



REPUBLIC OF KENYA



Omuga c/o Pamu Engineering Company Limited v Ufanishi Cleaners Limited (Civil Appeal E094 of 2024) [2025] KEHC 12150 (KLR) (16 June 2025) (Judgment)

Neutral citation: [2025] KEHC 12150 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E094 OF 2024
F WANGARI, J
JUNE 16, 2025**

BETWEEN

**PATRICK ADARO OMUGA C/O PAMU ENGINEERING COMPANY
LIMITED APPELLANT**

AND

UFANISHI CLEANERS LIMITED RESPONDENT

(Being an Appeal by the Appellant of the whole of the Judgement delivered by Hon. V. Muthoni, Adjudicator/Magistrate on the 7th March, 2024 in SCCCOMM No. E709 of 2023)

JUDGMENT

1. This is an appeal from the judgement of the Learned Adjudicator/Magistrate Hon. V. Muthoni in Mombasa SCCCOMM No. E709 of 2023 delivered on 7th March, 2024.
2. The Appellant being dissatisfied with the said judgement preferred the present appeal and raised seven (8) grounds of appeal which are set out as follows: -
 - a. That the Learned Trial Adjudicator erred in law and in fact in dismissing the Appellant's claim with costs;
 - b. That the Learned Trial Adjudicator erred in law and in fact after making a finding that there was a valid contract between the Appellant and the Respondent and that the parties intended to create legal obligations and that there was consideration as one Fredrick Sigei received the sum of Kshs. 403,000/= on behalf of the Respondent but she proceeded to dismiss the Appellant's claim with costs;
 - c. That the Learned Trial Adjudicator erred in law and in fact after making a finding that Fredrick Sigei acted as an agent of the Respondent in the joint venture agreement dated 10th January,



2020, the Honourable Adjudicator misdirected herself by making a finding that the Appellant was supposed to join Fredrick Sigei in his claim against the Respondent in his personal capacity;

- d. That the Learned Trial Adjudicator erred in law and in fact in failing to find that there existed a Principal – Agency relationship between Fredrick Sigei and the Respondent and the actions of Fredrick Sigei in relation to the Joint Venture Agreement dated 10th January, 2020 bound the Respondent and it was enforceable as against the Respondent;
 - e. The Learned Trial Adjudicator erred in law and in fact after finding that Fredrick Sigei received a total of Kshs. 403,000/= on behalf of the Respondent in presence of the Respondent’s Director the same bound the said Director and the Respondent and the Appellant’s testimony corroborated the Claimant’s claim as against the Respondent;
 - f. That the Learned Trial Adjudicator erred in law and in fact in that after making a finding that the Respondent’s witness was evasive and did not produce evidence of having demanded payment from Devki Steel Mills Ltd but never bothered to report to the police that Fredrick Sigei impersonated himself as an agent of the Respondent and the Appellant was not charged in court with the offence of falsifying the Respondent’s documents and demanding money from the Respondent through false pretences but she still ruled that the burden of proof was still on the Appellant to prove the claim against the Respondent and she dismissed the Appellant’s claim;
 - g. That the Learned Trial Adjudicator erred in law and fact after finding that the Respondent’s witness was not truthful as to distance himself from Ufanisi Cleaners which was his company that was used to transact the Joint Venture Agreement dated 10th January, 2020 but she still stated that the Appellant had not discharged the burden of proof which was a misdirection on the part of the court as the Claimant had discharged his burden of proof as required in civil cases which is on a balance of probabilities; and
 - h. That the Learned Trial Adjudicator erred in law and in fact by not making a finding that the Appellant had proved his case as required on a balance of probabilities and the judgement was to be entered against the Respondent as prayed in the Appellant’s Statement of Claim.
3. The Appellant thus prayed that the court sets aside, varies and or discharge the judgement and/ or orders of the Honourable Adjudicator delivered on 7th March, 2024 and that the court enters judgement for the Appellant against the Respondent as prayed in the Statement of Claim dated 18th August, 2023 plus costs and interests from the date of filing suit till payment in full and that the costs of the appeal be borne by the Respondent.
 4. This being a first appeal, this court is under a duty to re-evaluate and re-assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
 5. This was aptly stated in the cases of *Selle vs Associated Motor Boat Company Ltd* [1968] EA 123 and *Peters vs Sunday Post Limited* [1985] EA 424 where in the latter case, 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...”

