Mwangi t/a Stemer Hardware & Paints v Apex Steel Limited (Civil Appeal 367 of 2018) [2024] KEHC 7047 (KLR) (Civ) (13 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7047 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 367 OF 2018

CW MEOLI, J

JUNE 13, 2024

BETWEEN

STEPHEN WAMBUGU MWANGI T/A STEMER HARDWARE & PAINTS ..... APPELLANT

AND

APEX STEEL LIMITED ..... RESPONDENT

(Being an Appeal from the Judgement and Decree of Hon. D.W. Mburu (PM) delivered on 27th July, 2018 in Milimani CMCC No. 3476 of 2013)

JUDGMENT

1. This appeal emanates from the judgment delivered on 27th July, 2018 in Milimani CMCC No. 3476 of 2013. The suit was commenced by way of the plaint filed by Apex Steel Limited, the plaintiff in the lower court (hereafter the Respondent) against Stephen Wambugu Mwangi T/A Stemer Hardware & Paints, the defendant in the lower court (hereafter the Appellant). The claim was for the sum of Kshs. 2,541,924/-, costs of the suit and interest at the rate of 3% per month on the claimed sum, from 1st October, 2009 until payment in full.

2. The Respondent averred that the parties herein were at all material times engaged in a contractual business relationship, through which the Respondent sold goods various to the Appellant who made payment upon receipt . That it was a term of the contract between the parties that interest on all overdue invoices would accrue interest at the rate of 3% per month.

3. It was pleaded further that sometime in the year 2009, the Respondent sold and delivered goods worth Kshs. 2,541,924/- to the Appellant at the latter's Niku Hardware Division, upon request; that subsequently, the Appellant issued six (6) cheques to the Respondent in payment, but which cheques were dishonored upon presentation; and that the Respondent's claim against the Appellant was for

the sum of Kshs. 2,541,924/- being the balance of the amount due on the delivered goods, with interest at the agreed rate.

4. The Appellant entered appearance and filed the statement of defence dated 6th September, 2013 denying the key averments in the plaint and liability. More particularly, the Appellant denied the existence of the alleged contract between the parties, and further denied owing the outstanding sums alleged in the plaint, or at all. He pleaded in the alternative that if a contract subsisted as alleged, it was on a "sale or return basis." The Appellant further pleaded that any cheques which previously bounced were replaced with cash payments.

5. The suit proceeded to full hearing during which the Respondent called one (1) witness, while the Appellant personally testified in his defence. Judgment was delivered on 27th July, 2018 allowing the claim.

6. Aggrieved by the outcome, the Appellant preferred this appeal via the memorandum of appeal dated 8th August, 2018 premised on the following grounds:

> " 1. The learned Principle Magistrate erred in law and fact by holding that there was a valid contract between the plaintiff and the defendant to change 3% interest per month on overdue invoices.
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> 2. The learned Principle Magistrate erred in law and fact in finding that the defendant owed the plaintiff Kshs 2,541,924 when evidence was adduced to the contrary.
>
> 3. The learned Principle Magistrate erred in law and fact by disregarding the evidence of the defendant." (sic)

7. The appeal was canvassed by way of written submissions. Counsel for the Appellant anchored his submissions on the decisions in Selle & Another v Associated Motor Boat Company Ltd & Others, [1968] EA 123; Gitobu Imanyara & 2 others v Attorney General [2016] eKLR and Peters v Sunday Post Ltd [1958] EA 424 regarding the role of the first appellate court. Counsel submitted that the trial court erred in determining that a valid contract existed between the parties herein, in the absence of any supporting evidence. In that regard, counsel disputing the existence of any written or oral contract and the term of the contract levying interest for late payments. Counsel therefore argued that the trial court erred in awarding interest at the rate of 3% per month, to the Respondent.

8. The Appellant's counsel revisiting evidence at the trial contended that the Appellant was merely a customer of the Respondent, who would order goods from the latter through complimentary notes and either collect the said goods personally or through his driver and thereafter issue post-dated cheques. Pointing out that for goods delivered, the Appellant would append his signature on the respective invoices. Counsel therefore relied on the decision rendered in National Bank of Kenya Limited v Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR to argue that courts cannot rewrite contracts entered into between parties, and that such parties are bound by the terms therein.

9. The Appellant's counsel also faulted the trial court for determining that his client was indebted to the Respondent in the sum of Kshs. 2,541,924/- in the absence of any supporting evidence. Counsel contended that the Appellant's witness tendered sufficient evidence to controvert the Respondent's claim. Reference was made to Sections 107 and 108 of the *Evidence Act*, Cap. 80 Laws of Kenya as well as the decision rendered in Palace Investments Limited v Geoffrey Kariuki Mwenda & another [2015] eKLR regarding the party bearing the burden of proof in civil cases.

