



**Adix Plastics Limited v Jane Ndanu Kavingo t/a Gentex Gen Agencies (Civil Appeal E279 of 2021) [2024] KEHC 8730 (KLR) (Civ) (8 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8730 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E279 OF 2021**

**CW MEOLI, J**

**JULY 8, 2024**

**BETWEEN**

**ADIX PLASTICS LIMITED ..... APPELLANT**

**AND**

**JANE NDANU KAVINGO T/A GENTEX GEN AGENCIES ..... RESPONDENT**

*(Being an appeal from the judgment of Wanjala, E, PM. delivered on 27th April 2021 in Nairobi CMCC No. 7815 of 2017)*

**JUDGMENT**

1. This appeal emanates from the judgment delivered on 27<sup>th</sup> April, 2021 in Nairobi CMCC No. 7815 of 2017. The suit in the lower court was commenced by way of the plaint dated 23<sup>rd</sup> October 2017, amended on 8<sup>th</sup> August, 2018 and further amended on 18<sup>th</sup> December, 2019 (the re-amended plaint). The suit was brought by Jane Ndanu Kavingo T/A Gentex Gen Agencies the plaintiff in the lower court (hereafter the Respondent) against Adix Plastics Limited, the defendant in the lower court (hereafter the Appellant). The Respondent sought various reliefs therein, arising from a claim for alleged breach of contract in respect of supply of goods, namely:
  - a. A declaration that the Defendant's issuance of goods of improper description resulted in accrual of the Plaintiff's right to rescind the contract and declare it null and void.
  - b. A refund of the purchase price of Kshs. 884,000/- together with interest thereon from the dates of the depositing in the Defendant's account until payment in full.
  - c. A refund for expense incurred to hire a vehicle and pay the driver to return the goods to the Defendant's premises the same being Kshs. 58,000/-.



- d. Loss of expected business profit for the full tender cancellation the same being Kshs. 5,000,500/-.
  - e. Costs of the suit together with interest on b) and c) at the court's rate from the time of filing the suit until payment in full.
2. It was pleaded in the further amended plaint that the Respondent who was at all material times engaged in the business of hardware sales and supplies within Makueni County (the County), successfully bid for a tender from the said County on 3<sup>rd</sup> March, 2017 for the supply and delivery of plastic kiddy tables and chairs under the specific terms of the quotation reference number GMC/E/T/106/2016/2017 (the tender). It was similarly pleaded that thereafter, on or about 2<sup>nd</sup> May, 2017 the Respondent entered into a contractual agreement with the Appellant, as particularized in paragraph 5 of the further amended plaint:

“5. On or about the 2<sup>nd</sup> of May 2017, the Plaintiff entered into an Agreement (hereafter referred to as “the said Agreement”) with the defendant company Adix Plastics Limited.

Particulars Of The Said Agreement

The said Agreement was made partly orally, partly in writing and partly by conduct.

- i. In so far as it was oral, the said Agreement was made on or about the 2<sup>nd</sup> of May 2017 during discussions held between Mr. Mulonzi (the Plaintiff's Manager) and a Mr. Hudsap from the Defendant company.
- ii. In so far as it was in writing, the said Agreement was contained in or can be inferred from the following documents:
  - a. Invoices dated 8<sup>th</sup> May 2017,
  - b. Delivery notes issued on 8<sup>th</sup> and 9<sup>th</sup> May 2017,
  - c. Bank Credit Advice dated 29<sup>th</sup> April 2017,
  - d. Bank Credit Advice dated 4<sup>th</sup> May 2017,
  - e. Payment receipts
  - ...
- iii. In so far as the said Agreement was by conduct, or in so far as the same may be inferred from course of dealings between the parties, whereby:-
  - a. The Plaintiff issued the Defendant with strict specification pursuant to the terms of the tender from her client.
  - b. The Defendant sold the said goods at the request of the Plaintiff.
  - c. The Defendant delivered the said goods to the said Plaintiff's premises.



