



**David v Nutrimatrix Enterprises Limited (Civil Appeal
E246 of 2024) [2025] KEHC 11668 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11668 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E246 OF 2024
FN MUCHEMI, J
JULY 31, 2025**

BETWEEN

TERESA NDUKI DAVID APPELLANT

AND

NUTRIMATRIX ENTERPRISES LIMITED RESPONDENT

*(Being an Appeal from the Judgment and Decree of Hon. J. K. Tawai (RM/Adjudicator)
delivered on 2nd September 2024 in Ruiru Small Claims Court SCCCOMM No. E443 of 2024)*

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Ruiru Resident Magistrate/Adjudicator in SCCCOMM No. E443 of 2024 whereby the court entered judgment in favour of the respondent for a sum of Kshs. 275,000/- plus interest at court rates from the date of filing the claim until the date of payment and costs of Kshs. 35,000/-.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 6 grounds summarized as follows:-
 - a. The learned adjudicator erred in law and in fact when she entered judgment against the appellant for Kshs. 275,000/-.
 - b. The learned adjudicator erred in law and in fact by finding that the respondent had adequately discharged his burden of proof for the claim without sufficient evidence linking the appellant to the alleged supply of goods.
 - c. The learned trial magistrate erred in law and in fact in failing to consider that the documents produced by the respondent including the invoices and delivery note, did not demonstrate a transaction between the parties as they were addressed to third party, one Mr. Ndolo.



- d. The learned trial magistrate erred in law and in fact by ignoring the appellant's clear testimony that's he did not engage in any transaction with the respondent and the cheque in question was issued to her father for an entirely different reason.
3. Parties disposed of the appeal by way of written submissions.

The Appellant's Submissions

4. The appellant relies on the case of *Agricultural Finance Corporation vs Lengetia Ltd & Another* [1985] KLR 765 and *Savings & Loan (K) Ltd vs Kanyenje Karangatia Gakombe & Another* [2015] eKLR and submits that respondent did not table evidence to show that there was a contract between herself and the respondent as the delivery note and the invoice are addressed to one Peter Ndolo. Further, the appellant submits that the only involvement with the respondent herein was that she issued a cheque on her father's instruction. Additionally, she did not know that the cheque was paying for the goods that were allegedly supplied and she paid Kshs. 40,000/- to the respondent on her father's instruction and her father paid Kshs. 10,000/- using his registered line. Thus, the payment of Kshs. 40,000/- should not be construed as her assuming debt.
5. The appellant submits that she entered into an assignment of debt agreement with her father which is a legal arrangement in which a creditor transfers the right to receive payment of a debt from a debtor to another person. Thus the respondent was an assignee for purposes of receiving funds and she was an assignor thus her involvement automatically does not include her as a party to the contract.
6. Relying on the case of *Oceanbulk Shipping and Trading SA vs TMT Asia Limited & 3 Others* (2010) UKSC, the appellant maintains that any negotiations held between themselves and the respondent were on a without prejudice basis and solely intended to solve the issue. As such, relying upon them would be unfair and unjust. Further, the allegations by the respondent that she represented herself as the owner of Kathiani Series Wholesalers have not been corroborated and do not hold water as the respondent admitted to holding negotiations with her father and not her.

The Respondent's Submissions

7. The respondent relies on Section 107(1) of the *Evidence Act* and the case of *Commissioner of Domestic Services vs Galaxy Tools Limited* [2021] KEHC 5530 (KLR) and submits that once it exhibited invoices and delivery notes, the onus of proof shifted to the appellant to contradict them; absent any rebuttal, the inference of liability is compelled. The respondent submits that it produced a delivery note dated 7th February 2024 which bore the stamp of Kathiani Series Wholesalers and an invoice dated 7th February 2024 and NCBA bank cheque dated 19th February 2024 issued by the appellant which was to offset the invoice dated 7th February 2024. The appellant further admitted at the hearing to have paid Kshs. 50,000/- to offset the debt. The respondent argues that although the appellant alleges that the business does not belong to her, she has failed to file any documents to support the said allegations.
8. The respondent further relies on Section 109 of the *Evidence Act* and the cases of *EP Communications Ltd vs EA Courier Services Ltd* [2019] eKLR and *Edward Muriga through Stanley Muriga vs Nathaniel D. Schulter* Civil Appeal No. 23 of 1997 and submits that where a defendant does not adduce evidence, the plaintiff's evidence is to be believed, as mere allegations by the defence is not evidence. The respondent submits that its evidence on record is clear that the appellant is the proprietor of Kathiani Series Wholesalers as admitted in the appellant's response dated 25th July 2024. Further, the evidence shows that maize products were delivered to Kathiani Series Wholesalers who stamped received the delivery note thus discharging its burden of proof.