10. It was equally counsel's submission that the duplum rule codified under Section 44A of the *Banking Act*, Cap. 488 Laws of Kenya was applicable to the matter. In closing, counsel for the Appellant contended that the trial court did not consider the evidence tendered by the Appellant. On those grounds, the court was urged to allow the appeal accordingly.

11. The Respondent naturally defended the trial court's judgment. Its counsel asserted that the trial court's judgment was sound, the Respondent having established the existence of a contract between the parties at all material times, by way of proforma invoices presented to the Appellant for acceptance and which formed the basis for supply of the requisite goods by the Respondent. Counsel cited the case of Fuelex Kenya Limited v Seed Group Limited [2000] eKLR where the court held that a transaction commenced by way of issuance of a proforma invoice supported by instructions and other relevant documentation constituted a valid contract. On the ingredients of a valid contract, he cited Savichem Africa Limited v General Printers Limited [2019] eKLR.

12. Counsel for the Respondent reiterated evidence by the Respondent that goods were supplied to the Appellant upon its request, followed by invoices indicating the sums owing to the Respondent. That the Appellant subsequently issued the Respondent with several cheques which were dishonoured upon presentation, thus default on the part of the Appellant in making the requisite payments. That in the end, the Appellant was indebted to the Respondent to the tune of Kshs. 2,541,924/- together with interest at the rate of 3% per month.

13. Concerning the interest in dispute, counsel emphatically submitted that this was based on an express term of the contract by virtue of its inclusion in the invoices issued to the Appellant by the Respondent, and that the latter was therefore entitled to the said interest. Here, citing the decision in Devcon Group Limited v Timsales Limited [2016] eKLR where it was held that courts cannot rewrite contracts. And Bawazir Glassworks Limited & Another v Asea Brown Boweri Limited [2015] eKLR where the court held that an interest rate of 3% per month was payable pursuant to the agreement entered into between the relevant parties, by way of a proforma invoice.

14. Finally, the Respondent's counsel contended that the provisions of Section 44A of the *Banking Act* as well as the duplum rule invoked in the Appellant's submissions, were inapplicable to the present circumstances, the Respondent not being an entity governed by the *Banking Act*. Based on these arguments, counsel urged that the appeal be dismissed with costs and the decision of the trial court be upheld.

15. The court has considered the record of appeal in respect of the appeal, the pleadings and original record of the proceedings as well as the submissions by the respective parties. The is a first appeal. In that regard, the Court of Appeal for East Africa set out the duty of the first appellate court in Selle v Associated Motor Boat Co. [1968] EA 123 in the following terms:

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.
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> An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

16. An appellate court will not normally interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See Ephantus Mwangi & Another v Duncan Mwangi Wambugu [1982 – 1988] IKAR 278.

17. The court will contemporaneously address the three (3) grounds of appeal. The Respondent's claim against the Appellant was primarily founded on payments allegedly outstanding upon certain material goods supplied to it by the Respondent, sometime in the year 2009. In that regard, the Respondent pleaded as follows under paragraphs 3, 4 and 5 of the plaint:

> " 3. The plaintiff's claim against the defendant is for Kshs. 2,541,924 being the balance of the agreed and/or reasonable amount due for goods sold and delivered to the defendant by the plaintiff at its Niku Hardware Division at the request of the defendant at Nairobi during 2009, particulars whereof are within the knowledge of the defendant.
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> 4. The defendant issued the following cheques which were all dishonoured on presentation.
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> i. Cheque No. 101006 dated 1/04/2009 for Kshs. 200,000/-
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> ii. Cheque No. 101030 dated 10/04/2009 for Kshs. 98,227/-
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> iii. Cheque No. 101036 dated 24/04/2009 for Kshs. 250,000/-
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> iv. Cheque No. 000008 dated 25/04/2009 for Kshs. 100,000/-
>
> v. Cheque No. 000024 dated 19/11/2009 for Kshs. 100,000/-
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> vi. Cheque No. 000160 dated 30/08/2009 for Kshs. 75,000/-
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> 5. The terms of the contract of sale between the parties, and which the defendant was well aware of was that interest accrued at 3% per month on all overdue invoices. The plaintiff claims interest on the sum of Kshs. 2,541,924/- at 3% per month from 1st October 2009 until payment in full." sic

18. In his statement of defence denying the averments in the plaint and liability, the Appellant averred as follows under paragraphs 3-6:

> " 3. The Defendant denies that there was a contract to supply and deliver as alleged and specifically denied that he there are monies outstanding. The Defendant puts the Plaintiff to strict proof thereof.
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> 4. The Defendant further avers that if there was any contract that existed the same was on "Sale or Return Basis" and the Plaintiff is out to unjustly enrich itself due to fabrication of accounts, uncontractual, unconscionable interest and illegal charges.