- d. The Defendant acted in a manner that suggested that it was in a position to honour the terms and conditions of the said specification to supply/manufacture plastic tables of the description 90cm by 55cm in size.” sic
3. She averred that under the terms of the agreement the Respondent would place an order for the specific goods pursuant to the tender and would effect the requisite payments to the Appellant’s bank accounts, and upon confirming payment thereof, the Appellant would commence the supply/manufacture of the ordered goods; that upon the goods being processed, the Respondent would inspect them to confirm that they conformed to the required specifications and were fit for the intended purpose; and that upon approval thereof by the Respondent, the Appellant would dispatch the said goods to a destination agreed upon between the parties, being the County.
4. The Respondent averred further that upon entering into the agreement, the parties herein continued to trade in line with the terms set out therein, at all material times. The Respondent then averred that later on 8<sup>th</sup> May, 2017 the Appellant communicated to the Respondent that it had completed manufacture of the requisite goods and therefore required the latter’s inspection and approval thereof, before proceeding to dispatch them.
5. That the Respondent’s Operations Manager, Mr. Victor Mbithi, proceeded to the Appellant’s premises to inspect and verify the said goods on the aforesaid date, but upon arrival, the goods were not available to him for inspection and ascertainment. That soon thereafter, the goods were brought into the premises, already loaded up for transportation, thus denying Mr. Mbithi an opportunity to undertake inspection thereof, with the Appellant’s agent proceeding to instruct his driver to deliver the goods as they were, to the County.
6. That it was discovered upon delivery that the goods did not meet the requisite specifications, a fact which was brought to the attention of the Appellant by the Respondent. Despite this notice, the Appellant proceeded to supply and deliver a second set of similar goods to the County. The Respondent averred that upon further deliberations between the parties’ agents, it was agreed that the goods would be returned to the Appellant’s premises and the relevant sums paid in that regard would be refunded to the Respondent. That notwithstanding the return of the goods to the Appellant’s premises on 12<sup>th</sup> May, 2017, the Appellant neglected and/or failed to refund the purchase price of Kshs. 884,000/-. That the above events resulted in cancellation of the tender awarded to the Respondent by the County, occasioning her loss of income.
7. That in the premises, the Respondent sought against the Appellant compensation for loss of business to the tune of Kshs. 5,005,500/- as well as a refund of the purchase price to the tune of Kshs. 884,000/-, the cost of transportation and hiring of a driver amounting to Kshs. 58,000/-. The sums claimed amounted to Kshs. 5,942,500/-.
8. The Appellant entered appearance and filed the statement of defence dated 19<sup>th</sup> December 2017 and amended on 9<sup>th</sup> November, 2018 (the amended defence) denying the key averments in the further amended plaint and liability. The Appellant denied having knowledge of the tender which allegedly existed between the Respondent and further denied that any issue was raised concerning the quality of goods supplied.
9. The Appellant averred that upon the Respondent’s request for supply of 1920 tables, her representative identified a sample thereof from the Appellant’s selection and therefore requested the latter to supply tables of similar specification. The Appellant similarly averred that the goods supplied



conformed to the sample specifications requested and that upon visiting its premises on the aforesaid 8<sup>th</sup> May, 2017 the Respondent's representative confirmed this to be the position and supervised the loading of the goods to the truck for delivery. It denied agreeing to return the delivered goods, averring instead that the Respondent's representative upon visiting its premises sometime on or about 11<sup>th</sup> May, 2017 informed it that the tender had failed and therefore requested that the delivered goods be returned.

10. That in the premises, the Appellant was in no way obligated to return the goods once delivered or to refund the sums already paid. The Appellant therefore denied that the Respondent was entitled to the sums sought in the re-amended plaint.
11. The suit proceeded for full hearing with the Respondent testifying and calling one (1) additional witness. The Appellant relied on the testimonies of three (3) witnesses. Upon close of submissions, the trial court by way of the judgment delivered on 27<sup>th</sup> April, 2021 partially allowed the Respondent's claim, thus awarding her the sum of Kshs. 884,000/- plus costs of the suit and interest thereon.
12. Aggrieved by the outcome, the Appellant preferred this appeal by way of the memorandum of appeal dated 24<sup>th</sup> May, 2021 which is based on the following grounds:-
  - “ 1. That the Learned Magistrate erred in law and fact by failing to find that the Sale of Goods by the Appellant to the Respondent was a Sale by Sample in terms of the facts and circumstances of the case and particularly in terms of the *Sale of Goods Act* (CAP 33).
  2. That the Learned Magistrate erred in law and fact by failing to find that the Respondent having had a full opportunity to inspect a sample of the Goods subject of the Agreement between the parties and in the absence of an express or implied Warranty as to the quality of the Goods, was not entitled to reject the goods which matched the sample and subsequently were accepted by them.
  3. That further and/or in the alternative to Ground (2) supra the Appellant avers that the Learned Magistrate erred in fact in failing to hold that the Respondent not only had a full opportunity to inspect the Goods subject to the Agreement between the Parties but further accepted the said Goods as a result of which the property therein passed to the Respondent.
  4. That the Learned Magistrate erred in law and fact in failing to hold that the Respondent waived their right to reject the Goods once the said Goods were accepted upon delivery and further that the Contract between the Parties had an express Clause and Condition of Sale on when the Goods could be rejected or discrepancies raised.
  5. That the Honourable Learned Magistrate erred in law and fact in awarding the Respondent the sum of Kshs. 884,000/- together with costs and interest on the said sum being the sum claimed by the Respondent as a refund for the Goods delivered by the Appellant when the said sum was not refundable in the circumstances of the case.
  6. That the Learned Trial Magistrate erred in law and fact in failing to consider the Appellant's submissions and authorities in arriving at her finding.



