



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Almasi Botlers Ltd v Kiboi (Civil Appeal E094 of 2023)
[2025] KEHC 7233 (KLR) (13 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 7233 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL E094 OF 2023
A. ONG'INJO, J
FEBRUARY 13, 2025**

BETWEEN

ALMASI BOTLERS LTD APPELLANT

AND

PAUL WATHIGA KIBOI RESPONDENT

*(Being an appeal from the judgment and decree of Hon. Naomi Wairimu
(SPM) delivered on 7th November 2023 at Migori in Civil Suit No. 95 of 2020)*

JUDGMENT

Background

1. By way of a plaint dated 3rd June 2020, the Plaintiff/Respondent initiated a suit against the Defendant/Appellant seeking the following prayers;
 - a. An order that the Defendant unlawfully breached the Distributorship contract between the plaintiff and itself.
 - b. An order compelling the Defendant to indemnify the plaintiff of all the loss and damages that has flown from the unlawful breach of the Suit contract as particularized in paragraph 7 above herein from November 2019 till date of settlement in full.
 - c. An order of specific performance of the suit contract.
 - d. Costs of the suit.
 - e. Interest
 - f. Any other relief.



2. The plaintiff claimed that the Defendant was a producer and supplier of Coca-cola soft drinks while he was the distributor of the products at Isbania town in Migori county. The plaintiff stated that before he was contracted to distribute the Defendant's products, the Defendant required the plaintiff to attain or comply with numerous requirements, namely;
 - a. Provision of storage facility to accommodate the products and empty crates at all times.
 - b. Provide transport of the products to the client within the area of jurisdiction.
 - c. Employ a minimum number of personnel including security provision of the products and empty crates.
 - d. Prove a level of financial liquidity throughout the contract period to ensure that he is able to purchase the products in certain level of bulk.
3. The Plaintiff averred that parties executed a distributorship agreement which the Defendant took all the copies thereof and never provided the Plaintiff with a copy. It was further averred that the Plaintiff complied with all the conditions of the contract and the parties were in business for several years when in November 2019, the Defendant unlawfully and unilaterally stopped supplying the Plaintiff with the suit products without any notice.
4. By reason of the foregoing, the plaintiff suffered loss and damages particularized as follows;

Settled salaries in absence of business

 - i. Salary for Director Kshs. 30,000/= per month.
 - ii. Salary for Manager kshs. 20,000/= per month.
 - iii. Salary for two drivers at Kshs. 24,000/= each per month.
 - iv. Salary for two Salesmen at Kshs. 16,000/= each per month.
 - v. One assistant store keeper at Kshs. 10,000/= per month.
 - vi. Two watchmen at Kshs. 7,000/= each per month.
 - vii. Rent for 3 stores at kshs. 15,000/= each per month.
 - viii. Loss of business and profits on 300 mls sodas at kshs. 122,550/= per month.
 - ix. Loss of business on 500 mls sodas at Kshs. 114,550/= per month.
 - x. On pets, juices, mineral water at Kshs. 50,000/= per month.
5. The plaintiff stated that despite demand and notice of intention to sue, the Defendant had failed to compensate the plaintiff and resume their contractual dealings.
6. In response to the plaint, the Defendant filed a statement of defence dated 15th July 2020. In its defence, it was stated that it entered into a distributorship agreement with the plaintiff. That the Plaintiff conducted business under the distributorship agreement from the date of execution until sometimes in July 2019 when he breached the terms of the distributorship agreement by failing to observe the payment terms thereby making it impossible for the Defendant to continue the contractual relationship.
7. The Defendant particularized the breach of contract as follows;



