Odhiambo v Muhumud (Commercial Case E309 of 2023)
[2024] KEHC 15320 (KLR) (Commercial and Tax) (28 November 2024) (Judgment)

Neutral citation: [2024] KEHC 15320 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E309 OF 2023

MA OTIENO, J

NOVEMBER 28, 2024

BETWEEN

JACKSON JAMINE ODHIAMBO .... APPELLANT

AND

MOHAMMED ADBI MUHUMUD .... RESPONDENT

(An appeal from the Judgment and Decree of Hon. Judith Omollo (SRM & Adjudicator)) delivered on 19th October 2023 in the Milimani SCCCOMM No. E843 of 2023)

JUDGMENT

Introduction

1. This is an appeal from the Judgment in the Milimani Small Claims Court (SCCCOMM) case No. E843 of 2023 delivered on 19th October 2023 in which the trial court dismissed the Appellant's claim for injunction/compensation against the Respondent.

2. The background of the matter is that the Appellant vide his Statement of Claim dated 23rd January 2023 claimed that sometime in June 2022, he opened a hospital and later, via an oral contract, incorporated the Respondent as an equity partner, with a profit-sharing ratio of 70:30 in favour of the Appellant.

3. It was further the Appellant's case before the trial court that on 2nd January 2023, the Respondent locked the hospital and kicked out all employees of the hospital, the Appellant included, thereby assuming sole ownership of the hospital without any compensation to the Appellant.

4. The Appellant therefore instituted the lower court suit seeking injunctive orders against the Respondent, that the Respondent be restrained from interfering with the Appellant's management

and running of the hospital. The Appellant also sought, as an alternative prayer, that he be paid by the Respondent a sum of Kshs. 1,000,000/- in exchange for his interest in the hospital.

5. On 19th October 2023, the lower court rendered its judgment on the matter and dismissed the Appellant's claim on the basis that he had not proved his case against the Respondent to the required standards.

The Appeal

6. Aggrieved by the trial court's Judgment, the Appellant lodged this appeal vide its Memorandum of Appeal dated 17th December 2023 and raised the following as the grounds of appeal; -

   i. That the learned Honourable Magistrate erred in fact and law in finding that the Respondent's Defence was watertight when there was no concrete evidence to support the same.

   ii. That the learned Honourable Magistrate erred in law and fact by failing to realize that there was material non-disclosure on the part of the Respondent hence arriving at a wrong conclusion in her judgment.

   iii. That the Learned trial Honourable Magistrate erred in law and fact in relying only and exclusively on the evidence of the Respondent and ignoring completely the evidence of the Appellant.

   iv. That the learned trial Honourable Magistrate erred in law and fact in failing to consider the overwhelming evidence brought to the court by the appellant during the hearing of the case at the lower court.

   v. That the learned trial Honourable Magistrate erred in law and fact in disregarding the entirety of the evidence of the appellant thereby arriving at erroneous factual findings in her judgment.

   vi. That the learned trial magistrate erred in law and fact by raising the standard of proof the appellant having proved his case on a balance of probability.

7. The appeal was canvased by way of written submissions. The Appellant filed his submissions dated 29th October 2024 whilst that of the Respondent is dated 6th November 2024.

Appellant's submissions

8. The Appellant submitted that the trial court erred in finding that the Respondent's defence was meritorious. According to the Appellant, the Respondent locked the hospital and without any reasonable cause, excluded the Appellant from the running of the business.

9. It was further the Appellant's submissions that the trial court failed to appreciate that there was material non-disclosure on the part of the Respondent. That the Respondent failed to disclose to the court that he was the one in charge of the financial records of the business/hospital and that contrary to the Respondent's assertions at trial, no money had been embezzled by the Appellant.

10. According to the Appellant, the trial court erred by relying exclusively on the Respondent's evidence while ignoring that of the Appellant. That the trial court ignored the Appellant's evidence that he was the one who registered the hospital in question and only incorporated the Respondent much later. That it is the Respondent who sabotaged the business by closing the premises.

11. Finally, the Appellant argued that the trial court failed to appreciate that the Appellant had proved his case against the Respondent to the standards required under section 107 of the *Evidence Act*.

12. The Appellant therefore urged this court to allow the appeal, set aside the lower court's judgment, and substitute it with a judgment of this court granting his prayers as sought in the lower court.