5. The Defendant in reply to paragraph 4 of the Plaint denies that it has failed to replace all bounced cheques and avers that he has replaced the same with cash and puts the Plaintiff to strict proof thereof.

6. The Defendant denies any sums due or payable on his part as alleged in these proceedings and puts the Defendant to these proceedings to strict proof thereof." sic

19. During the trial, the Respondent relied on the testimony of one witness. Parimal Raithatha who was PW1 adopted his executed witness statement dated 17th June, 2013 as his evidence-in-chief. He then proceeded to testify inter alia, that he worked as the Respondent's General Manager at all material times. The witness then testified that the Appellant was a regular customer of the Respondent who would supply goods to the former on credit from the year 2004. That it was not until sometime in the year 2009 when the Appellant began to issue bad cheques. He said that no agreement based on sale or return subsisted between the parties herein; and that the invoices issued to the Appellant contained Clause 4 which stipulated interest at the rate of 3% for late payment.

20. In cross-examination, the witness stated that the Respondent would supply the Appellant's representative (Eric Mwangi), with goods documented in respective invoices upon the Appellant's verbal instructions or written request via a complimentary note; whereupon the Appellant would issue the Respondent with post-dated cheques. The witness further disputed that the Appellant replaced the returned cheques with cash payments. That the first bad cheque was that dated 1/04/2009 despite which, the Respondent continued to supply the Appellant with the requisite goods until end of April, of the same year. He asserted that even though no express contract was executed concerning interest, the invoices issued to the Appellant provided for interest at the rate of 3%, a matter the Appellant was privy to, at all material times.

21. During re-examination, PW1 restated that the Appellant's representative upon collecting goods on his behalf and would append his signature at the bottom of the invoices. He further stated that on occasion, the Appellant would make lumpsum payments on the goods delivered and that the cheques issued would be delivered either by himself or through his representative.

22. On his part, the Appellant who was DW1 upon adopting his executed witness statement dated 6th September, 2013 proceeded to testify that although no written contract existed between the parties, he was at all material in a business relationship with the Respondent. Ordinarily placing orders for goods by way of complimentary notes which goods would be collected from Respondent's premises personally or through his representative. Following which he would issue post-dated cheques.

23. The Appellant stated that upon delivery of the goods, he would sign the respective invoices and that whenever a cheque was returned, he would make good in cash before the next order for supply of goods. Reiterating that supplies were made on the post-dated cheques and no further supplies would be made until payments had been made on previous supplies. It was his testimony that the invoices relied on at the trial were never signed by him and are therefore unfamiliar to him. It was equally his testimony that some of the orders purportedly made are not accompanied by complimentary notes and hence the Respondent's claim was not supported.

24. In cross-examination, the Appellant testified that he was a customer of the Respondent between the years 2003 and 2009. That he ordinarily sent his driver with a complimentary note and post-dated cheque, and that the goods were delivered to him on credit. The Appellant confirmed that he is the one who issued the cheques tendered by the Respondent at the trial and further confirmed that some of the cheques remained unpaid. He testified that he could not ascertain which of the cheques were

paid. The Appellant equally confirmed that he received goods from the Respondent in the month of April, 2009 but stated that he made full payments on the said goods. Admitting that the cheque for the sum of Kshs. 98,227/- was returned unpaid, he asserted that he later replaced it with cash, as was customary with returned cheques.

25. The trial court after restating and analyzing the evidence, held that evidence tendered confirmed the existence of a valid contract between the parties herein. Regarding whether the payments sought in the plaint were outstanding, the trial court reasoned that the Appellant despite having admitted issuing the particularized cheques did not tender any evidence to support his testimony that the same were replaced by way of cash payments. The trial court further observed that the Appellant did not call any evidence to rebut the Respondent's evidence that the cheques were dishonored. And on that basis, the court was satisfied that the Appellant was indebted to the Respondent, in the sums claimed and with interest at the rate of 3% per month. In the result, the trial court granted the reliefs sought in the plaint.

26. The duty of this court is to review the evidence and while drawing its own conclusions determine whether the findings of the lower court on issues in dispute were well founded. The burden of proof in civil cases rests with the plaintiff at all material times, while the standard of proof is held on a balance of probabilities. In Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91, the Court of Appeal stated in this regard that:

> "We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail." (Emphasis added).

