

IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: W. KARANJA, M'INOTI & ACHODE,
JJ.A) CIVIL APPEAL NO. 167 OF 2019

BETWEEN

PRIDE INN LIMITED.....APPELLANT

AND

THATCHMAANZ LIMITED.....RESPONDENT

*(Being an appeal from the Judgment and Decree of the High Court of Kenya
(Tuiyott) dated 15th February 2019*

in

HCCC No. 329 of 2015)

JUDGMENT OF THE COURT

1. **Pride Inn Limited**, the appellant herein, was aggrieved by the judgment rendered by Tuiyott J. (as he then was), in **Milimani High Court & Tax Division Case No. 329 of 2015** on 15th February 2019. The respondent, **Thatchmaanz Limited**, had instituted a suit against the appellant in the superior court, based on an alleged oral agreement said to have been entered into between the parties in or about April 2014. The judgment was in favour of the respondent. This is therefore the first appeal.
2. In the suit, the respondent averred that prior to the said agreement, the appellant maintained a strict no-alcohol policy

in its establishments. According to Anthony Ngunga PW1, who was the appellant's Chief Executive Officer for the period between 10th February 2014, and 2nd December 2014, the appellant's stance had adversely affected its revenue streams.

3. Consequently, the appellant resolved to introduce the sale of alcohol within its establishment in a manner that would remain compatible with the religious beliefs of its proprietors. To implement this, it was agreed that the appellant would not directly handle proceeds from alcohol sales. This necessitated the involvement of a third party to supply and manage the sale of alcoholic beverages within the appellant's hotels. As a result, the respondent, through its Director Edward Ahn, PW2, a person known to Ngunga and who had experience in the bar and restaurant industry, was introduced to the appellant's Managing Director.
4. The respondent alleged that following a meeting held in April 2014, the parties entered into an oral agreement with the following express terms:
 - 1) *The contract was to subsist for three (3) years, from May 2014 to May 2017.*
 - 2) *The respondent would supply alcoholic beverages to the appellants' hotels in Nairobi for use in the restaurants and conference facilities.*
 - 3) *The respondent would construct, equip, and operate a bar at the appellant's hotel situated along Lantana Road.*

- 4) The respondent would supply alcoholic beverages for functions and events held at the appellant's establishments.*
 - 5) The agreement would be renewable upon expiry, to enable the respondent to recover its investment in setting up and operating the bar.*
 - 6) Payments for beverages supplied were to be made in arrears, upon presentation of the relevant invoices by the respondent.*
5. Pursuant to this arrangement, the respondent proceeded to establish a bar unit at the appellant's Lantana Road hotel and, by the end of May 2014, had stocked all the appellant's Nairobi hotel outlets with alcoholic beverages, engaged bar staff, and commenced operations.
6. However, the relationship soon ran into headwinds. The respondent alleged that by the end of July 2014, the appellant had failed to settle invoices issued from 19th May 2014 onwards, despite repeated assurances from PW1 that payment would be forthcoming. The default persisted until November 2014, prompting the respondent to threaten termination of the arrangement. In December 2014, the appellant's Managing Director allegedly undertook to clear the outstanding sum of Kshs. 1,500,000 within one week, a promise that induced the respondent to continue supplying them. The payment was never made.
7. The respondent's claim was therefore for:
 - i. Outstanding invoices amounting to Kshs. 2,104,770.*

