**Maps Investment Limited v Momanyi trading as Dove Therapeutic Services (Civil Appeal E112 of 2021) [2025] KEHC 15635 (KLR) (3 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 15635 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT ELDORET**

**CIVIL APPEAL E112 OF 2021**

**JRA WANANDA, J**

**NOVEMBER 3, 2025**

**BETWEEN**

**MAPS INVESTMENT LIMITED ..... APPELLANT**

**AND**

**MR DAVID OSEKO MOMANYI TRADING AS DOVE THERAPEUTIC SERVICES ..... RESPONDENT**

***(Appeal from the Judgment dated 25/08/2021 delivered in Eldoret Chief Magistrate's Court Civil Case No. 351 of 2019 by Hon. R.K. Onkoba – Resident Magistrate)***

## JUDGMENT

1. This Appeal arises from the Judgment rendered in the lower Court case referred to above, which was dismissed, and in which the Appellant was the Plaintiff, while the Respondent was the Defendant.

2. The suit was instituted by way of the Plaint filed dated 3/04/2019 through Messrs Z.K. Yego Law Offices Advocates, in which the Appellant pleaded that between January 2018-December 2018, it was contracted by the Respondent to provide security services, which it duly rendered but whose payment the Respondent defaulted, refused or neglected to settle. The Appellant pleaded further that the Respondent issued cheques dated 15/01/2019 and 31/01/2019 for Kshs 91,000/- which were however dishonoured upon presentation, and the Appellant charged Kshs 5,000/-. The Appellant thus prayed for Judgment for the sum of Kshs 96,000/-.

3. The Respondent, through Messrs Mathai Maina & Co. Advocates, filed the Statement of Defence dated 4/06/2019 in which he denied the existence of the contract alleged, and pleaded that he leased the premises from Trans Africa Equator Hotels Ltd, which Lease did not have a covenant obligating him to pay the Appellant any fees for services whatsoever. He pleaded further that he only issued the said cheques because his said Lessor, Trans Equator Africa Hotels Ltd instructed him to make payments on the Lessor's behalf in favour of the Appellant as part-payment for rent for the month of January

2019, and that Kshs 96,000/- was then supposed to be deducted by the Lessor from the Respondent's monthly rent.

4. After close of pleadings, the matter proceeded to trial wherein the Appellant and the Respondent called 1 witness each.

5. PW1 was Damiana Wekesa Kongani. He introduced himself as a Director of the Appellant, adopted his Witness Statement, and produced the Plaintiff's documents. He then basically reiterated the matters already stated in the Plaint. In cross-examination, he agreed that he did not produce a CR12 Form to prove that he is the director of the Plaintiff, and also that he did not produce a Resolution from the Plaintiff to confirm that it is owed the debt alleged, or that he is authorized to appear in Court, or appoint Advocates on behalf of the Plaintiff. He claimed that the Plaintiff had a written agreement for provision of security services, and contended that the Respondent took over the subject business, but conceded that the Plaintiff's agreement was with Trans Africa Hotel. He agreed that he did not avail any witness to confirm that the Plaintiff offered the security services to the Respondent as alleged. He then insisted that he had the security services documents, and that he had reported to the police that the Respondent had retained the same. He also agreed that he did have any evidence to prove that Dr. Momanyi, PW1, is the owner of "Dove Therapeutic Services", but insisted that it is Dr. Momanyi who issued the cheques. He also conceded that he did not have any evidence to show that Dr. Momanyi took over from Trans Africa Equatorial Hotels. In re-examination, he stated that the defence did not dispute that Dr. Momanyi is the proprietor of "Doves Theraupitic Services", or that the signature on the cheques is his.

6. DW1 was Dr. David Oseko Momanyi. He, too, adopted his Witness Statement and produced a copy of the Lease Agreement between Trans Africa Equatorial Hotel Ltd and himself as "David Momanyi". He denied having any relationship with the Appellant, and insisted that at the time of the Lease Agreement, the premises had its own security services. He also claimed that he did not know how the Plaintiff got hold of the cheques.

