



**Gulam v Mantra Marketing & Travel (Commercial Case  
E203 of 2023) [2024] KEHC 4431 (KLR) (17 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4431 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
COMMERCIAL CASE E203 OF 2023  
DKN MAGARE, J  
APRIL 17, 2024**

**BETWEEN**

**SHOKAT GULAM ..... APPELLANT**

**AND**

**MANTRA MARKETING & TRAVEL ..... RESPONDENT**

**JUDGMENT**

1. This is an appeal from the decision of Hon. David Mburu given on 28/7/2023 in Mombasa CMCC 2796 of 2005. The Appellant was the defendant in the matter and had also filed a counter claim.
2. The Respondent filed a memorandum of appeal dated 3/8/2023 and raised the following 4 grounds, on 8/8/2023.
  - a. That the learned trial magistrate erred in law and in fact in holding that the plaintiff had proved its case on a balance of probability.
  - b. That the learned trial magistrate erred in law and in fact in holding that the appellant had not proved its counterclaim to the required standard nor the set off.
  - c. That the learned trial magistrate erred in law in holding that the appellant had not proved the costs of the ticket it bought to return to Kenya from London.
  - d. That the learned trial magistrate misapprehend the evidence and made a decision that was perverse and contrary to the evidence on record.
3. They prayed for orders that
  - a. That the judgment in favour of the respondent be set aside and be replaced with an order dismissing the respondent's case with costs.



- b. That the order dismissing the counter claim be set aside and be replaced with an order allowing the counter claim as prayed by the appellant with costs.
  - c. That the appellant do have cost of this appeal.
4. This being a first appeal, this court is under a duty to re-evaluate and 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. In the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:
 

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
  6. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968] EA 123, where the law looks in their usual gusto, held by as follows;-
 

“.. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”
  7. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.
  8. In the case of Peters vs Sunday Post Limited [1958] EA 424, 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...”
  9. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 is as follows:-
 

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made



on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

10. In *Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd* (2017) eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth: -

“Courts adopt the objective theory of contract interpretation and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document’s meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it.

In *Prudential Assurance Company of Kenya Limited V Sukhwender Singh Jutney and Another*, Civil Appeal No. 23 of 2005 the Court citing a passage in *Odgers Construction of Deeds and Statutes* (5<sup>th</sup> edn.) at p.106 emphasized that in construing the terms of a written contract;

“It is a familiar rule of law that no parol evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well to deeds as to contracts in writing. Although the rule is expressed to relate to parol evidence, it does in fact apply to all forms of extrinsic evidence.”

11. The trial court and this court will similarly construct documents as there are no witnesses required to know the content of a document. Therefore, where the findings of the trial Court are consistent with the evidence generally, this Court should not interfere with the same.
12. The Appellant filed a record of Appeal on 17/11/2023.

### **Pleadings**

13. The Respondent filed a plaint dated 9/8/2005 and the defendant filed defence and counter claim on 15/9/2005. There was subsequently filed a reply to defence on 5/10/2005.
14. Not Much activities were done till 2014. The parties were heard and judgment delivered dated 28/7/2023. The Appeal indicates that the same is dated 27/7/2023. The plaintiff’s claim was for a sum of Ksh. 104,915 due to the plaintiff for an airline tickets procured on behalf of the defendant in the year 2004. The said amount was said not to have been paid despite demands. The defendant filed defence and denied the entire 104,915 and put the Respondent to strict proof. In the alternative it was stated that he bought a return ticket for 58,658 for his wife Shamina Khatar Shaulkat valued at Ksh 58,658 and the same was to be valid and good for travel. The wife was informed that the ticket was invalid and the Defendants wife was forced to purchase another one at a cost of F452.60 equivalents to Ksh 61,554. He therefore sought damages and setoff. The set off and counter claim was for 58,658 less ½ unused thicket of Ksh. 29,329. The defendant admitted owing Ksh. 29,329/= being the value of a ticket form Mombasa to London. The Appellant purchase a ticket for Ksh. 61,554 therefore sought to set off 29,329 and counter claimed for Ksh. 32,225. They stated that as a result of breach the defendant and his wife suffered loss and mental anguish. They prayed for Ksh. 32,225/= and General damages together with costs. In the reply to Defence and defence to counter claim they stated that they procured tickets for East Africa Safari Airlines on behalf of the appellant. If there was any breach the same was for the said airline.



