



REPUBLIC OF KENYA



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

**Urban Edge Properties Limited v Wasilwa (Civil Appeal E052 of 2023)
[2025] KEHC 3578 (KLR) (21 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3578 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CIVIL APPEAL E052 OF 2023
AC MRIMA, J
MARCH 21, 2025**

BETWEEN

URBAN EDGE PROPERTIES LIMITED APPELLANT

AND

FESTUS MASOLO WASILWA RESPONDENT

*(Being an appeal from the Judgment and decree of Hon. A. Akida (RM) in Kitale
Chief Magistrates Civil Case No. 143 of 2022 delivered on 26th June 2023)*

JUDGMENT

Background:

1. Festus Masolo Wasilwa, the Respondent herein, filed a Complaint dated 17th March 2022 against Urban Edge Properties Limited, the Appellant herein. He sought payment of Kshs. 700,000/- being the price of 175 bags of 90kg dry shelled maize he sold to the Appellant. That was in Kitale Chief Magistrates Civil Case No. 143 of 2022 [hereinafter referred to as 'the civil suit'].
2. The Respondent pleaded that he supplied the maize upon being given Cheque No. 000081, drawn by the Appellant on the understanding that it would be honoured and that if it was not, the Appellant would compensate him. It was the Respondent's case that the cheque was drawn on a bank account maintained by the Appellant and it was issued to him in payment of the purchase of maize. However, on 4th February 2022, when he presented it to his Bank, Standard Chartered Bank, it was dishonoured because payment had been stopped.
3. The Appellant responded to the suit through its statement of defence dated 26th April 2022. It was its case that it was a stranger to the Respondent's case. It asserted that on 1st November 2021, its Director, Harun Kiige, had the physical cheque book when he was drugged at a place called Komarock and cheque leaves plucked between No. 000054 to 0000100 for account No. 1178920XXX KCB Bank



- Moi Avenue. That the Appellant then stopped payment of all cheques that had been stolen and duly informed its bank that all the cheques bearing the foregoing serial numbers should not to be honoured.
4. The Appellant pleaded that it never purchased maize nor did it issue a cheque to the Respondent. It contended that the signatures on the claimed cheque leaf were not in accordance with the specimen. It was its case further that its director made a report to Mowlem Police station and was referred to Soweto Police station. The Appellant stated that the Plaintiff did not disclose where the transaction took place and maintained that the Respondent was a stranger.
 5. When the trial Court heard the case, it made various findings among them, that despite the Appellant referring to reports it made to the Police stations through Occurrence Books, no extracts of them were produced in Court. It observed that no police officer investigating the report was called in as a witness and that no expert witness was called to shed light on the difference in the specimen signature and the one purportedly endorsing the cheque.
 6. The trial Court further observed that there was no evidence that the Appellant instructed the Bank to stop payment on claims arising from the subject cheque.
 7. Based on the provisions of section 55(1) of the *Bills of Exchange Act*, the Court entered judgment in favour of the Respondent. The Appellant was aggrieved hence the instant case.

The Appeal:

8. Through the Memorandum of Appeal dated 24th July 2023, the Appellant expressed its dissatisfaction with the trial Court's findings on the following grounds: -
 1. That the learned magistrate erred in law and in fact by not making a finding that the Defendant did not deal with or issue any valid cheque to the defendant (sic).
 2. That the learned trial magistrate misdirected himself in reaching a conclusion that the defendants failed to prove it had not issued the cheque or that there were forgery of the signatures.
 3. That the learned trial magistrate failed, misdirected himself by shifting the burden of proof to the Defendant and finding that Plaintiff ought not to have conducted any diligence in accepting a company cheque.
 4. That the learned trial magistrate failed to consider the position taken by the Kenya Commercial Bank which acknowledged that the cheques were stopped before the Plaintiff ever made a sale.
 5. That the learned trial magistrate failed to appreciate that the Plaintiff confirmed in viva voce evidence that based on what he knew after filing he would not have proceeded with the case.

The Appellant's submissions:

9. In its written submissions dated 4th April 2024, the Appellant submitted that when he was drugged, he made a report to stop the cheques when he received a call from the Bank. He submitted that he informed the Bank on phone of its plight and went to Buru Buru branch and instructed them to stop cheques No. 000054 to 0000100. It submitted that when it received a demand letter, it requested the bank to issue it with a letter confirming that he had instructed them to stop cheques No. 000054 to 0000100 and that the Branch Manager notified the Court vide a letter dated 24th November 2022, which was attached to its application dated 24th November 2022 that the Bank had acted in accordance with its instructions but the letter could not be located.



