IN THE COURT OF APPEAL AT KISUMU

(CORAM: ASIKE-MAKHANDIA, OMONDI & KIMARU,

JJ.A.) CIVIL APPEAL NO. 152 OF 2020

BETWEEN

OURU SUPERSTORES LIMITED..............................APPELLANT

AND

HIGHLAND MINERAL WATER COMPANY LIMITED… RESPONDENT

(Being an Appeal from the Judgment and Decree of the High Court of Kenya at Kisii, (Ougo J.) dated 5th February, 2020

in

HCCA NO. 31 of 2018)
****

JUDGMENT OF THE

COURT

[1] This is a second appeal against the judgment and decree of the Chief Magistrate's Court at Kisii delivered in Civil Case No. 241 of 2016. The suit in the trial court was commenced by a plaint in which **Ouru Superstores Limited**, **"the appellant"**, pleaded that **Highlands Mineral Water Company Limite**d, **"the respondent"**, had approached it requesting for storage facilities for its assorted products on an interim basis pending relocation to their

new premises within a period of thirty days.

[2] It averred that the respondent neglected to remove its goods from the storage facility after the expiry of the period contrary to the mutual agreement. It was further pleaded that some of the goods later expired, caused some nuisance and deprived the appellant of the use of its own storage facility. The appellant also claimed that the respondent's agents had taken possession of some of the assorted goods already sold to the appellant for marketing and promotional purposes but failed to remit the proceeds of sale, leaving an outstanding sum of Kshs.375,992.60. The prayers in the plaint included an order compelling the respondent to vacate and remove the assorted goods from the storage facility, payment of Kshs.375,992.60, general damages for deprivation of storage facilities and interest at court rates.

[3] The respondent filed its defence denying entering into any agreement with the appellant for storage of its goods, that the appellant suffered nuisance or deprivation of its facility, and that its agents took assorted goods or owed the appellant the claimed sum. The respondent averred that any agreement with third parties could only be executed by its Chief Executive Officer or senior management which was not the case here, and that it had regional distribution centres of its own across the country where its

products were stored. It prayed that the suit be dismissed with costs in the premises.

[4] At the plenary hearing, Kennedy Nyakundi (PW1), general manager of the appellant testified that on 20th March, 2013, or thereabouts there was an arrangement between the appellant and the respondent for the former to provide the later with storage facilities on temporary basis for its mineral water and fruit juices products for sale within Kisii region for thirty days. He stated that the appellant provided the storage but the respondent failed to collect the goods at the expiry of the period thereof. He added that the respondent instructed its agents to collect some items belonging to the appellant for sale and promotional activities but never remitted to the appellant the proceeds thereof. He admitted though that there was no written agreement between the parties. He explained that the items stored belonged to the respondent but some of them had already been sold to the appellant.

[5] On the defence side, Esau Nderitu Nyamweya (DW1), a regional manager of the respondent, testified that no goods were stored on behalf of the respondent by the appellant. He stated that the appellant was the respondent's distributor and that the appellant ordered goods from the respondent which were supplied on credit for thirty days. He denied that the respondent sent agents to collect goods, insisting that the goods in the appellant's custody belonged

to the respondent. He further denied

owing the appellant the claimed sum of Kshs.375,992.60.

[6] The trial court in its determination found that the appellant had failed to prove any arrangement for storage of the respondent's goods and thus failed to establish breach of contract. However, on the second prayer in the plaint, the court awarded the appellant Kshs.254,610.32 based on invoices tendered in evidence by the appellant. It was this award that prompted the first appeal to the High Court of Kenya at Kisii by the respondent.

[7] The High Court re-evaluated the evidence and noted that invoices produced were described as "sales invoices" and not delivery notes, and that while some invoices bore signatures of persons said to be agents of the appellant, those persons were not called as witnesses. The court emphasized that **Section 107(1)** of the Evidence Act, places the burden of proof on the party asserting a fact. Citing **<u>Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another</u>, Civil Appeal No. 345 of 2000 [2005] 1 EA 334**, the court reiterated that the legal burden lies upon the party invoking the law, while the evidential burden shifts depending on the facts asserted. The court held that the appellant failed to prove delivery of goods to the respondent's agents or any common intention to create contractual obligations. It found that the trial court erred in awarding Kshs.254,610.32 to the appellant solely on the basis of

sales

invoices.

