Sansora Bakers & Confectioners Limited v Chweya & 2 others (Civil Appeal E003 of 2024) [2025] KEHC 2623 (KLR) (4 March 2025) (Judgment)

Neutral citation: [2025] KEHC 2623 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E003 OF 2024

DKN MAGARE, J

MARCH 4, 2025

BETWEEN

SANSORA BAKERS & CONFECTIONERS LIMITED ..... APPELLANT

AND

ALBERT CHWEYA ..... 1ST RESPONDENT

MOUKO MUMA WYCLIFF ..... 2ND RESPONDENT

RUTH KEMUNTO ABUYA ..... 3RD RESPONDENT

JUDGMENT

1. This appeal arises from the Judgment and decree of the lower court delivered by Hon. P.K. Mutai (PM) on 22.5.2023 in Kisii CMCC No. 910 of 2019. Leave was granted to the Appellant to file this appeal out of time pursuant to an application in Kisii HC MISC Civil Application No. 108 of 2023. The Appellant was the Plaintiff in the lower court. The Appellant filed 7 grounds of appeal as follows:
    a. The judgment of the learned trial magistrate is an affront to the provisions of Order 21 rule 4 and 5 of the Civil Procedure Rules, 2010 and cannot lie.
    b. The learned trial magistrate erred by failing to find that on the basis of the cogent and uncontroverted evidence tendered by the appellant the latter had established its case against the 2nd respondent (who did not testify) as a primary debtor and the 3rd respondent (who did not controvert the appellant's evidence in material respects) as a secondary debtor in her capacity as a guarantor.
    c. The learned trial magistrate erred by failing to hold and to find that the 3rd respondent was liable on her guarantee to make good losses sustained by the appellant in the course of the 2nd respondent's employment having proved its case against the 2nd respondent on a balance of probabilities.

d. The learned trial magistrate erred in law by failing to consider that the appellant had demonstrated on a balance of probability that the 2nd defendant in his capacity as a salesman had failed to account for bread sales and was thus indebted to it in the sum of Kshs.291,400/=.

e. The learned trial magistrate erred by failing to take into account relevant evidence in the M-pesa statement tendered in evidence by the appellant which clearly showed that the 1st respondent was intricately involved in bread deliveries purportedly made to Amasago Secondary School by the 2nd defendant at a time when it was purported that the said school had retained a bread supplier different from the appellant.

f. The learned trial magistrate misdirected himself in holding that the failure by the appellant to summon one Ogeto as its witness was fatal to its case when the 1st respondent who did not personally receive bread supplies to Amasago Secondary School made several payments.

g. The judgment of the learned trial magistrate was against the weight of evidence tendered and thereby amounted to a miscarriage of justice.

Pleadings

2. The Appellant filed suit against the Board of Management of St Paul's Amasago on 28.11.2019 claiming a sum of Ksh 291,000/=. The said amount was said to be for the supply of various wheat products. The said school is said to have made a part payment of Ksh 47,000/= but failed to clear the balance of Ksh 291,000/=. With the original plaint, the Appellant filed statement of Jared Ombati Okongo to accompany the plaint together with delivery notes to Amasago.

3. The said school entered appearance pro se on 30.1.2020. Unknown to them, the Appellant had amended its plaint 2 days earlier to withdraw the case against them and introduce the 3 Respondents. It appears the amendment was done without leave before close of pleadings. It is not clear when the order for joinder of parties was made. Nevertheless, it is water under the bridge.

4. The 1st Appellant was sued as a senior teacher who purported to be in charge of the canteen at the said school while the 2nd Respondent was a salesman. The supplies were said to have been made to the 1st Respondent on the account, who paid 47,000/=, leaving 291,000/=. It is unclear from the amended plaint, why the 3rd Respondent was sued. The glimpse is in the prayers where a sum of Ksh 291,400/= was sought with respect to the defendants, and the same was limited to Ksh 250,000/=, which is the limit of the guarantee. This however is not buttressed with solid pleadings on how and why she should be liable.