7. After the trial, the Court, by the Judgment delivered on 25/08/2021, as aforesaid, found that the Appellant had failed to prove its case on a balance of probabilities, and thus dismissed the suit with costs to the Respondent. Aggrieved by the decision, the Appellant filed this Appeal on the following 6 grounds:

    i) That the trial Magistrate erred in law and fact by holding that the Appellant failed to prove its case on a balance of probabilities in disregard of the clear evidence that the Respondent was indebted to the Appellant.

    ii) That the trial Magistrate erred in law and fact in holding that the Appellant needed to produce a written contract in order to prove his claim notwithstanding the fact that the Respondent admitted issuing the dishonoured cheques issued in favour of the Appellant.

    iii) That the trial Magistrate erred in law and fact by holding that the burden of proof lay on the Plaintiff despite the Respondent being the one who willingly issued the dishonoured cheques and such the onus was on the Respondent to show why he issued the cheque which was dishonoured upon the presentation for sufficient funds.

    iv) That the trial Magistrate erred in law and fact by stating that the dishonoured cheques produced cannot form sufficient proof of there being a contract in disregard of section 30 of the Bill of Exchange Act that provides that a cheque is proof of debt.

    v) That the trial Magistrate erred in law and fact in failing to consider salient principles in a claim relating to dishonoured cheques and thus arriving at a wrong decision.

8. The Appeal was canvassed by way of written Submissions. The Appellant filed the Submissions dated 26/05/2025, while the Respondent's is dated 2/04/2025.

**Appellant's Submissions**

9. Counsel for the Appellant appreciated that under Section 107 of the *Evidence Act*, the onus of proof is on the person who seeks recourse from the Court, but also cited Section 109 on the principle that the burden on any particular fact lies on the person who wishes the Court to believe in its existence. He submitted that the Appellant proved its case because the Respondent admitted issuing the cheques in favour of the Appellant, which were later dishonoured, which fact is not in dispute, and that this admission by the Respondent constitutes prima facie evidence of a debt owed. He submitted that the Appellant strongly averred that the dishonoured cheques were in respect of the security services it rendered to the Respondent, and as such, the Appellant discharged its burden of proof. He maintained that the Respondent thus bore an evidentiary burden to explain what the bounced cheque was in respect of, that Section 30 of the Bill of Exchange Act clearly provides that a cheque is proof of a debt, and that by virtue of this provision, the cheques should have been considered sufficient evidence since the evidential burden shifted to the Respondent to explain why the cheques were issued if not for the services rendered.

10. Counsel added that the Respondent however failed to provide any alternative explanation for issuance of the cheques. He urged further that the learned trial Magistrate erred in holding that a written contract was necessary to establish existence of an agreement between the parties as it is a well-established principle of law that contracts can be inferred from the conduct of parties and need not always be in writing unless specifically required by statute. He then cited several authorities, including the Supreme Court Presidential Election Petition No.1 of 2017-Raila Odinga & Another v. IEBC & 2 Others (2017) eKLR in respect to shifting of the "evidential burden", and the case of Hassanah Issa & Co. v Jeraju Produce Store [1967] EA 55, and also the case of Paresh Bhimsi Bhatia v. Mrs Nita Jayesh Pattni-CA Civil Appeal No. 199 of 2003 (Nairobi), in respect to shifting of the burden where dishonoured cheques have been presented. Counsel also faulted the trial Magistrate for failing to consider the Appellant's written submissions, which, he submitted, constitutes a procedural irregularity that substantially affected the outcome of the case, and violated the right to a fair hearing.

