



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CIVIL APPEAL NO 68 OF 2018**

**ALICE OMEDI T/A JOYCE WANJIKU NJUGUNA.....APPELLANT**

**VERSUS**

**EQUATOR BOTTLERS LIMITED.....RESPONDENT**

**(Being an appeal from the Judgment and decree of Hon J. N. Wambilyanga (PM)**

**delivered at Kisumu in Chief Magistrate's Court Case No 235 of 2016 on 5<sup>th</sup> July 2018)**

**JUDGMENT**

**INTRODUCTION**

1. In her decision of 5<sup>th</sup> July 2018, the Learned Trial Magistrate, Hon J. N. Wambilyanga, Principal Magistrate, entered Judgment in favour of the Respondent against the Appellant for a sum of Kshs 4,147,327.32. She also awarded the Respondent costs of the suit and interest at court rates from the date of the said Judgment.
2. Being aggrieved by the said decision, on 30<sup>th</sup> July 2018, the Appellant filed a Memorandum of Appeal of even date. She relied on six (6) grounds of appeal.
3. The Appellant's Written Submissions were dated 7<sup>th</sup> May 2021 and filed on 10<sup>th</sup> May 2021 while those of the Respondent were dated 7<sup>th</sup> October 2021 and filed on 13<sup>th</sup> October 2021.
4. The Judgment herein is based on the said Written Submissions which parties relied upon in their entirety.

**LEGAL ANALYSIS**

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
6. This was aptly stated in the case of **Selle & Another vs. Associated Motor Boat Co Ltd & Others [1968] EA 123** where the court therein held that the appellate court was not bound by the finds of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.
7. Having looked at the Grounds of Appeal and the respective parties' Written Submissions, it appeared to this court that the issues that had been placed before it for consideration were as follows:-
  - a. **Whether or not the Respondent sued an entity that was not capable of being sued.**
  - b. **Whether or not the Appellant was liable to pay the Respondent Kshs 4,147,327.32/=.**
8. This court therefore dealt with the two (2) issues under the following distinct heads.

**A. CAPACITY TO BE SUED**

9. The Appellant placed reliance on the case of **Abok James Odera t/a A.J. Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR** where the court explained the duty of a first appellate court and urged this court to consider the pleadings and evidence tendered before the trial court, re-evaluate the same and make its own conclusions.

10. She was emphatic that the Respondent sued a non-existing entity and from the way she was described, she was incapable of being sued. She asserted that at Paragraph 2 of the Complaint, the Appellant was described as a “female adult carrying on business of buying and selling sodas and other soft drink beverages, at Asembo Bay SSD, within the Republic of Kenya in the business name of Joyce Wanjiku Njuguna”.

11. She pointed out that during the hearing it emerged that Joyce Wanjiku Njuguna was the one who had a distributorship agreement with the Respondent and she could not possibly have traded in the name of “Joyce Wanjiku Njuguna”.

12. She invoked Section 4 and Section 14(1) of the Registration of Business Names Act Cap 499 Laws of Kenya and argued that the Respondent failed to produce a Certificate of Registration of business name to confirm that she carried out business in the name and style of “Joyce Wanjiku Njuguna”.

13. She further placed reliance on Section 17 (1) of the Registration of Business Names Act which prohibited registration of certain business names. She pointed she could not trade in the name and style of Joyce Wanjiku Njuguna since it would mislead the public on who owned and controlled the business.

14. She placed reliance on the case of **Raila Odinga vs The Independent Electoral & Boundaries Commission & 3 Others, Supreme Court Petition No. 5 of 2013** where the Court held that the provisions of Article 159(2)(d) were never meant to oust the obligation of litigants to comply with procedural imperatives as they sought justice from courts of law.

15. She was categorical that the Learned Trial Magistrate as such erred in law and in fact in failing to appreciate that the matter that did not fall under Article 159 (2)(d) of the Constitution of Kenya 2010 for the reason that the Respondent sued an entity that was not capable of being sued.

16. In this regard, she relied on the case of **Resley vs The City Council of Nairobi (2006) 2 EA 311** where the court held that an issue that has been statutorily provided for ceases to be an issue of technicality.

17. She further explained that Joyce Wanjiku Njuguna did not transfer the debt to her and consequently, the Respondent’s claim was against the said Joyce Wanjiku Njuguna. She added that there was a question of whom between her and Joyce Wanjiku Njuguna, the decree would be executed against.