5. The 3rd Respondent entered an appearance through M/s Job Obure & Company Advocates. She stated in her statement that she could not imagine why she was sued. In her defence, she said she was not privy to the dealings.

6. The 1st Respondent entered appearance through the firm of M/s Nyamwange & Company Advocates. The 2nd Respondent entered appearance in person on 1.4.2020. He filed defence stating that he was an employee of the Appellant. He supplied bread on their authority. Any non-payment is not up to him. He noted that the Appellant owed him salary arrears. He termed the suit vexatious, misconceived and an abuse of the court process.

7. The 1st defendant filed a defence stating that he was not a senior teacher at St. Paul's Amasago. He denied the supply of wheat products or payment of Ksh. 47,000/=.

Evidence

8. The Appellant filed a supplementary list of documents including an affidavit dated 7.10.2017 and an M-pesa statement.

9. The 1st Respondent stated in his statement, that he had no contract with the Appellant. They only paid over the counter when hosting visiting schools sometimes and paid via M-pesa. The matter had a lull before starting in earnest on 9.11.2022. on the said date, the Appellant's witness testified and adopted his statement dated 6.11.2019. In the statement, the tenderer was St. Paul's Amasago. None of the defendants is referenced therein.

10. He stated that the 1st Respondent was in charge of tendering. He paid vide cheques and M-pesa. He stated that the defendants are yet to pay the proceeds of sale. On cross-examination, he stated that he was attending on behalf of the Appellant. He was neither a director nor had any resolution. He posited that the said bread was delivered to St Paul's by the 2nd Respondent. He could not tell the exact figure due. He stated an Accountant could give a breakdown. How the amounts arise is left to conjecture, surmise, and hyperbole.

11. He continued that the school received deliveries, and they have never complained. On re-examination, he stated that the 1st Respondent paid on behalf of the school. The Appellant closed their case after producing four documents: -

    a. Account statement for St Paul's Amasago

    b. M-pesa statement

    c. Delivery notes for Amasago

    d. Affidavit dated 6.11.2017 for an unknown number.

12. The 1st Respondent testified on 16.1.2023 he was a retired deputy head teacher of St Paul's Amasago. He adopted his statement stating that he was not involved except once when he bought bread over the counter and paid. The goods were from the school. He stated that from the statement, he paid 63,000/= in May 2019, Ksh. 50,000/= on 11.5.2019 and 19.5.2019, he paid 13,000/=. He was not aware of any payment of Ksh 47,000/=. He stated he is not the chair of the school board. He was just a retired Deputy Principal. He stated that the claim was fictitious. On cross-examination, he said he retired on 3.9.2022. He recalled that the school hosted many events. He could receive between 200,000/= and 300,000/= to host events in the school.

13. He testified further that the school made arrangements for supplies. He stated that he paid Ksh. 63,000/= for bread that was supplied on behalf of the school. On re-examination, he stated he was being cross-examined on behalf of the school.

14. The 3rd Respondent testified as DW2. She stated that she was served with an indemnity notice for the 2nd Respondent, her brother. She does not know how much he owes. She stated that the nature of the loss was not specified.

15. The 2nd Respondent did not testify. The court analyzed the evidence and dismissed the case against the Respondents with costs, which resulted in this appeal.

Submissions

16. Parties filed lengthy submissions, introducing new evidence and nuances. Before I address these, it is essential to address the concept of submissions. However, in addressing the court, they stated they would address the grounds wholesomely.

17. The Appellant then completed a summarized version of their submissions, which ran to 7 pages. The 1st and 3rd Respondents filed a whooping 18 pages of submissions. Such submissions are lengthy and mainly do not address the matters in question. It is also not edifying to have seven grounds, then argue them as one, and then file argumentative submissions. As was held by Mwera, J (as he then was) in Erastus Wade Opande v Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007:

> " Submissions simply concretise and focus on each side's case with a view to win the court's decision that way. Submissions are not evidence on which a case is decided."