- i. Failing to pay the goods on delivery.
 - ii. Issuing dishonoured cheque no. 952 for Kshs. 225,845/= on 28th May 2018.
 - iii. Making underpayments for goods delivered and invoiced.
8. The Defendant alleged that the plaintiff's claim is vague, incompetent, bad in law and the defendant shall at the opportune time request for such further and better particulars.
 - i. The Defendant executed a distributorship agreement with the plaintiff on 19th December 2017 and the plaintiff would purchase goods from the Defendant and retail within a determined geographical area. The terms of the agreement were such that the Defendant would deliver goods to the plaintiff to be paid for at a later date.
 - ii. The Defendant averred that pursuant to the agreement, the Defendant delivered goods to the plaintiff with a value of Kshs. 536,774.92/= which was still due and owing to the Defendant.
 - iii. The Defendant further averred that despite demand the Plaintiff had refused and failed to make payment of Kshs. 536, 778.92/=. The Defendants prayed ;
 - a. That the plaintiff's case be dismissed with costs.
 - b. For interest at court rates on Kshs. 225, 845/= from 29th May 2018 until payment in full.
 - c. For costs and incidental to the suit.
9. Upon consideration of the Plaintiff and the Defendant's case, the trial court delivered its judgment on 7th November 2023 in favour of the plaintiff/Respondent and awarded the amount of Kshs. 7,776, 800/= whereas the Defendant/Appellant was awarded the sum of Kshs. 536,774.92/=.
10. The Appellant being dissatisfied with the judgment and decree of the trial court preferred an appeal before this court vide a Memorandum of Appeal dated 4th December, 2024 setting out the following grounds of appeal that;
 - i. That the learned trial Magistrate erred in fact and in law, in entering Judgment in favor of the Plaintiff/Respondent in terms of prayers a, b, c, d & e of the Plaint, In essence awarding the sum of Kshs 7,776,800/= when it was clear that the said amount was not supported by any evidence in proof of the claim for loss of business and profits.
 - ii. That the learned trial magistrate erred in law and in fact in failing to consider the claim for loss and damages of Kshs 7,776,800/= on its own merit against the well laid out legal principles in regard to claims for special damages thus misapprehending and/or erroneously disregarding the principle that such damages ought not only to be specifically pleaded but also must be strictly proved.
 - iii. That the learned trial magistrate misapprehended the law and erred in fact and in law in awarding special damages which were pleaded but not supported by any evidence in proof as legally required under the rules of evidence.
 - iv. That the learned trial Magistrate erred in law and in fact in failing to properly consider the evidence on record in proof of the claim for loss and damages from November, 2019 on the claimed damages and in consequently making a blanket award not based on sound reasoning and thus occasioned grave prejudice to the Defendant/Appellant.



- v. That the learned Trial Magistrate erred in his assessment of the evidence adduced in proof of the Plaintiff's claim and gave undue regard to the Plaintiff's evidence in respect to claim for salaries of Plaintiff's alleged employees, rent for stores, loss of business and/or profit on 300mls soda, 500mls soda, pet juices and mineral water, hence came to erroneous findings that the Defendant/Appellant was bound to indemnify the Plaintiff/Respondent for all the loss and/or damages.
- vi. That the trial Magistrate erred in law and in fact in not taking into account and/or in disregarding the issues stated in the Defendant/Appellant's submissions and the binding authorities cited therein and thus came to wrong findings and leading to miscarriage of justice.
11. The Appellant prays for orders that;
- a. That this appeal against the Judgment of the Senior Principal Magistrate, Hon. Naomi Wairimu delivered on 7th November, 2023 be allowed in entirety.
 - b. That the said Judgment and Decree of the Learned Trial Magistrate be varied and/or set aside.
 - c. That the appellant be awarded costs of this appeal.
 - d. That this Honourable Court grants any other or further relief it deems fit or just.
12. The Plaintiff's case was that he entered into a contract with the Defendant dated 19th December 2017 for selling sodas, juices, mineral water and other products. The Defendant availed the contract for which the Plaintiff said he complied with the terms of the contract which was to run from 2017 to 2019 and the contract ended when the Defendant failed to supply him with products and they brought in another distributor. He stated that the contract was to run upto 2021 but they stopped the contract without notice and before the time elapsed.
13. According to clause 5 any party to could terminate the contract upon giving a written notice and clause 41 required the Plaintiff to have warehouses and he had three warehouses. The Plaintiff further said that he still had two warehouses that had empty bottles and that he had employed 2 workers for each motor vehicle as well as the office.
14. The Plaintiff stated that the Defendants never wrote to him that he owed them money but told him after filing the case. He said it was normal to be indebted to the Defendants since they would invoice after they supply the products. The Plaintiff asked the court to compensate him as per the plaint. He produced invoices marked as exhibit 1, delivery notes marked as exhibit 2 and transport details marked as exhibit 3.
15. During cross examination, he stated that he had a contract with Almasi Botlers but he was not supplied with a copy of the said agreement. He also said that he was not given any documents to show that he owed the Defendants Kshs. 536, 774/=. The Plaintiff admitted that on 28th May 2018, he paid by cheque and after filing the suit he was told that the cheque had bounced. He said that no products were supplied between December 2018 and November 2019 and he failed to make payments.
16. The Plaintiff said that he used to write a cheque everytime a delivery was done and he asked for compensation for the loss he incurred. He said he used to pay workers and he was not asked for the payroll. The Plaintiff said that the court knows that he signed a contract with the Defendant and he was expected to pay workers. He averred that he still paying for the warehouse with empty bottles but he had nothing to show the payment for rent.