**Respondent's Submissions**

11. Counsel for the Respondent, on his part, while also referring to Section 107 and 109 of the *Evidence Act*, and appreciating that the evidential burden of proof may shift depending on the nature and effect of evidence adduced, submitted that in this case, the burden did not shift as the Appellant failed to discharge its legal burden. He submitted that PW1 did not produce a certificate of incorporation to demonstrate that the Appellant was an existing company, nor did he produce a CR12 to prove that he was a director thereof. He cited Section 18, 19, 35(1) and 37 of the *Companies Act*, 2015. He also submitted that PW1 did not produce anything to confirm that he was an authorized officer of the Appellant or a director, and therefore there was nothing to imply that he had authority to represent the Appellant, or any Resolution from the Appellant to confirm that there was a debt owing from the Respondent, which the Appellant intended to recover, or that PW1 had been authorized by the Appellant to appoint Advocates to act in the suit. He also pointed out that the Appellant did not produce evidence to prove that the parties had an agreement for provision of security services, and also observed that in cross-examination, the Appellant stated that the Appellant had an agreement for provision of security services with Trans Africa Hotel, and not the Respondent. Counsel further submitted that the Appellant did not produce any evidence to demonstrate that even if there was no written agreement, the Appellant, by conduct, provided the security services to the Respondent, and

that the Appellant never called any witness or produce any record of any security guard that had been stationed at the Respondent's premises.

12. Counsel also submitted that the Appellant did not produce any evidence that connects the Respondent to "Dove Therapeutic Services". He thus averred that the trial Magistrate was correct in her finding that issuance of the cheques was not proof of existence of a contract, and that as the Appellant failed to discharge its burden of proof, the suit was doomed to fail. He thus urged that the Appellant failed to discharge its legal burden of proof to enable the evidential burden shift, and thus reliance on Section 30 of the Bill of Exchange Act cannot hold any water.

**Determination**

13. As reiterated in a plethora of cases, this being a first appellate Court, it has the duty to evaluate, re-assess and re-analyze the evidence before the trial Court, and draw its own conclusion (see for instance, the case of Kenya Ports Authority v Kuston (Kenya) Ltd [2009] 2 EA 212.

14. It is evident that the major issue arising for determination in this Appeal is "whether the trial Magistrate erred in, inter alia, failing to find that production of the dishonoured cheques by the Appellant shifted the evidential burden to the Respondent, which the Respondent did not discharge."

15. It is the position in law that proof in civil cases is on a balance of probability, and that the burden of proof is on the party alleging the existence of a fact which he wants the Court to believe. This is anchored in Section 107 (1) and (2) of the *Evidence Act*, which provides that "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" and that "when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person"., respectively.

16. It is therefore not in doubt that the Appellant bore the burden of proving, on a balance of probabilities, that it was owed the claimed amount by the Respondent. Regarding the distinction between "legal burden of proof" and "evidential burden of proof, and the possibility of shifting of the burden in some instances, during the trial, the Supreme Court in the case of Raila Amolo Odinga & Another v. IEBC & 2 Others [2017] eKLR held as follows:

> "(132) Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and "remains constant through a trial with the Plaintiff, however, "depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.
>
> (133) It follows therefore that once the Court is satisfied that the Petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the Respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the Petitioner bears an evidentiary burden to adduce 'factual' evidence to prove his/her allegations of breach, then the burden shifts and it behoves the Respondent to adduce evidence to prove compliance with the law ..."

17. Similarly, the Court of Appeal in the case of Mbuthia Macharia v Annah Mutua & Another [2017] eKLR, guided as follows:

> (16) "The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence? ....."

