Rusho Enterprise Limited v Endeavour Linen Limited (Commercial Appeal E217 of 2023) [2025] KEHC 1215 (KLR) (Civ) (28 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1215 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

COMMERCIAL APPEAL E217 OF 2023

RC RUTTO, J

FEBRUARY 28, 2025

BETWEEN

RUSHO ENTERPRISE LIMITED ..... APPELLANT

AND

ENDEAVOUR LINEN LIMITED ..... RESPONDENT

(Being an Appeal from the Judgment and Decree of the Small Claims Court of Kenya at Milimani delivered by the Hon. Resident Magistrate V. M Mochache, on the 11th August 2023 in Nairobi Commercial Suit No. E3261 OF 2023)

JUDGMENT

1. This appeal arises from the judgment and decree entered in Milimani Small Claims Court Case No. E3261 of 2023. In the said suit, the Appellant was sued by the Respondent, who sought special damages of Kshs 831,844.33/=, together with costs and interest.

2. The genesis of the dispute, as outlined in the Statement of Claim filed by the Respondent, was that pursuant to an agreement for the supply of goods, the Appellant placed an order on 8th December 2021 for the supply of goods, which were duly delivered and an invoice for Kshs 409,770/= issued. Subsequently, on 23rd December 2022, the Appellant placed another order, and goods worth Kshs 472,273/= were supplied. According to the Respondent (the Claimant in the Statement of Claim), the Appellant made a partial payment of Kshs 150,000/=, leaving an outstanding balance of Kshs 732,043.12/=.

3. The Appellant filed its Response dated 14th June 2023, in which it denied the allegations and asserted that no order for the supply of goods was placed at the alleged time, as the company was experiencing financial difficulties due to the impact of COVID-19. Additionally, the Appellant stated that the agreed

supply of products was valued at Kshs 353,250/=, with a deposit of Kshs 150,000/= to be made, and the balance payable upon delivery.

4. The Appellant further filed a counterclaim against the Respondent for Kshs 970,000/=, being the cost of a Six-Head Embroidery Machine, 850/100 RPM, 6-inch screen, which was allegedly received by the Respondent on 16th August 2021. Additionally, the Appellant claimed Kshs 150,000/= for goods delivered to the Respondent, bringing the total counterclaim to Kshs 1,120,000/=.

5. In response to the counterclaim, the Respondent denied owing the Appellant the sum of Kshs 1,120,000/= and sought its dismissal.

6. The court heard each party's witness and on 11th August 2023 entered judgment in favor of the Respondent herein as follows: -

    i. Judgment was entered for the Claimant against the Respondent in the sum of Kshs 732, 042.12.

    ii. The Respondent shall pay costs and interest at court rates from the date of filing until payment in full.

    iii. The Respondent's counterclaim was dismissed with costs.

    iv. The Respondent was granted 30 days stay of execution.

7. The Appellant being aggrieved with the entire judgment, lodged this appeal on 7th September 2023. The appeal sets out the following summarized grounds; the Learned Trial Magistrate erred in law and fact by awarding the Claimant Kshs 723, 043.12/=; ignored the Respondent's evidence as well as submissions to the effect that the goods were of substandard quality when sold to the Respondent and the same was returned to the Claimant; erred in fact and law by dismissing the Respondent's counterclaim; erred in fact and in law by concluding that the Respondent had failed to prove its case to the requisite standard; erred in facts by holding that the Respondent had failed to prove that they had entered into oral agreement with the Claimant for the sale of machine; misdirected herself by making a finding that the conduct of the parties is one where the Claimant supplied goods to the Respondent.

8. The appellant prayed that the judgment be set aside and be substituted with orders granting the prayers in the counterclaim.

9. The appeal was canvassed by way of written submissions. The Appellant's submissions are dated 19th September 2024 while the Respondent's submissions are dated 11th October 2024.