27. The applicable law as to the burden of proof is set out under Sections 107, 108 and 109 of the *Evidence Act*. The Court of Appeal in Mumbi M'Nabea v David M.Wachira [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say:

> "In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:
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> "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." The above provision provides for the legal burden of proof.
>
> However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:
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> "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."

The position was re-affirmed by the Court of Appeal in Maria Ciabaitaru M'mairanyi & Others v Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:

"Whereas under section 107 of the *Evidence Act*, (which deals with the legal evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence."

28. The latter statement alludes to the position that the legal burden of proof, unlike the evidentiary burden of proof does not shift. In reiterating the standard of proof, the Court of Appeal in Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another [2015] eKLR 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 a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
>
> This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the 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."

29. From these authorities, it is clear that the duty of proving the averments in the plaint lay squarely with the Respondent. In Karugi & Another v Kabiya & 3 Others [1987] KLR 347 the Court of Appeal stated that:

> " The burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendants' failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant.... The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim." (Emphasis added)

30. A key issue arising in the matter was whether a contract or a valid one for that matter, existed between the parties herein in the material period. The ingredients of a valid contract were spelt out by the Court of Appeal in Charles Mwirigi Miriti v Thananga Tea Growers Sacco Ltd & Another [2014] eKLR as follows:

> " It is trite that there are three essential elements for a valid contract that is an offer, acceptance and consideration."

31. On its part, the Respondent affirmed the existence of a contractual relationship between the parties between the years 2003 and 2009. From a re-examination of the record, the court observed that while

the Appellant appeared to contest the existence of a contract between the parties by his pleadings before the trial court and submissions on appeal, he admitted in his oral testimony to the existence of a contract for supply of goods between the parties at all material times. Which gives credence to the evidence tendered on behalf of the Respondent. More specifically, the Appellant admitted to placing orders with the Respondent for the supply of goods by way of complimentary notes, and to making payments thereon. He also admitted collection of such ordered goods by himself or through his representative, one Eric Mwangi.

32. The foregoing admissions align with the documentation constituting part of the Respondent's list and bundle of documents dated 17th June, 2012, namely, copies of the invoices found on pages 7-26. Some of these invoices were accompanied by complimentary notes admittedly issued by the Appellant, as well as copies of various cheques issued by the Appellant in favour of the Respondent. (see pages 1-6). This is clear indication of the existence of a valid partially oral and partially written contract between the parties.

33. The Court of Appeal while dealing with similar circumstances in Devcon Group Limited v Timsales Limited [2016] eKLR stated that:

> " In this case we find that the respondent's contention that there was an oral agreement between the parties to deliver timber products to the appellant is corroborated by the delivery notes and invoices produced in court. We concur with the following sentiments of the trial court,
>
> "To conclude this point, the evidence adduced by the plaintiff (respondent) clearly demonstrates that there was a contract between the plaintiff and the defendant. The contract was partly oral and partly written. There were offers to buy products from the plaintiff by the defendant through purchase orders, made to the plaintiff in writing. There was an acceptance of that offer through the delivery of the products to the defendant or through collection by the defendant, which was acknowledged in writing by the signing of the delivery notes. There was consideration which the plaintiff claimed from the defendant through invoices."

34. In the premises, the Appellant herein cannot convincingly dispute that a valid contract existed between him and the Respondent. Flowing from the foregoing, the court is satisfied that on the evidence on record that the parties herein enjoyed a contractual business relationship at all material times. Consequently, the court finds that the trial court's finding that a valid contract existed in the material period between the parties herein was sound.

35. The next key question falling for determination is whether the Respondent's evidence proved the claim against the Appellant to the required standard; and consequently, whether the award of Kshs. 2,541,924/- with interest at the rate of 3% per month was justified.

36. The Respondent's case was that upon delivery of the material goods, the Appellant issued it with cheques totaling Kshs. 2,541,924/- that were returned unpaid and remained unpaid. Moreover, that it was a term of the contract (per invoices) that interest would be charged at 3% per month on all overdue accounts and on this basis, the Respondent was entitled to the sum awarded and interest.

37. Although the Appellant attempted to challenge the orders and related invoices relied on by the Respondent, on the basis that, he had not signed some of the invoices and that the invoices were not accompanied by complimentary notes, he admitted having issued the Respondent with the related cheques (see pages 1-6 of the latter's bundle of documents) in settlement of the invoices. Stating however that upon the cheques being returned unpaid, he made good through cash payments.

38. The record contains the Respondent's invoices to the Appellant in respect of various goods supplied by the Respondent on various dates, (See pages 7-26 of the Respondent's bundle of documents). These invoices bear signatures acknowledging receipt of the goods. Some of the invoices bear the name Eric Mwangi, the Appellant's admitted representative, who would admittedly collect goods on his behalf on occasion.