18. Mwera J, posited as follows when postulating on what is the role of submissions. He stated that they are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim. In the case of Nancy Wambui Gatheru v Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993, it was stated:

> " Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case."

19. Submissions are not, strictly speaking, part of the case, the absence of which may do no prejudice to a party. Their precence or absence does not in any way prejudice a case as held in Ngang'a & Another v Owiti & Another [2008] 1KLR (EP) 749, where the Court held that:

> " As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."

20. The Court of Appeal was more succinct in that Submissions cannot take the place of evidence when they addressed the question in the case of Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another [2014] eKLR:

> " Submissions cannot take the place of evidence. The 1st Respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is

the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."

21. The Appellant filed submissions dated 6.12.2024. They also filed an updated version on 7.1.2025, arguing that the court erred in dismissing the suit. According to them, it is preposterous for the appellant to call some witnesses. They explained the payments and why the Respondents failed to explain why they paid while schools were closed. They stated that even if they did not prove the case against the 1st Respondent, there should have been a case against the 2nd Respondent.

22. They argued that in the absence of evidence that he collected sale proceeds, he ought to be held liable. They stated that a sum of Ksh.47,000/= was a credit. This part was not in evidence in the court below, and I shall thus ignore it.

23. The 1st and 3rd Respondents posited that the Appellant confused the cases with the schools. They stated there was no breakdown for the Ksh 291,200/=, which the witness promised to call an Accountant to clarify.

24. In respect to the 3rd Respondent, they adopted their arguments in respect of the 1st Respondent. They submitted that the case was against St. Paul's Amasago and not the 1st Respondent. The said school is no longer a party. Consequently, there can be no liability.

Analysis

25. This being a first appeal, this court is under a duty to reevaluate and assess the evidence and make its own conclusions. It must, however, remember that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence firsthand. In the case of Mbogo and Another v Shah [1968] EA 93 the Court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

26. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

27. In the case of Peters v Sunday Post Limited [1958] EA 424, the court therein rendered itself as follows:-

> "It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who 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 have come to a different conclusion..."

28. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya v Republic [1957] EA 336 as follows:-

> "On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and

reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

29. Cases rise and fall on pleadings and evidence, not submissions. I have noted lengthy submissions running into tens of pages. I have endeavoured to summarize succinctly in the preceding paragraphs. Parties must know that before they prove a case, they must plead the same. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in William Kabogo Gitau v George Thuo & 2 Others [2010] 1 KLR 526 as follows:

> "In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

30. This was further enunciated in the case of Palace Investments Limited v Geoffrey Kariuki Mwenda & Dollar Auctions [2015] KECA 616 (KLR), where the Court of Appeal [J Karanja, GG Okwengu, CM Kariuki, JJA] stated as follows:

The burden of proof is placed upon the appellant and is to be discharged on a balance of probabilities. Denning J. in Miller v Minister of Pensions [1947] 2 ALL ER 372 discussing the burden of proof had this to say:-

"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

31. This is also provided in Sections 107-109 of the *Evidence Act* which posits as hereunder:

> "107.
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> (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.
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> (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.
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> 108. 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. 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."

32. The nature of the claim is for special damages. This must not only be particularized but also specifically proved. In the case of David Bagine v Martin Bundi [1997] eKLR, the court of appeal stated as follows: -

> " It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v Jackson M. Nyambu t/a Sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v City Council of Nairobi [1982-88] IKAR 681 at page 684: "....special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter v Hyde Park Hotel Limited [1948] 64 TLR 177 thus:
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> "Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it"

33. Special damages must be pleaded and proved before they can be awarded by the Court. In the case of Swalleh C. Kariuki & another v Viloet Owiso Okuyu [2021] eKLR, the court, Justice Luka Kimaru, as then he was, stated as doth:

> " In regard to special damages the law is quite clear on the head of damages called special damages. Special Damages must be both pleaded and proved, before they can be awarded by the Court. Suffice it to quote from the decision of the Court of Appeal in Hahn V. Singh, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. - held:
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> "Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

34. Further, specific pleadings must be made before a party is called to answer. A prayer cannot be made in vacuo. In this case, no case was pleaded against the 3rd Respondent. Other than being alleged to have signed a guarantee, nothing is raised against her. Order 2 Rule 10 provides as follows:

Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing—

(a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and

(b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.