Respondent's Submissions

13. On his part, the Respondent supported the trial court's judgment and submitted that the Appellant's case was dismissed since the Appellant failed to prove his case on a balance of probabilities against the Respondent as required under section 107 of the *Evidence Act*.

14. According to the Respondent, the prayer for injunction sought by the Appellant in the lower court to have the hospital re-opened could not be granted since the Appellant had in his pleadings stated that he was no longer interested in running the hospital.

15. Further, the Respondent supported the trial court's finding that the Appellant had not proved his claim for Kshs. 1,000,000/- against the Respondent. The Respondent maintained that the trial court was right in its finding that the claim being a special damage claim, needed to be strictly proved by production of the relevant receipts, a task the Appellant failed.

16. The Respondent submitted that in any event, the Appellant's claim is premised on legality since

17. Citing among others, the case of Heptulla v Noormohamed 1984 eKLR, the Respondent submitted that the trial magistrate was right in its finding that the Appellant's claim for a sum of Kshs. 300,000 allegedly paid by the Appellant to acquire a medical certificate for purposes of registration of the hospital could not be awarded since the claim was based on illegality and therefore not enforceable by a court of law.

18. The Respondent therefore urged this court to dismiss the appeal with costs for lacking merit.

Analysis and determination

19. This is an appeal emanating from the Small Claims Court pursuant to Section 38 of the *Small Claims Court Act* which clothes this court with Appellate jurisdiction on matters arising from that court. The section provides that; -

> " 38.
>
> (1) A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.
>
> (2) An appeal from any decision or order referred to in subsection (1) shall be final."

20. It therefore follows that appeals originating from the Small Claims Court to this court can only be on the points of law in terms of Section 38(1) of the Small Claims Act. Consequently, in appeals emanating from the Small Claims Court, this court is not to entertain an invitation to interfere with the factual findings of the trial court.

21. The duty and jurisdiction of this court when dealing with appeals from Small Claims Court is comparable to that of the Court of Appeal when dealing with a matter on a second appeal. In Kenya

Breweries Ltd v Godfrey Odoyo [2010] eKLR the Court of Appeal, distinguishing between matters of law and matters of fact stated as follows: -

> "First, this is a second appeal. In a first appeal the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyse it, evaluate it, and come to its own independent conclusion. In other words, a first appeal is by way of a retrial and facts must be revisited and analysed a fresh, - see Selle and Another vs. Associated Motor Boat Company Ltd and Others (1968) EA 123. 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."

22. Again, in Charles Kipkoech Leting v Express (K) Ltd & another [2018] eKLR the Court of Appeal further clarified that where a right of appeal is confined to questions of law only, an appellate court is duty bound to accept the findings of fact by the lower court. That it should not interfere with the findings of the trial on the factual issues unless it is apparent that, based on the evidence on record, no reasonable tribunal or court could have reached the same conclusion, in which case, the holding or decision would be bad in law and therefore qualify to be reviewed on a second appeal. The court stated as follows; -

> "This is a second appeal. Our mandate is as has been enunciated in a long line of cases decided by the Court. See Maina versus Mugiria [1983] KLR 78, Kenya Breweries Ltd versus Godfrey Odongo, Civil Appeal No. 127 of 2007, and Stanley N. Muriithi & Another versus Bernard Munene Ithiga [2016] eKLR, for the holdings inter alia that, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the 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. See also the English case of Martin versus Glywed Distributors Ltd (t/a MBS Fastenings) 1983 ICR 511 where in, it was held inter alia that, where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

23. Before delving into the substantive questions as framed by the Appellant in its memorandum of appeal, it is therefore imperative for this court to first consider whether or not the issues raised and framed in the appeal are matters of law and therefore fall within the jurisdiction of this court bestowed under section 38 of the Small Claims Act.

24. I have considered the grounds of appeal as presented by the Appellant. I note that the major complaint by the Appellant is that the trial court erred in failing to appreciate that the Appellant proved its case against the Respondent on a balance of probability.