7. That the Honourable learned Magistrate erred in law and fact in finding for the Respondent which finding was contradictory and against the weight of the evidence and submissions tendered.” (sic)
13. The appeal was canvassed by way of written submissions. Counsel for the Appellant anchored his submissions on the decision in *M’Bita Ntiro v Mbae Mwirichia & another* [2018] eKLR regarding the principle that he who alleges must prove, as well as the decision in *Raila Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR regarding the evidential burden of proof. Counsel went on to argue that the trial court having found that the Respondent had failed to prove that the sale in question was based on description, it followed that the Respondent had no right to rescind the contractual agreement to entitle her to refund of the sums sought. That the trial court therefore erred in allowing her prayer for refund.
14. Counsel argued that instead, the sale was by sample, which meant that upon delivery of the material goods, ownership thereof passed to the Respondent, and she could not therefore reject the said goods, pursuant to Section 20(d) of the *Sale of Goods Act* (the Act) as well as Sections 13 and 16 of the said Act. Reference was made to the decision in *Smith v Hughes* [1871] LR 597 where the court held that where goods are offered for sale without a warranty and the buyer having had an opportunity to inspect the said goods before purchasing them, he or she is regarded to have exercised his or her own judgment. According to counsel, evidence was tendered at the trial to demonstrate that the Respondent’s representative inspected the material goods before accepting them and hence property therein had passed to the said Respondent upon delivery. That in the circumstances, the Respondent had failed to discharge the burden of proof in her claim and hence the suit ought to have been dismissed in its entirety.
15. The Appellant’s counsel went on to submit that flowing from the foregoing, his client had no legal obligation to accept a return of the material goods and that any return was accepted on the policy condition that the goods were in proper condition. It was therefore submitted that the Appellant acted in accordance with the terms of the agreement and the trial court ought to have dismissed the case entirely, for want of proof. On those grounds, counsel urged this court upon the principles for consideration by an appellate court as set out in *Selle & Another V Associated Motor Boat Company Ltd & Others*, [1968] EA 123, to allow the appeal accordingly.
16. The Respondent naturally defended the trial court’s award. Counsel for the Respondent submitted that it is not disputed that the Respondent placed an order with the Appellant, for the supply of 1920 kiddy tables. That it is equally not disputed that the said order was paid for by the Respondent and that upon delivery thereof to the County, the tables/goods were rejected and therefore returned to the Appellant. That in the circumstances, the trial court acted correctly by finding that the Respondent was entitled to a refund on the rejected goods.
17. Counsel further submitted that the trial court rightly held that it could not ascertain from the material tendered, whether the sale in question was by sample or description, but that notwithstanding, the Respondent had proved her claim for breach of contract, against the Appellant. It was counsel’s contention that in any case, the Appellant’s representative willingly agreed to accept the returned goods, following an agreement between the parties to that effect.
18. Counsel further argued denial of the Respondent to a refund of the sums already paid on the returned goods would have amounted to unjust enrichment on the part of the Appellant and hence the trial court acted correctly in awarding the sums sought as a refund. To buttress his point here, counsel relied on the decisions in *Joel Mwangangi Kithure v Priscah Mukorimburi* [2022] eKLR and *Pinnacle*



Projects Limited vs. Presbyterian Church of East Africa, Ngong Parish & another [2018] eKLR where the doctrine of unjust enrichment was considered.