18. As regards application of the "legal burden" and "evidential burden" principles specifically to a cause of action based on dishonoured cheques, the Court of Appeal for Eastern Africa, in the case of Hassanah Issa & Co v Jeraj Produce Store [1967] EA 55, while considering Section 30 of the *Bills of Exchange Act* (Tanzania), which is similar to the Kenyan Section 30(2) of the *Bills of Exchange Act*, Cap. 27, held that:

> " [I]n this case in as much as the suit was upon a cheque and in as much as the cheque was admittedly given, the onus was then on the defendant to show some good reason why the plaintiff was not entitled to have judgment upon the cheque admittedly given for the figure set out in that cheque. This position stems from Section 30 of the Bill of Exchange Act (Ch 215); which provides that the holder of a bill is prima facie deemed to be a holder in due course; but if an action on the bill is admitted or proved that the issue is affected with duress or illegality, then the burden of proof is shifted unless certain events, which are irrelevant for this purpose, take place. The position is therefore that where there is a suit on a cheque and the cheque was admittedly been given the onus is on the defendant to show circumstances which disentitle the plaintiff to a judgment to which otherwise he would be entitled." [Emphasis mine]

19. Similarly, the Court of Appeal in the case of Paresh Bhimsi Bhatia v- Mrs Nita Jayesh Pattni CA Civil Appeal No. 199 of 2003 (Nairobi) (unreported), while following the Hassanah Issa & Co v Jeraj Produce (supra), and quoting the statement reproduced above, held as follows:

> " A cheque is a bill of exchange drawn on a bank payable on demand (see Section 73(1) of the Bill of Exchange Act, Cap 27). By Section 55(1) the drawer of a bill by drawing it, engages, inter alia, that on due presentation, it shall be presented and paid according to its tenor and that if it is dishonoured, he will compensate the holder or a subsequent endorser who is compelled to pay it so long as the requisite proceedings for dishonour be duly taken. .....
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> ..... The appellant's suit is substantially based on the four cheques. The issuance of the cheques is pleaded. The cheque numbers, the date and the amount of each cheque are pleaded. The fact of dishonour is pleaded. It is admitted that the cheques were given. It is also admitted that by the time the cheques were given, the 3rd respondent owed the appellant the money shown in the respective cheques. In the circumstances, the onus was on the respondents to show circumstances which he is disentitle the appellant to summary judgment such as fraud, duress, or illegality." [Emphasis mine]

20. In following the Hassanah Issa & Co v Jeraj Produce (supra above, F. Gikonyo J, in the case of Equatorial Commercial Bank v Wilfred Nyasim Oroko [2015] KEHC 8122 (KLR), also found as follows:

> " [20] In the face of the above evidence, the court conclude that these cheques were issued by the Respondent to the predecessor of the Applicant and so they constitute an admission of the debt to the extent of the amount of the cheques. Where the cheques are found to have been issued by the Respondent and were dishonoured, it is upon the Respondent to offer an explanation which he thinks will disentitle the Applicant of relief on the cheques. ....."

21. It is therefore the general position that dishonoured cheques amount, generally, to presumption of admission of a debt. The Court will not however automatically enter judgment on that sole basis, as the Defendant will still be at liberty to rebut that presumption, in his defence, by giving an explanation why the same should not be upheld.

22. In this matter, the Appellant's claim was for a sum of Kshs 96,000/- being alleged unpaid fees for security services it rendered to the Respondent. In support of its case, the Appellant produced copies of two cheques, number 000084 for Kshs 13,000/- and 000085 for Kshs 78,000/-, thus ttaling Kshs 91,000/-, which it claimed were issued by the Respondent in its favour in payment of the security services, but which, the Appellant claimed were dishonoured upon presentation to the bank for payment. Evidence of dishonour was indeed established as the same was apparent on the face of the "image return" documents produced, and from which the reason for dishonour is stated as "insufficient funds". According to the Appellant, it was also charged a penalty of Kshs 5,000/- by the bank for depositing the subsequently dishonoured cheques. The aggregate claim was therefore for Kshs 96,000/-. The Respondent, in its Statement of Defence, expressly admitted issuing the two cheques in favour of the Appellant. The Appellant's claim that it was charged the penalty of Kshs 5,000/- for depositing the dishonoured cheques was also not controverted. To this extent, I am satisfied that the Appellant did discharge its "legal burden of proof", and thus, the "evidential burden" shifted to the Respondent to explain his issuance of the cheques.

