



**Bapa Limited v Mwangi t/a Kamande Hardware & Timber
Enterprises & another (Miscellaneous Application E271 of 2023)
[2025] KEHC 497 (KLR) (Commercial and Tax) (24 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 497 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E271 OF 2023
BM MUSYOKI, J
JANUARY 24, 2025**

BETWEEN

BAPA LIMITED APPELLANT

AND

**JOSEPH KAMANDE MWANGI T/A KAMANDE HARDWARE & TIMBER
ENTERPRISES 1ST RESPONDENT**

BHARAT HALAI 2ND RESPONDENT

JUDGMENT

1. The appellant filed suit before the small claims court claiming a sum of Kshs 314,960/= being goods supplied to the 1st respondent and not paid for. The 2nd respondent was an employee of the appellant with whom the 2nd respondent was dealing. The claim against the 2nd respondent was that he received the amount claimed from the 1st respondent but failed to remit to the appellant. The first respondent admitted that the goods were supplied but averred that the claimed sum was paid to the 2nd respondent as a representative of the appellant. On his part, the 2nd respondent averred that he received the payments from the 1st respondent and remitted the same to the appellant through its bank account and cash to its director one Mr. Delip.
2. In her judgement the honourable adjudicator held that the appellant had not proved that the goods were indeed delivered and that the 1st respondent had failed to pay the outstanding sum of Kshs 314,960.00. She went on to state that the appellant (it appears she meant the 1st respondent) had failed to prove that the 2nd respondent had delivered the goods to the 1st respondent and that he failed to account for the monies received from the 1st respondent. She concluded by stating that the claimant's claim and the 1st respondent's counterclaim were dismissed with each party bearing their costs.



3. The appellant has preferred this appeal citing nine grounds. In its submissions however, the appellant has crystallised the grounds into two; that is, whether the trial court erred in law and fact by directing itself to an issue already admitted by the parties and whether any monies are lawfully owed to the appellant by the 1st respondent for supply of various building materials. From the arguments advanced by the appellant in its submissions, it does not seem to be pursuing anything from the 2nd respondent although in grounds 6 and 8 of the memorandum of appeal, the appellant seeks to overturn the adjudicator's decision in dismissing the appellant's claim against the 2nd respondent.
4. This is an appeal from a small claims court and as such this court's appellate jurisdiction is limited to matters of law only. In my opinion not all the grounds set out by the appellant are on issues of law which this court can consider by virtue of section 38(1) of the *Small Claims Court Act*. In my view, the following are the only issues of law in this appeal;
 - a. Whether the honourable adjudicator erred in delving into an issue that had been admitted by the parties.
 - b. Whether the burden of proof shifted to the respondents and if so whether the same was discharged.
5. The appellant has submitted that the honourable adjudicator erred in directing itself to an issue already admitted by the parties. Although it does not come out clearly in its submissions dated 3rd September 2024, it is clear to me that the appellant's complaint is that the honourable adjudicator should not have delved into considering whether or not the goods were delivered to the 1st respondent as the same had been admitted and should not have been a subject of proof.
6. I have examined the proceedings of the trial court and it is indisputable that the parties were in agreement that the goods were delivered to the 1st respondent. This was both in the pleadings and in the viva voce evidence taken before the adjudicator. The 1st respondent's only defence was that the goods were paid for through the 2nd respondent while the 2nd respondent admitted that the money was paid to him but he forwarded it to the appellant.
7. Section 61 of the *Evidence Act* also provides that;

“No fact need be proved in any civil proceeding which the parties thereto or their agents agree to admit at the hearing, or which before the hearing they agree, by writing under their hands, to admit, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:

Provided that the court may in its discretion require the facts admitted to be proved otherwise than by such admissions.’
8. The above provision cannot have a meaning other than that admitted matters or facts need not be proved. The appellant has cited to me several authorities on this issue which I am in agreement with but I would add a holding in *Isuzu East Africa Limited (Formerly General Motors East Africa Limited) vs Nairobi City County Government (2020) eKLR* where the court held that;

“Section 61 of the *Evidence Act* applies to whether facts ought to be proved in the conduct of civil proceedings. In instances where parties have admitted facts at the hearing and in writing agreed on admitted facts or by law deemed to be admitted facts based on their pleadings, there will be exemption from proving these facts in the proceedings.”



9. In view of the above, I do agree with the appellant that the adjudicator erred when she proceeded to consider whether or not the goods were delivered and held that there was no proof of delivery. No proof of the delivery was necessary or required. What was before the adjudicator was a dispute as to whether or not the goods admittedly delivered were paid for. However, this alone does not make this appeal successful.
10. The other issue raised by the appellant which I believe I should consider is whether the adjudicator failed to consider that the burden of proof was on the respondents to prove payment and whether the burden was discharged. The way the appellant has framed this issue insinuates that it has no claim against the 2nd respondent. In the trial court, the appellant's statement of claim stated that the 2nd respondent who was its employees had failed to account for any monies received if any from the 1st respondent as a result of the sale and supply of the said materials.
11. The appellant claims that once admission of delivery was made, the burden shifted to the respondents to prove payments and according to it, the respondent did not discharge the burden. I have noted from the proceedings that the 1st respondent had in addition to admitting delivery of the goods stated that he had paid the same through the 2nd respondent. The 1st respondent produced Mpesa statements showing payments made to the 2nd respondent and screenshots of messages showing that payments were made to the 2nd respondent. The 2nd respondent is on record admitting having received the money which he claimed to have forwarded to the appellant.
12. Dhurumit Divesh Vora the only witness who testified on behalf of the appellant told the court that the 2nd respondent was joined in the suit because he received money from the 1st respondent which was not deposited in the company's account. While being cross examined by Miss Angote for the 1st respondent, he stated that before filing of the claim, the appellant would receive payments through the 2nd respondent and that they never declined such payments. In my opinion, the 1st respondent was justified to pay for the goods through the 2nd respondent. With that evidence, I find that the 1st respondent discharged his burden of proving that he had paid.
13. The amount claimed by the appellant was said to have become due on 22-09-2021 and 24-09-2021. I have seen screenshots of messages produced by the 2nd respondent showing that some money was purportedly sent to the appellant's bank account between 4-11-2021 and 6-11-2021. It may not be clear what was the purpose of the money but the appellant had the burden to disprove this allegation. All it needed to do was to produce its bank account statement to prove that the money was not from the 2nd respondent or was for a different transaction.
14. The 2nd respondent further claimed to have given cash to the appellant's director which he said was normal in their mode of operation. None of the parties has told the court when the employer/employee relationship between the appellant and the 2nd respondent ceased and under what circumstances. If indeed the 2nd respondent had not accounted for the monies received from the appellant's customers, this would have been an issue at the time the 2nd respondent left employment. It is my considered finding that the appellant failed to satisfactorily counter the 2nd respondent's evidence and in the circumstances its case against the 2nd respondent must fail.
15. The upshot of the above is that I find that this appeal lacks merits and the same is dismissed with costs to the 2nd respondent.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JANUARY 2025.

B.M. MUSYOKI



JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Mr. Maraga for the appellant and Mr. Javier for the respondent.