10. The Appellant submitted further that the Bank acts according to its records and keeps customer's information confidential except in instances of Court orders. It reiterated that the Bank confirmed that the cheques were stopped on the 10th November 2021 three months before the Respondent transacted with its customers. The Appellant relied on the Court of Appeal of England and Wales in *N Joachimson -vs- Swiss Bank Corporation* (1921) All ER REP 92 where it was observed that a banker will not divulge to third persons without the express or implied consent of the customer, either the state of the customer's account or any of his transactions unless the bank is compelled by the order of the Court.
11. The Appellant argued that the trial Court ought not to have distrusted the letter written by the Bank and disregarded it as of no consequence despite the Bank's glaring negligence in misplacing it. The Appellant was quite emphatic that it had never dealt in maize and its Director had never been to Kitale. It hastened to add that the cheque in question was a company cheque not a personal one. It was its case that the Respondent had not made any inquiries as to who the Directors were and whether the one drawing the alleged cheque had apparent authority.
12. In the end, the Appellant urged the Court to take cognizance of the letter written by the Bank to the effect that it did stop the cheques before the transaction between Respondent and its customers took place. It also asked the Court to allow the appeal and dismiss the Respondent's case.

The Respondent's case:

13. Festus Masolo Wasilwa challenged the appeal through written submissions dated 28th June 2024. It was his case that there was no proof that the Appellant did not issue the cheque and that it did not come out that there was forgery of the signatures thereon. He asserted that the cheque in question was drawn on an account maintained by the Appellant and its payment was stopped by the Appellant. It was his case that the cheque was not dishonoured not because the signatures thereon were forged and, therefore, it was incumbent upon the Appellant, under section 107, 108 and 109 of the *Evidence Act*, to show that the signatures were forged, a fact it did not do.
14. The Respondent further claimed that it had no reason to exercise due diligence since the cheque was valid as it was drawn by a banker on an existing account and was duly signed in compliance with section 73 of *Bills of Exchange Act*. It was its case further that the cheque issued complied with section 3(1), (2), (3) and (4) of the *Bills of Exchange Act* and as such, had no reason to carry out due diligence.
15. The Respondent pointed out that the trial Court's order of 7th November 2022 requiring the Branch manager, KCB Bank Buru Buru to furnish the Court with a copy of the letter dated 10th November 2021, allegedly instructing the bank to stop payment, was not complied with since the Bank was unable to furnish the letter.
16. In conclusion, the Respondent maintained that the trial Court did not misdirect itself in arriving at its decision. It urged this Court to dismiss the appeal with costs.

Analysis:

17. From the foregoing discourse, the main issue that emerges for determination is whether, in the unique circumstances of this case, the Appellant's cheque issued in favour of the Respondent was valid and was wrongly stopped for payment.



18. This Court's role, as a first appellate Court, is well established. The Court in *Susan Munyi -vs- Keshar Shiani* [2013] eKLR observed thus: -

... As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.

19. Similarly, in *Abok James Odera t/a AJ Odera & Associates -vs- John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR the Court set out the role of a first appellate Court in the following terms: -

... This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse 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. See the case of *Kenya Ports Authority vs Kustron (Kenya) Limited* 2000 2EA 212.

20. Speaking to the advantage the trial Court has in observing the witnesses and the need for the appellate Court to exercise restraint while differing with the findings of fact, the Court of Appeal of East Africa in *Peters -vs- Sunday Post Limited* (1958) E.A 424, observed as follows: -

.... It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has the advantage of seeing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whenever the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.

21. With the foregoing, this Court now turns the issue at hand, but first, the parties' cases.

22. The Respondent testified as PW1. It was his evidence that on 3rd February 2022, he sold 175 bags of maize each weighing 90Kgs to the Appellant and was paid by cheque No. 000081 which he banked on 4th February 2022, but it was instead not honoured. The Respondent produced the Standard Chartered Cheque Report in respect of the cheque, the search on the Appellant's company registration and directorship, the demand letter and the Certificate of the registered posting as exhibits. On cross-examination, it was his evidence that he sold the bags of maize to the Appellant. He stated that they came to his home with two lorries and whereas he did not check the registration of the said lorries, he was present when the maize was being loaded. He stated that he interacted with the persons that had come even before they started loading. That, they gave him a cheque which ended up being dishonoured on account of the drawer having instructed the bank to stop payment.

23. In his defence, the Appellant's witness, Harum Mugenya Kiige, testified that on 1st November 2021, he was in Komarock in Nairobi when he got drugged and as a result lost valuable including his cheque book. It was his case that he reported to his bank and requested it to block the cheque book of account No. 1178920976 belonging to Appellant herein.

24. It was further his further evidence that he received a call from the Bank asking him to authorize the payment of the cheque that as deposited by the Respondent and that he went to the Bank and stopped the payment. To that end, he produced the letter dated 26th April 2022 and denied ever issuing a cheque to the Respondent. On cross-examination, he admitted that the cheque was the Appellant's cheque, drawn in favour of the Respondent.