19. On the question whether the material goods were inspected before delivery, it was counsel's contention that the evidence tendered on behalf of the Respondent is that her representative, Mr. Victor Mbithi, did not have an opportunity to inspect the said goods; that this evidence was uncontroverted, while The Appellant's evidence to the contrary was not credible. In the premises, the court was urged to dismiss the appeal with costs, and to uphold the decision of the trial court.
20. The court has considered the record of appeal, the pleadings and original record of the proceedings as well as the submissions by the respective parties. This is a first appeal. 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.

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.”

21. An appellate court will not ordinarily 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.
22. The legal position is that 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).



23. The following constitutes the oral evidence tendered at the trial. The Respondent who was PW1 identifying herself as a business lady adopted her executed witness statement filed on 2<sup>nd</sup> November, 2017 as part of her evidence-in-chief and produced her list and bundle of documents dated 23<sup>rd</sup> October, 2017 as P. Exhibits 1-7 in the following order: local service order (P. Exhibit 1); invoices dated 8<sup>th</sup> May, 2017 and 9<sup>th</sup> May, 2017 (P. Exhibit 2 (a) and (b)); receipts (P. Exhibit 3); delivery notes dated 8<sup>th</sup> September, 2017 and 9<sup>th</sup> May, 2017 (P. Exhibits 4 (a) and (b)); letter dated 19<sup>th</sup> June, 2017 (P. Exhibit 5); cash paid to one Geoffrey (P. Exhibit 6); and demand letter dated 23<sup>rd</sup> May, 2017 (P. Exhibit 7). She then proceeded to briefly state that the Appellant declined to refund the sums paid on the returned goods.
24. In cross-examination, the Respondent testified that she did not have the specific information regarding the tables which had been ordered, and that the invoice produced as P. Exh.2 (b) was directed at Gentex Gen Agencies being the company through which she trades. The Respondent further testified that she neither visited the Appellant's premises at any time, nor issue it with a contract. During re-examination, it was her testimony that the material goods were delivered to the County and not to her premises.
25. Harrison Musyoki Muyunzi who was PW2 equally adopted his witness statement filed on 2<sup>nd</sup> November, 2017 as evidence. He stated that upon receipt of the tender from the Company, he went to the Appellant's premises and selected the tables meeting the desired specification , namely 90cm by 55 cm, but that the same were unavailable at the time, according to the Appellant's representative. That the said representative however indicated that tables bearing the same specifications could be manufactured. That consequently, he paid the sum of Kshs. 884,000/- for the manufacture and supply of 1920 tables by way of two (2) instalments made on 27<sup>th</sup> April, 2017 (for a sum of Kshs. 434,000/-) and 24<sup>th</sup> May, 2017 (for a sum of Kshs. 450,000/-).
26. That subsequently, upon receiving communication from the Appellant's representatives to the effect that the tables were ready for collection, the witness sent a representative to collect them on 8<sup>th</sup> May, 2017, though the Appellant's representative transported the said tables using its own vehicles, without the supervision of the Respondent's agent. That the tables were delivered to the County but that on 9<sup>th</sup> May, 2017 the witness received communication from the County's representative, essentially rejecting the tables for not meeting the relevant specifications.
27. That upon contacting one Hizak of the Appellant, it was agreed that the tables be returned to the Appellant's premises, save that the Respondent would be held liable for any broken or otherwise destroyed tables. That the tables were consequently returned on 12<sup>th</sup> and 13<sup>th</sup> May, 2017 respectively, through driver Geoffrey Musyoki whose services had been sought by the witness. That both batches were accepted and offloaded at the Appellant's premises, even though the Appellant's representative claimed that a few of the tables were broken. The witness stated that even so, the Respondent never received a refund on the sums paid towards the material tables, adding that arising from the rejection of the tables, the County canceled the tender with the Respondent.
28. In cross-examination, the witness testified that he was at all material times a director of Gentex General Supplies (the Company) which company traded with the Appellant, notwithstanding the fact that the invoices tendered as P. Exhibit 2 (a) and (b) were issued in the name of Gentex Gen Agencies being the company through which the Respondent trades. That the two are separate but related entities. The witness further testified that he did not have any documentation to support his averment regarding the specifications conveyed to the Appellant. It was his evidence that one Victor, was assigned to collect the tables, but that the said Victor was not present at the time of loading of the said tables for delivery to the County premises. That upon rejection thereof, the witness informed the Appellant of the position via telephone communication and the latter accepted the return thereof.



