Seraph Ladies Lounge & another v Owino (Civil Appeal E485 of 2024)
[2025] KEHC 10804 (KLR) (Civ) (23 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10804 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E485 OF 2024

TW OUYA, J

JULY 23, 2025

BETWEEN

SERAPH LADIES LOUNGE ..... 1ST APPELLANT

LYZE NJERI WAIGANJO ..... 2ND APPELLANT

AND

SYDNEY OWINO ..... RESPONDENT

(Being an appeal against the entire judgment of Hon. JW Nasimiyu, Resident Magistrate/ Adjudicator at the Milimani Small Claims Court delivered on 18th March 2024)

JUDGMENT

1. This appeal emanates from the judgment delivered in favour of the Respondent on 18th March 2024 based on a Statement of Claim dated 31st November 2023.

2. The basis of the claim was that the Respondent, who was the Plaintiff, at the trial court injected Kshs. 800,000.00 into the 1st Appellant with an understanding that he would be made a director. However, no formal agreement was entered to that effect. It was the Respondent's contention that the Appellants had failed to grant him directorship nor refund him the money he had contributed to the business.

3. The Appellant's admitted receiving the sum of Ksh. 800,000.00 from the Respondent. However, they denied promising to make him a director on account of the sum he had advanced to the 1st Appellant. Instead, they contended that the money was contributed through an informal arrangement.

4. By consent of the parties, the matter proceeded by documentary evidence pursuant to Section 30 of the *Small Claims Court Act* and judgment was entered in favour of the Respondent against the appellant for Kshs. 800,000.00.

5. Aggrieved with the entire judgment of the court, the Appellants lodged the instant appeal urging the following grounds:

   i. The Honourable learned magistrate erred in law and fact in failing to consider the Appellants documentary evidence/ accounts and the written submissions thereof;

   ii. The honourable magistrate erred in law and fact in awarding the Respondent the entire sum of Kshs. 800,000.00 without considering the appellant's counterclaim and cash drawings, time taken by the Respondent with no lawful authority

   iii. The Honourable learned magistrate failed to appreciate the actual status of the Respondent in the company and the role he personally played in the management and was liable for any loss.

   iv. The learned magistrate erred in law and fact by solely relying WhatsApp screenshots to infer directorship having been discussed without considering the Appellants evidence and the loss incurred by the company

   v. The learned magistrate erred in law and fact in holding that the appellants statement of account was not sufficient evidence to prove that the claimant Respondent owed the Appellants mainly because any alleged theft ought to have been reported to the police

   vi. The learned magistrate erred in law and fact in awarding costs Kshs. 50,000.00 and interest to the Respondent without laying any basis for such unilateral assessment.

6. The Respondent's case is that on diverse dates between December 2021 and March 2022, the 2nd Appellant approached the Respondent with a view of being business partners. Towards this end, the Respondent was to inject Ksh. 800,000.00 into the 1st Appellant and in turn, he would be made a director of the 1st Appellant and be involved in the daily operations of the 1st Appellant.

7. The Respondent did make the capital injection as agreed upon, however, the Appellants refused to admit him to the directorship as promised, causing the Respondent to demand for the repayment of the money that he had advanced to the 1st Appellant. When no favourable response came from the Appellants, he opted to institute the suit herein to recover the sum of Ksh. 800,000.00 and costs of the suit.

8. The Appellants filed a joint response to the Respondent's claim via their response dated 24th January 2024 denying the existence of any promise or agreement to make the Respondent a director of the 1st Appellant.

9. The Appellants admitted that the Respondent contributed Ksh. 800,000.00 to the 1st Appellant through an informal arrangement with the 2nd Appellant. However, the amount injected was never utilized for the required purpose and in return the Respondent took Ksh. 673,112.00 as unpaid bills, items taken and cash drawings even before considering the loss incurred during the period in a shared matrix which amounts to Ksh. 342,983.88, hence a total loss.

10. It was further averred that the Respondent owed the 1st appellant Ksh. 216,095.88 based on the 1st Appellants financial report from February 2022 to September 2023. Therefore, the Appellants made a counterclaim of Kshs. 216,095.88 and prayed that judgment be entered in their favour.