23. The Respondent, in its Statement of Defence denied the Appellant's claim by refuting existence of the contract alleged, and pleading that he leased the premises from an entity by the name of Trans Africa Equator Hotels Ltd, which Lease did not have a covenant obligating him to pay the Appellant any fees for any security services. Regarding the dishonoured cheques, he alleged that he only issued the same because his said Lessor, Trans Equator Africa Hotels Ltd instructed him to make payments on the Lessor's behalf to the Appellant as part-payment for rent for the month of January 2019, and that the payment would be offset by the Lessor from the Respondent's monthly rent. I however note that at the trial, the Respondent never at all canvassed or pursued this line of his defence. His Counsel did not even lead him towards this alleged explanation and he, too, said nothing about it whatsoever. He also never produced any evidence to prove the allegation. The Respondent clearly therefore failed to rebut the presumption of admission of the debt.

24. As is apparent from the authorities cited, by Section 30 of the *Bills of Exchange Act*, every holder of a bill is prima facie deemed to be a holder in due course, and to have become a party thereto for value, unless it is proved that the acceptance, issue or subsequent negotiation is affected with fraud, duress, force and fear or illegality. The onus was thus on the Respondent to give reasons why judgment should not be entered on the dishonoured cheques. Unfortunately, he woefully failed in discharging this onus.

25. The folly of the Respondent's Counsel is that, instead of addressing the above core question, he chose to dwell on side-issues that added very little value, if at all, to the live matters for determination. For

instance, Counsel dwelt on the fact of the absence of filed company resolutions for instituting the suit, or of authority granted to PW1 to represent the Plaintiff. With due respect, these were all peripheral matters that were never even raised in the Respondent's Statement of Defence in the first place, nor were they raised at any time before the trial so as to afford the Appellant the opportunity to respond. They never thus formed the issues for determination, and could not therefore have been belatedly raised at the trial. The Appellant, instead of arguing its defence in discharge of its evidential burden, thus "scored an own goal", in dwelling on scavenging around for unhelpful technicalities in the Appellant's case.

26. Counsel for the Respondent also submitted that the existence of a contract for provision of security services was not proved. Again, with due respect, the Appellant's cause of action was based on the dishonoured cheques, an independent cause of action by itself, not dependent on establishment of the contract. In any case, a contract need not even be in writing.

27. In light of the above, I find that the presumption that the Appellant was a holder in due course for value of the two dishoured cheques aggregating to the sum of Kshs 91,000/- was not displaced. As aforesaid, the Appellant's claim that it was charged the penalty of Kshs 5,000/- for depositing the dishonoured cheques was also not controverted. For the above reasons, I find that the trial Magistrate erred in finding that the Appellant had failed to prove its case on a balance of probabilities. It clearly did. The trial Magistrate therefore erred in dismissing the suit.

**Final Orders**

28. The upshot of my findings above is as follows:

    i. The Judgment delivered on 25/08/2021 in Eldoret Chief Magistrate's Court Civil Case No. 351 of 2019 dismissing that suit is hereby set aside, and substituted with an order allowing the suit, and thus entering Judgment against the Respondent for the sum of Kshs 96,000/-, plus interest thereon from the date of filing suit, and costs of the suit, as sought in prayers (a), (b) and (c) of the Plaint filed therein.

    ii. The Appellant is also awarded costs of the Appeal.

**DELIVERED, DATED AND SIGNED AT ITEN THIS 3RD DAY OF NOVEMBER 2025**

**.....**

**WANANDA JOHN R. ANURO**

**JUDGE**

Delivered in the presence of:

N/A for the Appellant

Ms. Orikodi h/b for Mr. Maathai for the Respondent

Court Assistant: Brian Kimathi