



**Equator Bottlers Limited v Achieng (Civil Appeal E033 of 2024)
[2025] KEHC 8393 (KLR) (16 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8393 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E033 OF 2024
BM MUSYOKI, J
JUNE 16, 2025**

BETWEEN

EQUATOR BOTTLERS LIMITED APPELLANT

AND

EUNICE RAHEL ACHIENG RESPONDENT

(Being an appeal from judgment and decree in the Chief Magistrate's Court at Kisumu (D.O. Onyango) civil case number 425 of 2017 dated 18th January 2024)

JUDGMENT

1. The respondent sued the appellant in the subordinate court praying of the following orders;
 - a. An order compelling the defendant to account for the following cheques issued to the defendant by the plaintiff. Cheques drawn upon Equity Band Bondo branch namely 000693, 00699, 000722, 000706, 000707, 000796, 000697, 000697, 000695, 000694, 000698, 000700, cheques drawn against Cooperative Bank Limited Bondo branch namely 001326, 001327, 001335, 001322, 002323, 001324, 001336, 001327, 001328, 001329 or in default the defendant to refund all sums unaccounted for each cheque.
 - b. Costs of this suit together with interest thereon at such rate and for such period as this Honourable Court may deem fit to orders.
 - c. Any other just and equitable relief as this Honourable Court may deem appropriate.
2. After hearing the parties, the Honourable Magistrate found for the respondent and ordered the appellant to refund Kshs 17,260,810.00 to the respondent within following which the appellant has preferred this appeal raising the following grounds;



1. That the learned Magistrate erred in fact and in law by failing to take into account considerations that should have been taken into account before entering judgment for the respondent against the appellant.
 2. That the learned Magistrate erred in fact and in law by failing to apply the applicable laws of evidence on the facts before it.
 3. That the learned Magistrate erred in fact and in law by failing to evaluate and consider the evidence adduced by the appellant before it.
 4. That the learned Magistrate erred in fact and in law by violating the appellant's right to be heard as enshrined under Article 50(1) of *the Constitution* of Kenya, 2010.
 5. That the learned Magistrate erred in fact and in law by making a determination on issues which were not placed before the court for determination.
 6. That the learned Magistrate erred in fact and in law by arriving at a decision and making final orders prematurely.
 7. That the learned Magistrate erred in fact and in law by making a finding that the respondent had proved on a balance of probability that the appellant could not account for the value of the cheques despite not giving the appellant a chance to account for the same.
 8. That the learned Magistrate erred in fact and in law by granting a secondary order before granting the primary order prayed by the plaintiff in their plaint dated 31st July 2017.
 9. That the learned Magistrate erred in fact and in law by making a finding that the appellant should refund the plaintiff Kes. 17,260,810.00 yet the appellant was not given an opportunity to account for the cheques issued.
 10. That the learned Magistrate erred in fact and in law in arriving at the entire decision contained in the judgment dated 18th January 2024.
 11. That the learned Magistrate erred in fact and in law by exercising his discretion injudiciously, improperly and unconstitutionally.
 12. That the learned Magistrate erred in fact and in law by misapprehending the dispute before it as borne by the pleadings and consequently arriving at findings and orders that are dysfunctionally opposite of the prayers sought by the plaintiff.
 13. That the learned Magistrate erred in fact and in law by failing to take into account relevant facts and law and instead considering irrelevant matters in arriving at the judgment dated 18th January 2024.
 14. That the learned Magistrate erred in fact and in law by arriving at findings and making final orders that amount to deprivation of property against the appellant contrary to Article 40(1) of *the Constitution* of Kenya, 2010.
 15. That the learned Magistrate erred in fact and in law by making the order for payment of Kes. 17,260,810.00 plus interest and costs of the suit plus interest contrary to the prayers sought by the Respondent. The Court violated the appellant's right to equal protection of the law as espoused under Article 27(1) and (2) of *the Constitution* of Kenya, 2010.
3. This is a first appeal and as required of this court, I will subject the evidence of the parties as produced in the lower court to my own scrutiny and analysis and arrive at my own independent conclusion but I



will remind myself that I did not take the evidence of the witnesses neither did I have the opportunity of observing their demeanour.