- ii. *Special damages of Kshs. 1,648,000, comprising Kshs. 1,000,000 for construction and equipment and Kshs. 648,000 in staff salaries.*
 - iii. *Damages for loss of business and profits of Kshs. 7,366,695.*
 - iv. *Costs of the suit; and*
 - v. *Interest at court rates on all sums from the date of filing until payment in full.*
8. The appellant denied the existence of the alleged contract, asserting that any purported arrangement between the respondent and PW1 was undertaken without the appellant's authority and could not bind it. The appellant further contended that its hotels were not licensed to sell alcoholic beverages, and the purported contract was illegal and unenforceable under the doctrine of *ex turpi causa non oritur actio*, which precludes enforcement of illegal contracts.
9. During the hearing, the respondent called four witnesses: Anthony Ngunga PW1, served as a Chief Executive Officer of the appellant from 10th March 2014 to 2nd December 2014. He stated that the appellant was making losses in its banqueting hall and the restaurant sales were very low because of its strict no alcohol policy. PW1 held a meeting with the management of the appellant including the Chairman Mr. Shabir Kassam and the Managing Director Mr. Hasnain Noorani and discussed the need to raise revenue for the appellant by allowing the sale of alcohol. Tasked with finding a suitable person to supply alcohol and to set up and

run a bar

in each of the appellant's units in Nairobi, he proposed Edward Ahn PW2, a director of the respondent which was in the business of supply and retail of alcoholic beverages.

10. Sometimes in April 2014, PW1 and PW2 met at the headquarters of the appellant, where PW1 offered the respondent the contract of supplying alcohol to the appellant. The terms of the contract were that the respondent would bill the appellant directly by way of invoice for any alcohol consumed by the customers and patrons of the appellant's hotels. The appellant was to impose a service charge at the rate to be agreed, with a three month moratorium on any proposed service charge to allow the respondent to recover the investments incurred in setting up the bars and the respondent was to construct and run a bar at the unit in Lantana Road.
11. It was his testimony that towards the end of May 2014, all restaurants had been stocked with alcohol, staffed with barmen and were selling alcohol. Further, an entire bar unit was constructed on Lantana Road. However, in July 2014, PW2 on behalf of the respondent contacted PW1 to query why the invoices had remained unpaid since May 2014. PW1 met with the Food and Beverages Manager, one Michael Kimitho Kamau PW3, and requested him to prepare all invoices and send them to the appellant's financial controller for prompt settlement.

12. At the end of November 2014, PW2 once again contacted PW1 informing him that the respondent's invoices had still not been settled, and they were considering terminating the agreement between the parties. PW1 asked him to reconsider the intention of terminating the contract. Thereafter, in December 2014, there was a meeting of the Managing Director and Chief Finance Officer of the appellant with PW2 and PW1 at the appellant's office in Westlands. The meeting resolved that the outstanding invoices which stood at around Kshs.1,500,000 would be settled within one week of the meeting and the respondent would continue supplying the alcoholic drinks and running the bars. Immediately thereafter on 2nd December 2014, PW1 ceased employment with the appellant.
13. PW2, a director of the respondent, corroborated what was stated by PW1 and added that the contract between the appellant and the respondent was for the respondent to supply alcoholic beverages to the appellant which would then sell it. It was his testimony that at the formation of the contract the appellant's Managing Director, Mr. Hasnain Noorani assured him that the appellant would obtain all such permits as would be needed to allow it to sell alcohol. He testified that the appellant has, and does sell alcohol on its premises. To prove this, he stated that the appellant made a partial payment to the respondent vide a cheque dated 16th December 2015 for Kshs. 322,200.

14. In addition, PW2 stated that after the termination of the contract between the appellant and the respondent, the appellant engaged the services of the respondent's former Bar Manager, Moses Mahavi PW4, to run the bar at Lantana. Thus, he was categorical that the appellant continues to operate the business of selling alcoholic drinks. On a without prejudice basis, PW2 stated that failure by the appellant to apply or, obtain a liquor license for his premises before or after commencing the sale of alcoholic beverages, did not in any manner prejudice the subsistence, the legal validity and/or the enforceability of the agreement between them.
15. PW3, the General Manager of Pride Inn Westlands at the material time, testified that he was aware that the directors of Pride Inn Hotels were in discussions to allow the sale of alcohol in the Nairobi units. They entered into an agreement to allow an independent vendor to supply the alcohol to be sold in the units and in turn to be paid independently by the Hotel. PW3 was tasked with ensuring that the hotel had a proper liquor license before the commencement of supply to the hotel.
16. In that regard, PW3 visited City Hall in May 2014 to get the licenses for the units to sell alcohol, and found that the Alcohol Licensing Board was yet to be formed. However, he was asked to pay the fee and book for inspection at the City Hall as they awaited the formation of the Licensing Board. In the meantime, they were allowed to proceed with the sale

of

alcohol in their premises after the payment. They did as advised.