25. Section 3 of the *Bills of Exchange Act* defines a ‘bill of exchange’ as an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person or to bearer.
26. From the record, there is proof enough that indeed the Respondent received a cheque or a bill of exchange from the Appellant. The Standard Chartered cheque report, which contains the front and the back-side photocopy of the cheque in question, produced as P. Exh. 1 fortifies that evidence. It shows that the cheque was drawn on 3rd February 2022 by the Appellant in favour of the Respondent and, therefore, in tandem with the law.
27. At the heart of this dispute is the allegation that the cheque was a forgery. The Appellant’s witness fronted the position that the cheque was drawn and issued to the Respondent not by the Appellant but by fraudsters. He claimed that he lost his valuables among them his cheque book when he was drugged at Komarock in Nairobi.
28. That claim rested solely on evidence and the onus of proving that the cheque was a forgery was a responsibility on the Appellant. Several concerns, however, come to the fore. Firstly, the Appellant’s claim that he lost his cheque book ought to have been evidenced by a report made to the Police and the issuance of a Police Abstract. These items ought to have been availed at the trial Court to prove the alleged theft and loss. Alternatively, any other form of evidence from the police to that end would have sufficed.
29. Concurrently, and secondly, the Appellant had the responsibility of immediately, upon the loss of the cheque book, to inform its Bank in order to forestall the fraudulent use of the cheques. However, the evidence has it that the Appellant did not do so, instead it was the Bank that called him to seek payment approval and that was when the Appellant stopped the payment. One, therefore, wonders why the Appellant did not act as expected of a prudent person whose cheque book was lost.
30. Further, in order to exonerate itself from the execution of the cheque, the Appellant ought to have availed the evidence of a document examiner. That was not done. In *R.G. Patel v. Lalji Makani*, [1957] E.A it was held that: -

.... All allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.

31. In Civil Appeal No 297 of 2015 *Mbuthia Macharia -vs- Annah Mutua Ndwiga & another* [2017] eKLR, the Court of Appeal, while discussing the burden and incidence of proof, pointed out the importance of a document examiner in cases of fraud. The Learned Judges agreed with the trial Court’s interpretation on the mechanics of burden and incidence of proof and the implication of failing to avail a document examiner when the following was said:

... Has the plaintiff proved the allegation of fraud against the 1st defendant" The plaintiff claimed that his title document got lost from his house and he suspected that the document was stolen by the 1st defendant. He, however, did not indicate when the said document was stolen but he reported the lost title at Pagani Police Station on 8th November 2004. The lost title was later gazetted in the Kenya Gazette as No. 5590 dated 22nd June, 2007 stating that the title was lost and an interim title would be issued after 90 days. The new title must have then been issued sometime in October 2007. The transfer of the suit property was done on 13th May, 2009. From the face of it, the transfer document looks proper but the plaintiff



alleged that he did not sign the consent to transfer it. He claimed that that the signature appended on the transfer document was not his. He, however, did not take any steps to prove to the court that the signature appended on the document was not his by bringing a document examiner or other expert to prove that the signatures appended on the various documents used by the 1st defendant to transfer the suit property into her name were not his. The court cannot determine on the face of a document which signature is genuine and which is forged in order to point out which signature belongs to the plaintiff and not in the absence of such evidence I find that the plaintiff had not proved that the 1st defendant was involved in any fraudulent scheme of transferring the suit property to herself as alleged. I find that the plaintiff has been unable to link the 1st defendant to the claim of fraud made against her. (emphasis added).

32. This Court finds itself in the same predicament as observed in the foregoing case. There is no evidence against which the authenticity of the signatures appended on the impugned cheque can be ascertained. The situation is further compounded by the failure of the Appellant to avail a witness from the Bank to speak to the incident and shed light on the sequence of events. It was further made worse by the finding by the trial Court that despite ordering the Bank to produce a letter it received from the Appellant directing it to stop payment, the Bank indicated that it could not trace from its records.
33. The Appellant, however, affixed a copy of a letter from the Bank dated 20th April 2022 in its application which letter was addressed to the Appellant purportedly informing him that the Bank stopped payments in respect of Cheque No. 000054 to 0000100. The proper way to avail such a document was for it to be produced by its maker, John Maina, who was the Ag. Branch Manager KCB Bank Buru Buru, or by the consensus of the parties. None of the two happened.
34. Deriving from the foregoing, the manner in which the Appellant handled the matter as evidenced by the record, it is quite doubtful that there was any loss and subsequent forgery of its cheques. The observation in *Hassanali Issa & Co. -vs- Jeraj Produce Store (1967) 1 EA 555* by the Court of Appeal that in a dispute involving a cheque, the onus is on the Defendant to show circumstances that disentitle a Plaintiff from judgment seem to apply in this case.
35. This Court's re-assessment of the facts, evidence and the law yield that the Appellant did not discharge its evidential burden of proof as to disentitle the Respondent from a judgment. The trial Court, therefore, did not err.

Disposition:

36. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 and later elected to the Judicial Service Commission thereby mostly being away from the station. Apologies galore.
37. Consequently, the following final orders hereby issue: -
 - a. The Appeal is hereby dismissed.
 - b. The Appellant shall bear the costs of the appeal.
38. It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 21ST DAY OF MARCH, 2025.



A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Miss Bilha, Learned Counsel for the Appellant.

Mr. Ingosi, Learned Counsel for the Respondent.

Chemosop/Duke – Court Assistants.