18. On its part, the Respondent submitted that the Learned Trial Magistrate was correct in her findings that the provisions of Article 159 (2) (c) did apply in its favour by holding that justice must be administered without undue regard to procedural technicalities.

19. It argued that in the Complaint, the Appellant was described as a “female adult carrying on business” and not an “entity” and argued that the Appellant was only trying to mislead this court because Section 17(1)(a) of the Registration of Business Names Act gave power to the Registrar to refuse to register a business name only when it contained any word which in the opinion of the Registrar was likely to mislead the public as to the nationality, race or religion of the persons by whom the business was wholly or mainly controlled.

20. It pointed out that in the Acknowledgement of Debt and Debt Repayment Agreement, the Appellant executed the said document knowing full well that she had been described on the first page as, “ALICE OMEDI (Trading as JOYCE WANJIRU NJUGUNA...)”. It therefore argued that because it entered into a binding agreement with the Appellant, it found it fit to institute a suit against the Appellant after she defaulted in paying the debt arrears.

21. It was emphatic that the mere fact that the Appellant was described in the Complaint as carrying business in the name of Joyce Wanjiku Njuguna did not negate the fact that there was a duly executed agreement between it and her. It added that in her Statement of Defence, the Appellant admitted to Paragraphs (1) and (2) of the Complaint as merely being descriptive of the parties in the suit and that she was aware of its existence and contents of the said Agreement.

22. It was its contention that the Learned Trial Magistrate proceeded on the right principles of law supported by the valid documents and henceforth arrived at a correct conclusion. It urged this court to dismiss the Appellant’s appeal with costs.

23. Notably, Order 30 Rule 9 of the Civil Procedure Rules, 2010 provides as follows:

**“Any person carrying on business in a name or style other than his own name may be sued in such name and style as if it were a firm name: and, so far as the nature of the case will permit, all rules under this order shall apply”**

24. Under the aforesaid provision therefore, a plaintiff could sue a person or persons trading under a business name or style as if it were a firm name.

25. In her letter dated 10<sup>th</sup> July 2014 to the Respondent herein, the said Joyce Wanjiku Njuguna stated as follows:-

**“Due to unavoidable circumstances, I wish to transfer my account with Equator bottlers (sic) as a distributor in BUMULA to ALICE OMEDI with immediate effect.”**

26. In another letter to the Respondent dated 3<sup>rd</sup> March 2015, the said Joyce Wanjiku Njuguna wrote as follows:-

**“I am unable to continue running the business directly, I am kindly making a request to hand business as a going concern to Alice Omedi of Id No...”**

27. Notably, the Acknowledgement of Debt and Debt Repayment Agreement dated 10<sup>th</sup> December 2015 (hereinafter after referred to as “the Agreement”) was duly executed by Alice Omedi on behalf of Alice Omedi Trading as Joyce Wanjiku Njuguna and Suman Sankarghosh on behalf of the Respondent herein. The said Agreement was duly attested by Kuoko Cecil Wilson. For all purposes and intent it was a binding agreement between the parties therein as no vitiating factors such as fraud, misrepresentation, mistake, coercion and/or duress were demonstrated during trial.

28. The question of whether or not suit against Alice Omedi could be instituted as trading in the name of Joyce Wanjiku Njuguna was one that could be answered by the provision of Section 17 (1) of the Registration of Business Names Act which stipulates that:-

**The Registrar shall refuse to register, or, in the case of an application under [section 9](#), to register a change of business name of, any firm, individual or corporation carrying on, or proposing to carry on business under a business name—**

- a. which contains any word which, in the opinion of the Registrar, is likely to mislead the public as to the nationality, race or religion of the persons by whom the business is wholly or mainly owned or controlled;**
- b. which includes any of the words “Presidential”, “Government”, “Municipal” or any other word which imports or suggests that the business enjoys the patronage of the President or imports any connection with the Government or with any municipality or other local authority;**
- c. which includes the word “co-operative” or its equivalent in any other language or any abbreviation thereof;**
  - cc. which includes the words “Old Law Courts Mombasa” “National Monument” “Lamu Fort” “Nairobi Botanical Gardens” “Nairobi Snake Park” “National Museum” “Fort Jesus”, or “Karen Blixen”;**
- d. which is identical with or is similar to that of a business or corporation existing, or is already registered under this Act or under the Companies Act, [Cap. 486](#), if in the opinion of the Registrar such registration would be likely to mislead the public;**
- e. which in the opinion of the Registrar is undesirable.**

29. It was clear from aforesaid provision that the description of the business name of Alice Omedi did not fall within the descriptions prohibited by the Registration of Business Names. The onus was on the Appellant to have adduced in evidence a Certificate of Registration showing that she was trading under a different name other than that of Joyce Wanjiku Njuguna that was captured in the Acknowledgement of Debt and Debt Repayment Agreement.