17. PW3 corroborated the evidence of PW1 on the delay of the payment, and on the partial payment of Kshs.322, 200 made to the respondent vide a cheque, in settlement of the outstanding invoices on alcoholic beverages. He resigned from the company in December 2014, and at the time the invoices were still outstanding.
18. PW4, the Bar Manager for the respondent, stated that his duties were to ensure the supply of alcoholic beverages, whenever needed by the appellant's hotels/restaurants. The appellant also required the respondent to supply alcoholic beverages to any of its guests outside of the main hotel premises, who required it, through the outside catering offered by the appellant.
19. It was the testimony of PW4 that the suppliers would supply the alcoholic beverages directly to the appellant's premises and in turn, the respondent would ensure it is supplied to the various units as directed and needed by the appellant. All supplies of alcoholic beverages were verified by the appellant's security officers at the entrance and appropriate gate passes issued, and further verified by the hotel staff. Once supplied, the respondent issued invoices for the supplied beverages as per the agreement between the parties.

20. PW4 realized that the payments were not forthcoming and informed the respondent's director of the difficulties he was experiencing in collecting the payments. As at December 2014 invoices worth more than ksh.2 million remained unpaid. On 15th December 2014, the appellant made a partial payment of Kshs. 322,000 to the respondent through a cheque, in part settlement of the outstanding invoices on alcoholic beverages.
21. The appellant on its part called one witness, Nicholas Ochieng DW1, the General Manager of Pride Inn Ltd. He denied that the appellant had ever offered any contract for supply of alcoholic beverages to any of its branch hotels to the respondent. He stated that it was the company's policy not to engage in the sale of alcoholic beverages in any of its hotel branches and at no point did the company obtain a license as required by law to sell alcoholic beverages in its premises as alleged by the respondent. He stated that if as alleged by the respondent it entered into an oral contract with the appellant, whose representative was the former Chief Executive Officer, PW1, then that was a private agreement that the company was not privy to and therefore, is not bound by it.
22. Upon considering the matter before him, the learned trial Judge, Tuiyott J. (as he then was), found in favour of the respondent against the appellant. He entered judgment for the respondent in the sum of Kshs. 2,104, 770, plus interest

at court rates from the date of filing of the suit. This aggrieved the appellant provoking the instant appeal.

23. The grounds as set out in the Memorandum of Appeal dated 26th April 2019, are that the learned Judge erred in law and fact:

- 1) *By holding that there was a contract between the appellant and the respondent to supply the appellant and/or the appellant' customers with alcoholic beverages.*
- 2) *By holding that the respondent had supplied alcoholic beverages to the appellant and/or the appellant's customers with no evidence thereto, which finding was untenable.*
- 3) *By failing to apply the legal maxim of ex turpi cause no ortur thereby enforcing an alleged contract that was illegal ab initio which decision is against public policy.*
- 4) *By entering judgment against the appellant for a sum of Kshs. 2, 104,770/= as a special damage which said sum was not specifically proved as required by law.*
- 5) *By failing to enter judgement against the third party Mr. Anthony Ngunga pursuant to Order 1 Rule 15 of Civil Procedure Rules.*
- 6) *By rendering a judgment that was wholly erroneous and manifestly unjust for failure to analyze the evidence on record and consequently arriving at a finding not supported by evidence.*