29. During re-examination, PW2 stated inter alia, that he was present at the time of return of the second batch of tables.
30. For the defence, Hardick Dave who was DW1 stated that he is a director of the Appellant and proceeded to adopt his witness statement dated 19<sup>th</sup> February 2019 as evidence. The witness testified that sometime in April, 2017 he was approached by Harrison (PW2) and one Joshua, who were looking to purchase tables. That upon being shown samples displayed in the Appellant's premises, the two placed an order for approximately 1920 tables similar to the sample shown and made payments to the tune of Kshs. 884,000/- prior to delivery thereof. That when the required tables were ready for delivery, the two gentlemen again visited the Appellant's premises on 8<sup>th</sup> May, 2017 to inspect the same before the loading process was done. That delivery was made to the County, as per the instructions. He stated that subsequently on 9<sup>th</sup> May, 2017 a second batch of the ordered goods were similarly delivered to the County premises.
31. However, it was not until 11<sup>th</sup> May, 2017 that Harrison contacted him, requesting to be allowed to return the delivered tables on the basis that the tender had been cancelled by the County. That his request was accepted on the condition that only tables in good condition would be accepted back. That the tables were returned to the Appellant's premises on 12<sup>th</sup> and 13<sup>th</sup> May, 2017 respectively, with the witness noting that out of the returned tables, 234 were damaged and were therefore declined by the witness.
32. In cross-examination, DW1 stated inter alia, that delivery notes were issued to the two gentlemen hereinabove. The witness confirmed that he received the price for 1920 tables and reiterated his earlier evidence on receiving the returned tables, some of which had suffered damage, and which resulted in a disagreement. That it was eventually agreed that the tables in good condition would be resold, while Harrison left the premises with those in a broken state. That it was further agreed that a refund would only be made on the good tables which are 1023 in number, but that he later changed his mind on the refund upon receiving threats.
33. The witness testified that the tables supplied are all standard in size, stating in re-examination that a total of 277 of the delivered tables were broken.
34. Utsav Shah who testified as DW2 equally adopted his signed witness statement dated 19<sup>th</sup> February, 2019 as his evidence -in-chief and stated that he was at all material times the Finance Controller of the Appellant. He then echoed the testimony of DW1 regarding the manner in which the material goods were selected, paid for and delivered to the County, further stating that both Harrison and Joshua were present at the time of loading of the tables up until the time of delivery thereof. The witness also echoed the testimony of his counterpart, that on 11<sup>th</sup> May, 2017 Harrison approached them with information regarding the tender that fell through, and thus requesting that they accept return of the tables. That in the ordinary course of business, the Appellant does not receive returned goods once delivered, but that an exception was made here, as an act of goodwill, on the condition that the Appellant's representatives would only accept tables returned in decent condition. That nonetheless, some of the tables were returned to the Appellant in broken condition.
35. In cross-examination, the witness testified inter alia, that he was the first point of contact for the Respondent's representatives and that he was present on the date on which the material tables were loaded for delivery. He then restated his earlier testimony, adding that 1900 tables were returned to the Appellant's premises following the request by Harrison, out of which 277 were broken. That the matter was escalated to the police following a dispute which ensued, but that the police did not