30. The fact that she admitted in Paragraph 2 of her Statement of Defence in so far as the same was merely descriptive of the parties led this court to believe that indeed, she was trading as Joyce Wanjiku Njuguna having taken over her business as a going concern. Therefore, as per the above mentioned provision, this court found and held that the Appellant was an entity being capable of being sued as trading in another’s name.

31. Assuming that the Appellant did not trade in the name of Joyce Wanjiku Njuguna, the suit could not be defeated by virtue of misjoinder of parties as the person who was in question was one Alice Omedi.

32. Indeed, Order 1 Rule 9 of the Civil Procedure Rules, 2010 that states that:-

**“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.”**

33. Further, Order 30 Rule 9 of the Civil Procedure Rules provides that:-

**“Any person carrying on business in a name or style other than his own name may be sued in such name or style as if it were a firm name; and, so far as the nature of the case will permit, all rules under this Order shall apply.”**

34. The Appellant’s argument that there would be a confusion against whom the decree would be executed against was inconsequential for the reason that execution proceedings are taken out directly against a natural person if a claim lies against him or her.

35. In the case of a sole proprietor of the business distinct from a limited liability company where the properties of a director cannot be attached unless the corporate veil has been lifted. Indeed, the principle of corporate personality was established in the well-known case of [Salomon v Salomon \[1897\] AC 78](#) where the House of Lords held that a company is in law a separate person from its members.

36. This court was thus satisfied that the Learned Trial Magistrate did not misapply herself when she proceeded on the basis of how the suit had been instituted against the said Alice Omedi, the Appellant herein.

## **B. LIABILITY OF DEBT**

37. Although the court had determined that the manner in which the Respondent sued the Appellant did not deal a fatal blow to the Plaint therein, the question of whether the Appellant herein was liable for the debt owed to the Respondent was a different and pertinent issue altogether.

38. The Appellant submitted that there was no privity of contract between her and the Respondent herein. She pointed out that Eugene Munya Mathenge (hereinafter referred to as PW 1) testified that it was a precondition for anyone to have a distributorship agreement with the Respondent before engaging in business with it. She argued that the purported agreement between her and the Respondent was inexistent since the pre-requisite for one to be taken in as a distributor by the Respondent was not met and/ or complied with.

39. She added that PW 1 admitted that it was Joyce Wanjiku Njuguna who had the distributorship agreement with the Respondent and as such, she could not have possibly been sued for the debt that had accrued. She was emphatic that the person who was entitled to pay the debt was Joyce Wanjiku Njuguna. She added that the said purported agreement was executed without the approval of the directors of the company (sic).

40. She further asserted that PW 1 confirmed that the Respondent's board of directors declined to approve and/or authorise the transfer to her until the debt had been substantially reduced. In this regard, she referred this court to the letter dated 14<sup>th</sup> April 2015. She further averred that knowing that certain documents could be incriminating against it, it chose to exclude such documents.

41. She argued that the Learned Trial Magistrate shifted the burden of proof on her despite the express provisions of Section 107 and 108 of the Evidence Act. She was categorical that the Respondent failed to provide any material such as invoices and/ or statements to show how the amount claimed against her accrued. She thus urged this court to allow her appeal and invoked Section 27 of the Civil Procedure Act which provides that costs follow the event.

42. On its part, the Respondent submitted that the Appellant admitted to having voluntarily signed an Acknowledgement of Debt and Debt Repayment Agreement dated 10<sup>th</sup> December 2015. It asserted that there was a clear breakdown and categorisation of the accrued debt by the Appellant on the 1<sup>st</sup> page of the Acknowledgement of Debt and Debt Repayment Agreement and that she failed to challenge the breakdown of the said accrual during trial. It pointed out that she in fact proposed a debt repayment plan of instalments of Kshs 80,000/=.