4. The respondent was the only witness on her side. She told the court that the defendant and herself entered into a contract in 1999 which ran until February 2017 when her contract was terminated. The contract was for the respondent to distribute the appellant's goods and beverages within Bondo and the surrounding areas. The appellant would deliver goods to her which she would pay for upon delivery. In December 2016, the appellant required her to issue to it blank but signed cheques in its favour. The appellant was to fill in the figures then deliver goods of the value of the figures it filled in.
5. She added that she went to the offices of the appellant demanding delivery of the goods against the cheques but they refused to do so despite the cheques having been cashed. She produced 21 copies of the cheques from Equity Bank and Cooperative Bank for the period between 20-12-2016 to 5-02-2017 and 20-12-2021 to 15-02-2017 respectively. She went on to narrate when each of these cheques were cashed as appearing in the bank accounts statements. She stated that for all these 21 cheques, she did not receive goods worth the value of the cheques. In a rather short cross-examination, the respondent stated that she was compelled by the defendant to sign the blank cheques.
6. The appellant called one Julius Gicheha who according to his witness statement dated 26-04-2022 which he adopted as his evidence in chief, told the court that he worked with the appellant as an assistant credit controller in Kisumu. He confirmed that the appellant and the respondent had a contract for distribution of the appellant's goods by the respondent. The respondent was to pay for the goods in cash or cheques. He added that it was agreed that the appellant would make payments to itself using blank cheques drawn from the respondent's banks accounts held in the Cooperative Bank and Equity Bank. He added that the appellant kept diligent records and never made payments to itself before the actual delivery.
7. In December 2017, the respondent issued blank cheques to the appellant to facilitate faster delivery of the products. He added that contrary to the agreement, the respondent issued cheques which were returned unpaid for insufficient funds. These were cheques numbers 001339 dated 31-12-2016, 001340 dated 31-12-2016, 001242 dated 2-01-2017, 001343 dated 2-01-2017 and 001346 dated 2-01-2017., 00727 dated 26-01-2017, 0728 dated 26-01-2017.
8. The witness denied receiving the cheques numbers 000693, 000699, 000722, 000707, 000696, 000697, 000695, 000694, 000693, 000700, 001326, 001327, 001335, 001322, 001323, 001324, 001336, 001327, 001328 and 001329. He proceeded to give details of invoices for which the cheques were applied and according to the breakdown the cheques he narrated totaled to Kshs 22,189,807.70.
9. The witness added that the appellant used independent contractors who transported the goods to various customers. These independent contractors used their own delivery books to record the details of the delivery. The independent contractors would give the customers delivery notes and invoices from the appellant. The customers would sign these documents to acknowledge receipt of the products which would then be returned to the appellant while the independent contractors retained their delivery books for their own records. The witness sought to produce documents in the appellant's list of documents dated 26-04-2022 which was objected to for having been filed and served the previous day. The objection was sustained.
10. In cross-examination, the witness confirmed that the respondent had issued blank cheques and the same were cashed. He maintained that they issued invoices and delivery notes. He stated that the invoices were accompanied by delivery notes indicating when, where and by who the goods. He added that the delivery notes were received were stamped by the respondent. He admitted that they had cashed a total of Kshs 17,260,810.00 through the cheques. He added that the deliveries were done by their



driver or hired transporter but in this case, their transporter had no driver's delivery book but had dispatch notes which was different from a delivery book and confirmed that the dispatch notes did not confirm delivery of goods. The appellant closed its case at this juncture which was on 8-6-2022.

11. The witness was recalled on 6-09-2023 for reasons I could not trace in the proceedings. He produced a bundle of documents containing 161 pages as the defendant's exhibits. The documents, were delivery notes, invoices, dispatch notes and a summary of the cheques vis a vis invoices. He sought to explain what invoices, dispatch and delivery notes meant by stating that an invoice is a demand for payment. He also explained that a dispatch note is a document delivered together with goods to confirm delivery where the customer would go through it and confirm the goods had been delivered. He added that a delivery note was an internal document that the driver goes with to track fuel. According to him, the delivery note was the appellant's internal document which was used to confirm that the driver delivered goods to the customer.
12. He was subjected to fresh cross examination where he stated that he had said before that he did not have delivery notes. He added that he did not have orders from the customer as the orders were made through telephone calls. None of the documents he had produced was accompanied by any orders. He feigned ignorance of what word dispatch meant and insisted that the appellant had its own terms of operations. He added that delivery notes he had produced did not indicate the value of the goods delivered but quantity only. When he was shown dispatch note number 103159, he stated that it was signed and stamped by the respondent although the stamp in all the dispatch notes read Bondo S.S.D. whereas the contract was between the parties herein. He also confirmed that the signatures vary in the dispatch notes. He also admitted that the appellant did not produce the respondent's statement of account.
13. This case was in my view a simple exercise but the parties especially the appellant convoluted it. The respondent had asked for accounting of cheques numbers 00693, 000699, 000722, 000706, 000707, 000697, 000696, 000697, 000695, 000694, 000698, 000700, 01326, 001327, 001335, 001322, 001323, 001324, 001336, 001327, 001328 and 001329. The trial court had on several occasions issued interlocutory orders compelling the appellant to account for the 21 cheques which the appellant ignored and which in my view, if it had been done would have easily completed the matter.
14. In his witness statement, the appellant deviated from these narrow issues and included other cheques which were not part of the proceedings. Some of these were cheque numbers 00727, 00728, 001339, 001340, 001342, 001343 and 001346. But I would understand that the appellant wanted to demonstrate that the cheques in question went into settling invoices which would have been settled by these cheques which it claimed to have bounced.
15. The court observed that the appellant's witness testimony when he was recalled was contradictory to what he told the court in the first time he testified and based on this, the trial court found the witness to be dishonest. This is one of the areas the appellate court is called upon to be cautious in interfering with the discretion of the trial court. The trial court in this matter must have observed the demeanour of the witness and his inconsistencies for it to arrive at the decision that he was dishonest which advantage I did not have.
16. Even without the advantage, I can observe two or three areas of inconsistencies and indicators of dishonesty. First, the appellant had throughout the proceedings defied court orders to provide accounts. Secondly, the witness feigned ignorance and made attempts to mislead the court on what a delivery note meant as compared to a dispatch note. He stated in his oral testimony that the delivery notes were for their internal use whereas in his recorded witness statement which he adopted, it was



