Board of Management St Mary'a Lwak Girls High School v Ogwalo t/a Elimar Enterprises (Civil Appeal E021 of 2024) [2025] KEHC 5567 (KLR) (25 April 2025) (Judgment)

Neutral citation: [2025] KEHC 5567 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CIVIL APPEAL E021 OF 2024

DK KEMEI, J

APRIL 25, 2025

BETWEEN

BOARD OF MANAGEMENT ST MARY'A LWAK GIRLS HIGH SCHOOL ..... APPELLANT

AND

ELAZAR OUMA OGWALO T/A ELIMAR ENTERPRISES ..... RESPONDENT

(Being an appeal from the judgment of Hon. J. P Nandi (SPM/Adjudicator) delivered on 31st May 2024 in PMC Civil Suit No. E062 of 2023 at Bondo)

JUDGMENT

1. The Appeal arises from the judgment of Hon. J. P Nandi (SPM/Adjudicator) delivered on 31st May 2024 in PMC Civil Suit No. E062 of 2023 at Bondo.

2. The Respondent had filed a Plaint dated 2nd May 2023 claiming payment of Kshs. 2,249,900.00 from the Appellant together with interest and costs. The facts pleaded are that on various dates, the Appellant requisitioned for and retained the Respondent to supply maize and beans, which were made at negotiated and agreed-upon terms. The Appellant prepared and issued the requisite Local Purchase Order (LPO) in favor of the Respondent. Upon receipt of the LPO, the Respondent processed, arranged, and supplied the assorted items of maize and beans. According to the Respondent, the goods were received and acknowledged by and on behalf of the Appellant.

3. The total costs for the deliveries as per the 'Particulars of Deliveries were pleaded to be in the sum of Kshs. 6,592,984.00 but Kshs. 4,343,084.00 was paid on diverse dates, leaving a balance of Kshs. 2,249,900.00. The supply of the goods as per the particulars of delivery was pleaded to have been done between 23rd January 2019 and 14th May 2021, and paid between 11th September 2019 and 15th February 2023. According to the Respondent, the Appellant refused and/or neglected to pay and/or fully settle the balance.

4. On its part, the Appellant filed a defence dated 26th June 2023 wherein it admitted part of the claim when it averred vide Paragraph 3 of the defence that the total deliveries made by the Respondent amounted to Kshs 5,747,300/= and not the amount of Kshs 6,592,984/= as stated by the Respondent in Paragraph 6 of the Plaint.

5. As per the trial court proceedings, on 30th October 2023, the Respondent's advocate, Mr. Ochwangi, submitted that the Appellant had admitted part of the Respondent's claim in the sum of Kshs. 1,204, 216.00 in paragraph 4 of its defence. Ms. Manyama for the Appellant did not object and only submitted that the school pays in installments.

6. The learned trial magistrate entered judgment in favour of the Respondent for the admitted sum of Kshs. 1,204,216.00.

7. The trial court took the viva voce evidence from Eliazar Ouma Ogwalo (PW1) who stated that he is a businessman. He stated that he had supplied cereals for the last 10 years. He adopted his witness statement dated 2nd May 2023 as his evidence in chief. He produced the documents in his list of documents as exhibits 1-4 respectively. He stated that by consent he had been paid Kshs. 602,108.00 after he had filed the case, thus the remaining balance is Kshs.1, 647,792.00 which he is demanding now. On being cross-examined, he stated that he did not have an LPO for 16th May 2019. He stated that the delivery note dated 16th May 2019 was not stamped as the store person had left and that the head cook received the maize deliveries. He stated that they had a mutual understanding which is why he did not follow it to be stamped. He stated that some invoices were not stamped as he reached the school late when the person in custody of the stamp had left the school. He stated that the school had been paying him for what he had delivered. He stated that the delivery for 16th May 2019 was already paid for. On being re-examined, he stated that he has done business with the Appellant for the last 5 years, and that the Appellant had never raised issues with the deliveries. He denied forging delivery notes and invoices or being called to any police station to record a statement about a forged document.