11. The appeal was canvassed through written submissions.

12. The appellants submissions were hinged on the allegation that the learned trial magistrate failed to consider the documentary evidence filed by the appellants. Therefore, he erred in concluding that the

Kshs. 800,00.00 advanced by the Respondent was a soft loan yet no such averment was made by the Appellants in their statement of response.

13. It was further submitted that the learned magistrate completely ignored to consider the appellants evidence in support of the counterclaim without any legal justification ultimately dismissing the counterclaim.

14. Citing the case of *Selle & Another vs Associated motor boat Co Ltd* [1968] EA 123, the appellant invited this honourable court to consider the pleadings, proceedings, submissions and find the appeal in favour of the appellants.

15. The Respondent on the other hand submitted that they had proved their case on a balance of probabilities as espoused under Section 107, 108 and 109 of the *Evidence Act*. The amount of Ks. 800,000.00 that the Respondent claimed was not disputed as the Appellants admitted receiving the amount through an informal arrangement.

16. It was further submitted by the Respondent that the Appellants contention that there existed no agreement to make him director of the 1st Appellant was a mere denial that had no force of law. Reliance was placed on the case of *Margaret Njeri Mbugua v Kirk Mweya Nyaga* [2016] eKLR where the court in dealing with a defence of mere denial stated that a mere denial is not a sufficient defence, a defendant has to show either by affidavit, oral evidence or otherwise that there is a good defence. A fair and substantial answer should accompany the denial of the existence of an alleged fact.

17. Regarding the ground that the learned trial magistrate merely relied on WhatsApp documents, the Respondent submitted that the statement of accounts submitted by the Appellants were not conclusive as the they omitted the drawings made by the 2nd Appellant. Therefore, he contended that this omission, hampered the admissibility of the statements of accounts. Reliance was placed on the case of *E.P. Communications Limited v East Africa Courier Services Limited* [2019] KEHC 1298 (KLR) where the court stated that:

> "(16) Only entries in books of account regularly kept in the course of business are admissible whenever they refer to a matter into which the court has to inquire, but such statements alone are not sufficient evidence to hold a person liable. Personal statements authored by the Appellant is not sufficient evidence to prove liability especially considering the supporting documentation relied on is invoices and LPOs without the evidence of delivery of the goods. The appellant failed to prove on a balance of probability the extent to which the respondent was liable."

18. On the issue of costs of Ks. 50,000.00 awarded to the Respondent, it was submitted that the award of costs is a discretionary and that since it often follows the event, it is not made to punish the losing party but rather to compensate the successful party. Reliance was placed on the case of *Karuru Ngayu vs Barclays Bank of Kenya another* [2016] eKLR.

19. In view of the above the Respondent submitted that the appeal be dismissed.

20. This being the first appellate court, the guiding principle for the first appellate court was set out in the case of *Selle v Associated Motor Boat Co.* [1968] EA 123 where the court stated as follows:

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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 allowance in this respect. In particular, the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

21. This is an appeal from a Small Claims Court. Ordinarily first appeals from the Subordinate Courts, the Appellant is called upon to re-valuate and re-analyze the Trial Court's evidence and the facts of the case and arrive at its own independent conclusion. This however is an appeal from the Small Claims Court whereby Section 38 of the *Small Claims Court Act* provides that:

> " 1. A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law."

22. The Court of Appeal in *Kenya Breweries Ltd v Godfrey Odoyo* [2010] eKLR, distinguished between matters of law and matters of fact by stating that:

> "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 a retrial and facts must be revisited and analysed a fresh, - see *Selle and Another v Associated Motor Boat Company Ltd 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."

23. I have addressed my mind to the pleadings and submissions as well as the pleadings before the Lower Court, the proceedings and the impugned judgement and it is my considered opinion is that the issue for determination is whether the Trial Magistrate misdirected himself in his award in favour of the Respondent.

24. The Respondent's case before the trial court was for the refund of Ksh. 800,000.00 that he had contributed and or injected into the 1st Appellant pursuant to an informal arrangement that was to make him a director of the 1st Respondent. The learned trial magistrate in his judgment awarded the Respondent Ksh. 800,000.00 for reasons that the advancement of the amount to the 1st appellant was admitted. Since the Appellants had denied the existence of any promise to make the Respondent one of the directors of the 1st Appellant, the trial magistrate in his judgment was that the only reasonable explanation for the advancement of the amount by the Respondent was that the same was a soft loan.