Appellant's submissions

10. The Appellant submitted on the grounds of appeal jointly as follows: Grounds 1 and 2, Grounds 3, 4, and 5, and Grounds 6 and 7. On whether there was valid justification for awarding the Respondent Kshs 732,043.12/=, the Appellant, while fully relying on its submissions before the adjudicator, argued that there was no compelling evidence to substantiate the Respondent's claim that goods were delivered and that the Appellant defaulted on payment.

11. The Appellant further contended that no directive was issued for the supply of goods as indicated in Invoice No. ELL-DN-2112-45 and Delivery Note No. ELL-DN-211245, both dated 23rd December 2021. It was submitted that the adjudicator misinterpreted the facts and erroneously assumed that the Appellant's statement regarding the rejection of another order also applied to the invoice in question.

12. Additionally, the Appellant argued that the delivery note and invoice did not bear its stamp or signature (or that of its representative), which is necessary to confirm acknowledgment of receipt of the goods. In support of this position, the Appellant relied on the cases of: *Kenya Trucks and Tractors Limited v County Government of Mombasa (Civil Suit E001 of 2020*) [2023] KEHC 2394 (KLR); and E.P. Communications Limited v East Africa Courier Services Limited [2019] eKLR.

13. The Appellant submitted that, in the absence of a signed delivery note, proof of delivery was doubtful. Consequently, on a balance of probabilities, the Respondent failed to establish its case.

14. On Grounds 3, 4, and 5, the Appellant submitted that the trial court overlooked its counterclaim, response to the statement of claim, oral evidence, and written submissions. The Appellant contended that its witness testified to having placed an order worth Kshs 409,273/=, made a Kshs 150,000/= deposit, and subsequently returned the goods to the Respondent as they did not meet the required quality standards. The Appellant argued that this evidence was not considered by the trial court in determining whether the goods were actually supplied and whether the Appellant had accepted or acknowledged receipt. Consequently, the Appellant urged this Court to analyze the said evidence and render a determination.

15. On whether the Appellant entered into an oral contract, the Appellant, relying on the case of Ali Abdi Mohammed v Kenya Shell & Company Limited [2017] eKLR which held that a contract can exist even in the absence of express words—submitted that it sold the machines to the Respondent following the Respondent's expression of interest. However, the Appellant argued that the trial court misapprehended the facts and consequently erred in its decision. In conclusion, the Appellant urged this Court to allow the appeal and counterclaim, set aside the decision of the learned adjudicator, and award costs to the Appellant.

Respondent's submissions

16. The Respondent submitted on two issues; whether the Respondent proved its case on a balance of probabilities and whether the Learned adjudicator erred in law and fact by dismissing the Appellant's case.

17. On the first issue, the Respondent argued that, based on the pleadings, the contract between the parties was valid. It further submitted that it had provided evidence demonstrating the existence of a business relationship between the parties a fact that the Appellant did not dispute. The Respondent contended that since the Appellant admitted to receiving the first batch of goods, it should be estopped from denying receipt of the second batch, which was delivered on 23rd December 2021.

18. Regarding the Appellant's assertion that certain goods were returned, the Respondent submitted that the Appellant failed to provide any supporting evidence. It argued that if the goods had indeed been returned, the Appellant would have lodged a complaint and presented evidence before the court to substantiate its claim.

19. Relying on the case of Mumbi M'Nabea v David M. Wachira [2016] eKLR, which discusses the standard of proof in civil claims, the Respondent maintained that it had proved its case to the required standard and, therefore, its claim should be upheld.

20. On the second issue, the Respondent submitted that while the Appellant claimed that the Respondent owed it Kshs 970,000/= from an alleged sale of a machine, the Appellant failed to satisfy the burden and standard of proof as required under Sections 107 and 109 of the *Evidence Act*. The Respondent argued that the Appellant did not provide sufficient evidence to establish, on a balance of probabilities, that there was a valid contract for the sale of the machine, nor did it produce any supporting correspondence

or a demand letter relating to the alleged transaction. Consequently, the Respondent maintained that the dismissal of the counterclaim was proper and should be upheld.