24. The appellant filed submissions dated 21st August 2020 through the firm of M/s Morara Apiema & Nyangito Advocates and urged that there was no contract between the appellant

and the respondent premised on the sale of alcoholic

beverages arising from an oral contract or at all. It was posited that by finding that there was a contract between the appellant and the respondent, the learned Judge erred because the alleged oral agreement did not provide for the price of the goods on the basis on which the annexed invoices were raised in breach of **section 10** of the **Sale of Goods Act**. There was no evidence as to how the said alcoholic beverages were ordered and delivered to the appellant's customers in breach of **section 20** and **39** of the **Sale of Goods Act**. Further, that there was no evidence that the appellant received any proceeds of sale of alcohol on behalf of the respondent. Therefore, the respondent failed to discharge its burden of proof pursuant to **section 107 (1)** of the **Evidence Act**.

25. The appellant asserted that the business that the respondent was referring to was being carried out without a license and in breach of **section 7 (2)** of the **Nairobi City County Alcohol Drinks, Control and Licensing Act**. That the law is clear that the person to obtain the license is the seller of the alcoholic beverages and not the buyer. This means that the alleged business run by the respondent was illegal for want of compliance with the law.
26. The appellant urged that the award of Kshs. 2,104,770 by the learned trial Judge as special damages for breach of contract was erroneous, since the respondent pleaded for loss suffered and quantified it. The onus was on it to then

strictly prove the said loss which was special damages.

27. The appellant urged that it filed a third-party notice to include PW1, and he admitted that he was served with the notice and as such, in the unlikely event this Court finds that the appellant was liable, the third party should be found liable to indemnify the appellant.
28. In rebuttal, the respondent filed submissions dated 29th October 2024 through the firm of M/s S.M. Kilonzo & Associates and supported the trial court's finding on the existence of the oral contract between the parties herein. They submitted that the **Sale of Goods Act** is inapplicable to the facts of this case, particularly on the structure of the oral contract between the parties. It was asserted that the oral contract meets the legal requirement for a valid contract. Additionally, the testimonies of PW1 and PW2 proved that there was an offer made to the respondent to supply alcohol to the appellant's establishments, which the respondent accepted on the consideration set out in the plaint.
29. The respondent submitted that the trial court was correct in its finding that the onus of obtaining the license to sell alcohol lay with the appellant, and PW3 had taken steps to obtain the same on behalf of the appellant. That the testimony of PW3 finds support in the law and particularly, Part 2 paragraph 4 (c) of the Fourth Schedule to the Constitution which devolved the function of liquor licensing to the County Governments.

Further, that **section 56 (b)** of the **Nairobi City County Alcohol Drinks Control and Licensing Act, 2014** allowed
a

nine months transitional period within which any owner or manager of an establishment that sells alcohol, or intends to sell alcohol under the Act was to comply with the provisions of the Act. This included licensing. As such, its deposition is that the doctrine of *ex turpi non ortur actio* is not applicable to the present proceedings as there is no illegality demonstrated.

30. On the third party notice, it was urged that the appellant sought and was granted the right to commence third party proceedings but failed to prosecute its third-party notice in the proceedings before the trial court. On 20th November 2016 the trial court directed the appellant to apply to serve the third- party by substituted service, but the appellant failed to file such an application. Additionally, PW1 was not made a party to the present proceedings to warrant orders being issued against him.
31. The respondent also submitted that while dealing with people at the management level of a company such as the CEO, there is a legal presumption that internal company rules have been complied with.
32. The respondent urged that through the invoices that remained unpaid and are in the Record of Appeal, the appellant's client statement which shows receipt of part payment of the amount owed, captured as an entry for 18th December 2014, it had proved that the appellant is indebted to it. Also, that the appellant had acknowledged the debt

by partly paying it.

Further, that the appellant's employees at the material time (PW1 and PW3), testified to the supply of alcohol and receipt of the invoices by the appellant that remained unpaid as at the time of their leaving employment with the appellant.

