



REPUBLIC OF KENYA



**Randu v Free Holiday Limited & another (Civil Appeal 146 of 2022)  
[2025] KEHC 12062 (KLR) (23 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 12062 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL 146 OF 2022**

**F WANGARI, J  
JUNE 23, 2025**

**BETWEEN**

**CHARLOTTE GEORGE RANDU ..... APPELLANT**

**AND**

**FREE HOLIDAY LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**HANANEL ADIN ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the Judgement of the Hon. J.B. Kalo (CM) in Mombasa  
CMCC No. E889 of 2017 delivered on the 11th day of August, 2022)*

**JUDGMENT**

1. Through the Plaintiff dated 26/05/2017, the Appellant who was the Plaintiff in the lower court matter sued the Defendant for Kshs. 1,771,620.65/= and compounding interest, being the amount by the Plaintiff to Diamond Trust Bank as a guarantor to the Defendants after the Defendant defaulted paying the said amount.
2. The Plaintiff stated that she paid the amount so as to redeem her charged property No. CR. 39533 which she had offered as security for a loan facility of Kshs. 10,000,000/= which had been advanced to the 1<sup>st</sup> Defendant.
3. In the Statement of Defence dated 15/06/2017, the Defendants denied the allegations by the Plaintiff. Instead, they stated that they had entered into an agreement with the Plaintiff to run a coffee shop and it was the Plaintiff who owed the Defendants money that she had borrowed under the security of plot no. CR 39533. Kshs. 1,566,446/= remained unpaid and the Defendant in the counter-claim, claimed for the said amount.
4. After hearing both parties, the trial court found that none proved its claim against the other. The suit and the counter-claim were dismissed with each party bearing its own costs.



5. The Appellant being dissatisfied with the said judgement preferred the present appeal through the Memorandum of Appeal dated 08/09/2022. The trial court was faulted for failing to consider the evidence on record and misleading himself to arriving at a wrong decision. She prayed to have the appeal be allowed and judgment be entered in favour of the Appellant as per the Plaintiff.
6. The Respondents filed a Memorandum of Cross Appeal dated 29/09/2022. The trial court was faulted for having a wrong evaluation of the Respondents case thus falling into error. It was prayed that the appeal be dismissed with costs and the cross-appeal be allowed by entering judgment as per the counter-claim.
7. The Appellant thus prayed that the appeal be allowed, the judgement/decreed of the Trial Magistrate be set aside and substituted with an order dismissing the Respondent's suit and entering judgement for the Appellant as prayed for in the counter-claim and that costs of the appeal, the Respondent's suit and the counter-claim.
8. The appeal was canvassed by way of written submissions. Both parties complied by filing their rival submissions.
9. 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.
10. 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...”

11. 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”

12. This is a case where both parties are giving totally conflicting facts. The Plaintiff/ Appellant case is that she offered the title to plot No. CR 39533 as security and guarantor for a Kshs. 10,000,000/= loan which was advanced to the Defendants. The Defendant was to service the loan. It is until when the Appellant received notification from the bank that there was default in repayment of Kshs.



1,771,620.65 and the bank demanded for the payment of the same. In order to redeem her property, she paid the money.

13. On the other hand, the Defendants/ Respondents' case was the Plaintiff had been advanced money by the Defendant and the paid part of it leaving a balance of Kshs. 1,566,466 which the Defendants are claiming in the counter-claim. The title was given as security for the loan given and to get capital for their joint business known as Dublin Café and Restaurant where both parties were directors.
14. No independent witness was called. Both parties know the truth, and this court can only rely on the evidence adduced to come up with a finding as to which party is telling the truth. In the case of *Dormakaba Limited v Architectural Supplies Kenya Limited* (Civil Suit 136 of 2020) [2021] KEHC 210 (KLR) (Commercial and Tax) (10 November 2021) (Judgment), Mativo J (as he then was) in explaining how a court should resolve disputes and ascertaining where the truth lies between conflicting facts, he relied on the South African Supreme Court case of *Stellenbosch Farmers Winery Group Limited & ano v Martell & others*, 2003 (1) A 11 (SCA) where it was stated as follows;

“To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equiposed probabilities prevail.”
15. From the above, the following three aspects must be examined;
  - a. credibility of witnesses
  - b. their reliability; and
  - c. probability.
16. The trial court had the benefit is hearing the parties orally and observing their demeanour as they testify. Both parties had the burden of proof in respect to their respective claims. The trial court found that both parties had failed to prove their case and he proceeded to dismiss both the suit and counter-claim.
17. I have perused through the evidence on record. It is a fact that the 1<sup>st</sup> Defendant took a loan of Kshs. 10,000,000/= from Diamond Trust Bank and guaranteed by the Plaintiff. The loan was approved



as per the letter dated 03/03/2014. The Charge was registered on 30/05/2014. It is a fact that Kshs. 1,777,243.07/= was debited from the Plaintiff's account at DTB in favour of the 1<sup>st</sup> Defendant.

18. The court cannot ignore the fact that there are several other transactions between the Plaintiff and the 1<sup>st</sup> Defendant. Several cheques were drawn by the Plaintiff in favour of the 1<sup>st</sup> Defendant. The said cheques were produced by the Defendants. The Plaintiff in her pleadings and evidence in chief did not disclose of any other business transaction she had with the Defendants.
19. It can also not be ignored that the company that was to run the coffee shop was incorporated before the loan was taken by the 1<sup>st</sup> Defendant. The articles of Association of Dublin Café and Restaurant limited are dated 04/11/2013. It is on cross examination of the Plaintiff that she admitted there was such a company that was established in partnership with the Defendant.
20. On the other hand, the Defendants said that the Plaintiff was advanced Kshs. 3,345,680/= but upon payment, the Plaintiff had a balance of 1,566,466/=. It is upon this balance that the 1<sup>st</sup> Defendant had the Plaintiff's property charged as security. From the bank documents, the said title document was a security for the Kshs. 10,000,000/= loan. Further, there is no evidence that the money was advanced to the Plaintiff as claimed. What is at play is that both parties who were friends had transactions between themselves that they do not intend to fully disclose. Their credibility as witnesses is in question. Their evidence cannot be relied on. It is not clear from both the pleadings vis-à-vis the witness statements as to which party is telling the truth. I do agree with the finding of the trial court that both parties had failed to prove their respective cases.
21. Therefore, just as the Trial Court, Plaintiff's suit and the Defendants' counter-claim were not merited and the court was correct to dismiss them. Both the appeal and the cross appeal lacks merits and are hereby dismissed.
22. On the issue of costs, a careful reading of Section 27 indicates that it is trite law that they follow the cause or event. None of the parties succeeded. Each party is to bear its own costs.
23. Flowing from the foregoing, I proceed to make the following orders: -
  - a. The appeal and the cross-appeal have got no merits and are hereby dismissed;
  - b. Each party to bear own costs.It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 23<sup>RD</sup> DAY OF JUNE, 2025.**

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**F. WANGARI**

**JUDGE**

In the presence of:

Mr. Magiya Advocate for the Appellant

Mr. Abwere Advocate for the Respondent

Ms. Getrude, Court Assistant

