



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Knut Bungoma Education Scheme & 3 others v Lutukayi (Civil Appeal E164 of 2023) [2025] KEHC 4675 (KLR) (2 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4675 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E164 OF 2023**

REA OUGO, J

APRIL 2, 2025

BETWEEN

KNUT BUNGOMA EDUCATION SCHEME 1ST APPELLANT

KENNEDY MASIKA MUNUYA 2ND APPELLANT

BONFACE WANJALA CHEBUKATI 3RD APPELLANT

METRINE SANYA 4TH APPELLANT

AND

FRANCIS LUTUKAYI RESPONDENT

(Being an Appeal from the Judgment of Hon. T. M. OLANDO, Principal Magistrate in Bungoma Chief Magistrate's Court Civil Case No. 98 of 2023 delivered on 29th November 2023)

JUDGMENT

1. The respondent in this appeal sued the appellants through a plaint dated the 13th March 2023 for Kshs. 123000/-. In his plaint, he averred that he was a member of the KNUT Bungoma Education Scheme from 1995 to June 2022. He contributed Kshs. 123000/-. He withdrew from the Scheme on the 21st of June 2022, which amount the defendants were to pay within 90 days. Before the defendants' case was heard, the respondent sought to amend his plaint, and the court allowed his application. In his amended plaint, he sought to be paid Kshs. 251000/- being his monthly contribution of Kshs 740 for 28 years. The defendants filed a defence denying the respondent's claim and put the respondent to strict proof.
2. The Appellants being dissatisfied and aggrieved by the Judgment preferred this appeal against the whole of the said judgment based on the following grounds:-



- i. That the Learned Magistrate erred in both fact and law when he concluded that the Plaintiff's Respondent's evidence was not challenged and concluded that the plaintiff has proved his case on a balance of probabilities, hence led to miscarriage of justice.
 - ii. That the Learned Magistrate erred both in fact and law when he awarded the Plaintiff/Respondent special damages of Kshs. 251,100/- , yet the same was not proved.
 - iii. That the Learned Magistrate erred in both fact and law for failure to comprehensively consider the Defendant's /Appellants submissions and documents.
 - iv. That the Learned Magistrate erred in both fact and law to rely on the plaintiff's /Respondent's evidence which was so contradictory.
 - v. That the Learned Magistrate erred in both fact and law for failure to appreciate and consider the fact that the Plaintiff/Respondent was after fishing evidence and documents presented particular payslip did not prove or show that the Plaintiff/Respondents was remitting money to the 1st Defendant /Appellant.
 - vi. That the Learned Magistrate erred in both fact and law for failure to appreciate that the Defendants/appellants cannot be sued.
 - vii. That the Learned Magistrate erred in fact and law when he introduced his version of evidence, acted as the Plaintiff/Respondent with fixed mind for sole purpose to find the Defendants/ Appellants liable.
 - viii. The Judgement by the Honourable Magistrate is poorly reasoned and bad precedent.
3. The appellant seeks that the Appeal be allowed with costs to the Appellants, that the decision made by the Trial Magistrate on 29 November 2023 be set aside, and the Plaintiff/Respondent's suit be dismissed with costs to the Defendant/appellant.
 4. The duty of this court is to re-evaluate the evidence adduced before the trial court and to make its finding, bearing in mind that I did not see or hear the witnesses.(See *Selle V Associated Motor Boat Company Ltd* [1968] EA 123.)
 5. The respondent testified as follows: he is a teacher and a member of Bungoma Teachers Education Scheme. He joined the scheme as a member. He paid Kshs. 200/- for membership and he used to contribute Kshs 300/- per month. The sum was raised later to Kshs. 740/-. In June 2022 he stopped remitting his share of contributions. This is after he withdrew from the scheme. At the time he had withdrawn, he had contributed Kshs. 215,000/- but the defendants refused to refund his shares. He seeks a refund of the said sum together with accrued interest until payment in full, plus costs of the suit. During cross- examination he told the court that he joined the scheme in 1995 and that he had filed a statement on contributions. He admitted that he had been given a loan. He admitted he had not produced any payslips and that his statements were a printout and had no stamp. He fully paid the loan he took.
 6. The appellants called 3 witnesses. Kennedy Masika Manunya (Kennedy), the chairman of KNUT Bungoma Teachers Education Scheme testified that he was elected as a Chairman in 2022. Francis Mutonyi Masila is not the chairman. Teachers join the scheme and are a liberty to leave the scheme at any time. The respondent was a member up to 2010, and his share was Kshs.. 45100/-. As per their records, the respondent applied for a loan in the year 2009 for Kshs 25000/- and in the year 2010, he applied an additional of Kshs. 25000/-. The respondent failed to service the loan, and his share was recovered. The respondent did not contribute any share from June 2010. His letter dated 28.10. 2022.