8. In his witness statement, he stated that they had agreed amongst themselves for the Respondent to supply the Appellant's school with maize and beans. He stated that he had always given the Appellant various invoices for confirmation of the supplies and payment. He stated that their engagement had been very cordial save for some hiccups which were normal. He supplied the maize and beans without fail. The Respondent closed his case at that juncture.

9. DW1 Eresia Njiru, who is the in charge of the store at the Appellant's school adopted her statement dated 30th August 2023 as her evidence in chief. She produced her documents in the list of documents dated 30th August 2023 as exhibit 1-3 respectively. On being cross-examined, she stated that she had been the storekeeper for the school for the last 8 years and had known the Respondent since 2019 as a supplier of cereals to the school. She stated that it is the bursar who makes the payment but she verifies the documents. She stated that the bursar issues LPOs. She stated that the invoice was brought to her office first to confirm delivery, stamp, and sign the same. She stated that she was aware of the delivery note of 16th May 2019. She stated that she had the Respondent's contact but she did not call him to alert him over the said delivery note. That it was the Respondent who came to her office. That they went through the document before the case was filed. She stated that she has never reported the issue of forgery to any police station. She stated that she is aware that the school admitted part of the claim. On being re-examined, she stated that an LPO is a must when it comes to the supply of goods to the school. She stated that the contested money is on the delivery of 16th May 2019. That marked the close of the Appellant's case.

10. In his judgment, the subject of this appeal, the learned trial magistrate framed the key issue for determination to be whether the delivery of 16th May 2019 took place and who should bear the costs of the suit.

11. According to the learned trial magistrate, the Respondent having filed different invoices that had been accepted by the Appellant's agents, it was illogical and irregular for the Appellant to deny that they did not know the invoices on pages 45,46 and 54 of the Respondent's documents. According to the learned trial magistrate, the Appellant had accepted various invoices that had not been stamped by its agent, thus the Appellant could not purport to claim that it did not know the import of the said invoices of the Respondent's documents. The learned magistrate found that there was clear evidence that the Respondent was owed Kshs.1, 647,792.00 after payment of Kshs. 602,108.00 from the initial claim of Kshs. 2,249,900.00.

12. The learned trial magistrate found the unsigned and unstamped delivery notes dated 14.5.2021 for 105 bags of beans and on 10.5.2021 for 140 bags and delivery notes signed without being rubber-stamped dated 10.5.2021 for 138 bags of maize; delivery note dated 16.5.2019 were acted upon by the Appellant and paid to the Respondent. The learned trial magistrate held that the signing acknowledges receipt of the maize delivered by the Respondent. The learned trial magistrate held that there was no evidence by the Appellant that the signature on the delivery note dated 16th May 2019 was forged.

13. The learned trial magistrate held that the Appellant having not disputed the said delivery notes, on a balance of probabilities, the Respondent had been able to demonstrate that he supplied maize on 16th May 2019 which was received and that the Appellant should pay for the goods supplied. The learned trial magistrate entered judgment in favour of the Respondent for a sum of Kshs. 1,647,792.00 plus costs and interest.

14. Aggrieved by the aforesaid judgement, the Hon. Attorney General lodged a Memorandum of Appeal dated 6th June 2024 contending that:

    1. The learned trial magistrate erred in fact and in law by failing to appreciate that the burden of proof at all times upon a Plaintiff

    2. The learned trial magistrate erred in law by shifting the burden of proof to the Defendant

    3. The learned trial magistrate erred in fact and law by arriving at a finding that the Plaintiff delivered the delivery on 16th May 2019 that took place in the absence of a stamped and signed invoice, unstamped delivery note, and in absence of an LPO thus arriving at the finding that is based on no evidence.

    4. The learned trial magistrate erred in law and fact by ignoring the fact that an amount of Kshs. 1,204,216 was paid to the Plaintiff and that he acknowledged receipt.

    5. The learned trial magistrate erred in law and fact to award the Plaintiff Kshs.1, 647,792.00 in the absence of the evidence to support the case.