9. Relying on Section 109 of the *Evidence Act* and the case of *Trust Bank Ltd vs Paramount Universal Bank & 2 Others* cited in *Linus Ng'ang'a Kiongo & 3 Others vs Town Council of Kikuyu* (2012) eKLR, the respondent submits that where documents are exhibited in evidence without question or contradiction, they prove themselves upon their face value unless and until the contrary is shown. The respondent maintains that it produced copies of an invoice no. 2211 of Kshs. 325,000/-, a delivery note no. 2072 duly stamped by the appellant and a cheque of Kshs. 317,000/- which was dishonoured for lack of funds, thus proving its claim. The appellant only denied the said averments but did not produce any evidence to support her averments.
10. The respondent relies on the case of *Total Kenya Limited vs D. Pasacon General Construction & Electrical Services* [2022] KECA 593 (KLR) and submits that Peter Ndolo is a known person between the parties herein as he was an employee/agent for the appellant and had authority to receive the goods. Furthermore, the delivery note was duly received and an official stamp belonging to the appellant affixed which is further proof of delivery to the appellant. The appellant did not provide proof that the said Peter Ndolo lacked authority or that he ever repudiated the documents.
11. The respondent relies on Section 26(1) of the *Civil Procedure Act* and the cases of *Sbarriff Salim & Another vs Malundu Kikava* Civil Appeal No. 15 of 1989 [1989] eKLR and *Mukisa Biscuits Manufacturing Company Ltd vs West End Distributors* [1969] EA 696 and submits that the learned adjudicator awarded judgment in its favour of Kshs. 275,000/- and being a liquidated sum awarded interest at court rates from the date of filing the claim until payment in full which is justified.

Issues for Determination

12. The main issues for determination are:-
 - a. Whether the appeal is properly before the court.
 - b. If so, whether the appeal has merit.

The Law

13. The Court of Appeal while referring to a second appeal, which is essentially on points of law and thus similar to the duty of this court under Section 38 of the *Small Claims Court Act*, set out the duty of the second appellate court in the case of *Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited* [2020] eKLR as follows:-

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 that they should have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.

14. In distinguishing between matters of law and fact the Court of Appeal stated in *Kenya Breweries Ltd vs Godfrey Odoyo* [2010] eKLR as follows:-

I have anxiously considered the pleadings, the evidence on record, the judgment of the learned Senior Resident Magistrate and the judgment of the superior court, the grounds of appeal, the submissions of the learned counsel as well as the authorities to which we were referred. First, this is a second appeal. In a first appeal the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyse it, evaluate it and come to its own independent conclusion. In other words, a first appeal is by way of retrial and facts must be revisited and analysed a fresh. See *Selle and Another vs Associated Motor Boat Company Limited and Others* (1968) EA 123. In a second appeal however, such as this one



before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two 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.

Whether the Appeal is Properly Before the Court

15. Section 38 of the *Act* provides:-

A person aggrieved by the decision or an order of the court may appeal against that decision or order to the high Court on matters of law.

16. I have perused the grounds in the memorandum of appeal and noted that the same are based primarily on matters of fact. The appellant states that he is aggrieved that the learned adjudicator found that the respondent proved its claim by producing in evidence copies of an invoice no. 2211 of Kshs. 325,000/-, a delivery note no. 2072 duly stamped by the appellant and a cheque of Kshs. 317,000/- to the respondent written by the applicant and the cheque was dishonoured for lack of funds. The grounds as raised by the appellant touch on matters of fact which will require this court to scrutinize and re-evaluate the evidence Section 38 bars appeals from Small Claims Court on matters of fact.

17. As such, this appeal having been based on matters of fact cannot stand.

18. In my considered view, this appeal is incompetent and is hereby struck out with costs to the respondent.

19. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 31ST DAY OF JULY 2025.

F. MUCHEMI

JUDGE