was not received at the scheme, it has no receiving stamp. The respondent had a loan of 50000/- and shares of 45000/- his loan was set off from the shares. If the respondent has any issue regarding his shares with the scheme, they have an internal mechanism like the scheme arbitration, which should deal with the shares matter, the respondent had not exhausted the required mechanism. Boniface Wanjala Chebukati and Metrine Sanya are not officials of the scheme. During cross-examination Kennedy told court that the respondent had no loan with the scheme and that it is a welfare. Metrine Nafula Sanya adopted her statement dated 18.9.2023. In her statement, she deponed that she is a member of KNUT Bungoma Education Scheme. She is not the treasurer of the scheme. The respondent is a stranger to her she has never held any post in the scheme. In cross-examination, she told the court that she is not an official and she does not know about the loan forms.

7. Parties canvassed the appeal by way of written submissions. The appellant's submissions are dated 16.10.2024. The appellants dealt with each ground of appeal as set out in their memorandum of appeal. On the 1st ground, it was submitted that the appellants called two witnesses. The issues raised by the appellants were not considered or analyzed by the court. The appellants challenged the respondent's evidence. The trial court failed to frame issues; this was an error and led to a miscarriage of justice. On the 2nd ground, it was submitted that after the respondent was granted leave to file an amended plaint, nowhere in the proceedings was the respondent granted leave to file further documents. As per the sample statement produced by the respondent, it indicates that the Bungoma Teachers Education Scheme Members card dated 2010, 2009 shows Kshs. 44,100/- in 2010. The respondent's new statement and payslips to support the claim of Kshs. 251,100/- were not adopted as per of his evidence. The same was filed without the court's leave and does not form part of his evidence. The respondent was not granted leave to file a further list of exhibits, and the statement admitted as part of his evidence was nowhere in the evidence. Even if the respondent were to rely on his payslips, which show SWAs-Knut Swa-Bung's account had an amount of Kshs 102860/- and not 251,100/- as claimed. The respondent's claim is a special damage claim which must be specially pleaded and proved (see *Kosgei vs Mutisya (Civil Appeal No. 4 of 2023)*, KEHC 156 KLR). On the 3rd ground, it was submitted that the trial court failed to consider the appellants' submissions, which was unfair and it led to a miscarriage of justice. On the 4th ground, it was submitted that the respondent admitted that the amount in the member's card was Kshs. 45100/- and the statement that was adopted indicated a sum of Kshs.123,000/-, the letter from Sichangi Advocate's indicates a sum of Kshs. 150,000/- and the amended plaint indicates Kshs. 251100/- . He who alleges must prove the existing fact (see sections 107 (1) and (2) of the *Evidence Act* Cap 80) . It was submitted that it is difficult for the court to determine the true fact in view of the several versions by the respondent. On the 5th ground it was submitted that the respondent admitted that he had not produced any of his payslips. The respondent filed a further list of documents without the court's leave. The court in its judgment stated that, " The plaintiff testified and produced payslips to show that he was contributing to the scheme". On the 6th ground, it was submitted that from the amended plaint, it is not clear whether the respondent was to sue Knut Bungoma County or Knut Bungoma Teachers Education Scheme. There is a misjoinder of parties which the trial court did not consider. The respondent sued the wrong persons and un-procedurally sued the 2nd, 3rd. and 4th appellants.
8. The respondent's submissions are dated 7.11.2024. In his submissions, he has tendered evidence in response to the various grounds of appeal. He submitted that the appellants' witnesses produced two loan forms which show he was a member number 1715 and that he had paid his loan. He explained that in Mr. Sichangi's letter the figure of Kshs. 150,000/- was quoted because the employees of Education refused to give him the amount of his total shares as per their records. The amount of Kshs. 250,000/- is his share contribution for 28 years, 1995 to 2022. The respondent has adduced his evidence in court.