25. It is noteworthy that the case was disposed through documentary evidence pursuant to Section 30 of the *Small Claims Court Act*. it is an established principle in law that parties are bound by their

pleadings. In *CMC Aviation Limited -vs-Cruisair Limited (No. 1)* [1976-8011 KLR 835, Madan J (as he then was) expressed himself thus:

> " Pleadings contain the averments of the parties concerned or anything until they are proved or disapproved or there is an admission of them or any of them by the parties they are not evidence and no decision could be founded upon them. (Emphasis added)"

26. In the persuasive decision of the court in *Standard Chartered Bank v Masinde* (Civil Appeal 139 of 2023) [2025] KEHC 7181 (KLR), the court observed that:

> ...the established legal position is that it is law trite that parties are bound by their pleadings. The court being a neutral arbiter can only grant that which is sought by a party in their pleadings. Anything outside of the pleadings is untenable. This is because justice must not just be done, but must also be seen to be done. The court must not be seen to seem to be litigating a case on behalf of a litigant."

27. In the instant case, the Appellants denied promising or agreeing to admit the Respondent as a director of the 1st Appellant. Nevertheless, they still submitted a counterclaim on amounts allegedly drawn or used by the Respondent. One therefore wonders the capacity in which the Respondent allegedly made such withdrawals. The Respondent was not a director of the 1st Appellant, with whose authority did he make the said drawings that the Appellant is now counterclaiming? it is trite that legal disputes are determined on the basis of facts proved by evidence and the law applied to the facts.

28. A perusal of the record shows that the Appellants submitted statements of accounts in support of the alleged drawings by the Respondent in support of the counterclaim of Ksh. 216, 095.55, shows that the same was not prepared in the ordinary course of business contrary to section 37 of the *Evidence Act*.

29. It is an established principle in law that only entries in books of account regularly kept in the course of business are admissible whenever they refer to a matter into which the court has to inquire. Personal statements authored by the Appellant, as in the instant case, is not sufficient evidence to prove liability. I therefore concur with the learned trial magistrate that the Appellants had failed to prove the counterclaim on a balance of probabilities as required by law.

30. Regarding the issue of costs, the Supreme Court in *Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others*, SC Petition No. 4 of 2012; [2014] eKLR observed that though costs often follow the event, the court has discretion to ensure that the ends of justice are met.

31. In *Joseph Oduor Anode v Kenya Red Cross Society*, Nairobi High Court Civil Suit No 66 of 2009; [2012] eKLR Odunga, J observed

> " ...whereas this Court has the discretion when awarding costs, that discretion must, as usual, be exercised judicially. The first point of reference, with respect to the exercise of discretion is the guiding principles provided under the law. In matters of costs, the general rule as adumbrated in the aforesaid statute [the *Civil Procedure Act*] is that costs follow the event unless the Court is satisfied otherwise. That satisfaction must, however, be patent on record. In other words, where the Court decides not to follow the general principle, the Court is enjoined to give reasons for not doing so. In my view it is the failure to follow the general principle without reasons that would amount to arbitrary exercise of discretion ..." [emphasis supplied].

32. In the instant case, the Appellant has not demonstrated any arbitrary exercise of discretion as the costs were awarded to the successful party, the Respondent herein. The Supreme Court in the *Rai case* (*supra*) further remarked:

> " 11. It emerges clearly that, whether in this Court or any other superior Court, costs are awarded at the discretion of the Court or Judge. Indeed, as for the Supreme Court, rule 3(5) of the *Supreme Court Rules* is the most pertinent, especially as it constitutes the governing framework for costs - and costs fall under the "inherent powers of the Court."
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> 12. Such a principle applies in other countries as well, as we learn from the comparative lesson. We draw, in this respect, from *Halsbury's Laws of England*, 4th ed Re-Issue (2010), Vol 10, para 16:
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> The Court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not award them.

33. 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.

34. In the absence of any evidence of arbitrary exercise of discretion, I find that this limb of the appeal also fails.

35. The upshot of this is that the Appellants appeal is hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED ELECTONICALLY THIS 23RD DAY OF JULY 2025.

HON. T. W. OUYA

JUDGE