6. In *Livestock Research Organization v Okoko & another* (Civil Appeal 36 A of 2021) [2022] KEHC 3302 (KLR) (29 June 2022) (Ruling), Justice R. E. Aburili, J. held as follows;

In other words, a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyse and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated that

“[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect”

7. This is a case founded upon a contract in the nature of a joint venture wherein one party is alleged to have been awarded some work for land scaping at Devki Still Mills Ltd situated in Samburu Area in Kwale County worth Kshs. 750,000/=. The two parties thereafter agreed to co-finance the works at a ratio of 50% each. To this end, the Appellant alleges that he financed the work to a tune of Kshs. 668,000/=. However, despite payment of Kshs. 750,000/= being paid to the Respondent, it refused to pay the Appellant thus the claim as can be discerned from the pleadings.
8. From the record, it is not in contest that the Appellant called three (3) witnesses while the Respondent called one (1) witness in support of their respective claims. The court shall thus proceed to re-analyse the evidence before the Trial Court.

Summary of the Evidence

Appellant’s Case

9. Patrick Adaro Omuga, testified as CW1. He adopted his witness statement as well as the further statement dated 18th August, 2023 and 12th October, 2023 as his evidence in chief. He also produced a list of documents as a bundle collectively identified as Exhibits 1 – 7. He thus prayed for judgement for a sum of Kshs. 668,740/=.
10. In cross examination, he stated that the agreement dated 10th January, 2020 was between Fredrick Sigei and Patrick Adaro but there was somewhere written Ufanishi Cleaners and that Fredrick was acting for Ufanishi Cleaners. He confirmed being the director of the company called Pamu. He also confirmed not having sued Fredrick Sigei but pointed that Lincoln Muraguri and Fredrick Sigei are the owners of Ufanishi and that is why he sued it.
11. He stated that he did not know the directors of Ufanishi at the time the agreement was entered. He added that Fredrick Sigei came to his office and he knew him as a director and the work was partly delivered. He confirmed that money was given to Fredrick Sigei on behalf of Muraguri and the same was paid in cash.
12. In re-examination, he stated that he knew Sigei and Muraguri as partners and that he knew this position when Sigei signed the agreement with the authority of Muraguri. He contended that he only came



- to know that Muraguri was the sole partner after the Respondent filed its documents. He added that both Sigei and Muraguri came to his office together and that he paid the two as they were inspecting the site together. He stated that the agreement showed that Sigei was a partner at Ufanishi and that is why he signed and paid. He reiterated that Sigei signed the agreement in the presence of Muraguri.
13. Lewis Omuga testified as CW2. He stated that he was a manager at Pamu Engineering. He adopted his statement dated 12th October, 2023. On cross examination, he confirmed that he witnessed CW1 issuing a petty cash voucher for Kshs. 150,000/= to Fredrick Sigei who he knew as a director of Ufanishi Cleaners and that he knew Muraguri as Sigei's partner. He stated that he met Muraguri on 10th January, 2020 as he had come to the office with Sigei.
 14. On the said 10th January, 2020 he stated that Muraguri told Sigei to sign the petty cash voucher. In re-examination, he reiterated the position that he saw the Appellant issuing a petty cash voucher to Sigei and that Sigei took the amount on behalf of Ufanishi Cleaners. He concluded that he knew them as partners due to their interaction.
 15. Juma Mwamburi testified as CW3. He confirmed he was working in the Appellant's company as a clerk and proceeded to adopt his witness statement dated 12th October, 2023. On cross examination, he confirmed that he knew Fredrick Sigei as he used to come to their workplace with Muraguri. He stated he met Sigei in the company of Junior Lincoln Muraguri. He stated that on 16th January, 2020, Sigei was given Kshs. 253,000/= while in the company of Muraguri.
 16. He added that the money was to be used for works given at Devki Steel Mills Ltd and which work was being done by Ufanishi Cleaners Ltd. According to him, the Appellant was to finance the Respondent for the work at Devki. He reiterated that Muraguri was a business partner to Sigei and that the money was received by him on behalf of Muraguri and Ufanishi Cleaners. In re-examination, he stated that the money was taken by Sigei in the presence of Muraguri. That marked the close of the Appellant's case.
 17. Lincoln Junior Muraguri testified as RW1 and he was the sole witness. He stated that he was the director of the Respondent and denied that Fredrick Sigei was neither his business partner nor an employee. He confirmed that in the agreement in issue, the parties were Fredrick Sigei, Ufanishi and Patrick Odero of Pamu Engineering. He denied being present when the agreement was prepared though he knew Fredrick Sigei. On the LPO, he stated that it was not related to the agreement in question. He adopted his witness statement and produced the response to the demand letter. He prayed that the claim be dismissed.
 18. On cross examination, he confirmed being the sole director of Ufanishi Cleaners and that he knew Patrick Adaro but denied doing any business with him previously. He confirmed that they dealt with construction but denied sub-contracting other companies to carry out its tenders. He further denied receiving any money from Patrick of Pamu Engineering or introducing Fredrick Sigei to Patrick. He stated that the witnesses did not know him. Referred to the LPO, he confirmed that the addressed used therein was his.
 19. He further stated that he did not suspect the Appellant was making a false claim, he neither went to the police nor counterclaimed against the Appellant. He stated that he did not know how Patrick got the address and that the purchase order was not stolen from his office. He did not have any evidence of Devki being in receivership.
 20. In re-examination, he stated that Sigei was not his partner, the LPO was reading Ufanishi Cleaners and not Ufanishi Cleaners Ltd and that the LPO was not related to the joint venture agreement. Questioned by the court, he confirmed that his company is called Ufanishi Cleaners Ltd and it had entered an agreement with Devki Steel Mills Ltd. He added that he did the work but was not paid.