    6. The learned trial magistrate erred in fact and law by completely ignoring the Defendant's written submissions and all authorities cited whose copies were availed

    7. The learned trial magistrate misdirected himself by finding that the Respondent issued a delivery note without being issued with a local purchase order as required by law.

8. The learned trial magistrate erred in fact and law when he applied the wrong principles to arrive at a finding that the bags of maize were delivered in school as against the evidence tendered that included the school ledger

9. The learned trial magistrate erred in fact and law when he relied on a delivery note that was not stamped and that the signature was strange as it wasn't named

10. The learned trial magistrate erred in totally ignoring and disregarding the Appellant's pleadings, evidence, and submissions.

15. The Appellant prays that the judgment be set aside and substituted with an order dismissing the Respondent's case against the Appellant. The Appellant seeks the costs of this appeal and in the lower court.

Determination

16. I have considered the appeal in light of the evidence on record and submissions on behalf of the parties.

17. This being a first appeal, the role of this Court is to re-evaluate and subject the evidence to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial Court. The court also takes note of the fact that it did not have the benefit of seeing or hearing the witnesses testify and therefore has to make an allowance for the same. (Selle vs. Associated Motor Boat Co. [1968] EA 123). Odunga J. (as he then was) in China Wu Yi Company Limited vs Ronald Manthi David [2021] KEHC 1626 (KLR) stated that this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyze the same, evaluate it and arrive at its independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

18. In Abok James Odera t/a A.J Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates [2013] e KLR, the role and duty of the first appellate court was held as follows;

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess, and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way"

19. In Ephantus Mwangi and Another vs Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278 the Court of Appeal held that:

> "A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

20. It is not in dispute that there was a contract of supply of goods to the Appellant by the Respondent. From the trial Court's proceedings, judgment was entered against the Appellant for the sum of Kshs. 1,204, 216.00 which had been partly admitted by the Appellant in paragraph 4 of its defence. The dispute between the Appellant and Respondent concerned the delivery note dated 16th May 2019. The Appellant denied the supply of the alleged bags of maize in respect of the delivery note to the school and therefore contended that the sum claimed by the Respondent is not payable. DW1 only stated that an LPO is a must when it comes to the supply of goods to the school.

21. The Appellant faults the learned trial magistrate for finding that the delivery took place in the absence of a stamped and signed invoice, unstamped delivery note, and in the absence of an LPO. In cross-examination, the Respondent admitted that he did not have an LPO for the delivery on 16th May 2019. He confirmed that the delivery note dated 16th May 2019 was not stamped because the store person had left and that the head cook received the maize. According to the Appellant, the finding by the learned trial magistrate was against the evidence tendered in the trial Court.

22. In my view, the issue for determination is whether maize was supplied, delivered, and received by the Appellant's school on 16th May 2019, and if the answer in (a) is yes, what sum is the Respondent entitled to claim against the Appellant? Did the Respondent prove his claim to the required standard on a balance of probabilities?

23. The legal burden of proof was on the Respondent to prove his claim on a balance of probabilities. It was therefore incumbent upon the Respondent to prove her assertions pleaded in the Plaint.

24. Section 107(1) of the *Evidence Act*, Cap 80 provides that:

> 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.

25. However the burden may shift to the Defendant to disprove the alleged claim. This is the evidential burden of proof which is well captured under Sections 109 and 112 of the *Evidence Act*.

26. The Court of Appeal in Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another [2005] 1 EA 334 held that:

> " As a general proposition under section 107(1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act."

27. The standard of proof is well captured in the case of Palace Investment Ltd v. Geoffrey Kariuki Mwenda & Another (2015) eKLR, where the Court held that:

> Denning J. in Miller v Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -
>
> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. 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 probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

28. Kimaru J. (as he then was) in William Kabogo Gitau Vs George Thuo & 2 Others (2010) 1 KLR 526 stated that;

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has placed in his case are more likely than not to be what took place.In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed

to 49% of the opposite party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegation that he made has occurred."