33. During the plenary hearing on 9th April 2025, Ms. Morara learned counsel, appeared for the appellant. She relied on her submissions and added that all the money from the sales was received by the respondent. Counsel urged that there was no evidence that drinks were sold to the appellant, or that the appellant placed any orders for the drinks. Further, that the respondent did not have an alcoholic licence and the court cannot enforce an illegality.
34. Ms. Okimaru, learned counsel, was present for the respondent. She also relied on her submissions and added that the trial court discussed different monies that came in through the PDQ and ETR systems and that which was received in cash. Counsel submitted that the oral contract was discussed and agreed by the members of the board and the CEO, and that they testified even if the Managing Director, Mr. Noorani did not testify. Counsel submitted further that **section 56** the **Alcohol Licensing Act** for Nairobi County gave sellers nine months to comply with the Act.
35. This being the first appeal, our mandate is as stated in the case of **Neepu Auto Spares Limited v Narendra Chaganlal Solanki & 3 others [2014] KECA 383 (KLR)**

thus:

“Being a first appeal we must re-evaluate the evidence and come to our own conclusions, but always bearing in mind that we did not hear the witnesses nor observe their demeanour. We may only interfere with the findings of the trial judge if the judge failed to take into account particular circumstances or based his impression on demeanour of witnesses which was inconsistent with the evidence - see the judgment of this court in Maimuna s/o Patrick Mutoo v Wilson Njau Nyaki Civil Appeal No. 131 of 1994. In Peters v Sunday Post Limited [1958] EA 424 it was held that while an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of the circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate to so decide.”

36. We have considered the record of appeal and the supplementary thereto, together with the rival submissions and we discern that the issues that need our determination are:

- i. Whether a valid and enforceable contract existed between the appellant and the respondent,*
- ii. If the contract existed, whether it runs afoul of the principle of ‘ex turpi non ortur actio’,*

iii. Whether the respondent proved that the appellant is indebted to it, and

iv. Whether PW1 is liable to indemnify the appellant.

37. The first issue is whether a valid and enforceable contract existed between the appellant and the respondent. To answer that question, we examine whether the alleged oral agreement from which the dispute herein arose, met the threshold of a valid and enforceable contract. An oral contract is enforceable if it contains all the essential elements of a valid contract. That is, offer, acceptance, consideration, capacity and legality. The existence of an oral contract can be proved, often through receipts, emails or witness testimony.

38. On the elements required to make an oral contract valid and enforceable we had recourse to the decision of this Court in **Attorney General v Kabuito Contractors Limited** [2023] KECA 230 (KLR) where it was stated that:

“30. The respondent’s claim is anchored on an alleged oral contract. Several requirements must be met in order to form an oral contract. The following provides a basic list of oral contract requirements: - (a) The terms of the contract must be valid and legally enforceable;
(b) It must contain the necessary elements found in all contracts (e.g. offer, acceptance, consideration, and mutuality or a “meeting of the minds”); and, (c) the oral agreement must not violate laws or regulations/policies;

(d) capacity of the parties.

31. Undeniably, verbal contracts can be enforceable, but only if they are provable in court, and the contract meets the requirements of contract formation outlined above. For oral contracts, the courts will first be concerned with whether an oral contract exists and then with ascertaining the terms as these are, by their very nature, not written down. Ascertaining the terms of an oral contract has been held to be a question of fact. (See *Carmichael v National Power Plc* (1999) 1 WLR 2042 (HL)). This means that all evidence to assist that task is admissible, including evidence of the parties' subjective intentions and subsequent conduct. As Lord Neuberger stated in *Thorner v Major* (2009) UKHL 18, (2009) 1 WLR 776 "the interpretation of an oral contract is a matter of fact (I suggest inference from primary fact), rather than one of law, on which the parties' subjective understanding of what they were agreeing is admissible."

