

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
HCCOMMA NO. E094 OF 2024

SUNBLEST DISTRIBUTORS LTD.....APPELLANT

-VERSUS-

ALGARVE DISTILLERS LIMITED.....RESPONDENT

(Being an Appeal from the Judgment and decree of the late Hon. Zena A. Rashid, delivered on 4th April 2024, in Milimani Chief Magistrate's Court Civil Case No. 148 of 2022.)

JUDGMENT

1. The plaintiff (respondent) filed a suit against the defendant (appellant) in the lower Court vide a plaint dated 18th February 2022, seeking judgment against the appellant for special damages in the sum of Kshs.1,450,000/= with interest at commercial rates from 6th July 2021 until payment in full, Kshs.2,500/= being the charges levied on the respondent for the dishonored cheques particularized in the plaint, and costs of the suit with interest at Court rates from the date of filing suit until payment in full.
2. The respondent's case was that it was engaged in the manufacture, wholesale distribution, and supply of alcoholic beverages. That between January and July 2021, the appellant approached it at its warehouse located at Algarve Industrial Park along the Eastern Bypass in Nairobi and purchased products for resale to third parties. The respondent stated that it duly supplied the goods, which the appellant acknowledged receiving, and issued invoices amounting to Kshs.7,635,000/=. The respondent however claimed that the appellant only paid Kshs.6,955,000/=, leaving an outstanding balance of Kshs.1,450,000/=: which remains unpaid despite repeated demands.

3. The respondent averred that in acknowledgment of this indebtedness, the appellant issued several cheques totaling Kshs.1,450,000/=, which were dishonoured upon presentation on the appellant's instructions, thereby occasioning additional bank charges of Kshs.2,500/= per cheque to the respondent. The respondent further averred that the appellant's conduct of ordering and accepting delivery of goods, issuing dishonoured cheques, selling the goods without remitting payment, and failing to return the goods, demonstrates a fraudulent intent to defraud and unlawfully convert the products.
4. In opposition to the respondent's suit, the appellant filed a statement of defence dated 13th July 2022, wherein it denied all the averments contained in the respondent's plaint. The appellant averred that it has never made any order for the purchase of products from the respondent, or visited the respondent's premises to purchase the alleged products for sale to any third party. It further averred that if at all it engaged in any business activity with the respondent, then it played its part fully, including making full payment of any products supplied by the respondent as per the terms of any business and/or contractual terms thereof. The appellant contended that it has never engaged in any business with the respondent involving sums of such magnitude, as no such transactions are reflected in its bank accounts and/or financial statements.
5. The appellant maintained that any genuine transaction between the parties would be duly captured in the financial records of both parties, and asserted that the respondent failed to produce any documentary or financial evidence to prove the alleged transaction and/or business dealings with it. It was stated by the appellant that any loss or damage claimed, if at all, was caused or substantially contributed to by the respondent's own breach of contract and/or misrepresentation, including

failure to supply quality or merchantable goods, supplying defective products, failing to acknowledge full payment and maliciously demanding payment for goods not supplied.

6. In a Judgment delivered by the Trial Court on 4th April 2024, the said Court found that the respondent had proved its case on a balance of probabilities and awarded it Kshs.1,450,000/=, special damages of Kshs.5,000/=, costs and interest of the suit from the date of Judgment until payment in full.
7. Dissatisfied with the aforesaid Judgment, the appellant filed a Memorandum of Appeal dated 15th April 2024, raising the following grounds of Appeal -
 - i) That the Trial Magistrate erred in law and fact in finding that there was a business custom between the plaintiff and the defendant of issuing cheques after delivery of goods and invoices drawn whereas:-
 - a) The single act of drawing cheques after delivery is a transactional arrangement and not sufficient to establish a custom.
 - b) The plaintiff never pleaded business custom as a basis for its claim.
 - ii) That the Trial Magistrate erred in law and fact in finding *prima facie* that the defendant was estopped from denying the existence of the contract when there was neither pleading nor facts to support the conclusion based on estoppel;
 - iii) That the Trial Magistrate erred in law and fact in finding that there was actual delivery of goods whereas the delivery notes were never signed;

- iv) That the Trial Magistrate erred in law in finding that the appellant's factual position that the goods were never supplied was vexatious and an abuse of the Court process. In particular, the Trial Magistrate failed to appreciate that:-
 - a) Delivery of goods is an integral component of a contract and there could not be a basis for claim for payment where there is no proof of delivery.
 - b) Vexatious and abuse of process are phrases with definite legal connotation.
 - c) A demand by the appellant that actual delivery be proved could be said to be vexatious and an abuse of the Court process.
 - d) The appellant stopped the post-dated cheques since the goods were not delivered as per the contract.
- v) That the Trial Magistrate erred in law in applying an inverse burden of proof against the appellant:-
 - a) She found that the cheques which were stopped by the appellant were an irrebuttable proof of delivery of goods as a substitute to the legal and evidential requirement of proof.
 - b) She found that the security cheques issued by the appellant were payment for the goods supplied whereas there was no proof of delivery.
- vi) That the Trial Magistrate erred in law in entering a Judgment for an amount of money which was more than twice the amount which was pleaded and which was not supported by evidence:-
 - a) The evidence produced by the respondent taken on its face value proved that the appellant had a credit of Kshs.7,635,000/= and a debit of Kshs.6,955,000/=.