He also confirmed that Ufanishi Cleaners was his previous company but changed in 2018. He denied knowing Fredrick Sigei. That marked the close of the Respondent's case.

21. Parties filed their closing submissions before the Trial Court and in a judgement dated 7th March, 2024, the claim was dismissed with costs thus precipitating the present appeal.
22. Directions were taken that the appeal be canvassed by way of written submissions. Both parties duly complied by filing detailed submissions and cited various decided cases in support of their rival positions. The Appellant's submissions are dated 31st October, 2025 while those of the Respondent are dated 4th December, 2024.

Appellant's Submissions

23. The Appellant isolated two (2) issues for consideration being whether the Appellant entered into a valid contract with the Respondent and whether the action of agent bound the principal. On the first issue, the Appellant placing reliance on the case of Omar Gorhan v Municipal Council of Malindi & Another [2020] eKLR, he submitted that the Trial Court misdirected itself after finding that there was a binding contract between the Appellant and the Respondent but then proceeded to dismiss the claim.
24. On the second issue, the Appellant cited the decision in Kisumu Civil Case No. 56 of 1987, Karanja v Phoenix of East Africa Assurance for the proposition that an act of an agent within the scope of his actual or apparent authority does not cease to bind his principal merely because the agent was acting fraudulently and in furtherance of his own interest. It was the Appellant's position that the Trial Court wrongly proceeded to dismiss the claim with costs instead of finding that the agent's actions bound the Respondent as it was the principal. He therefore urged that the appeal be allowed and that judgement be entered as prayed in the statement of claim dated 18th August, 2023.

Respondent's Submissions

25. The Appellant has identified three issues being the elementary considerations that the Trial Court considered in finding that the Appellant failed to discharge his burden of proof, considerations which the Trial Court failed to consider and ought to be looked at by this court and the orders which ought to issue and costs. On the first issue, the Respondent submitted that the Trial Court was correct in its findings that the claim was brought by the Appellant in his personal capacity, the cause of action was based on the Joint Venture Agreement and that the Appellant failed to discharge the required burden of proof.
26. On the second issue, it submitted that the appeal hangs on evidence which should not have been admitted to add, vary or contradict the Joint Venture Agreement. The case of Universal Education Trust Fund v Monica Chopeta [2012] eKLR which cited with approval the case of Muthuuri v Industrial Credit Bank Ltd [2003] KLR 145 was relied upon.
27. According to the Respondent, the court is forbidden from relying on evidence which alter a written joint venture agreement under the parole evidence rule. The case of Urbanus Kyalo Wambua v Briggitta Ndila Musau [2019] eKLR was relied upon.
28. Lastly, the Respondent urged the court to reconsider the issue of locus standi raised before the Trial Court but dismissed. It contended that the claim instituted by the Appellant at the Trial Court stemmed from a Joint Venture Agreement which did not enlist the Appellant as a beneficiary of any right thus lacked locus standi. Several decisions including Christopher Mutiambu Machimbo & 3 Others v County Surveyor Trans-Nzoia & 4 Others [2022] eKLR were cited.