17. DW1- Francis Kipkemboi Rop in his testimony stated that he is a Credit Controller at Almasi Bottler's Ltd. He filed a statement on 30th August 2022 which he asked the court to adopt as the Defendant's evidence in chief. He also filed a list of documents dated 15th July 2020 which were produced as defendant's exhibit 1-3. He stated that they used to renew the contract with the Plaintiff and the last contract was on 19th December 2017. That the discussion on payment was done orally between the Plaintiff and himself. He said that they had good relationship with the Plaintiff until November 2019 when the Board met and realized that customers owed the company 800 Million and they were having cashflow problem. That they then decided that all customers were to pay but the Plaintiff refused to show how he made payments and the debt remained outstanding.
18. On cross examination, DW1 stated that the last contract with the Plaintiff was dated 19th December 2019. He said that Kisii Bottlers, Mount Kenya Bottlers and Rift Valley Bottlers merged and that the Plaintiff was with Kisii Bottlers. He said that a Distributor had to comply with some conditions before being contracted. He said the contract with the Plaintiff was torun upto March 2021 but they stopped supplying him in September 2019 when they met to discuss the 800 million debt.
19. DW1 said he did not have demand notice to the Plaintiff and he was not sure any notices were given. He said that the Plaintiff was to have separate warehouses for their products and that the Plaintiff declined to have them collect their empty bottles from his warehouse. DW1 said he was not aware how much the Plaintiff paid his workers and he did not have alternative figures. He said the Plaintiff was given oral demand notice to pay.
20. On 30th October 2024, parties agreed to canvass this appeal by way of written submissions.
21. The Respondent's submissions are dated 26th November, 2024 whereas the Appellant's submissions are dated 17th January 2025 and filed on 24th January 2025.

Appellant's submissions

22. The Appellant in its submissions raised the following issues for determination:
 - i. Whether the Respondent breached and/ or frustrated the distributorship agreement.
 - ii. Whether the Respondent was entitled to the reliefs sought.
 - iii. Who should bear costs of this appeal.
23. On the first issue, the Appellant submitted that the failure by the Respondent to make payment for goods delivered and later issueing dishonoured cheques frustrated the agreement. The Respondent breached the terms of the agreement by failing to adhere to the terms and mode of payment as clearly stipulated in clause 4.7.1 of the distributorship agreement.
24. The Appellant cited the case of *Jackline Njeri Kariuki vs Moses Njung'e Njau* (2021) eKLR, to support the position that a breach of contract is committed when a party without lawful excuse, fails or refuses to perform what is due from him under the contract. The Appellant submitted that clause 4.7.1 of the distributorship agreement clearly states that, "the recommended mode of payment to the company by the distributor is cash on delivery through guaranteed or bankers cheques or cash through banking slips". That the Respondent issued a cheque on 29th May 2018 for Kshs. 225,845/= which was dishonoured and another outstanding amount of Kshs. 310,929/=.
25. In regards to the second issue, the Appellant cited the case of *Hydro water Well (K) Limited vs Sechere & 2 others (Civil suit No. E212 of 2019)* (2021) where the court held that to successfully claim damages for breach of contract, the Plaintiff had to show that a contract was in existence, that the contract



was breached by the Defendant and that the Plaintiff suffered damage as a result of the breach. The Appellant argued that the Respondent did not produce any evidence before the court to show that the Appellant breached the distributorship agreement. That in the contrary it is the Respondent who breached the agreement by issuing dishonoured cheques, failing to replace the dishonoured cheques and failure to adhere to the agreed terms on payment for the goods. The Appellant relied on the holding in *Bonface Njeru Ngemi & another vs Vincent Davis Kihara (2017) Eklr* and submitted that the remedy for specific performance is not available for the Respondent as he failed to perform the core term of the contract.