- b) The evidence of the respondent taken on its face value demonstrated that the value of the good allegedly delivered was Kshs.680,000/= but the Trial Magistrate entered Judgment for Kshs.1,450,000/=.
 - vii) That the Trial Magistrate erred in law in finding that the cheques issued by the appellant bounced at there was a charge attached to that fact whereas the cheques were stopped by the appellant due to non delivery of the goods; and
 - viii) That the Trial Magistrate erred in law and fact in relying on invoices which indicated a charge on VAT but no evidence of payment of VAT was proved.
8. The appellant's prayer is for the Judgment of the Trial Court to be set aside and for it be substituted with a Judgment of this Court dismissing the respondent's case with costs.
9. The instant Appeal was canvassed by way of written submissions. The appellant's submissions were filed on 6th June 2025 by the law firm of Githui Advocates LLP, while the respondent's submissions were filed by the law firm of Omusolo Mungai & Company Advocates on 24th November 2025.
10. Mr. Machoka, learned Counsel for the appellant relied on the case of **Rentco East Africa Limited v Dominic Mutua Ngonzi** [2021] KEHC 1079 (KLR), and submitted that under Sections 107 & 108 of the Evidence Act, the burden of proof lies squarely on the party asserting facts and seeking judgment. Counsel argued that in this case, delivery of goods was a central fact in issue, and once delivery was denied, the evidential burden rested on the respondent to prove it on a balance of probabilities. Counsel stated that the respondent relied on invoices and delivery notes which were neither signed nor stamped,

contrary to sound business practice, and therefore incapable of proving delivery. He stated that the Trial Court erred in finding actual delivery notwithstanding this deficiency.

11. Mr. Machoka submitted that issuance of cheques was wrongly treated as proof of delivery, as there was no demonstrated and unbroken evidential chain linking delivery, acknowledgment, invoicing, and issuance of cheques, particularly, in light of evidence that the cheques were provided merely as security under the parties' arrangement. He contended that the finding that issuance of cheques constituted proof of delivery or evidence of a business custom was legally erroneous, as no such custom was pleaded or proved. He asserted that the Trial Court relied on an alleged admission by DW1 that was unsupported by the record.
12. Emphasizing the centrality of pleadings, Counsel cited the case of **Levi Simiyu Makali v Koyi John Waluke & 2 others** [2018] KEHC 8492 (KLR) and the Court of Appeal case of **Pacific Frontier Seas Ltd v Kyengo & another** [2022] KECA 396 (KLR), and stated that Courts cannot determine unpleaded issues or introduce matters not supported by evidence.
13. Mr. Machoka contended that the Trial Court erred by entering Judgment for an amount exceeding what was pleaded, noting that the pleaded figures yielded a net claim of Kshs.680,000/=, not the amounts reflected on the stopped cheques. He also challenged the finding that denial of delivery was vexatious and an abuse of the Court process, arguing that this misapplied the legal tests articulated in the case of **Madison Insurance Company Limited v Augustine Kamanda Gitau** [2020] KEHC 9671 (KLR), since the defence was *bona fide*, evidence-based, and raised legitimate issues requiring determination.