[8] In the result, the High Court allowed the appeal, set aside the judgment and decree of the trial court and substituted it with an order dismissing the appellant's suit in the trial court. Costs of the appeal were awarded to the respondent.

[9] The appellant, dissatisfied with the determination of the first appellate court, now approaches this Court as perhaps the final avenue of recourse. Through the memorandum of appeal the appellant cites seven grounds impugning the judgment and decree of the first appellate court, to wit; that it erred in law in finding that the: appellant had not proved the existence of a contract or agreement with the respondent; the invoices tendered were not sufficient to establish a contractual relationship; trial court misconceived and misconstrued the import and tenor of the invoices by treating them merely as sales invoices; it failed to discharge the statutory duty of fresh and exhaustive scrutiny of the trial court's findings; and that it arrived at conclusions contrary to the law of contract, thereby occasioning a miscarriage of justice.

[10] When the appeal was called out for hearing, **Mr. Mulisa**, learned counsel appeared for the appellant, while **Ms. Nyakowa**, appeared holding brief for **Mr. Wandati**, learned counsel for the respondent. They all elected to rely on their respective written

submissions in arguing

their positions on the appeal.

[11] Counsel for the appellant submitted that the first appellate court erred in holding that no valid contract or memorandum of understanding existed between the parties. He contended that from the conduct, words, and circumstances surrounding their business dealings, a binding contractual relationship was established. That the respondent had approached the appellant seeking temporary storage facilities for its assorted products, with a clear understanding that the goods would be removed within thirty days. Further, the parties covenanted that the respondent's agents would market, promote, and sell the products collected from the appellant and thereafter remit the proceeds to the appellant. These arrangements were evidenced by invoices and delivery notes exchanged between the parties, which were tendered in evidence without any objection.

[12] Counsel submitted that the first appellate court adopted a narrow and monolithic view of contract formation, disregarding the principles of implied contracts and estoppel. Counsel reverted to **RTS Flexible Systems Ltd v Moikerei Alois Muller GmbH & Co KG [2010] UKSC 14**, in which the Supreme Court of the United Kingdom held that whether a binding contract exists depends on the parties' words and conduct, and that even where certain terms

remain unsettled, an

objective appraisal may reveal an intention to create legal relations.

That the absence of a formal written agreement does not negate the existence of a contract where business reality and mutual dealings demonstrate otherwise.

[13] Citing also the case of **Ali Abdi Mohamed v Kenya Shell Ltd [2017] eKLR**, counsel emphasized that an implied contract arises where it is necessary to give business reality to a transaction and to create enforceable obligations between parties who are evidently dealing with one another.

[14] Counsel further relied on **Mamta Peeush Mahajan v Yashwant Kumari Mahajan [2017] eKLR**, where the Court, citing Lord Steyn in **G. Percy Trentham Ltd v Archital Luxfer Ltd [1993] 1 Lloyd's Rep 25**, held that contract formation is governed by the reasonable expectations of sensible businessmen, and that executed transactions often make it unrealistic to argue that no intention to create legal relations existed. That performance of obligations by both parties strongly evidences contractual intent, even where negotiations were incomplete or informal.

[15] Applying these principles, counsel submitted that the invoices exchanged and accepted by the respondent, coupled with the continued performance of marketing and sales obligations, clearly demonstrated a

binding contractual relationship. The first appellate court therefore

erred in disregarding these facts and failing to appreciate that neither party disputed the invoices or the sum of Kshs.254,610.32 confirmed as due.

[16] In conclusion, counsel prayed that we allow the appeal, set aside the judgment of the first appellate Court and find that a valid contract or memorandum of understanding existed between the parties enforceable in law, on the basis of their conduct, words and mutual dealings.

[17] In opposition to the appeal, counsel for the respondent submitted that the first appellate court properly evaluated the evidence and rightly found that no valid contract existed between the parties. Counsel submitted that the appellant alleged two oral contracts: first, that the respondent was allowed to store goods in the appellant's warehouse for thirty days, and second, that the respondent's agents were to market and sell the goods on behalf of the appellant. However, in both instances, the appellant failed to demonstrate the essential element of consideration, without which no enforceable contract can arise.