26. The Appellant argued that special damages are awarded to compensate for actual out of pocket expenses and provable losses that have been incurred as a direct result of the Appellant's actions or behavior. During cross examination of the Respondent he stated that he did not have any documents before court to prove how much he paid the workers. He did not produce payroll and did not present any receipt to show the court how much was paid for rent. To buttress its position, the Appellant cited *Capital Fish Limited vs Kenya Power and Lighting Company Limited (2016)eKLR*, where the court of appeal stated that;

“The Appellant apart from listing the alleged loss and damage, it did not lead any evidence at all in support of the alleged loss and damage. As it were, the appellant merely threw figures at the trial court without any credible evidence in support thereof and expected the court to award them. Indeed, there was not credible documentary evidence in support of the alleged special damages.”

27. That the Respondent particularized the business and profit loss incurred in the plaint and sought the court to award him the amount of Kshs. 7, 776, 800/= without leading any evidence before the court to show how much the business was making per month. The Appellant urged the court to set aside and vary the judgment and decree of the Trial magistrate and award costs to the Appellant.
28. On the issue of costs, the Appellant cited Section 27 of the *Civil Procedure Act* and relied on the case of *Republic vs Rosemary Wairimu (Ex-parte Applicant)* and *Ihururu Dairy Farmers Co-operativ Society Ltd* where the court held that costs is the discretion of court and is used to compensate the successful party for the trouble taken in prosecuting or defending the case and not to penalize the losing party.

Respondent's submissions

29. The Respondent submitted that this court is empowered to subject the evidence to fresh scrutiny and make conclusions bearing in mind that it did not have the opportunity of seeing or hearing the witnesses first hand. He relied on the case of *Selle and another vs Associates Motor Boat Co. Ltd and another (1968) EA 123*.
30. He argued that the impugned decision remains sound and legally correct in light of the evidence tendered before the Trial court. That this case goes a long way to exhibit the glarest case of breach of contract by the Appellant which has caused financial loss to the Respondent and which loss still continues as the Appellant's empty bottles and crates plus marketing equipment continue to be kept in stores and warehouses whose rents are being paid by the Respondent long after the Appellant had terminated the distributorship contract. The Respondent adopted the submissions before the Trial court dated 3rd October 2023.
31. It was submitted that the Respondent proved the breach of the contract by the Appellant thereby justifying the impugned decision by the Trial court. The Respondent urged this court to find no merit



in the appeal and dismiss the same with costs and a further order to indemnify the Respondent for the storage of its empty crates and bottles occupying their stores.

Analysis and Determination

32. It is trite law that this being a first appeal, this court is called upon to analyse, re-assess and reconsider the evidence adduced before the Trial court and reach its own conclusions bearing in mind that it didn't have the opportunity to observe the witnesses testify. In the case of *Abok James Odera t/a A.J Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates* [2013] e KLR, where the court held that:

“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.”

33. I have considered the pleadings, evidence and the submissions on record. The issues emerging for determination by this court are: -

- i. Whether there was breach of contract?
- ii. Whether the Respondent proved his case against the Appellant on a balance of probability?
- iii. What remedies can this court grant in the circumstances?
- iv. Who bears the costs of the appeal.

34. As regards the issue of breach of contract, the Black's Law Dictionary, 9th edition defines breach of contract as follows;

“A violation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance. A breach may be one by non-performance or by repudiation or by both. Every breach gives rise to a claim for damages and may give rise to other remedies. Even if the injured party sustains no pecuniary loss, or is certainly, he has at least a claim of nominal damages.”

35. In the case of *Nakana Trading Co. Ltd vs Coffee Marketing Board* 1990-1994 EA 448 the High Court in Kampala stated as follows;

“In contract, a breach occurs when one or both parties fail to fulfill the obligations imposed by the terms since the contract between the parties was reduced into writing, the duty of the court is to look at the documents itself and determine whether it applies to existing facts. No evidence can be adduced to vary the terms of the contract if the language is plain and unambiguous. Support for the proposition can be found in Sarkar on Evidence at 849 where the author said.”

36. Thus, a breach of contract occurs when without legal justification, one party to the contract ignores, refuses to fulfill or fails to meet any provision of a written or verbal contract. The contract between the Appellant and the Respondent was executed sometimes in March 2018 and it was run until March 2021. However, the Appellant stopped supplying product to the Respondent in November, 2019 without giving a Notice as provided under Clause 5 of the said contract. Failure by the Appellant to supply the products to the Respondent without notice amounted to a breach of the terms and conditions of the contract between them. The cheques that the Appellant claimed were issued by the



Respondent in 2018 and were dishonoured could not have been the reason for stopping to supply the Respondent with goods because the relationship between them continued long after the dishonoured cheques until in November, 2019 when they stopped supplying goods. In any case it was not a term of contract that non-payment for goods supplied would amount to a breach of contract. The contract required that a notice be issued.