14. Ms Kiiru, learned Counsel for the respondent submitted that this Appeal is devoid of merits, as the Trial Magistrate did not reverse the burden of proof but properly applied Sections 107 & 108 of the Evidence Act by assessing whether delivery of goods was proved on a balance of probabilities based on the totality of the evidence. She argued that the respondent adduced documentary and oral evidence comprising statements of account, invoices, delivery notes, and dishonoured cheques admittedly issued by the appellant, together with the testimony of PW1, and express admissions by DW1 that cheques were issued only upon receipt of goods. She relied on the case of **Digithu Hotel Limited v Mwangi t/a Jaycmi Enterprises** [2025] KEHC 6373 (KLR), and asserted that the evidence adduced by the respondent was sufficient to discharge the respondent's legal burden and to shift the evidential burden to the appellant, which burden remained undischarged.
15. Ms Kiiru contended that the Trial Court correctly evaluated delivery holistically and did not treat unsigned delivery notes or cheques in isolation, nor did it regard cheques as irrebuttable proof of delivery, but rather as corroborative evidence within the established course of dealings. She cited the case of **Ondongo v Okango t/a Jemery Energy** [2025] KEHC 6187 (KLR), and argued that the Hon. Magistrate did not invent an industry-wide custom but permissibly inferred a consistent course of dealing between the parties from repeated transactions and conduct. She referred to the Court of Appeal case of **Pacific Frontier Seas Ltd v Kyengo & another** (supra) and maintained that even if the course of dealing was not expressly pleaded, the issue was fully canvassed in evidence and cross-examination, entitling the Court to determine it.
16. On the issue of quantum, Ms Kiiru relied on the cases of **Safarilink Aviation Limited v Trident Aviation Kenya Limited & another** [2015] KEHC 2609 (KLR) and **Rieny Distributors of Kenya Limited v**

Consolidated Bank of Kenya Ltd & another [2021] KEHC 6580 (KLR), and submitted that the Judgment did not exceed what was pleaded and proved, as the sum of Kshs.1,450,000/= was supported by statements of account and dishonoured cheques, and the appellant failed to rebut this financial evidence. In supporting the Trial Court's finding that the appellant's denial of delivery was vexatious and an abuse of the Court process, Counsel referred to the case of **Satya Bhamu Gandhi v Director of Public Prosecutions & 3 others** [2018] KEHC 6100 (KLR).

ANALYSIS AND DETERMINATION.

17. This being a first Appeal, it is by way of re-trial and as the first appellate Court, I have the duty to re-evaluate, re-analyze and re-consider the evidence and draw my own conclusions, while bearing in mind that I did not see witnesses testify and give due allowance for that fact. This was the holding by the Court in the case of **Selle v Associated Motor Boat Co.** [1968] EA 123, where it was held as hereunder –

The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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 the 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 demeanour of a witness is inconsistent with the evidence in the case generally.

18. An Appellate Court will only interfere with the findings by a Trial Court if the same was founded on wrong principles of law, or if the Trial Court misdirected itself on issues of facts. To this end, I am bound by the Court of Appeal finding in the case of **Mwanasokoni v Kenya Bus Services Ltd** [1985] KLR 931 where it was held that -

Accordingly, on when a finding of fact that is challenged on appeal is based on no evidence, or on a misapprehension of evidence or the judge is shown demonstratively to have acted on wrong principles in reaching a finding he did, will this court interfere.

19. I have re-examined the Record of Appeal and given due consideration to the written submissions by Counsel for the parties, the sole issue that arises for determination is whether I should set aside the decision of the Trial Court.
20. It is trite that the standard of proof in civil cases is that of a balance of probabilities. In the case of **Miller v Minister of Pensions** [1947] 2ALL ER 372, the Court of Appeal stated that -

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 the tribunal can say 'we think it more probable than not. Thus, proof 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' explanations are equally unconvincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.

21. The record reveals that the respondent's claim was anchored on delivery of goods. This means that without proof of delivery, no contractual obligation to pay could arise. The appellant's denial of delivery of the alcoholic beverages squarely placed the evidential burden on the respondent to demonstrate that goods were in fact supplied.
22. In a bid to demonstrate that goods were supplied to the appellant by the respondent, it relied on invoices, delivery notes, statements of account, oral testimony, and dishonoured cheques. A close examination of the record shows that the respondent produced three delivery notes, out of which only one of them was signed and stamped by the appellant to confirm that delivery of the goods listed thereon was actually effected.
23. The record further indicates that during cross-examination by Mr. Lang'at, PW1 admitted that the delivery notes produced in Court did not bear the name or stamp of the customer alleged to have received the goods, as would ordinarily be expected.
24. DW1, on the other hand testified that the appellant engaged in business with the respondent between 2019 and 2021, until it was discovered that the respondent had been issuing invoices without accompanying ETR receipts. He further stated that upon raising this concern, the respondent generated three invoices in the names of the appellant, Sunblest Distributors, and Sunblest Zero Diet, all bearing duplicate ETR receipts and unsupported by any evidence of actual delivery of goods.
25. This Court nonetheless observes that one of the delivery notes produced by the respondent bears the appellant's name and official stamp, signifying that delivery of the goods specified thereon was duly effected. The date and reference number on that delivery note correspond with the invoice dated 5th July 2021, invoice No. 7466. In light of the respondent's witness having confirmed receipt of a total sum of Kshs.6,955,000/= from

the appellant, I am satisfied that invoice No. 7466 dated 5th July 2021 was fully paid and settled by the appellant.