[18] Counsel emphasized that under **Section 107(1)** of the Evidence Act, the burden of proof lies on the party asserting the existence of facts. This principle was affirmed in **Anne Wambui**

Ndiritu v Joseph Kiprono

Ropkoi & Another (supra), where the Court held that the legal burden

of proof rests upon the party who invokes the aid of the law, while the evidential burden lies on the party who desires the Court to believe in the existence of a particular fact. Applying this *ratio decidendi*, counsel submitted that the appellant failed to discharge both the legal and evidential burden of proving the alleged contracts.

[19] Further, counsel referred to a letter from its legal officer, which expressly stated that the respondent had placed goods into the appellant's stores without any order or consent. This communication negated any claim of acceptance and demonstrated that the element of offer and acceptance was not satisfied. Counsel submitted that if goods were stored without consent, the proper claim by the appellant would have been conversion, which was never pleaded. Thus, no contract could be inferred.

[20] On consideration, counsel relied on **RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH (supra)** where it was observed that whether a binding contract exists depends on what was communicated between the parties by words or conduct, and whether objectively this demonstrated an intention to create legal relations. That contracts cannot be implied where essential terms are absent or where parties did not intend to be bound. The

respondent submitted that in the present

case, no such intention or payment of consideration were established.

[21] Counsel also cited **William Muthee Muthami v Bank of Baroda [2014] eKLR**, where the Court held that for a contract to exist, there must be proof of offer, acceptance, and consideration. Without these three elements, no claim for breach can succeed. Applying this principle, counsel submitted that the appellant failed to prove any of these elements, and therefore no contract existed.

[22] On invoices, counsel submitted that the documents relied upon by the appellant were merely sales invoices and not delivery notes. The invoices were neither stamped nor signed, while others bore signatures of persons whose authority was never proved, as they were not called to testify. Consequently, the invoices could not establish delivery, agency, or contractual relationship.

[23] In support thereof, the respondent relied on **Pakatewa Investment Co. Ltd v Municipal Council of Malindi [2016] eKLR**, where the Court held that parties are obligated to exercise due diligence in business transactions and cannot escape responsibility by claiming ignorance of basic procedures. Consequently, failure to verify authorization or compliance with business procedures negates contractual liability. Counsel submitted that the appellant failed to exercise due diligence before releasing goods to strangers and cannot now rely on unsigned or

unproved invoices to establish a contract. The respondent thus

submitted that the first appellate court correctly distinguished between invoices, sales invoices, and delivery notes, and properly found that the documents before it did not establish any contractual relationship. In a nutshell, the appellant failed to prove offer, acceptance, consideration, or delivery. Accordingly the appeal was without merit and accordingly prayed that it be dismissed with costs.

[24]This appeal is before us as a second appeal. It is well settled that at this stage, the jurisdiction of this Court is confined strictly to consideration of questions of law. **Section 72(1)** of the Civil Procedure Act expressly provides that a second appeal lies only on matters of law and not fact. In **<u>Kenya Breweries Ltd V Godfrey Odoyo</u> [2010] eKLR;** this jurisdiction***,*** was described thus***:***

> ***"In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse."***

[25] The issues of law arising for our determination in this appeal are twofold: first, whether a contract existed between the parties and the subsequent award of Kshs.254,610.32 was proper and second, whether

the first appellate court properly discharged its duty of re-evaluating the evidence and reaching its own independent conclusions.

[26] On the first issue, the appellant argued that the conduct and words of the parties demonstrated a binding contractual relationship. The High Court, however, found otherwise. The law is clear that for a contract to exist, there must be offer, acceptance, and payment of consideration. In **William Muthee Muthami v Bank of Baroda (supra),** the Court held:

> ***"In the law of contract, the aggrieved party to an agreement must in addition prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party for breach."***

[27] The common law has consistently maintained that courts will not rewrite contracts merely to shield a party from hardship or an unfavorable bargain. Once parties freely enter into an agreement, they are bound by its terms and conditions in their entirety. As early as the 19th century, the House of Lords in **Brogden v Metropolitan Railway [1877] 2 App Cas 666** articulated this position. Lord Blackburn observed:

> **"I have always understood the law to be that where an offer is made to another, and within that offer there is an express or implied request that acceptance be signified by performing a particular**

act, then the moment that act is performed, the party is bound."