25. Burden of proof is indeed a legal concept which in the Kenyan legal system is generally anchored under Sections 107, 108, and 109 of the *Evidence Act* Cap. 80 Laws of Kenya. In the case of Bwire v Wayo

& Sailoki (Civil Appeal 032 of 2021) [2022] KEHC 7 (KLR) Mativo J (as he then was) stated the following regarding the burden of proof; -

> " 26. "Burden of Proof" is a legal term used to assign evidentiary responsibilities to parties in litigation. The party that carries the burden of proof must produce evidence to meet a threshold or "standard" in order to prove their claim. If a party fails to meet their burden of proof, their claim will fail. The general rule in civil cases is that the party who has the legal burden also has the evidential burden. If the Plaintiff does not discharge this legal burden, then the Plaintiff's claim will fail. In civil suits, the plaintiff bears the burden of proof that the defendant's action or inaction caused injury to the Plaintiff, and the defendant bears the burden of proving an affirmative defense. If the claimant fails to discharge the burden of proof to prove its case, the claim will be dismissed. If, however the claimant does adduce some evidence and discharges the burden of proof so as to prove its own case, it is for the defendant to adduce evidence to counter that evidence of proof of the alleged facts. If after weighing the evidence in respect of any particular allegation of fact, the court decides whether the (1) the claimant has proved the fact, (2) the defendant has proved the fact, or (3) neither party has proved the fact."

26. Shifting of the burden of proof in a trial essentially involves the changing of responsibility of proving or disproving of a point, by way evidence, from one party to the other. The question of who bears the burden of proof and circumstances under which the burden of proof may be shifted and on what conditions is undoubtedly a question of law.

27. Accordingly, I find and hold that the question of the burden of proof, the standards applicable and the shifting thereof as raised in the Appellant's memorandum of appeal dated 8th December 2023 are clearly questions of law and therefore fits within the ambit of Section 38 (1) of the *Small Claims Court Act*. Consequently, this court has jurisdiction to entertain this appeal.

28. Having established that this court has jurisdiction to entertain this appeal, I will then proceed and examine the substance of the appeal with a view of establishing whether or not the trial court erred in failing to find that the Appellant had proved its claim against the respondent to the required standards.

29. It is an established principle of law that whoever lays a claim before the court against another has the burden to prove it. Sections 107, 108 and 109 of the *Evidence Act* are unequivocal on this and provide as follows: -

> " 107. . Burden of proof.
>
> 1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist
>
> 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person
>
> 108. Incidence of burden.
>
> The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
>
> 109. Proof of a particular fact.

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

30. In this case, the Appellant alleged that the trial court failed to appreciate that the evidence he tendered at trial proved his case against the Respondent to the standards required under section 107 of the *Evidence Act*.

31. From the record of appeal, I note that the parties agreed to proceed by way of documentary evidence. In his witness statement dated 17th March 2023, I note that the Appellant stated that sometime in 2022, he conceived the idea of starting and running a hospital business, but since he is not a qualified and registered medical professional, he approached one Rebecca John Mitto, a clinical officer who agreed to allow him to use her medical certificate at a fee of Kshs. 300,000/- to register the hospital business.

32. That to kickstart the business, the Appellant incorporated the Respondent who agreed to fund the business as a partner. According to the Appellant, the oral agreement between the parties was that the profit/loss sharing ratio was to be 70:30 in favour of the Appellant.

33. The Appellant claimed that immediately after the business commenced, the Respondent started sabotaging the business. That the Respondent among others, unilaterally and without disclosing to the Appellant changed the PIN of the business' MPESA line and transferred to his personal number a sum of Kshs. 5,000/- from the business line without the Appellant's knowledge, failed to pay for the medical services obtained from the hospital, and even threatened the Appellant's life with the sole intention of having the Appellant resign from the business.

34. It was further the Appellant's testimony before the trial court that on 2nd January 2023, the Respondent locked the hospital, thereby throwing out the Appellant from the business. The Appellant therefore filed a Statement of Claim dated 17th March 2023 before the trial court seeking the following orders; -

    i. Time lost when the hospital has been closed since 2nd January 2023

    ii. Losses incurred when the hospital was closed

    iii. Financial input into the business amounting to Kshs. 441,000/-

    iv. Market research and plan for the business

    v. Damages

    vi. Salary for the entire period up to the time the hospital was locked

    vii. The drugs let in the hospital worth 150,000/-

35. The Appellant also sought from the trial court compensation in the sum of Kshs. 1,000,000/- as an alternative prayer since he was no longer interested in working with the Respondent who has been threatening his life.

