



**Gichuki t/a Equal Options v Weru (Civil Appeal E353 of 2024)  
[2025] KEHC 7348 (KLR) (22 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7348 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL E353 OF 2024  
FN MUCHEMI, J  
MAY 22, 2025**

**BETWEEN**

**FRANCIS GICHUKI T/A EQUAL OPTIONS ..... APPELLANT**

**AND**

**NANCY WERU ..... RESPONDENT**

*(Being an Appeal from the Judgment and Decree of Hon. J. K. Tawai (RM/Adjudicator)  
delivered on 13th December 2024 in Thika Small Claims Court SCCCOMM No. E677 of 2024)*

**JUDGMENT**

**Brief facts**

1. This appeal arises from the judgment of Thika Resident Magistrate/Adjudicator in SCCCOMM No. E677 of 2024 whereby the court entered judgment in favour of the respondent as against the appellant for a sum of Kshs. 177,000/-.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 4 grounds summarized as follows:-
  - a. The learned trial magistrate erred in law and in fact in finding the appellant liable to pay Kshs. 177,000/- together with costs of the claim and interest.
3. Parties disposed of the appeal by way of written submissions.

**The Appellant's Submissions**

4. The appellant submits that the learned adjudicator in her judgment stated that he only filed a response with mere denials and did not adduce any evidence in court too support his allegations in the matter. The appellant argues that that was erroneous as he filed a witness statement dated 31<sup>st</sup> October 2024 which he adopted as his evidence in chief during trial. The appellant submits that he testified



that he was a director of Equal Options Recruitment Limited, the company which the respondent had engagements with and thus he was wrongly sued before the trial court, a fact that the learned adjudicator did not consider in her judgment.

5. The appellant submits that he was wrongly sued in the claim. The respondent testified that she made payments for licences and insurance on behalf of Equal Options Recruitment Limited, a registered limited company as evidenced by the certificate of incorporation produced by the respondent. The appellant refers to the cases of Salomon vs Salomon [1897] AC 78 and Victor Mabachi & Another vs Nurtun Bates Ltd, Civil Appeal No. 247 of 2005 [2013] eKLR and submits that the company is a separate legal entity from its directors and it was the company to be sued and not its directors.
6. The appellant submits that the agreement between the respondent and Equal Options Recruitment Limited was that the respondent would pay for various licences on behalf of the company and get a refund of the amount paid from the income generated from the clients she would bring to the company. That piece of evidence was not controverted. The appellant further submits that the respondent did not bring any clients to the company for her to get a refund of the amount paid on behalf of the company and also to earn any commission. The appellant argues that the adjudicator failed to analyse his evidence and submissions which would have led to a different outcome.
7. The appellant refers to the case of Swalleh C. Kariuki & Another vs Viloet Owiso Okuyu [2021] eKLR and submits that special damages should only be awarded if specifically pleaded and proved. In the instant case, the respondent pleaded Kshs. 177,000/- but only produced Mpesa messages for Kshs. 77,000/-. Further she confirmed that she was paying for Equal Options Recruitment Limited and not the appellant. Thus the appellant submits that it should not be condemned to pay money that was paid on behalf of the company yet the veil of incorporation had not been lifted.
8. The appellant further submits that the money paid on behalf of the company was to be refunded from the profits made by the company. The company did not do well in business and he handed over the operations of the company to someone else.
9. The appellant argues that the respondent did not adduce any proof that the company traded and made profits to entitle her to a commission. On cross examination, she confirmed that she did not have any evidence to prove how much the company made for her to get the alleged 10% commission. Thus there is no basis upon which the claimed commission could be awarded to the respondent. The appellant therefore argues that the respondent failed to specifically prove her case for special damages before the adjudicator and therefore the order that he should pay Kshs. 177,000/- to the respondent is erroneous and ought to be set aside.
10. Directions were issued that parties put in written submissions and the record shows that the appellant complied by filing submissions on 26<sup>th</sup> March 2025. The respondent on the other hand had not filed her submissions by the time of writing this judgment.

### **Issue for determination**

11. The main issue for determination is whether the appeal has merit.

### **The Law**

12. The Court of Appeal while referring to a second appeal, which is essentially on points of law and thus similar to the duty of this court under Section 38 of the *Small Claims Court Act*, set out the duty of



the second appellate court in the case of Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited [2020] eKLR as follows:-

I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below considered matters that they should have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.

13. In distinguishing between matters of law and fact the Court of Appeal stated in Kenya Breweries Ltd vs Godfrey Odoyo [2010] eKLR as follows:-

I have anxiously considered the pleadings, the evidence on record, the judgment of the learned Senior Resident Magistrate and the judgment of the superior court, the grounds of appeal, the submissions of the learned counsel as well as the authorities to which we were referred. 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 retrial and facts must be revisited and analysed a fresh. See *Selle and Another vs Associated Motor Boat Company Limited 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.

14. I have perused the grounds 1-4 in the memorandum of appeal and note that the grounds touch on the fact that the learned adjudicator did not analyze the evidence of the appellant and further that the respondent did not prove her claim on a balance of probabilities. I have further perused the judgment of the learned adjudicator and noted that the trial court found that the respondent proved her claim for Kshs. 177,000/- and entered judgment in her favour. The grounds as raised by the appellant are on matters of fact which will require this court to scrutinize and re-evaluate the evidence once more. However, that would be contrary to the provisions Section 38 of the Small Claims Act which outlaws appeal on matters of fact to the High Court. The matters of fact contained in the grounds of appeal are therefore outside the mandate of this court.
15. It is my finding that this Appeal is not properly before the court and is hereby struck out with costs to the respondent.
16. It is hereby so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 22<sup>ND</sup> DAY OF MAY 2025.**

**F. MUCHEMI**

**JUDGE**