[28] Applying the foregoing to the circumstances of this case, it is apparent that first and foremost there was no written agreement or contract between the parties to govern their relationship. Both parties appear concede to this fact. However the appellant is of the view, that the contract should be inferred from the conduct of the parties and the invoices tendered in evidence by the appellant. It is not in dispute that the appellant failed to demonstrate payment of any consideration. The alleged storage arrangement was not supported by evidence of payment or reciprocal benefit. The Court in **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR,** underscored that courts cannot rewrite contracts for parties and must enforce only what is proved. Here, the absence of consideration and acceptance negates the existence of a binding contract.

[29] The appellant relied heavily on documents described as sales invoices to lay the basis of implied contract. The High Court found, and rightly so in our view that these were merely sales invoices and not delivery notes. Further the invoices were neither stamped nor signed, while others bore signatures of persons whose authority to bind the respondent was never proved, as they were not called to

testify. Further, there was a letter from the legal officer of the respondent ,

which expressly stated that the respondent had placed goods into the appellant's stores without any order or consent. Consequently, the invoices could not establish delivery, agency, or contractual relationship. The Court in **Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another (supra)** held:

> ***"The legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue."***

[30] The evidential burden shifts depending on the facts asserted. In the present case, the appellant bore the burden of proving that the invoices evidenced delivery of goods to authorized agents of the respondent as a demonstration of part performance of the contract which may lead to inference of a contract. This burden was not discharged. In **Pakatewa Investment Co. Ltd v Municipal Council of Malindi (supra)**, the Court held that parties must exercise due diligence in business transactions and cannot rely on unsigned or unverified documents to establish liability. This simply means that failure to verify authorization or compliance with business procedures negates contractual liability. The invoices, whether signed or unsigned, did not prove delivery or agency and therefore could not establish a contractual relationship. Nor can a contract be inferred given the circumstances.

[31] It is difficult to appreciate whether a binding contract existed between the parties by way of conduct as there are no words or conduct, whether objectively that can demonstrate an intention to create legal relations between the parties. If anything, the relationship was one of give and take. The appellant will provide storage facilities and in return, the respondent's staff will carry out marketing and promotional activities of the appellant's products. This reasoning negates the appellant's assertion that the first appellate court took a narrow and monolithic view regarding the interpretation of what amounts to a contract. From all the foregoing, the existence of a contract between the parties could not be implied and therefore, the first appellate court was right in setting aside the judgment of the trial court and the award made therein in favour of the appellant.

[32] On the last issue, the appellant contended that the Judge failed to re-evaluate the evidence afresh as required. The duty of a first appellate court is well settled. In **Selle v Associated Motor Boat Co. Ltd** **[1968] EA 123**, the Court of Appeal held:

> ***"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."***

[33] The High Court in this case re-examined the invoices, considered the testimony of the witnesses, and applied **Section 107** of the Evidence Act. The first appellate court concluded that the appellant had not proved the existence of a contract between the parties whether written or implied. This was a proper discharge of the duty of re-evaluation. The Court of Appeal in **Ephantus Mwangi vs Duncan Mwangi Wambugu [1984] KLR 453,** stated:

> ***"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. But the jurisdiction "(to review the evidence)" should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion."***
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> ***That passage, was cited with approval by Sotiros Shipping v Sauviet Soholt, Times 16th March 1983.***
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> > ***'It is uncertain whether, their Lordships should have reached the same conclusion on the evidence, but it is important that, sitting in the appellate court, they should be ever mindful of the advantages enjoyed of trial judge who saw and heard the witnesses and were in an incomparably better position, than the Court of Appeal, to assess the significance of what was said, how it was said, and, equally important, what was not said.'***
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> ***In my judgment, the finding of the High Court has not been shown to have been wrong on liability, and, although I have the misfortune to differ from my brethren, I would dismiss the appeal on that issue."***

[34] Based on the above, and our total review of the record presented before us, and the submissions by both parties, it is clear that the first appellate court did so, and its conclusions were consistent with the law.

[35] In the result, we are satisfied that the appellant failed to prove the existence of a contract whether written or implied, and the first appellate court properly discharged its statutory duty. Accordingly, the appeal is devoid of merit and is dismissed with costs to the respondent. **Dated and delivered at Kisumu this 27th day of February, 2026.**

ASIKE-MAKHANDIA
...
JUDGE OF APPEAL

H.A. OMONDI
...
JUDGE OF APPEAL

L. KIMARU
...
JUDGE OF APPEAL

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

JUDICIARY
THE COURT OF APPEAL
REPUBLIC OF KENYA