36. On his part, the Respondent relied on his witness statement dated 6th July 2023. In the statement, the Respondent stated that sometime in June 2022 the Appellant approached him with the business idea of opening and operating a hospital business. That it was agreed between the parties that each was to invest a sum of Kshs. 500,000/- into the hospital as capital. That it was further agreed that profit/loss was to be shared in the ratio of 50:50 basis.

37. It was further the Respondent's testimony before the trial court that as part of his contribution to the business, he paid a sum of Kshs. 16,000/- towards rent, Kshs. 350,000/- for setting up of the premises and a further Kshs. 155,000/- towards the purchase of medicine and other supplies for the hospital.

38. The Respondent further told the court that the Appellant did not make any payments towards his share of the agreed Kshs. 500,000/-. According to the Respondent, the Appellant only paid a sum of Kshs. 16,000/- towards rent. Further, it was also the Respondent's position that apart from failing to pay for his portion of the capital for the business, the Appellant being the one who was in charge of the running of the hospital mismanaged the establishment and that the business could no longer meet its obligations such as payment of rent and payment of salaries to its staff.

39. The Respondent also stated in his statement before the trial court that he was shocked to realize that the Appellant was not a qualified medical doctor and that the Appellant had only used someone else's certificate to register the hospital.

40. The Respondent told the trial court that he closed the hospital to avoid problems with the relevant authorities and to curb further misappropriation of hospital funds by the Appellant.

Whether there was a Valid Agreement/breach thereof

41. I have carefully considered the pleadings, the evidence by the parties in the lower court as well as their submissions thereat. I have also considered the parties' submissions in this appeal and note that it is not in dispute that the Appellant conceived the idea of opening and operating a hospital business and that he approached the Respondent with whom they had an oral agreement to undertake the venture.

42. From the evidence tendered at trial it is evident that it is the Appellant who had the technical know-how while the Respondent was mainly a financier. What is not clear is whether the profit/loss sharing ratio was to be 70:30 as stated by the Appellant or 50:50 as asserted by the Respondent.

43. From the evidence before the trial court, it is clear that the Respondent admitted that he was the one who closed the door to the premises/hospital. His justification for closing access to the premises is that it was intended to prevent further misappropriation of the funds by the Appellant and also to avoid running into trouble with the relevant authorities, the Appellant having used someone else's medical certification/documents to register the business.

44. At this juncture, it is important to point out that from the evidence tendered at trial, it is evident that the Appellant's case against the Respondent is admitted. It is admitted by the Respondent that the Appellant came up with the business idea and incorporated him as a partner. That while the Respondent's role was mainly to fund the business, it is the Appellant who had the technical know-how in the running of the business and that it is the Appellant who indeed registered the business, and was in charge of day-to-day operations of the hospital.

45. From my analysis of the pleadings by the parties and their respective evidence before the lower court, I find that it is the Respondent who was in breach of the agreement between him and the Appellant. The Respondent took it upon himself to lock the premises to the hospital allegedly on the basis that the business was in debt and could not meet its financial obligations.

46. There was however no evidence tendered by the Respondent at trial, of the businesses' indebtedness, either to the landlord, its employees, or even to the suppliers.

47. From the documents submitted at trial, I note that the business was registered by the Appellant and not the Respondent. It is the Appellant who solely applied for registration and undertook all formalities

relating to the registration of the hospital. There is nothing in the registration documents indicating the Respondent's involvement in the registration process or ownership of the business.

48. Since the Appellant was essentially the one in charge of the running and operations of the business, at the very least, it was expected, that the Respondent would have engaged him, if indeed it was true that the business was in debt and unable to meet its financial obligations as alleged by the Respondent. No evidence of any engagement between the parties on the issue of the business's inability to meet its financial obligations was adduced by the Respondent at trial to justify his actions.

49. The allegation by the Respondent that he closed the premises so as not to run into trouble with the authorities due to the registration of the medical facility in the name of a person other than the Appellant is in my view irrelevant. First, as indicated above, the business was not registered in the name of the Respondent. Further, there is no evidence that he engaged the Appellant prior to closing the premises.

50. The finding by the trial court that the suit was tainted with illegality is equally in my view, not relevant in the circumstances of this case. From the pleadings, it is apparent that there was no dispute between the Appellant and Rebecca John Mitto, the clinical officer whose certificate was used in the registration of the hospital business. In any event, there is no law expressly prohibiting persons not trained in medicine from establishing a hospital business. What the law requires is that qualified staff is engaged for the purposes of offering the services.