35. There are no pleadings related to the breach of guarantee and particulars thereof. Ipso facto, the claim against the 3rd Respondent is dead as a dodo. It is accordingly dismissed with costs of Kshs. 95,000/=.

36. The next question is whether the 2nd Respondent should be non-suited for not tendering evidence. The 2nd Respondent was sued concerning a contract of employment. It is doubtful that the court had jurisdiction to handle the matter. The claim was sort of some breach. However, the breach is not particularized. The bread was not stolen. It is not clear what sins the 2nd Respondent committed. The witness for the Appellant exonerated him stating that he delivered bread. If there was something untoward, it was not pleaded. The Appellant bore the burden of proving the case against the 2nd Respondent even in the absence of evidence by him. In the case of Samson S. Maitai & Another v African Safari Club Ltd & Another [2010] eKLR, the High Court in trying to define Formal Proof stated thus:

> " ..... I have not seen judicial definition of the phrase "Formal Proof". "Formal" in its ordinary Dictionary meanings - refers to being "methodical" according to rules (of evidence). On the other hand according to Halsbury's Laws of England, Vol. 15, para, 260, "proof" is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption."

37. Indeed, there were no particulars of breach of contract. The Appellant cannot just throw figures to the court to award. I am alive that mere denial is not enough. The parties annexed delivery notes. The bread is said to have been delivered to Amasago. The witness claimed against the school, which is not a party to the suit. In the case of Raghbir Singh Chatte v National Bank of Kenya Limited [1996] eKLR, the court of appeal stated as doth: -

> " The main object of this rule and r.14 is to bring the parties by their pleadings to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing (per Jessel M. R. in Thorp v Holdworth [1876] 3 Ch. D. 637). This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him. Thus, in an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible", (underling supplied).
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> I will also add that the crucial deficiency of a general denial which I have already described, also applies to the evasive, inconsistent and contradictory alternative general traverse in the appellant's defence. This was that if the Respondent had extended any overdraft facilities without stating the amount involved, to the appellant which was moreover, denied, then the same and here again, without stating how and when, had been paid. Such a spurious pleading in the alternative cannot give any merit to the defence and so also makes it one which discloses no reasonable defence for all purposes including that of 0 6 r 13(1)(a)."

38. In this case, the defences answered sufficiently the questions raised in the plaint. The case against the 2nd Respondent is untenable. However, he did not participate in the appeal. The appeal against the 2nd Respondent is dismissed with no order as to costs.

39. Lastly, the case against the 1st Respondent is tenuous at best and mischievous at worst. The bill relates to St. Paul's Amasago. There is no assignment of any debt from the school. The Appellant cannot claim from the 1st Respondent without a contract. A contract cannot be enforced against a third party.

There was no privity of a contract between the 1st Respondent and the Appellant. The Court of Appeal had an opportunity to deliberate on the doctrine of privity of contract at length in Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & Another [2015] eKLR. The Court rendered itself as follows:

> " In its classical rendering, the doctrine of privity of contract postulates that an agreement cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party. In Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd [1915] AC 847, Lord Haldane, LC rendered the principles thus:
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> "My Lords, in the law of England, certain principles are fundamental. One is that only a person who is a party to a contract can sue on it." In this jurisdiction, that proposition has been affirmed in a line of decisions of this Court, among them Agricultural Finance Corporation v Lendetia Ltd (supra), Kenya National Capital Corporation Ltd vAlbert Mario Cordeiro & Another (supra) and William Muthee Muthami v Bank Of Baroda, (supra). Thus in Agricultural Finance Corporation v Lendetia Ltd (supra), quoting with approval from Halsbury's Laws of England, 3rd Edition, Volume 8, paragraph 110, Hancox, JA, as he then was reiterated:
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> "As a general rule, a contract affects only its parties. It cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or make him liable. The fact that a person who is a stranger to the consideration of a contract stands in such close relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract."