26. Despite the said evidence, the Trial Court still found that delivery had occurred, largely on the basis of the issuance of cheques and the inferred conduct of the parties. DW1 however confirmed in examination-in-chief that the cheques issued to the respondent were for security and were only to be cashed upon actual delivery of the goods. He explained that the respondent cashed one cheque for Kshs.800,000/= without having delivered any goods to the appellant and upon being notified by the latter's bank, it issued instructions stopping the other cheques from being encashed.
27. In light of the conflicting positions taken by the appellant and the respondent regarding the invoices, delivery notes, and cheques relied upon by the respondent, this Court is of the considered view that invoices, unsigned delivery notes, and cheques, when considered in isolation, constitute weak evidence of delivery. The respondent ought to have adduced additional corroborative evidence such as acknowledgment receipts, gate passes, transport or delivery records, or testimony from independent third parties to establish actual delivery and receipt of the goods by the appellant.
28. It is therefore my finding that the Trial Court elevated the evidential value of the cheques beyond their probative reach, effectively treating them as conclusive proof of delivery. This amounted to substituting proof of delivery with proof of the intention to pay, which are legally distinct concepts. A cheque, whether honoured or dishonoured, does not by itself prove that goods were delivered unless supported by an unbroken evidential chain linking invoicing, delivery, acknowledgment and payment.

29. In the premise, I am persuaded that the Trial Court reversed the burden of proof by requiring the appellant to disprove delivery once cheques were issued. The reasoning adopted by the Trial Court demonstrates that once issuance of cheques was established, the appellant was expected to justify stopping payment, thereby shifting the legal burden of proof, contrary to the provisions of Sections 107 & 108 of the Evidence Act. This Court maintains that the respondent bore the primary burden to prove delivery. From the foregoing, I am persuaded that the burden was never discharged to the required standard, and it was therefore erroneous to characterize the appellant's denial of delivery as vexatious or an abuse of the Court process.
30. I therefore find that the Trial Court erred in law in holding that actual delivery was proved on a balance of probabilities in the absence of signed delivery notes or other independent proof.
31. The Trial Court further found that there existed a business custom or established course of dealing between the parties, namely that goods were delivered first and cheques issued thereafter. However, from a perusal of the return cheque advices produced by the respondent, it is clear that the dishonoured cheques were dated 8th August 2021 and 9th September 2021. There is no evidence of deliveries done by the respondent to the appellant on those dates or a day before the dates of the cheques. Furthermore, business custom or course of dealing is a matter that must either be pleaded or clearly arise from consistent and repeated transactions proved by evidence. Similarly, the finding that the appellant was estopped from denying the contract was unsupported by pleadings or a factual foundation establishing representation, reliance and detriment.
32. In this case, business custom was neither pleaded in the plaint nor distinctly raised as an issue for determination. The evidence on record

discloses, at best, a limited transactional interaction, which cannot, without more, crystallize into a binding custom or settled course of dealing. Parties are bound by their pleadings and any evidence however strong that tends to be at variance with the pleadings must be disregarded. The Supreme of Kenya in the case of **Odinga & another v Independent Electoral and Boundaries Commission & 2 others** [2017] KESC 31 (KLR) held that–

In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....

33. I am therefore persuaded that it was a misdirection for the Trial Court to introduce estoppel and business custom as determinative factors in the absence of proper pleading and proof.
34. On the issue of quantum, the appellant challenged the award of Kshs.1,450,000/= on the ground that it was unsupported by the respondent's own financial evidence. On perusal of paragraph 4 of the respondent's plaint, it is clear that the respondent claimed to have supplied goods to the appellant worth Kshs.7,635,000/=, but the appellant only paid Kshs.6,955,000/=. Although the respondent claimed that from

its calculations the appellant had a balance of Kshs.1,450,000/=, a straightforward arithmetical computation reveals that the actual balance from the figures provided by the respondent is Kshs.680,000/=.

35. While Courts may rely on statements of account and dishonoured cheques to ascertain indebtedness, such reliance presupposes proof of the underlying transaction. Given the failure to prove delivery, the foundation for the monetary award collapses. In any event, a Court cannot award sums not strictly pleaded and proved as special damages.

36. In light of the foregoing, this Court finds that the instant appeal is merited. It is hereby allowed in the following terms –

- i) The Judgment and decree of the Trial Court are hereby set aside and substituted with an order dismissing the respondent's suit in the lower Court; and**
- ii) Costs of the lower Court case and this Appeal shall be borne by the respondent.**

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI on this 20th day of February 2026. Judgment delivered through Microsoft Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Machoka h/b for Mr. Githui for the applicant

Ms Kinuthia h/b for Ms Kiiru for the respondent

Ms B. Wokabi – Court Assistant.