39. The appellant argued that the sale agreement that the respondent alleged to have entered into did not comply with the **Sale of Goods Act**. The respondent on the other hand asserted that the **Act** is inapplicable to the facts of this case, particularly the structure of the oral contract between the parties.

40. The trial court in deciding that the **Sale of Goods Act** is inapplicable in the agreement between the parties held that:

"17. It would be against that backdrop that the model

said to be agreed was that the Plaintiff will bill the Defendant directly by way of invoices for alcohol

consumed by the customers and patrons. In addition, the Plaintiff was to construct and set up a bar in the Lantana Road Unit. Further, the Plaintiff bought ETR and PDQ machines for the 3 units and so any purchases paid for by credit or debit cards would go directly to Plaintiff's account.

18. *The entire essence of this model was that the Defendant did not wish to handle the alcoholic beverages yet wanted to avail them to its customers and patrons. It is for this reason that this Court holds that no property in the alcohol beverages was transferred or passed from the Plaintiff to Defendant in the sense contemplated by Section 3 of the Sale of Goods Act. It could not! Ownership of alcohol was abhorred by the Defendant! For this reason the transaction cannot be viewed through the prism of the Sale of Goods Act."*

41. To put things into perspective, we considered the definition of an agreement in the **Sale of Goods Act. Section 3** of the **Act** defines an agreement to sell as:

"A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods for a money consideration called the price."

42. We note that the evidence discloses that the appellant was bound by its religious policy prohibiting ownership of alcoholic beverages. Therefore, it deliberately structured the arrangement to avoid holding title to the goods. The respondent directly supplied, managed, and collected

proceeds from sales made within the appellant's premises.
In effect, the

relationship between the parties was not a conventional contract of sale, but a hybrid commercial arrangement - a service and supply contract, designed to allow the appellant to offer alcohol to patrons without violating its internal restrictions. We therefore agree with the trial Judge that the **Sale of Goods Act** is inapplicable in the circumstances of the agreement between the parties herein.

43. The relationship between the appellant and the respondent can be deduced from the evidence of the respondent's witnesses PW1 and PW2. These two witnesses gave consistent accounts of the meeting in April 2014 that gave birth to the contract. The meeting was attended by the appellant's Managing Director, Mr. Hassan Noorani. Notably, the appellant did not call Mr. Noorani to controvert that evidence, despite his being a critical participant in the alleged transaction. The unrebutted testimonies of PW1 and PW2, coupled with evidence of performance including the establishment of the bar complete with barmen, stocking of beverages, and a part-payment in the form of a cheque of Kshs. 322,000 issued by the appellant, support the existence of an oral agreement.

44. We are alive to the edict in **Section 119** of the **Evidence Act** which stipulates that:

“The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of

natural

events, human conduct and private and public business, in relation to the facts of the particular case.”

45. Going by the conduct of the parties herein, and having regard to the common course of natural events and human conduct in relation to the prevailing facts of this particular case, we are convinced that there was an orally binding contract between the appellant and the respondent and we so find.
46. Having found that a valid oral contract existed, we turn to the second issue whether it ran afoul of the principle of ‘*ex turpi non ortur actio*’. **Section 7 (2) (b)** of the **Nairobi City County Alcoholic Drinks Control and Licensing Act, 2014** prohibits sale of alcoholic beverages without a licence in the following terms:

“No person shall sell, dispose of, or otherwise deal in any alcoholic drink except under, and in accordance with a Licence issued under this Act.”

47. It is argued that the agreement between the appellant and the respondent is unenforceable, since the appellant did not obtain the licence allowing it to deal with alcoholic beverages. Thus, the doctrine of ‘*ex turpi causa non oritur actio*’ should apply. This Court discussed the foregoing doctrine in the case of **Heptulla v Noormohamed [1984] KECA 42 (KLR)** and stated as follows:

“The effect of the judgment and order appealed

from is to give effect to an unlawful contract:

Charan Kaur v Vanmali (1956) 23 EACA 14. The respondent alone has to bear the illegality particularly as he has brought it up. The following passage in the judgment of Lord Morris of Borth-y-Gest, in the case of Mistry Amar Singh v Kulubya [1963] EA 408 at page 414, letter D, admirably sums up the position of the parties to this appeal.

