that the amount of white pishori rice delivered was 70,721 kgs at Kshs.55 per kg which works to Kshs.3,889,655/=. During cross examination, the appellant also admitted that the respondent delivered milled rice, which was the pishori rice, to Kenya Millers Ltd and that he received the payment from Kenya Millers Ltd.

29. It is trite that a party is bound by its pleadings. In the case of ***INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & ANOTHER V STEPHEN MUTINDA MULE & 3 OTHERS, [2014] eKLR***, this court quoted with approval a Nigerian case, ***ADETOUN OLADEJI (NIG) LTD VS. NIGERIA BREWERIES PLC, S.C. 91/2002,*** where it was held:

> ***"….it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."***

That court further said:

> ***"In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."***

30. The only issue which appears to have been introduced by the respondent during the trial was the issue of the weight of the white pishori rice delivered. Can the evidence of the respondent with regard to the white pishori rice be said to have been at variance with its pleadings? We think not. Further as pointed out above, the appellant himself admitted to having received payment for the white pishori rice delivered by the respondent to Kenya Millers Ltd. It would not be fair and just to the respondent if the Court were to totally ignore this claim for the white pishori rice. This Court is enjoined by ***Article 159 2 (d) and Section 3A and 3B of the Appellate Jurisdiction Act*** to look at substantive justice. ***ABDIRAHMAN ABDI ALSO KNOWN AS ABDIRAHMAN MUHUMED ABDI V SAFI PETROLEUM PRODUCTS LTD. & 6 OTHERS, CIVIL APPLICATION NO. NAI 173 OF 2010,*** this

Court stated:

> ***"The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice……***
>
> ***In the days long gone the court never hesitated to strike out a notice of appeal or even an appeal if it was shown that it had been lodged out of time regardless of the length of delay. The enactment of***
>
> *Sections 3A and 3B of the appellate Jurisdiction Act, Cap 9 Laws of Kenya, and later, Article 159 (2) (d) of the Constitution of Kenya, 2010****, changed the position. The former provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the offending document. In short, the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other.*** *Article 159 (2) (d) of the Constitution* ***makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion."***

31. The question then becomes what is the prejudice that the parties are likely to suffer by the consideration of the issue of the white pishori rice. We opine that it is the respondent who is likely to suffer more as it risks being denied revenue derived from the sale of the white pishori rice. On the other hand the appellant stands to be unjustifiably enriched as he himself has admitted that indeed he received payment of the white pishori rice from Kenya Millers Ltd. In our opinion therefore this ground of appeal also fails.

32. The other issue is on the amount paid to the respondent as direct and indirect payments. The appellant

submitted that the learned Judge in the judgment left out certain payments which were either paid directly to the respondent or to third parties for services rendered. On its part, the respondent contended that the judgment could not be faulted as the Judge considered all the relevant evidence tendered; that the indirect payments which the appellant says were left out were considered by the Court and found not to be proper expenses on behalf of the respondent.

33. On the direct payments, the appellant submitted that four direct payments were left out by the learned Judge. These were Kshs.2,000,000/=, Kshs.4,200,000/=, Kshs.2,500,000/= and Kshs.1,523,367.50 vide cheque numbers 6545, 6666, 6754 and 104804 respectively. It is instructive to note that the respondent acknowledged receiving these amounts from the appellant. The respondent's 2nd witness on cross examination also confirms receipt of these amounts. However, looking at the judgment, it is apparent that these payments were left out by the learned Judge. The appellant therefore succeeds on this ground of appeal.

34. On the indirect payments, the appellant submitted that the learned Judge in his judgment had left out some payments that the appellant had made to third parties on behalf of the respondent. On its part, the respondent contended that the learned Judge duly considered the payments that the appellant claimed were left out and found them not to be proper expenses because there was no proof of authority to spend and there was also lack of evidence on actual spending.

35. The appellant in his submissions claimed that the total amount he paid to the third parties and which were not factored in by the learned Judge amounted to Kshs.9,156,787/=. However in his memorandum of appeal, his claim was for Kshs.1,551,200/= made up of two payments of Kshs.990,000/= made to Odds and Ends and Kshs.561,200/= to Telex (Radio Call). There is also an additional claim for Kshs.1,402,087/=. Looking at the respondent's submissions before the superior court it is evident that the respondent acknowledged the two payments of Kshs.990, 000/= made to Odds and Ends and Kshs. 561,200/= to Telex (Radio Call). These two payments were left out by the learned Judge in his tabulation of the indirect payments yet they should have been considered. As for the other payments, we have not come across any evidence of payment. Therefore under this ground the Appellant partly succeeds on the two payments of Kshs.990,000/= and Kshs.561,200/=.

36.As seen above, the learned Judge failed to consider several direct and indirect payments made to the respondent by the appellant. These amounts therefore ought to be subtracted from the amount that the court found to be due and owing by the appellant to the respondent. The direct payments are as follows Kshs.2,000,000/=,Kshs.4,200,000/=,Kshs.2,500,000/= and Kshs.1,523,367.50/= totaling 10,223,367.50/=. The indirect payments are Kshs.990,000/= and Kshs.561,200/= totaling Kshs.1,551,200/=. The total of direct and indirect payments not considered by the learned Judge is Kshs.11,774,567.50/=. The learned Judge found in favour of the respondent for a sum of Kshs.10,881,157/=. This amount is less than the amount of direct and indirect payments that the learned Judge failed to consider. We find that the difference is Kshs.893,410.50/= which is the amount that the respondent owes to the appellant.

37. The appellant also brought up the issue of 14% interest awarded to the respondent by the learned Judge. Although the award of interest is a matter of judicial discretion as submitted by the respondent, the appellant himself prayed for interest at court rates.

38. The upshot of the above is that we find that the appeal partly succeeds and the High Court judgment is hereby set aside and judgment entered for the appellant in the sum of Kshs.893,410.50/=. This sum shall attract interest at court rates from the date of filing suit until payment in full.

Dated and delivered at Nairobi this 31st day of March, 2017.

R. N. NAMBUYE

JUDGE OF APPEAL

F. AZANGALALA

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR