

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
COMMERCIAL APPEAL NO. E214 OF 2024

**JOHN OMWERI T/A NAIROBI FAMILY MATERNITY HOSPITAL
KISII**

GYNOCARE.....APPELLANT

VERSUS

TUFFSTEEL

LIMITED..

.....RESPONDENT

JUDGMENT

1. This appeal arises from the judgment of the Chief Magistrate’s Court at Milimani (Hon. Christine A. Ogweno, CM) delivered on 4th July 2024 in MCCC No. E273 of 2023, in which the trial court entered judgment in favour of the Respondent for the sum claimed together with interest at the rate of 3% per month on delayed payments.
2. The dispute before the trial court concerned the supply of goods by the Respondent to the Appellant. It is common ground that the goods were delivered and invoices subsequently issued. The central controversy, however, was whether the invoices formed part of the binding contractual terms between the parties, particularly as regards the imposition of interest at the rate of 3% per month on late payments.
3. Aggrieved by that decision, the Appellant lodged the present appeal vide a Memorandum of Appeal dated 14th August

2024, challenging both the factual and legal findings of the trial court. in substance it raises the following grounds:

- i. That the learned trial magistrate erred in law and fact by finding that the Respondent had proved its case on the issue of interest charged at 3% per month on late payment of invoices against the appellant.*
- ii. That the court erred in finding that interest at 3% per month formed part of the parties' agreement.*
- iii. That the Learned trial magistrate erred in law and fact by finding that the invoices issued amounted to an enforceable agreement to charge 3% interest per month on late payment*
- iv. That the court failed to properly evaluate the evidence and misapplied the law relating to contractual variation.*

4. The Appellant seeks that the appeal be allowed, the judgment of the trial court be set aside, and costs be awarded.

5. The Appeal was heard by way of written submissions. The appellant filed submissions dated 5th June 2025, while the Respondent's submissions are dated 24th November 2025

Appellant's case

6. The Appellant challenges the trial court's finding that the invoices formed binding contractual terms, particularly regarding the imposition of interest at 3% per month.

7. The Appellant argues that the agreement between the parties was purely oral and that the invoices were issued after delivery of goods, and therefore could not introduce

new contractual terms such as interest without mutual agreement.

8. It is contended that the invoices were merely demands for payment, not contractual instruments, the interest clause was unilaterally introduced by the Respondent at the invoicing stage, and there was no meeting of minds on the issue of interest.
9. The Appellant relies on authorities, including *Toyota Kenya Limited v Vehicle & Equipment Leasing Limited* and *Fulex Kenya Limited v Seed Group Limited* to argue that contractual variation requires mutual assent and cannot be imposed retrospectively.
10. Further, the Appellant submits that the trial court erred in treating the invoices as forming the contract, yet the evidence showed that the contract had already been concluded orally, the invoices were issued after performance, and both parties' witnesses confirmed that the agreement did not include interest.
11. The Appellant also invokes the principle in *Kenya Breweries Ltd v Kiambu General Transport Agency Ltd* that variation of a contract requires agreement and consideration, and cannot be effected unilaterally.
12. In conclusion, the Appellant submits that the invoices did not constitute a valid or enforceable contract and that the trial court misdirected itself in law and fact. The Appellant therefore prays that the appeal be allowed and the trial court's judgment set aside in its entirety.

Respondent's case

13. The Respondent opposes the appeal in its entirety and maintains that the trial court's judgment was sound both in fact and in law.
14. The Respondent identifies three core issues: whether the invoices formed binding contractual terms, whether the 3% monthly interest was agreed, and whether there is any basis to interfere with the trial court's findings.
15. On the first issue, the Respondent argues that the invoices constituted the operative contract between the parties. The Appellant received, retained, and acted upon them without objection, including making part-payments, thereby evidencing acceptance by conduct.
16. On the interest term, the Respondent submits that the 3% monthly interest was expressly stated in the invoices and was accepted through the Appellant's conduct. Authorities such as *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd*, *Coastal Bottlers Ltd v Kimathi Mithika*, and *Five Forty Aviation Ltd v Erwan Lanoe* are relied upon to support the propositions that courts do not rewrite contracts, contracts can be inferred from conduct, and a party cannot accept benefits while rejecting obligations.
17. The Respondent distinguishes the Appellant's authorities, arguing that cases like *Toyota Kenya Ltd* and *Fulex Kenya Ltd* are inapplicable since, in this case, there was no prior written contract and assent was demonstrated through conduct.
18. Further, reliance is placed on Section 60 of the Sale of Goods Act to justify entitlement to interest on delayed

payments, especially where such terms were clearly communicated.

19. Finally, the Respondent emphasizes that the trial court properly evaluated the evidence, including witness credibility, and that appellate interference with factual findings is unwarranted. The Respondent therefore prays that the appeal be dismissed with costs and the trial court judgment upheld.

Analysis and determination

20. This being a first appeal, our duty is as was aptly stated in the case of **Selle versus Associated Motor Boat Co. [1968] EA 123**: namely to:

“Reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally”.

21. I have re-evaluated and re-analyzed the record in light of the rival submissions and principles of law cited by the parties, in my view, the following issues arise for determination:

- i. *Whether the invoices constituted binding contractual terms between the parties;*
- ii. *Whether the interest of 3% per month was payable*

Whether invoices constituted binding contractual terms

22. The Appellant's position is that the agreement between the parties was purely oral and that the invoices were issued post-delivery, hence incapable of introducing new contractual terms without express assent. The Respondent, on the other hand, contends that the invoices were received without objection and acted upon through part-payments, thereby evidencing acceptance by conduct.
23. It is well-settled law that a contract may be oral, written, or inferred from the conduct of the parties. Contractual relations may arise from a consistent course of dealing and conduct. (see **Five Forty Aviation Limited v Erwan Lanoe [2019] KECA 763 (KLR)**).
24. It is equally trite that courts do not rewrite contracts for parties. **Pius Kimaiyo Langat versus Co-operative Bank of Kenya Ltd [2017] eKLR**, after reviewing case law on the subject, reiterated as follows:

“We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, fraud, or undue influence are pleaded and proved.”
25. In the present case, it is undisputed that goods were supplied, invoices issued, and part-payments made.

26. However, the critical question is whether such conduct amounts to acceptance of all the terms contained in the invoices, including those relating to interest.
27. The trial court, having looked at the invoices, found that: “each invoice had details on the description of the goods, the product specification and price, value and a statement that all interest would be charged at 3% per month or pro rata delay... it went ahead to find that a valid contract requires an offer, acceptance and consideration. The defendant failed to question the provision of interest as provided in the invoices, and the plaintiff proceeded to supply the goods as per the defendant's order ... I think that the Defendant cannot turn around to allege that the interest on late payments was not an agreed term of the contract.”
28. In my view, invoices may serve as documentary evidence of a transaction on agreed terms; they cannot, without clear assent, impose new and onerous terms after performance.
29. The Court in **Fulex Kenya Limited v Seed Group Limited [2000] eKLR** emphasized that unilateral variation of contractual terms is ineffective unless mutually agreed.
30. Similarly, in **Toyota Kenya Limited v Vehicle & Equipment Leasing Limited [2021] eKLR**, the Court underscored that contractual terms cannot be imposed retrospectively without consensus.
31. In the present case, the evidence on record does not demonstrate that the term imposing interest at 3% per month was part of the initial bargain. The invoices were

generated after delivery of goods, and there is no evidence of prior agreement on that rate of interest.

32. While the Appellant's conduct in making part-payments may signify acknowledgement of the debt, it does not, without more, amount to acceptance of an additional and penal term such as interest at 3% per month.

33. I therefore find that although the invoices may evidence the existence of the debt, they did not, in the circumstances of this case, constitute binding instruments capable of unilaterally introducing new contractual terms relating to interest.

Whether the interest at 3% per month was payable

34. The Respondent has contended that the Appellant, having received the invoices and failed to object thereto, is estopped from denying the terms contained therein and cannot approbate and reprobate.

35. There is no doubt that the doctrine of approbation and reprobation is well settled in law. It precludes a party from accepting and rejecting the same instrument or transaction. However, the doctrine only applies where there is clear, unequivocal and informed conduct demonstrating that a party has elected to take a benefit while disclaiming the corresponding burden. It cannot be invoked on the basis of mere silence or in circumstances where the alleged terms were not expressly agreed upon.

36. The trial court found that the invoices stipulated that payment was to be made within thirty (30) days and that the Appellant's failure to comply with that timeline constituted delay in payment. While that finding may be borne out by

the material on record in so far as the payment period is concerned, it does not, without more, establish that all terms contained in the invoices were contractually binding.

37. In particular, the imposition of interest at the rate of 3% per month, which translates to 36% per annum, is a substantial and, prima facie, penal term. Such a term cannot be implied lightly or inferred merely from the issuance of invoices, especially in the absence of evidence demonstrating that it was expressly brought to the attention of, and accepted by, the Appellant.
38. The law is clear that a court of law cannot rewrite a contract for the parties. In **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another**, the Court of Appeal held that a court cannot imply terms which the parties themselves did not agree upon. The Court must give effect to the intention of the parties as discerned from the contract, and not impose new obligations.
39. In the absence of clear evidence that the Appellant agreed to the interest term of 3% per month, I am unable to uphold its enforcement. To do so would be to impose a penal and onerous obligation not freely assumed by the Appellant.
40. In the premises, I find that the learned trial magistrate erred in holding that the interest at the rate of 3% per month formed part of the contractual terms binding upon the parties.
41. An appellate court will interfere with findings of fact where they are based on no evidence, or on a misapprehension of the evidence.

42. I therefore find that the trial court erred in law in enforcing the interest clause.
43. In the result, and having re-evaluated the evidence and the applicable law, I am satisfied that the appeal is meritorious. The principal sum having been fully settled, and there being no lawful basis for the imposition of interest at 3% per month, the Respondent's claim for interest cannot be sustained.
44. Accordingly, the Court makes the following orders:
- a. The appeal is hereby allowed.***
 - b. The judgment of the Chief Magistrate's Court awarding interest at the rate of 3% per month is hereby set aside.***
 - c. For avoidance of doubt, the principal sum having been fully settled on 14th February 2023, no further sums are payable by the Appellant to the Respondent.***
 - d. Each party shall bear its own costs of the appeal.***

JUDGMENT delivered virtually, dated and signed at **NAIROBI**

This **30th** day of **April** 2026.

P.M. MULWA
JUDGE

In the presence of:

Ms. Wetunga h/b for Mr. Gekonga for Appellant

Mr. Wachira for Respondent

Court Assistant: Lispa