21. In conclusion, the Respondent urged the court to dismiss the appeal with costs.

Analysis and Determination

22. To begin with, the duty of this court as the appellate court is described under Section 38 of the *Small Claims Court Act* which restricts the jurisdiction of the High Court on appeals from the Small Claims Court to matters of law only. It provides that:

    1. A person aggrieved by the decision or an order Appeals. of the Court may appeal against that decision or order to the High Court on matters of law. (2) An appeal from any decision or order referred to in subsection (1) shall be final."

23. What constitutes, points of law, has been settled. In the case of Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR, where the court stated as follows: -

> " This is a second appeal. 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 they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. (See: Stanley N. Muriithi & Another versus Bernard Munene Ithiga (2016) eKLR).

24. A thorough examination of the grounds of appeal as it appears in the Memorandum of Appeal is premised on the grounds that the adjudicator erred in "law and in fact" and it calls upon the court to reassess the issues of fact. The Appellant's submissions, from the outset, construe this court as the first appellate court empowered to re-valuate and assess the evidence a fresh and make its own conclusions while bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. They failed to acknowledge Section 38 of the *Small Claims Court Act* which limits the jurisdiction to issues of law only.

25. Consequently, this court will limit itself from delving into the issues of facts and address the only issue of law arising which is; Whether the Respondent in the claim and the Appellant in the counterclaim proved its claim to the required standard/as required by law?

26. Section 107-112 *Evidence Act* provide for burden and standard of proof in both criminal and civil cases. Section 112 of *Evidence Act* provides for proof of special knowledge in civil proceedings as follows;

> " In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

27. The Court of Appeal in Mumbi M'Nabea v David M.Wachira [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say:

> " In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:

"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." The above provision provides for the legal burden of proof.

However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:

"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

The position was re-affirmed by the Court of Appeal in Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:

"Whereas under section 107 of the *Evidence Act*, (which deals with the legal evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence."

28. From the foregoing guiding authorities, it is evident that the duty of proving the averments in the claim rested solely on the Respondent, while the burden of proving the counterclaim was on the Appellant.

29. Regarding the claim, the Respondent asserted that it supplied goods to the Appellant following orders placed and that the goods were duly delivered. The Respondent further alleged that upon delivery, invoices and delivery notes were issued. It contended that a total of two orders were made on 8th December 2021 and 23rd December 2021 resulting in an outstanding balance, inclusive of accrued interest, amounting to Kshs 831,844.33/=.

30. The Appellant, on the other hand, does not dispute the existence of the first order, under which it made a deposit of Kshs 150,000. Consequently, a balance of Kshs 259,770 remained. However, the Appellant contended that the goods delivered were substandard and were subsequently returned for exchange, which explains why the balance was not paid.

31. Regarding the second order, the Appellant denied ever placing it, asserting that no goods were delivered and that it did not receive an invoice. Additionally, the Appellant argued that the contested invoice for the alleged second order, ELL-INV-2112-45, lacks its official stamp, rendering it invalid as proof of goods supplied and/or received.

32. The trial court while relying on two authorities that is, Joseph Mbuta Nziu versus Kenya Orient Insurance Company Limited [2015] eKLR and David Sironga Ole Tukai v Francis Arap Muge & 2 others Civil Appeal No. 76 of 2014 [2014] eKLR allowed the Respondent's claim herein by stating that; -

    8. Flowing from the foregoing, the question that abides is whose version as between the parties tilts the balance of probability?

    9. The Claimant has produced delivery notes for the two alleged deliveries. The court notes that although the delivery notes are not signed by the Respondent, nevertheless the Respondent admitted to having received the first batch. For this reason, the court is inclined to believe the version of events set out by the Claimant with respect to the deliveries.

10. On the other hand, the Respondent alleges to have returned the defective goods. Nothing has been produced to show that the goods were defective or that they were ever returned.

11. Furthermore, there was no mention, in the response, of the goods being substandard or having been returned. It is trite law that parties are bound by their pleadings and any evidence which does not have roots in the pleadings should go to waste.....

12. .....

13. The court finds that if the Respondent did not receive the 2nd batch as claimed, nothing would have been as easy as to point out the error in the invoice, subsequent statements and demand letters.