- indicated that these delivery notes would be given by independent contractors, signed by the customer then a copy returned to the appellant and another one left with the customer.
17. In addition to the above, according to the witness, delivery to customers were proved by dispatch notes. The dispatch notes he produced were received and stamped by an entity called Bondo S.S.D. an entity he did not explain or connect to the respondent. None of the dispatch or delivery notes was received by the respondent. It is therefore justifiable to assume that the deliveries referred to were not made to the respondent.
 18. Further the appellant claimed that cheques number 001339 dated 31-12-2016, 001340 dated 31-12-2016, 001242 dated 2-01-2017, 001343 dated 2-01-2017 and 001346 dated 2-01-2017, 00727 dated 26-01-2017, 0728 dated 26-01-2017 were returned unpaid for insufficient funds. The appellant did not produce copies of the cheques return advice slips or its bank statement to show that these cheques were returned which again would have been a simple task if the appellant was genuine. Instead, the witness while being cross-examined admitted that all the cheques in question were cashed. In any event none of these cheques were in the plaintiff's list of what she wanted accounted for.
 19. At paragraph 10 of his witness statement the witness averred that the appellant did not accept or receive cheques numbers 000693, 000699, 000722, 000707, 000697, 000696, 000697, 000695, 000694, 000700, 01326, 001327, 001335, 001322, 001323, 001324, 001336, 001327, 001328 and 001329. Once such an averment was made, the court would not expect the appellant to have gone into giving an account for what it did not receive. When this list is compared to what is in prayer 'a' of the plaint, it leaves only cheques numbers 00706 and 000698 unexplained. So, for the witnesses to have gone further in paragraphs 11, 12, 13, 14, 15, 16, 17 and 18 of his written statement to explain how the same cheques it claimed not to have received were utilized, was a manifestation of the dishonesty the trial court referred to. In that case even the accounting for cheques numbers 000706 in paragraph 16 and 000698 at paragraph 12 should be taken with a pinch of the salt noting that the dispatch notes were received by a stranger to these proceedings.
 20. The above analysis brings me to the inevitable conclusion that there was proof that the appellant received the money shown in the cheques in question and failed to account for the same. The appellant argues that the court should have given an order for taking accounts after which the parties would have sat down a reconciled the same. I find this argument to be ignorant of the fact that the court had on 6-06-2018 made orders on for taking of accounts which the defendant failed to comply with citing unavailability of its accountant. Giving another such order then waiting for more time to take accounts would in my view be litigation by installment. The court cannot be turned in a toothless bulldog where it gives orders which are not self-executing. Prayer 'a' of the plaint had asked the court order refund of the amount found unaccounted for. In these circumstances I do not see any error the court made in ordering refund of the money.
 21. There are no reasons to upset the judgment of the trial court as both the evidence and conduct of the appellant's witness fell short of what he was expected to rebut the plaintiff's evidence.
 22. On the basis of the above it is my holding that this appeal is not merited and I proceed to dismiss it with costs to the appellant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JUNE 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.



Judgment delivered in presence of Miss Gicheru holding brief for Mr. Wathuta for the appellant and Mr. Abande and Miss Onyango the respondent.