- ascertain the number of broken tables. He stated during re-examination that the Appellant typically refunds broken tables.
36. Richard Musyoki was DW3. Upon adopting his executed witness statement dated 19<sup>th</sup> February, 2019 he proceeded to state that he has worked for the Appellant as a driver, at all material times. The witness recalled undertaking the deliveries on the material dates, on behalf of the Respondent. The witness recalled that at the time of loading the material tables, both Harrison and Joshua were present in the premises and that he acted upon their directions on where to deliver the same. That upon arriving at the County, he together with Joshua and the turnboy, offloaded the delivered goods on 8<sup>th</sup> May, 2017 during which time it was discovered that one of the goods was damaged, but the same was later replaced through the second consignment of 9<sup>th</sup> May, 2017. That similar to the first consignment of 8<sup>th</sup> May, 2017 Joshua assisted the witness in offloading the delivered goods at the designated point. That however, the witness was not present at the time during which the goods were returned.
  37. During cross-examination, it was his evidence inter alia, that the delivery notes which were tendered at the trial are a confirmation of delivery of the material goods. At the point of re-examination, the witness testified that his sole duties are to undertake deliveries and to ensure the delivery notes and other relevant documents are signed.
  38. Subsequently, DW1 was recalled, with the aim of producing CCTV footage allegedly showing that Harrison and Joshua were present in the Appellant's premises on the material date of 8<sup>th</sup> May, 2017. In cross-examination, the witness stated that the footage merely captured the point at which the lorry had already been loaded with the material goods, that no footage existed to show the events prior thereto. A second CCTV clip was tendered showing the reception area, where one Victor was alleged to have presented a deposit slip for purchase of the material goods. This marked the close of the defence case.
  39. Having earlier summed up the contents of the pleadings which were relied on by the parties and set out the respective oral testimonies, the trial court after restating and analyzing the evidence reasoned that it was not in dispute that the parties herein had entered into an agreement pertaining to the supply and delivery of the material goods, namely 1920 tables. The trial court further reasoned that it was not in dispute that upon placing an order for supply of the mentioned goods, the Respondent made payments to the Appellant for the same, to the tune of Kshs. 884,000/-. The trial court set out the events which followed, namely the delivery and subsequent return of the goods to the Appellant's premises, which were equally not controverted.
  40. According to the trial court, the key issue for determination was whether the Respondent had proved her claim to the effect that the goods supplied by the Appellant did not meet the specifications agreed upon, and whether the Respondent was entitled to a refund of the sums paid as well as the additional reliefs sought in the claim, as a result.
  41. On the question whether the goods supplied were by sample or description, the trial court concluded that going by the evidence tendered, the material goods did not fall in either category, but that the same was merely specific on the number of tables to be supplied, which was 1920. Regarding whether the Respondent's representative inspected the material goods prior to their delivery, it was the holding by the trial court that the evidence tendered at the trial did not assist in ascertaining whether the said goods were inspected at any material time. As concerns the other pertinent issue whether the Respondent was entitled to the reliefs sought, the trial court held that she was entitled to a refund of the sum of Kshs. 884,000/- being the total sum paid in respect of the 1920 tables which were delivered but later returned to the Appellant. Nevertheless, the trial court declined to grant the remaining sums sought, namely a refund for expense incurred to hire a vehicle and pay the driver to return the goods to the



Defendant's premises in the sum of Kshs. 58,000/- and loss of expected business profit for the full tender cancellation in the sum of Kshs. 5,000,500/-.

42. 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:

“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:

“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.”

43. 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 –vs- 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.”



44. From the foregoing, it is clear that the duty of proving the averments contained in the re-amended plaint lay squarely with the Respondent. In *Karugi & Another V. Kabiya & 3 Others* (1987) KLR 347 the Court of Appeal stated that:

“[T]he 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)

45. Upon re-examination of the pleadings and material on the lower court record, the court concurs with the findings by the trial court that it was not disputed that the parties herein had at all material times entered into an agreement for the supply and delivery of the material goods, namely 1920 tables by the Appellant; that that following the order made for supply of the mentioned goods, the Respondent paid a sum of Kshs. 884,000/- to the Appellant thereon towards supply of the said goods; that the material goods were delivered to the County by the Appellant’s agent on the material dates of 8<sup>th</sup> and 9<sup>th</sup> May, 2017 respectively, before subsequently being returned to the Appellant’s premises, at the request of the Respondent’s representative(s).

46. The crux of the appeal is whether the trial court arrived at a correct finding on the issue whether the Respondent had proved her case for breach of contract to the required standard or at all, on the basis that the material goods did not meet the specifications agreed upon, and whether she was entitled to a refund of the sum of Kshs.884,000/- as a result. This would give rise to the question whether the material goods were ordered by description or by sample.

47. From the pleadings and material tendered at the trial, the Respondent’s claim was that the relevant order was made by description by way of specifications of 90cm by 55cm, only for it to be discovered upon delivery to the designated place, that the delivered goods did not match the specifications given by the Respondent’s representative. In contrast, the Appellant’s case and evidence was that the order made by the Respondent and/or her representatives was on sample, and that the goods manufactured and delivered were in accordance with the sample selected, and further, that the Respondent’s representatives did inspect the goods at the time of loading and approved the same for delivery. That it was only later that the Respondent through her representatives, rejected the delivered goods and requested for a refund of the sum of Kshs. 884,000/- thereon, by which time the property in the goods had already passed to the Respondent and the agreement could not therefore be rescinded.

