



**Kamere t/a Hotel Tobriana v Muthoni (Civil Appeal E026 of 2023)  
[2023] KEHC 18155 (KLR) (Commercial and Tax) (26 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18155 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL APPEAL E026 OF 2023  
JWW MONG'ARE, J  
MAY 26, 2023**

**BETWEEN**

**SAMUEL MUKUA KAMERE T/A HOTEL TOBRIANA ..... APPELLANT**

**AND**

**HELLEN MUTHONI ..... RESPONDENT**

*(Being an Appeal from the Judgement and Order of the Honourable D.S. Aswani  
(RM) delivered at Nairobi on the 9/2/2023 in SCCCOMM No. E6221 of 2022)*

**JUDGMENT**

1. The respondent filed a claim against the claimant in the Small Claims Court in Milimani SCCCOM No E6221 of 2022. Her claim was for Kshs 360,000/- which she claimed was payment due to her, for advertising and recording an interview with the appellant which she did not receive payment for.
2. The appellant denied trading as Hotel Tobriana and claimed to have been wrongfully sued as no such party exists. As such, he sought to have the claim dismissed for being fatally defective.
3. The adjudicator honourable D.S Aswani entered judgement on February 9, 2023 in favour of the respondent for Kshs 360,000.00/- plus interest at court rates from the date of filing the claim until payment in full.
4. Aggrieved by the said judgement the appellant now appeals against it entirely in this court through its memorandum of appeal dated March 14, 2023 on the following grounds:

- “ 1. The learned magistrate misdirected herself in law by regarding the appellant as having capacity to be sued despite the appellant being a non-existent legal entity.



2. The learned magistrate misdirected herself in law by purporting to shift the burden of proof to the appellant, the resultant effect that the judgment was wholly erroneous in law.
  3. The learned magistrate erred in law and in fact by holding that the 2<sup>nd</sup> respondent in the trial claim was known to the appellant despite the honourable magistrate having struck out the claim against the 2<sup>nd</sup> respondent.
  4. The learned magistrate erred in law and in fact by entering judgment in the amount of Kshs 360,000/- despite the amount not being expressly stated in any evidence adduced against the appellant by the respondent.
  5. In all the circumstances of the case, the findings of the learned judge are insupportable in law, in fact or on the basis of the pleadings and evidence filed the resultant effect that the judgment was wholly erroneous.
  6. All in all the learned judge so misdirected himself on matters of both law and fact as to occasion a miscarriage of justice against the appellants.”
5. Based on the above grounds the appellant prayed to have the judgement delivered on February 9, 2023 be wholly set aside with costs to the appellant.
  6. The respondent opposed the appeal through its submissions dated March 20, 2023.
  7. I have considered the record of appeal and the submissions of the parties for and against the appeal. The grounds of appeal can be condensed into the following issues for determination:
    - 1) Whether the appellant is a legal entity capable of being sued and who has the burden of proving the existence of the appellant as a legal entity.
    - 2) Whether the trial court erred in finding merit in the respondent’s claim.

**Issue 1: Whether the appellant is a legal entity capable of being sued and who has the burden of proving the existence of the appellant as a legal entity.**

8. The appellant submitted that he does not trade as Hotel Tobriana and that no such legal entity exists; that once the appellant averred that it is not a legal entity capable of being sued, the burden shifted to the respondent to prove otherwise and that without this burden having been discharged, the judgement was a nullity in its entirety.
9. The appellant’s case was that the proceedings before the lower court were a nullity by the mere fact that the appellant is a non-existent legal entity and therefore can neither sue or be sued and that this remains the same to date.
10. On the other hand, the respondent submitted that the issue of whether or not the appellant was a Limited Company was not raised in the pleadings before the lower court therefore this court cannot determine issues not raised in pleadings; that the appellant represented himself to the respondent as the proprietor of Hotel Tobriana thus inducing the respondent to work for him by advertising the hotel and is estopped from reneging on that representation.
11. The respondent contended that the allegation that the appellant is not a legal entity was not substantiated nor supported by evidence to prove he was wrongfully sued and that during cross examination, the appellant confirmed that he was the proprietor of Hotel Tobriana and that he never disclosed to the respondent that he was acting on behalf of the company.



12. The adjudicator found that the respondent proved that she engaged the appellant as the proprietor of Hotel Tobriana which engagement was admitted therefore the claim was properly filed against him as the said proprietor.
13. During cross examination in the lower court (pages 61-62 of the record of appeal), the appellant Samuel Mukua, testified that Hotel Tobriana has always been a limited company and that he gave the approval to the respondent for her advertisement services as its director.
14. I note however that although the appellant claimed that Hotel Tobriana was a limited company, he did not provide evidence through a certificate of incorporation to support this assertion. It is a well-known legal principle that he who alleges must prove. The burden of proving that the appellant is a company therefore a legal entity was upon the appellant.
15. The evidence before this court and the lower court does not clearly indicate whether Hotel Tobriana is a company capable of being sued or whether it is a business entity.
16. As it is not ascertainable what kind of entity Hotel Tobriana is, it is possible that there was a misjoinder of parties by the respondent in the lower court. In the Court of Appeal case of *William Kiprono Towett & 1597 others v Farmland Aviation Ltd & 2 others* [2016] eKLR, it was held:-

“Most critically, order 1 rule 9 of the Civil Procedure Rules (2010) makes it abundantly clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit. We reproduce the same hereunder: -

“No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it”.
17. I concur with the above authority in holding that a misjoinder of parties is not sufficient to declare a suit completely defective. This court is inclined to determine the substantive issues before it in the spirit of article 159 of the *Constitution*.

**Issue 2): Whether the trial court erred in finding merit in the Respondent’s claim.**

18. There is no doubt that the respondent engaged the appellant as the proprietor of the hotel in order to confirm the advertisement services that she would offer to the hotel. This is seen through the attached Whatsapp messages found on pages 47 and 48 of the record of appeal. Services for which she has not received payment for carrying out.
19. It is also undisputed that the respondent marketed the Hotel through her social media platform as evidenced on pages 36-46 of the record of appeal. She therefore carried out her part of the deal but did not receive payment for it.
20. In light of the evidence in the record of appeal, I find that the respondent and the appellant that is Samuel Kamare, entered into a binding agreement and the same was breached by the appellant by neglecting to pay the respondent for the services that she offered.
21. I therefore find merit in the respondent’s case before the lower court and find that honourable D.S Aswani did not err in entering judgement in favour of the respondent.
22. This appeal is without merit and is stuck out with costs awarded to the respondent.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26<sup>TH</sup> DAY OF MAY 2023.**



.....

**J. W. W. MONG'ARE**

**JUDGE**

**In the Presence of: -**

Mr. Kinuthia for the Appellant.

Mr. Wanyingi for the Respondent.

Moses - Court Assistant.