43. It contended that she neither denied its existence nor adduced any evidence to show lack of awareness of the terms but that she had only stated that she signed the said Agreement to be absorbed and did not know it was regarding a debt. It also asserted that if she was genuinely not aware or was skeptical about the accrued debt, then she would have taken necessary action immediately to set aside the agreement. It was its submission that the onus was put on her to prove that she was not privy to the terms of the agreement.

44. Further, it submitted that she failed to demonstrate that there was any coercion, fraud or undue influence regarding the terms of the Agreement and consequently, they were bound by the terms of their contract. In this regard, it placed reliance on the case **Pius Kimaiyo Langat vs Co-operative Bank of Kenya Ltd [2017] eKLR** where the court therein arrived at a similar conclusion.

45. It was also its contention that she did not adduce any evidence to show that the Agreement was not approved by its Board of Directors when the same was executed. It pointed out that PW1 clarified that the said Agreement could not have been signed without the approval of the Board of Directors.

46. It invoked the general rule that he who alleges must prove, as grounded in Section 107 of the Law of Evidence and further relied on the case of **Evans Otieno Nyakwana vs Cleophas Bwana Ongaro [2015] eKLR** where the court stated that the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue.

47. It was emphatic that it produced ample evidence to show that the Appellant is liable to pay the amount owed and that further, it relied on an agreement that was voluntarily executed between the Appellant and itself and submitted that it was deserving of the amount owed to it in the sum of Kshs 4, 147,327.32.

48. This court analysed the evidence before the Trial Court and was satisfied that the Respondent provided sufficient proof to show that the Appellant was aware of the terms of the aforesaid Agreement and thus became bound by them when they both executed the said Agreement.

49. She did not plead duress, coercion or undue influence in her Statement of Defence, neither did she demonstrate and/ or prove any of the said vitiating factors during trial to avoid the said Agreement. Her argument that she only signed the agreement to be absorbed in the Company was neither here or there.

50. Notably, in the aforementioned letter dated 3<sup>rd</sup> March 2015, the said Joyce Wanjiku Njuguna further wrote as follows:-

**“She will take over the business with all the assets and liabilities to Equator Bottlers that are currently under Joyce Wanjiku. As at the time of this request, my outstanding debt at Equator Bottlers is Kshs 4,287,946/=.**

**Find below an acceptance by Alice to take over the business if you consider and approve the request.**

**Signed Joyce Njuguna**

**I Alice Omedi accept to take over Joyce Wanjiku's business once the request is approved.**

**Signed Alice Omedi 3<sup>rd</sup> March 2015”**

51. The take over of the business from the said Joyce Wanjiku Njuguna and the Appellant herein appeared to have been approved by the Respondent because this culminated in the execution of the said Agreement as aforesaid. The Appellant’s arguments that the Respondent did not approve the said take over were unsubstantiated.

52. Notably, on page 1 of the said Agreement that was voluntarily executed by the Appellant herein, she admitted the debt when she committed herself by acknowledging as follows:-

**I acknowledge that the sums I owe to the Company are demonstrated hereinbelow:-**

<b>Name</b>	<b>Amount</b>
<b>LIQUID ACCOUNT</b>	<b>5,100,194.42</b>
<b>EMPTIES ACCOUNT</b>	<b>698,300.65</b>
<b>DEPOSIT ACCOUNT</b>	<b>(675,000)</b>
<b>MOTOR VEHICLE LOAN ACCOUNT</b>	<b>54,500</b>
<b>“SODA LOAN”</b>	<b>(1,030,667.75</b>
<b>TOTAL AMOUNT</b>	<b>4,147,327,32</b>

53. It was this court’s finding and holding that the contract executed by the parties was lawful and the Trial Court cannot rewrite a contract for parties. This court was therefore not persuaded that the Learned Trial Magistrate erred in her decision by applying wrong principles which would have warranted the interference of this appellate court.

54. In light of the premises foregoing, Grounds of Appeal Nos (1), (2), (3), (4), (5) and (6) were therefore not merited and the same are hereby dismissed.

**DISPOSITION**

55. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Appeal lodged on 30<sup>th</sup> July 2018 was not merited and the same be and is hereby dismissed. The Appellant will bear the Respondent’s costs of this Appeal.

56. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF FEBRUARY 2022.**

**J. KAMAU**

**JUDGE**