'Ex Turpi causa non oritur actio. This old and well known legal maxim is founded in good sense and expresses a clear and well-recognized legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the Plaintiff proves the illegality, the court ought not to assist him.'

The obvious rights which the appellant has as a leasehold owner such as getting possession of the premises, are recognized and enforced notwithstanding the illegal contract. There is no reason why the appellant should not be paid mesne profits."

48. In the instant case, PW3, the appellant's General Manager at the material time, testified that efforts were made to

obtain a

licence issued under the Act, including payment of inspection fees in May 2014 and subsequent issuance of a receipt dated 4th February 2015. He stated that they were given the go ahead to run the business as they awaited the appointment of the Licensing Board. It is evident that the duty to obtain the licence lay with the appellant, since the sale occurred within its premises and for the benefit of its clientele.

- 49.** In our view, the appellant cannot rely on the doctrine of '*ex turpi causa non oritur actio*' where it has been proved that the duty was upon it to ensure that it had obtained the licence before it allowed the sale of alcoholic beverages in its premises. We therefore agree with the trial court that the absence of a licence was a regulatory lapse for which the appellant bore responsibility. As such it does not render the contract void for illegality. Further, the respondent's contention that the County Government allowed them to proceed with the sales pending the appointment of the Licensing Board, which the appellant did not controvert, sufficiently answered the argument founded on illegality. There is more credence to the respondent's position when we take into account **section 56 (b)** of the **Nairobi City County Alcohol Drinks Control and Licensing Act, 2014** which allowed a nine months transitional period pending compliance with the provisions of the Act.

50. The third issue is whether the respondent proved that the appellant is indebted to it. In determining whether the

respondent proved the special damages claimed, we refer to the pronouncement of this Court in **Telkom Kenya Limited v John Ochanda** (*suing on his own behalf and on behalf of 996 Former Employees of Telkom Kenya Limited* [2014] KECA 600 (KLR) as follows:

“This judicial function of assessment of damages is one the courts have long jealously guarded for it takes judicial wisdom, experience and consideration to arrive at an appropriate measure of damages. This is partly the reason that in the case of special damages it is the law that they must be specifically pleaded and strictly proved, (see HAHN V SINGH [1985] KLR, 716) as this implicates the integrity of the judicial process and avoids ambush and surprise.”

51. In the present case, the evidence shows that the respondent duly fulfilled its obligation of supplying alcoholic beverages, while the appellant failed to honor its payment obligations. The respondent availed copies of unpaid invoices to the Court, which are found on pages 19 to 59 of the record of appeal. These unpaid invoices totaled to Kshs. 2,104,770. We therefore find that the respondent not only pleaded special damages but also strictly proved them.
52. Regarding the third-party notice, it is in evidence that the appellant sought for leave to apply to serve the third-party notice upon PW1 by substituted service. There is no evidence that such an application was made and/or, that

such service

was effected on PW1. There is no evidence that third-party proceedings were prosecuted in the trial court. Nothing therefore, turns on this ground fails.

53. Consequently, upon re-evaluating the evidence afresh we find no merit in this appeal. We uphold the trial court's judgment and dismiss the appeal with costs to the respondent.

It is so ordered.

Dated and delivered at Nairobi this 30th day of January, 2026.

W. KARANJA

.....
**JUDGE OF
APPEAL**

K. M'INOTI

.....
**JUDGE OF
APPEAL**

L. ACHODE

.....
**JUDGE OF
APPEAL**

*I certify that this is a true copy of the original **Signed***
DEPUTY
REGISTRAR