37. Upon establishing that the Apepllant breached the contract between them and the Respondent herein the next issue is whether the Respondent proved the particulars of special damages as per pagraph 7 of his plaint. It is trite law that he who alleges must prove. This principle is anchored under Section 107 (1) and (2) of the *Evidence Act*, which provides as follows;

1. 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 those facts exist.”
2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

38. Further, Section 109 of the *Evidence Act* provides that:-

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.”

39. In *Bwire vs Wayo & Sailoki* [2022] KEHC 7 (KLR), where Mativo J (as he then was) observed as follows;

Burden of Proof” is a legal term used to assign evidentiary responsibilities to parties in litigation. The party that carries the burden of proof must produce evidence to meet a threshold or “standard” in order to prove their claim. If a party fails to meet their burden of proof, their claim will fail. The general rule in civil cases is that the party who has the legal burden also has the evidential burden. If the Plaintiff does not discharge this legal burden, then the Plaintiff’s claim will fail. In civil suits, the plaintiff bears the burden of proof that the defendant’s action or inaction caused injury to the Plaintiff, and the defendant bears the burden of proving an affirmative defense. If the claimant fails to discharge the burden of proof to prove its case, the claim will be dismissed. If, however the claimant does adduce some evidence and discharges the burden of proof so as to prove its own case, it is for the defendant to adduce evidence to counter that evidence of proof of the alleged facts. If after weighing the evidence in respect of any particular allegation of fact, the court decides whether the (1) the claimant has proved the fact, (2) the defendant has proved the fact, or (3) neither party has proved the fact.”

40. In the case of *Fakir Mohammed vs Joseph Mugambi Kiara & 2 others* (2010) KECA 51 (KLR), the Court of appeal stated as follows;

As regards special damages, it is trite law that these must not only be pleaded but be specifically proved. In this case, the learned Judge awarded the plaintiff (1st Respondent) Shs. 3,200/= as profit per day and multiplied this figure by 30 days. With due respect, there was no evidence to support that finding. We accordingly set aside that figure. There was also an award of Shs. 12,940/= as special damages for hiring of drivers. There was no evidence in support of that finding. Accordingly, the award of Shs. 12,940/= must be set aside too.”



41. The Respondent claimed special damages for loss of business, it should be noted that loss of business which claim should be specifically pleaded and proved. In the case of Mwangi & another vs Mwangi (1996) LLR (CAK) the court of appeal stated thus;

Loss of earnings is a special damage claim. It must be specifically pleaded and strictly proved. The damages under the head of “loss of earning capacity” can be classified as general damages but these have also to be proved on a balance of probability. The plaintiff cannot just “throw figures” at the judge and ask him to assess such damages. (See the case of Kenya Bus Service Limited Vs Mayende [1991] 2 KAR 232 at p. 285).”

42. I have perused the record and noted that the Respondent produced receipts and invoices for loss of business but failed to support the claim for salaries and rent for warehouse with receipts. As earlier stated, a claim for special damages must specifically be proved by production of receipts. If this court was to believe that the Respondent paid salaries, then he ought to have produced payroll for the employees and receipt for the rent. In the circumstances, the Respondent failed to prove the prayer for salaries and rent for the warehouse.

43. Based on the foregoing this court makes the following orders:-

- i. Loss of business and profits on 300 mls sodas at kshs. 122,550/= per month for 16 months=Kshs.1,960,000/=
- ii. Loss of business on 500 mls sodas at Kshs. 114,550/= per month for 16 months=Kshs. 1,832,000/=
- iii. Loss on pets, juices, mineral water at Kshs. 50,000/= per month for 16 months=Kshs. 800,000/
=

44. The Appellant’s appeal partially succeeds and the Trial court judgment is set aside and judgment is entered in favour of the Respondent in the sum of Kshs. 4, 592, 000/= for loss of business. The Appellant shall have the sum of Kshs. 536, 774.92/= being the award by the trial court on contercalim. The appeal having partially succeeded, each party shall bear their own costs.

45. It is so ordered.

SIGNED DATED AND DELIVERED AT MIGORI THIS 13TH DAY OF FEBRUARY, 2025.

.....

A. ONG’INJO

JUDGE