Analysis and Determination

29. I have carefully considered the Record of Appeal, the submissions filed both for and against, the authorities cited as well as the law and I discern the following issues for determination: -
 - a. Whether this court can consider issues not raised in an appeal or a cross appeal;
 - b. If the answer to (a) above is in the negative, whether the appeal is merited: and
 - c. Who bears the cost?
30. On the first issue, the Respondent in its submissions dated 4th December, 2024 raised several issues which ought to have been cross appealed if it was dissatisfied with the Trial Court's decision on those aspects. It is trite that an appellate court cannot generally make a determination on an issue that was not specifically appealed or cross appealed. An appellate court's jurisdiction is usually confined to the specific grounds of appeal or cross-appeal filed by the parties. It cannot raise or decide on new issues that were not presented for its consideration.
31. Therefore, the issue of the Trial Court admitting evidence which ought not to have admitted could only have been raised by way of cross appeal and not through submissions. Time and again, it has been said that submissions cannot take the place of pleadings and evidence. On the issue of locus standi, though the same was raised before the Trial Court, the record indicates that the same was struck out on 22nd April, 2024. The Respondent if dissatisfied ought to have appealed within the normal timelines.
32. Still, the Trial Court at paragraph 8 of its judgement made a determination that the Appellant had the necessary standing. There being no cross appeal challenging that portion of the Trial Court's findings, it would be onerous to allow a party who did not take the necessary steps to have a second bite of the cherry. Therefore, the first issue is answered in the negative.
33. Turning to the merits of the appeal, I note that the Trial Court found for a fact that there was a valid contract with all the essential ingredients. However, it proceeded to dismiss the case on the fact that the Appellant did not join Fredrick Sigei as a party since he was the one who received the money. Though I am in agreement with the Trial Court's finding that the burden of prove rested with the Appellant, I note that three (3) witnesses testified for the Appellant.
34. The basis of the relationship is the Joint Venture Agreement dated 10th January, 2020 between Fredrick Sigei of Ufanishi Cleaners Ltd and Patrick Adaro Omuga of Pamu Engineering Company Ltd. All the three witnesses confirmed that the agreement was signed in the presence of Junior Lincoln Muraguri, the sole director of Ufanishi Cleaners Ltd. In cross examination of RW1, he confirmed that Ufanishi Cleaners Ltd had been awarded a tender for cleaning land scapping at Devki Steel Mills Ltd.
35. On the recital part of the Joint Venture Agreement, it clearly captures this fact that indeed Ufanishi Cleaners Ltd had been awarded this tender. In examination in chief, RW1 confirmed that he knew Fredrick Sigei. However, when questioned by the Trial Court, he denied knowing Fredrick Sigei. The question which the Trial Court ought to have asked itself is how would Fredrick Sigei know of the work at Devki Steel Mills Ltd if he was not working with RW1?
36. Further, RW1 on cross examination confirmed that he did not report any incident to police over the activities of Fredrick Sigei. He also confirmed that the address in the LPO belonged to his company and that the same had not been stolen. Respectfully, the Trial Court made a reversible error in holding that the Appellant had failed to prove his case. The court appears to have elevated the standard of proof in civil cases to proof beyond reasonable doubt.



37. The question then is what amounts to proof on a balance of probabilities. Kimaru, J (as he then was) in *William Kabogo Gitau v George Thuo & 2 Others* [2010] 1 KLE 526 observed thus: -

“...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...”

38. I find that the Appellant discharged the evidential burden. The three (3) witnesses evidence was unshaken even on cross examination. This being the case, I have no hesitation that Fredrick Sigei was acting as an agent of a disclosed principal that is the Respondent. The general rule is that an agent of a disclosed principal cannot be held personally liable with few exceptions being where fraud, misrepresentation or deceit are alleged, commission of murder and where a liability of the principal is discharged. None of the exceptions arises in this case. (See the Court of Appeal decision in *Victor Mabachi & Another v Nuturn Bates Ltd* [2013] eKLR).

39. I have said enough to show that the appeal is well founded and the same is for allowing.

40. On the issue of costs, a careful reading of Section 27 indicates that it is trite law that they follow the cause or event as described by Sir Dinshah Fardunji Mulla in his book *The Code of Civil Procedure*, 18th Edition, 2011 reprint 2012 at 540. It is, that costs must follow the event unless the court, for some good reasons, orders otherwise. The import is that a successful party is entitled to costs unless he or she is guilty of any misconduct or there exists some other good reasons and or cause for not awarding costs to the successful party. I thus award the costs of this appeal as well as before the Trial Court to the Appellant.

41. Flowing from the foregoing, I proceed to make the following orders: -

- a. The appeal is allowed and judgement entered in favour of the Appellant against the Respondent for the sum of Kshs. 403,000/= which was proved;
- b. The Appellant is awarded costs of this appeal and in the court below; and
- c. The amount in (a) above shall attract interest from 20th January, 2020 until payment in full while the sum in (b) shall attract interest from the date herein until payment in full.
- d. This file is closed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 16TH DAY OF JUNE, 2025.

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F. WANGARI

JUDGE

In the presence of:

Mr. Ananda Advocate for the Appellant

Mr. Sang Advocate for the Respondent

Ms. Getrude, Court Assistant