29. The Appellant asserts that the delivery took place in the absence of a stamped and signed invoice, an unstamped delivery note, and in absence of an LPO. According to the Appellant, delivery would ordinarily be proved by way of a delivery note which would show the goods were delivered and received but none has been shown and therefore it was not shown by way of evidence of who received and signed for the goods.

30. The Appellant asserts that an invoice is not proof of delivery and receipt of goods but rather a demand for payment for goods alleged to have been delivered. On being re-examined, DW1 stated that an LPO is a must when it comes to the supply of goods to the school. To her, the contested money is on the delivery of 16th May 2019.

31. The Appellant places reliance on the decision of F. Gikonyo J. in E.P Communications Ltd vs East Africa Courier Services Ltd [2019] eKLR citing Alfred Ndogi Mata vs Hellen Siemeko Adede [2005] eKLR, the learned Judge observed that an LPO is sent by the purchaser to the seller to confirm the order and authorize purchase while a delivery note acts as proof of delivery of goods.

32. In his evidence, the Respondent admits that he did not have an LPO and that the delivery note dated 16th May 2019 was not stamped. The Respondent asserts that the delivery note dated 16th May 2019 was signed by the head cook but was not stamped since DW1 in charge of the store had left the office owing to the Respondent's lateness in making delivery of maize. According to the Respondent, the evidential burden of proof then shifted to the Appellant to prove that the signature on the delivery note dated 16th May 2019 did not belong to the Appellant's agent, the head cook. The Respondent submits that the Appellant failed to discharge that duty. Reliance is placed on Mrima J.'s decision in Migori High Court Civil Appeal No. 156 of 2018[2019] eKLR.

33. According to the Respondent, he supplied and delivered goods, and presented delivery notes and invoices, which were not signed and stamped by the Appellant, some were signed and stamped but that the Appellant paid them. To the Respondent, this was the course of dealing with the transaction of supply of goods. The Respondent claimed that he had transacted with the Appellant for 5 years, thus an indication of the conduct exhibited by parties in the course of the person's contractual performance. Reliance is placed on Brodgen vs Metropolitan Railway Company [1876-77] LR 2 App. Case No.666 cited by the High Court at Nairobi in Mamta Peeush Mahajan [Suing on behalf of the estate of the late Peeush Premlal Mahajan] vs Yashwant Kumari Mahajan [Sued personally and as Executrix of the estate and beneficiary of the estate of the late Krishan Lal Mahajan] ML HCCC No. 571 of 2015 [2017] eKLR on the proposition that a contract can be accepted by the conduct of parties.

34. In the judgment, the learned trial magistrate opined that it was irregular and illogical for the Appellant to deny invoices on pages 45, 46, and 54 of the Respondent's documents having accepted various invoices which had not been stamped by the Appellant's agent. The learned trial magistrate held that it was clear that the Respondent was owed Kshs. 1,647,792.00 after payment of Kshs. 602,108 from the initial claim of Kshs. 2,249,900.00.

35. DW1 stated that an LPO must be issued first before the delivery note. The Black's Law Dictionary defines a Local Purchase Order as:

> " A document that has been generated by the buyer in order to purchase products or property. This document allows a transaction to occur and when accepted by the seller becomes a legally binding contract of sale."

36. Gikonyo J. in E.P Communications Ltd vs East Africa Courier Services Ltd [2019] eKLR stated that invoices and LPOs alone do not prove delivery or receipt of the goods. In cross-examination, PW1 admitted that he did not have an LPO for 16th May 2019. Attached in the Respondent's list of documents are LPOs for delivery of the goods on different dates. The Respondent has not attached the LPO for 16th May 2019 but has attached a delivery note dated 16th May 2019 which shows that the Appellant requested 200 bags of dry white maize for Kshs.420 per bag of 90 Kg.

37. The Appellant has only denied the delivery of 16th May 2019. To counter the Appellant's assertions, the Respondent stated that the maize was received by the head cook but the delivery note was not stamped by DW1 in charge of the store since she had left the office owing to the Respondent's lateness in making delivery of maize. It will be noted that the Appellant did not controvert the head cook's signature or the delivery notes that were not signed and stamped and that the delivery notes were signed without being rubber-stamped by the Appellant's school. There was no objection to their production in court to support the Respondent's claim. The contract of supply of goods is not denied.