15. In defence to counter claim the stated that they did not order Ksh. 32,225 or any other sum. They stated that any other claims lied with the Airline for reimbursement. On 13/3/2009 the defendant changed his advocate

### **Evidence**

16. After several adjournments the plaintiffs 1<sup>st</sup> witness testified adopted his statement stating that they bought tickets. They state hat the client pays the airline and if he does not pay they are forced to pay the airlines.
17. She stated that a sum of Ksh. 104,915 is due and owing. They stated that the airline went down in August. He stated that the breach was with the airline. On cross examination she stated that appellants wife utilized the ticket one way. She stated that Noreen placed the order for her ticket There was a contract for Khlaif with instructions from the defendant. They stated that the airline went burst. The daughter paid for herself.
18. The matter was placed before Hon. Nyakweba who declined to proceed. The Chief Magistrate J.M. Nange'a reallocated to Hon. Ndegwa. The matter was adjourned several times at the instance of the Appellant till 7/10/2021. On the said date the Appellant testified adopted his witness statement, produced all the 14 documents and courter claimed for Ksh. 32,225/= for return ticket from.
19. He stated on cross examination that he bought only one ticket but it was used half way. He did not know who paid for the ticket. H admitted that East Africa Safari is air is a different company. The ticket was invalid because the airline went under. The Appellant admitted that he did not pay for the invoice.
20. The 2<sup>nd</sup> witness testified on 23/3/2022 and adopted her statement.
21. As fate will have it the defence advocate objected to the line of cross examination. The court overruled the objection, and rightly so. The matter was placed before Hon D W Mburu on 31/1/2023 for further hearing. The witness stated that she does not owe the respondent money.
22. She knew nothing of the arrangement between the parties herein. She stated she could not remember if the mother travelled at the same time. The Appellant sought an adjournment. The court noted that the respondent had testified in 2014 and as such being a 2005 matter gave a last adjournment.
23. The third witness stated that he had no dealings with the company. On 7/8/2014 she traveled with his mother to the US from Mombasa. He paid his own tickets. He had no evidence of this. His unknown uncle took care of the expenses. This was surprising turn given that he stated he bore his own expenses.
24. In the witness statement the appellant confirmed that he instructed for an air ticket. She collected the tickets. The wife traveled but on return the ticket was void. The Repoint could not help.

### **Analysis**

25. This is an appeal based on lies, subterfuge and hyperbole. The Appellant instructed tickets valued 104,915/=. They utilized the said tickets. It is irrelevant that the beneficiaries were adults. The instructing client was the Appellant. The tickets were paid for and used, mostly one way. On return the airline, East Africa Safaris had gone under. The tickets became invalid.
26. The tickets were not void ab initio. The Appellant was happy to use the same. The only issue that arose was owing under of the airline. That had nothing to do with the respondent. The contract was complete as it were. The agent completed the contract for booking an air ticket.



27. The appellant was to pay but did not pay. It is not enough to state that I cleared my indebtedness. There has to be a logical and sequential explanation how the debt was cleared. By failing to explain how it was cleared then the court can only make a negative inference. In the case of *Nesco Services Limited v CM Construction [EA] Limited [2021] eKLR*, justice G V Odunga as then he was stated as doth:

“In my view, the fact that the document in question was authored by the Appellant’s agent and was produced by consent of the parties themselves entitled the learned trial magistrate to rely on it. The Court of Appeal in *Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278* had this to say on the issue:

“Where documents are put in by consent, as for example an agreed bundle of correspondence, the usual agreement is that they are admitted to be what they purport to be (so as to save the necessity for formal proof of each document).”

41. Since the said author was for reasons unknown to the Court not called to testify and dispute its authenticity, adverse inference could be made thereon. In *Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR* the court stated as follows:

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“Section 112 of the *Evidence Act* Chapter 80 of the laws of Kenya provides:

‘In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.’

Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of *Kimotho –vs- KCB (2003) 1 EA 108* the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession.”

28. The duty to explain the payment is not new. In the case of *The case of Raghbir Singh Chatte v National Bank of Kenya Limited [1996] eKLR*, where the court of Appeal stated as doth: -

“The main object of this rule and r.14 is to bring the parties by their pleadings to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing (per Jessel M. R. in *Thorp v Holdworth (1876) 3 Ch. D. 637*). This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him. Thus, in an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible”, (underling supplied).

I will also add that the crucial deficiency of a general denial which I have already described, also applies to the evasive, inconsistent and contradictory alternative general traverse in the appellant’s defence. This was that if the respondent had extended any overdraft facilities without stating the amount involved, to the appellant which was moreover, denied, then the same and here again, without stating how and when, had been paid. Such a spurious



pleading in the alternative cannot give any merit to the defence and so also makes it one which discloses no reasonable defence for all purposes including that of 0 6 r 13(1)(a).”

29. It is not enough to say that you do not owe. There has to be a pleading on payment. Even the issue that some of the money belonged to his daughter must be placed as such.

30. The burden of proof is set out in Section 107 – 109 of the [Evidence Act](#).

“ 107.

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

31. This burden of proof is based on the balance of probabilities. This means it is more likely than not that the vent complained of occurred. The burden is not on the plaintiff. It is on the party that alleges. The respondent alleged that an invoice was outstanding and proved the same. The appellant alleged that he does not owe. It was upon him to plead that and then proof.

32. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 as follows:

“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.”

33. In Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR, the judges of Appeal held that:

“Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept,



where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained.”

34. A party cannot go to proof without first pleading. All the evidence of DW2 and DW3 were thus baseless. It was not supporting any evidence.

35. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, A C Mrima stated as follows: -

“ 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

“.....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....

...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

The Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in respect to the essence of pleadings in an election petition: -

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....”



36. The burden does not shift. It must be based on pleadings. However, good evidence is, the same must follow pleadings. A party does not have a burden of proving that the payment was made. A party does not have a burden of proving matters that were not pleaded.
37. Further, the pleading on the repayment are sacrosanct. Order 2 Rule 4 provides as doth: -
- “(1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—
- (a) which he alleges makes any claim or defence of the opposite party not maintainable;
- (b) which, if not specifically pleaded, might take the opposite party by surprise; or
- (c) which raises issues of fact not arising out of the preceding pleading.
38. In the circumstances I find that the Appellants did not answer the claim by the Respondents. Of more fundamental importance the Respondent’s role was limited to procuring the tickets for the Appellant. He did that. The evidence of DW2 and DW3 was otiose. It had no probative value as they were not involved. The party who engaged an agent was the Appellant. To state that they paid is to insult the intelligence of the court.
39. It is such conduct on the part of a witnesses that Odunga J (as he then was), alluded to in the case of *Kioko Peter v Kisakwa Ndolo Kingóku* [2019] eKLR while referring to the reasoning of Madan J, (as he then was) in the case of *N vs. N* [1991] KLR 685. The Learned Judge lamented as follows:
- “I wish people would not tell me absurd and unbelievable lies. I feel disappointed if a lie told in court is not reasonable imitation of the truth and is not reasonably intelligently contrived. I wish people who tell lies before me would respect my grey hair even if they consider that my intelligence is not of high order. I wish the witness had not told me the most stupid of his lies, which both disappointed and made me feel intellectually insulted.”
40. I wish that the Appellant could have understood that courts do not simply adopt all manner of rudderless evidence, hood, line and sinker. The tickets were clearly done on the order of the appellant. If the company went under, it was the duty of the Appellant as the principal to pay the agent. Booking a ticket does not guarantee safe travel. It only guarantees that it is what it states to and air ticket.
41. The Respondent was not an agent of the Airline. Thus boking an extra ticket is purely an affair outside the purview of the agent. The ticket for 61,000 was not for use by the Respondent.
42. In other words, the person who paid for the other ticket was the wife. She is not the agent of the parties herein. The agent have no role on the quality of airlines. They are also not exclusive both ways. The tickets booked by client have nothing to do with the unpaid dues.
43. I find and hold that the respondent has proved that an invoice of Ksh. 104,915 was due and owing. Further, the counter claim was baseless for two reasons. The payment for 61,000 was by the wife. It was not the Appellants.
44. Secondly the same has nothing to do with the contract order 104,915. Part of the unused ticket was disavowed while the one used was admitted. A party cannot approbate and reprobate.



45. The payment is due and owing to the respondent. The court was thus right in dismissing the counter claim and allowing the suit. I note the court allowed less amounts though the entire claim was proved. Nevertheless, there is no cross Appeal.
46. In the circumstances I dismiss the Appeal in limine with costs.

**Determination**

47. The upshot of the foregoing I make the following orders: -
- a. The Appeal is dismissed with costs to the Respondent.
  - b. The file is closed.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA ON THIS 17<sup>TH</sup> DAY OF APRIL, 2024.**

**KIZITO MAGARE**

**JUDGE**

In the presence of:-

Jengo & Associates Advocate for the Appellant

A B Patel & Patel Advocates for Respondent

Court Assistant- Brian