Analysis And Determination

9. After considering the submissions and the evidence adduced in the lower court, in my view, the issue for determination is whether the respondent proved his case, his claim of Kshs. 251000/- as per his amended plaint. It is not in dispute that the trial court allowed the respondent to amend his plaint. His original plaint had a claim of Kshs. 123,000/- The respondent filed his amended plaint after he had testified on his original plaint. From the court proceedings, after the amendment was allowed, the respondent did not adduce any further evidence. The trial court in its judgment held that the respondent was a member of the education scheme and that he had contributed Kshs. 251100/-. The trial magistrate stated that the respondent had testified and produced payslips to show that he had contributed to the scheme. The court stated that the defendant testified and stated that the respondent was not contributing to the scheme and that the defendant failed to produce a list to show the respondent was not a member.
10. The court record does not show that the respondent produced the payslips the court relied on in awarding the respondent the sum of Kshs 251100/-. He who alleges a fact must support it with evidence (see section 107 (1)(2) of the [Evidence Act](#) Cap 80 of the Laws of Kenya) .
11. Section 35 (1) of the [Evidence Act](#) provides as follows;

“In any civil proceedings where, direct oral evidence of a fact would be admissible any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact.”
12. The appellants were not the ones to prove that the respondent was a member. The appellants adduced evidence that the respondent was a member and had contributed shares of Kshs 45100/-. It is noteworthy that after the respondent was granted leave to amend his plaint, he did not seek the court’s leave to adduce further evidence on the payslips he was relying on. The payslips found their way into the court record without the respondent seeking the court’s leave to produce them. His payslips were not produced as part of his evidence. Further, the respondent also did not give further evidence on the said payslips to prove that he had shares worth 251000/- with the defendant scheme. The averments in pleadings are not evidence in Francis Otile vs Uganda Motors Kampala HCCS No. 210 of 198 the court held that the court cannot be guided by pleadings since pleadings are not evidence and nor can they substitute therefor. In Mohammed & Another vs Haidara [1972] E.A 166 the court held that the contents of a plaint are only allegations, not evidence. Lastly, in CMC Aviation Ltd vs Cruisair Ltd (No. 1) [1978] KLR 103 1KLR 835, Madan J expressed himself as follows:

“Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes that means by means by which an alleged matter of fact , the truth of which is submitted for investigation.”
13. The respondent failed to adduce evidence to support his case. Further, the respondent’s case was a special damage claim, which has to be specifically pleaded and proved. The Court of Appeal in Hahn V. Singh, Civil Appeal No. 42 Of 1983 [1985] KLR 716, the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. - held:

“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 respondent was under an obligation to prove his case as pleaded against the parties he sued and the claim against them.

14. In my view, the trial court erred in relying on documents that were not tendered in evidence to enter judgment for the respondent. The appeal has merit, and I therefore set aside the judgment of the lower court dated the 29.11.2023. The respondent failed to prove his case at the trial as required by law, and therefore his case is dismissed. In conclusion, I do note that the DW1 stated that the respondent's case could have been resolved by way of arbitration and that the respondent did not exhaust the requisite mechanism on his claim.
15. Section 27 of the *Civil Procedure Act* deals with costs, stating that costs should follow the successful party unless the court, for good reason, orders otherwise, meaning the issue of costs is a discretionary award. Considering what happened in this case in the lower court, each party will bear its costs.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 2ND DAY OF APRIL 2025.

R.E.OUGO

JUDGE

In the presence of:

Mr. Wattangah -For the Appellants

Francis Lutukayi - Respondent

Wilkister - C/A.