38. From the foregoing, there is reasonable evidence on a balance of probabilities that the Respondent supplied maize to the Appellant as per the delivery note dated 16th May 2019.

39. The Court finds that there was no basis for the learned trial magistrate to award the Respondent Kshs. 1,647,792.00 when it is clear from the trial court proceedings that the admitted sum was Kshs. 1,204,216.00. The Respondent stated in his evidence that Kshs. 602, 108.00 had been paid to him after he filed the suit. Though the Respondent never tendered any proof of payment, DW1 never controverted such evidence from the Respondent. DW1 stated that payments are made by the bursar who was not called to testify. The Respondent who by his own words admitted having been paid the sum of Ksh602,108/=. It is noted that the Respondent did not bother to amend the plaint so as to reflect the new balances. The trial court having heard the Respondent admitting to having been paid the aforesaid sums after the institution of the case, ought to have factored the same in computing the actual balances owing by the Appellant to the Respondent.

40. The amount claimed by the Respondent is in the form of special damages as it is quantifiable. The Court of Appeal in Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd [1992] KLR 177 stated that special damages are the precise amount of pecuniary loss that the claimant can prove to have followed from the particular facts set out in the pleading.

41. It is trite that they must not only be specifically claimed (pleaded) but also strictly proved as held by the Court of Appeal in Hahn vs *Singh, Civil Appeal No. 42 of 1983* [185] KLR 716. The same Court in Jackson K. Kiptoo vs The Hon Attorney General [2009] KLR 657 had this to say:

> " The court is conscious that the degree of certainty and particularity of proof required depends on the circumstances and the nature of acts complained of."

42. This was echoed in Woodruff vs Dupont [1964] EA 404 where it was held by the East African Court of Appeal that:

> " The question as to the quantum of damage is one of fact for the trial Judge and the principles of law enunciated in the decided cases are only guides. When those rules or principles are applied, however, it is essential to remember that in the end what has to be decided is a question of fact. Circumstances are so infinitely various that, however carefully general rules are framed, they must be construed with some liberality and too rigidly applied. The court must be careful to see that the principles laid down are never so narrowly interpreted as to prevent a judge of fact from doing justice between the parties. So to use them would be to

misuse them…The quantum of damages being a question of fact for the trial Judge the sole question for determination in this appeal is not whether he followed any particular rules or the orthodox method in computing the damage claimed by the plaintiff, but whether the damages awarded are "such as may fairly and reasonably be considered as a rising according to the usual course of things, from the breach of the contract itself". The plaintiff is not entitled to be compensated to such an extent as to place him in a better position than that in which he would have found himself had the contract been performed by the defendant."

43. Based on the evidence on record, it is clear that the learned trial magistrate while awarding the amount owed to the Respondent, failed to factor in the admitted sum by the Appellant and what has been paid. The amount of Kshs. 1,204,216.00 ought to have been deducted from the amount of Kshs. 602,108.00 which has been paid to leave a balance sum of Kshs. 443,576.00 to be claimed by the Respondent. The court finds the amount owed to the Respondent, was the sum of Kshs. 443,576.00 and not Kshs. 1,647,792.00.

44. In the premises, the Court finds the appeal partly succeeds. The judgment of Hon. J. P Nandi (SPM/Adjudicator) delivered on 31st May 2024 in PMC Civil Suit No.E062 of 2023 in favour of the Respondent is hereby aside and substituted with an order that the payment of Kshs. 1,647,792.00 is set aside and substituted with an amount of Kshs. 443,576.00.

45. The Appellant having partially succeeded in this appeal, is awarded half the costs of this appeal while the Respondent shall have full costs in the lower court.

DATED, SIGNED, AND DELIVERED AT SIAYA THIS 25TH DAY OF APRIL, 2025.

D. K. KEMEI

JUDGE

In the presence of:

N/A Gichobi for Essendi.....for Appellant

Ochillo..... for Respondent

Mboya..... Court Assistant