39. While the Appellant stated that he did not recognize the signatures on the invoices, he did not demonstrate that the appended signatures were not made by himself or his representative. Bearing in mind his admitted issuance of cheques in favour of the Respondent in purported payment for the goods delivered on the said invoices, it appears more probable than not that the goods were indeed received by the Appellant. And although the Appellant admitted that the cheques were returned unpaid, his claim that the said cheques were eventually replaced with cash payments, was not supported by any evidence.

40. The admitted cheques as particularized constitute part of the Respondent's bundle of documents and are found on pages 1-6 therein in the following order:

    i. Cheque No. 101030 dated 10/04/2009 for Kshs. 98,227/-

    ii. Cheque No. 101036 dated 24/04/2009 for Kshs. 250,000/-

    iii. Cheque No. 101006 dated 1/04/2009 for Kshs. 200,000/-

    iv. Cheque No. 000008 dated 25/04/2009 for Kshs. 100,000/-

    v. Cheque No. 000024 dated 19/11/2009 for Kshs. 100,000/-

    vi. Cheque No. 000160 dated 30/08/2009 for Kshs. 75,000/-

41. The correct total of cheques is Kshs.823,227/- and not Kshs. 2,541,924/- which was sought and consequently awarded by the trial court. The former is the sum proven by the Respondent as owing from the Appellant, and the trial court erred, while analyzing the Respondent's evidence in support of its claim, by failing to calculate the total of the sums reflected on the cheques.

42. Regarding the rate of interest applicable, the court upon perusing the invoices issued to the Appellant by the Respondent (found on pages 7-26 of the Respondent's bundle of documents), noted therein Clause 4 which stipulated that "Interest at 3% per month will be charged on all overdue accounts." The Appellant was evidently aware of this clause, given his admissions concerning the issuance of the invoices in question at delivery of orders. He must be deemed, by his conduct, to have agreed to the terms set out in the invoices. In the absence of evidence to the contrary, the court is satisfied that the term on interest became applicable upon default by the Appellant, and consequently, the trial court's finding on that score cannot be faulted.

43. The Court of Appeal faced with a similar contestation regarding interest levied on invoiced goods due to overdue accounts in Devcon Group Limited v Timsales Limited (supra) stated:

> " One of the terms as indicated in the delivery notes and invoices was that interest at the rate of 3% would be charged on all overdue accounts. Another term, according to the respondent's evidence, was that interest would accrue upon the appellant failing to pay for goods within 30 days of delivery.
>
> With regard to the interest of 3% on the outstanding amount we concur with the trial court that it was clear from the documents on record that the same was a term agreed upon by the

parties. As such the trial court was correct in not interfering with the intention of the parties since it would have been tantamount to re-writing the contract between the parties".

44. The Court here applying the principle enunciated by it in National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd [2002] 2 E.A. 503, [2011] eKLR to the effect that:

> " A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved."

45. Section 44A of the *Banking Act*, which the Appellant called to his aid provides no succor to his case; the section has no bearing or application in this case. The *Banking Act* applies to banking and financial institutions, a category to which the Respondent does not belong being merely a regular business entity trading in goods.

46. On the Appellant's separate complaint that the trial court overlooked the Appellant's evidence, the court having reviewed the judgment of the trial court against the evidence before it found no merit in the complaint.

47. In the result, the court is of the considered view that the trial court's conclusions were well founded, except for the erroneous tally of the unpaid cheques at Kshs. 2,541,924. The correct total of the returned cheque sums, which is the sum owed by the Appellant to the Respondent is Appellant is Kshs.823,227/. This is the sum the Respondent would be entitled to, together with interest at the agreed rate of 3% per month from 1st October 2009 until payment in full. In the premises, the court will vary the judgment of the trial court in that regard.

48. The appeal partially succeeds on arithmetic only, that is, the correct tally derived from the returned cheques exhibited at the trial. Consequently, the judgment of the trial is varied to reflect an award to the Respondent, against the Appellant in the sum of Kshs.823,227/- with interest at the rate of 3% per month from 1st October 2009 until payment in full. The court maintains the order of the trial court awarding the costs of the suit in the lower court to the Respondent. The final order that commends itself in the circumstances is to award half the costs of the appeal to the Respondent. It is so ordered.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 13TH DAY OF JUNE 2024.

C.MEOLI

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:

For the Appellant: Ms. Onyancha h/b for Nyandieka

For the Respondent: Ms. Muthiani h/b for Mr. Makori

C/A: Erick