48. Section 15 of the *Sale of Goods Act*, Cap. 31 Laws of Kenya (the Act) stipulates as follows regarding a contract for sale of goods by description:

“Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and, if the sale is by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.”

49. The Act further provides for contracts for the sale of goods by sample under Section 17, thus:-



1. A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.
  - (2) In the case of a contract for sale by sample there is—
    - a. an implied condition that the bulk shall correspond with the sample in quality;
    - (b) an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample;
    - (c) an implied condition that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of sample.
50. The lower court record reveals that the contract entered into between the parties herein was largely oral. Be that as it may, the Respondent tendered various documentation to support her averment that the material goods were delivered to the designated venue, being the County, namely the local service order (P. Exhibit 1); invoices dated 8<sup>th</sup> May, 2017 and 9<sup>th</sup> May, 2017 (P. Exhibit 2 (a) and (b)); receipts (P. Exhibit 3); and delivery notes dated 8<sup>th</sup> September, 2017 and 9<sup>th</sup> May, 2017 (P. Exhibits 4 (a) and (b)). This court however noted that a majority of the documents tendered were illegible.
51. Be that as it may, as pertains to the issue whether the order was made on the basis of sample or description, none of the parties tendered any credible evidence to enable a conclusive determination on this issue, since it was not clear what the terms of the contract were in that regard. Going by the evidence tendered, it is apparent that on the one hand, the Appellant averred that the goods delivered were in accordance with the sample agreed upon, while the Respondent and her supporting witness took the position that the goods did not meet the order specifications given. Related to this, was the reason for the return of the goods to the Appellant; while the Respondent claimed that it was due to failure to meet specification, the Appellant asserted that the return was occasioned by the failure of the tender with the county government. None of the parties tendered credible evidence to support their respective claims in that regard.
52. Thus, the parties herein gave conflicting narrations, none of which were supported by way of cogent evidence. This court therefore concurs with the finding by the trial court that it was not possible to ascertain the true position regarding the terms relating to particulars of the goods agreed to be supplied to begin with, to enable a conclusive determination whether the said goods upon delivery met the specifications or sample agreed upon.
53. In the same manner, and on the subject of whether the goods in question were first inspected before being dispatched for delivery, PW2 on the one hand echoed the testimony of the Respondent that no opportunity was granted for the material goods to be inspected prior thereto; while the Appellant's witnesses, particularly DW1 and DW2 maintained that the Respondent's representatives who were Harrison (PW2) and Joshua, had an opportunity to inspect and approve of the goods before delivery. Once again, it was a case of one person's word against another, with no credible evidence to ascertain the true or more plausible position. In addition, the CCTV footage, which was tendered brought no further clarity on the matter, in identifying the persons appearing therein and to support or controvert the positions of the respective parties. Having no probative value, the footage was to no avail.
54. On the question whether the trial court acted correctly by finding that the Respondent was entitled to a refund of the sum of Kshs. 884,000/- it was confirmed by the evidence of DW1 echoed by that of DW2, that following delivery of the material goods, the Respondent's representative, Harrison (PW2) contacted the Appellant's representative, and it was agreed that the goods would be returned to the



Appellant's premises and that the Appellant would refund any monies to the extent of goods returned in proper condition. It is undisputed that no monies were refunded.

55. The court further observed that while the Appellant through its witnesses, claimed that some of the chairs totaling 277 in number were returned broken and therefore declined, no credible evidence especially by way of documents in acknowledgment or photographs was tendered to support this claim. Nevertheless, upon the return of the goods previously delivered and upon the Appellant's voluntary acceptance of the said goods, the contract between the parties herein was rescinded. It therefore follows that the Respondent was entitled to a refund of any monies previously paid on the said goods. In the premises, the court is of the view that the trial court correctly awarded the sum of Kshs. 884,000/- being the refund sought by the Respondent on the bason account of the returned goods while declining the other reliefs sought.
56. Separately, and in closing, this court having examined the evidence and submissions in the lower court against the judgment of the court, is of the considered view that the Appellant's complaint that the trial court ignored its evidence and submissions, does not appear tenable.
57. In the circumstances, the appeal must fail and is hereby dismissed with costs to the Respondent.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 8<sup>TH</sup> DAY OF JULY 2024.**

**C.MEOLI**

**JUDGE**

In the presence of:

For the Applicant: Mr. Ochieng h/b for Mr. Makori Chege

For the Respondent: Mr. Muli

C/A: Erick