51. The only obligations imposed by the Medical Practitioners and Dentists (Medical Institutions) Rules, 2000 (as amended by the Medical Practitioners and Dentists (Private Medical Institutions) (Amendment) Rules, 2017 (*Legal Notice 3 of 2017*) on the owner/Administrator/Director of a health facility is to ensure that; -

    a. All payments are paid in full, depending on the category of the health facility.

    b. Licenses are up to date.

    c. Health Professionals working therein are registered and licensed by their respective Boards/ Councils.

52. From my analysis of the facts of this case, it is apparent that the Respondent, using his financial muscle, pushed the Appellant out of a business that the Appellant laboured so hard to establish.

53. For the above reasons I find that the Respondent's actions, viewed from the circumstances of this case, were in breach of the Respondent's oral agreement with the Appellant.

Remedies available to the Appellant

54. Having found that there was an agreement between the Respondent and the Appellant in relation to the establishment and running of the hospital in question and that it is the Respondent was in breach thereof, the next issue for determination is what remedies would be available to the Appellant, taking into account his pleadings.

55. I note that in his statement of claim filed in the lower court, the Appellant prayed for the following orders; -

    i. An order of injunction ordering the Respondent to reopen Jamine Hospital and allow the Claimant to manage the hospital without interference from the Respondent.

    ii. In the alternative, the Respondent pays the Claimant Kshs. 1,000,000/- in exchange for his interest/shares in the hospital.

iii. Costs of the claim.

56. Having established that the Respondent had no legal basis for locking the hospital premises, I find no difficulty in issuing a mandatory injunction, directing the Respondent to immediately reopen the premises and have the Appellant continue with his business without any undue interference from the Respondent.

57. The Appellant's prayer that he be compensated Kshs. 1,000,000/- by the Respondent was an alternative prayer and is therefore not awardable, particularly given that the court has granted the prayer for injunction. Further, the claim being of the nature of special damages, the Appellant did not demonstrate by way of evidence, how the amount of Kshs. 1,000.000/- was arrived at.

58. However, to the extent that the Respondent unlawfully and without justifiable cause closed the Appellant's business thereby infringing on the Appellant's rights, it is the position of this court that no wrong should be allowed to remain unredressed if it is capable of being remedied by the court of justice. Consequently, I direct that the Respondent pay to the Appellant a sum of Kshs. 250,000/- being nominal damages for the infringement.

59. Before I pen off, it is critical that I address the Respondent's submissions that the trial court lacked jurisdiction to deal with the dispute in question. First, the argument by the Respondent that this was a partnership dispute and therefore ought to have been filed in the high court is not correct. From the facts of this case, it is evident that the relationship between the parties herein was not that of partners within the meaning of the Partnership Act. Consequently, the provisions of the Partnership Act do not apply to this dispute.

60. Secondly, the Respondent's argument that no order of injunction can be issued by this court since the dispute in this case is not one of those enumerated under Section 12 (1) of the *Small Claims Court Act* is equally not correct. The correct position in my view is that unless specifically ousted by legislation or *the Constitution*, the Small Claims Court has jurisdiction over all disputes civil where the claim involves one million shillings or less. See the case of Wanjiru *v Kiilu (Civil Appeal 90 of 2023*) [2024] KEHC 8881 (KLR) (19 July 2024) (Judgment) where this court stated that; -

> "By didn't of section 13(5) of the Small Claims Act, the only disputes expressly excluded from the jurisdiction of the court, irrespective of their monetary value, are those relating to defamation, libel, slander, malicious prosecution and those falling under the jurisdiction of specialized courts pursuant to Article 162 (2) of *the Constitution*. Apart from those expressly excluded under Section 13 of the Act, the rest of the claims fall within the jurisdiction of the Small Claims Court, with the only limitation being the monetary value of shillings one million."

61. From the foregoing discussion, I find the appeal merited and hereby allow the same with costs to the Appellant.

62. It is so ordered.

SIGNED DATED and DELIVERED IN VIRTUAL COURT THIS 28TH DAY OF NOVEMBER 2024

ADO MOSES

JUDGE

In the presence of:

Moses – Court Assistant

............for the Appellant.

.... for the Respondent.