40. Though the 1st Respondent paid for some services, that alone does not make him a party to the contract. Even if it was true that he was given bread he should not have, he cannot be liable for a contract to a third party. Evidence of payment is never evidence of indebtedness in the absence of evidence of any credit supply. The 1st Respondent paid for whatever was supplied. He indicated it was on behalf of the school. This was supported by the Appellant's evidence. Premium was taken that he denied that he was a senior teacher when he was. This is irrelevant in so far as liability is concerned. In any case, he was a Deputy Principal and not a senior teacher as alleged. The bread was delivered to the 1st Respondent, with no evidence whatsoever. There are no invoices or delivery notes to him to support the claim against the 1st Respondent. He cannot carry the cross of the school. The witness for the Appellant was candid that they are claiming against the school.

41. To make matters worse, the Appellant cannot enter into the school's internal affairs. Without fraud or any breach of contract having been proven, the 1st Respondent is not privy to the contract for supply. This reminds me of the words of the Bard:

> " There is a tide in the affairs of men Which, taken at the flood, leads on to fortune; Omitted, all the voyage of their life Is bound in shallows and in miseries. On such a full sea are we now afloat; And we must take the current when it serves, Or lose our ventures.

41. The Appellant cannot go into the internal affairs of the school to hold its former Deputy Principal liable for alleged actions of the school. This is against the Royal British Bank v Turquand [1885] E&

B 327. The rule is espoused well under the doctrine of constructive notice as addressed by the learned authors in Palmer's Company Law, 22nd Ed. Vol. 1 which provide as follows(page 286):-

> "…..That the parties who had dealings with the company need not inquire into the indoor management but could assume that its requirements had been complied with. The rule in Turquand's case was again subject to exceptions. Even this solution would have been principle that a director or other officer could bind the company if he had ostensible or apparent authority, even though the Board of Directors had not endowed him with actual authority. By this circuitous route English and Scottish company law developed a pattern of legal rules which were acceptable to modern practice and worked, on the whole, satisfactorily."

41. The reverse of this rule is not valid. The company does not bind the individual members to pay the firm or school debts. Even if the 1st Appellant was a shareholder, director, or board member, he is protected by the doctrine of separate legal personality as established in the case of Salmon v Salmon & Company Limited [1986] UKHL 1, [1897] AC 22. The forgoing leads to one conclusion, that the Appeal lacks merit and is accordingly dismissed.

41. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

41. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or Respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law,

constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases."

41. The order available is of costs to follow the event. The event is the dismissal of the appeal for lack of merit. The Appellant shall bear costs of the 1st Respondent of Kshs. 95,000/= and Kshs. 95,000/= for the 3rd Respondent. The 2nd Respondent to bear his own costs.

Determination.

41. The upshot of the foregoing is that I make the following orders:

a. The appeal against each of the Respondents lacks merit and is accordingly dismissed.

b. Costs of Ksh 95,000/= to the 1st Respondent.

c. Costs of Ksh .95,000/= to the 3rd Respondent.

d. The 2nd Respondent to bear his own costs.

e. Costs be paid within 30 days, in default execution to issue.

f. Right of appeal 14 days.

g. The file is closed.

DELIVERED, DATED, AND SIGNED AT NYERI ON THIS 4TH DAY OF MARCH, 2025.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Ms. Kebungo for the Appellant

No appearance for the Respondent

Court Assistant – Michael