14. The court therefore finds that the Claimant supplied the goods in two batches as claimed and that the Respondent paid Kshs 150, 000/=."

33. The Appellant contends that the adjudicator erred in relying on unsigned delivery notes and subsequently assuming that the Respondent had delivered the goods. Upon review, I note that the invoice for the first batch of goods, which the Appellant did not contest, bears the Appellant's official stamp, dated 9th December 2021. However, despite alleging that the goods were substandard and subsequently returned, the Appellant has failed to provide any evidence to substantiate this claim. Consequently, as it stands, the Appellant owes the Respondent a total sum of Kshs 259,770.

34. Regarding the contested invoice and delivery note, both dated 23rd December 2021, it is evident that while the documents were generated, there is no proof that they were actually received by the Appellant. Since the mode of placing orders, whether orally or in writing is not in question, given that both parties acknowledged their ongoing business relationship and oral orders were common practice, the distinction between the two invoices is significant. Therefore, it is necessary to address the legal implications of an unsigned or unstamped delivery note in determining whether the goods were indeed supplied.

35. Given that the delivery note for the first batch of goods was duly stamped by the Appellant, it would have been a straightforward process for the Respondent to similarly obtain the Appellant's acknowledgment either by signature or stamp on the delivery note or invoice for the second batch. The absence of such acknowledgment raises doubt as to whether the alleged goods were indeed delivered. Consequently, in relation to the unsigned delivery note, the Respondent's evidence fails to meet the threshold of proof on a balance of probabilities, as uncertainty remains regarding whether the goods were actually supplied.

36. Furthermore, during the hearing, the Respondent's witness testified that the alleged order was placed in July 2021, whereas the delivery note and invoice are dated 23rd December 2021. Noting that the Respondent's witness statement indicated that its policy requires immediate payment upon delivery of goods, it is suspicious as to why an alleged order was made in July and delivery is allegedly made in December. These inconsistencies further weaken the Respondent's claim and render the evidence insufficient to meet the required standard of proof.

37. In light of the foregoing, this court finds that the only outstanding sum proved on a balance of probabilities is Kshs 259,770. Regarding the interest payable, the Respondent submission was that its policy was to charge interest at 2% of the outstanding amount on a monthly basis. Notably the said policy was not produced before this court. This court however takes note of the provisions of Section 26 of the *Civil Procedure Act* as well as case PremLata vs Peter Musa Mbiyu [1965] EA 592, that an award of interest on the principal sum is generally to compensate a plaintiff for the deprivation of any

money or specific goods through the wrongful act of a defendant. Consequently, having considered the circumstances of this case, the applicable interest rate shall be the court rates.

38. In relation to the counterclaim filed by the Appellant, I note that beyond the allegations made in the claim, there is no supporting evidence to establish that the Appellant supplied or sold a six-head embroidery machine worth Kshs 970,000 to the Respondent. The invoice produced by the Appellant, without any proof of acknowledgement of the invoice or service to the Respondent, is insufficient to substantiate the existence of such a transaction. This raises doubt as to whether the alleged sale actually occurred. Accordingly, I find no reason to interfere with the trial court's findings on the counterclaim.

39. I am guided by the Court of Appeal's decision in the case of Antony Francis Wareham t/a AF Wareham & 2 others v Kenya Post Office Savings Bank [2004] eKLR where the court stated:-

> " ...we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or the Court on the basis of those pleadings pursuant to the provisions of order XIV of the Civil Procedure Rules. And the burden of proof is on the plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail..."

40. Following the above authority and in view of the reasoning above, I find that the Appeal partially succeeds and make the following orders: -

    i. Judgment is hereby entered for the Respondent against the Appellant in the sum of Kshs 259, 770/= together with interests at court rate from the date of filing the claim until payment in full.

    ii. The Appellant's counterclaim is dismissed with costs.

    iii. Each party to bear their own costs of the Appeal.

Orders accordingly.

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 28TH DAY OF FEBRUARY 2025

For Appellant:

For Respondent:

Court Assistant: