



REPUBLIC OF KENYA



Karemu v Ali Oumarou Moumouni Formerly t/a Kiza Now t/a as Kulture Restaurant & Lounge & another (Civil Appeal E008 of 2023) [2024] KEHC 7827 (KLR) (Civ) (11 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7827 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E008 OF 2023

DKN MAGARE, J

JUNE 11, 2024

BETWEEN

MELLISA MWENDWA KAREMU APPELLANT

AND

**ALI OUMAROU MOUMOUNI FORMERLY T/A KIZA NOW T/A AS KULTURE
RESTAURANT & LOUNGE 1ST RESPONDENT**

ACORN LIMITED 2ND RESPONDENT

*(Being an appeal from the Judgment of Hon. B. J. Ofisi - SRM in Milimani
Small Claims Court SCC Comm. No. E801 of 2023, delivered on 5th May, 2023)*

JUDGMENT

1. This is an appeal from the Judgment and decree of the Small Claims Court Cause No. E801 of 2023. The Appellant was the Claimant in the Small Claims Court.
2. The Appellant filed 4 grounds of Appeal in their Memorandum of Appeal dated 11.5.2023 as doth:-
 - a. The Honourable Tribunal failed to appreciate the mandatory provisions of Section 51(3) of the Tax Procedures Act with regard to the threshold required for a valid objection.
 - b. That Section 51(11) of the Tax Procedure Act is procedural law. The Tribunal ought to have given more weight to the substantive issue as opposed to procedural technicalities.
 - c. That the Tribunal erred in both fact and law by failing to consider the relevant material evidence placed before it and thus arriving at a wrong conclusion.
 - d. That the Tribunal issued a judgment without considering the arguments raised by the Appellant in its pleadings and the submissions filed before the Tribunal and thereby giving a



one sided judgment to the detriment of the Appellant contrary to the provisions of Section 29 of the Tax Appeals Tribunals Act.

- e. That in any event, the delay was not inordinate given the complexity of tax matters.
3. The Appeal is purely on questions of fact and evidence. It is indicated so. In fact the only question of law is costs. Costs are governed by Section 33 of the Small Claims Court as follows: -
 1. The Court may award costs to the successful party in any proceedings.
 2. In any other case parties shall bear their respective costs of the proceedings.
 3. Without prejudice to subsections (1) and (2), the Court may award to a successful party disbursements incurred on account of the proceedings.
 4. Except as provided in subsection (2), costs other than disbursements, shall not be granted to or awarded against any party to any proceedings before a Court.
4. On the claim related to supply of electric cigarettes valued at 910,617 on 22.3.2023, the Respondent's view was that the ETR receipts were to be produced before payment. The court dismissed the case.
5. The court made a finding that it is unable to decipher the terms of the agreement since the claimant's support is not sufficient. As a matter of law the adjudicator was bound by Section 32 of the Small Claims Act. It posts as hereunder: -
 1. The Court shall not be bound wholly by the Rules of evidence.
 2. Without prejudice to the generality of subsection (1), the Court may admit as evidence in any proceedings before it, any oral or written testimony, record or other material that the Court considers credible or trustworthy even though the testimony, record or other material is not admissible as evidence in any other Court under the law of evidence.
 3. Evidence tendered to the Court by or on behalf of a party to any proceedings may not be given on oath but that Court may, at any stage of the proceedings, require that such evidence or any part thereof be given on oath whether orally or in writing.
 4. The Court may, on its own initiative, seek and receive such other evidence and make such other investigations and inquiries as it may require.
 5. All evidence and information received and ascertained by the Court under subsection (3) shall be disclosed to every party.
 6. For the purposes of subsection (2), an Adjudicator is empowered to administer an oath.
 7. An Adjudicator may require any written evidence given in the proceedings before the Court to be verified by statutory declaration.
6. The Respondent did not deny that there was a debt. They claim that it was over and above what was owed.
7. I am unable to understand the position the adjudicator looks in the sanctity of pleadings. Delivery was done and it was not an issue. The dispute was over an ETR invoice. There is no Counter Claim registering the same. Once it is shown that the debt is due it was the duty of the Respondent to show it was paid. The Appellant had no such duty. The pleadings were sacrosanct and could not be deciphered.

In the case of Raila Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae)



(Presidential Election Petition 1 of 2017) [2017] KESC 42 (KLR) (Election Petitions) (20 September, the Supreme Court stated as doth: -

“62. On this sole important issue, the law is clear that he who alleges must prove. The term burden of proof draws from the Latin Phrase Onus Probandi and when we talk of burden we sometimes talk of onus.

63. Burden of Proof is used to mean an obligation to adduce evidence of a fact. According to Phipson on the Law of Evidence, the term ‘burden of proof’ has two distinct meanings:

1. Obligation on a party to convince the tribunal on a fact; here we are talking of the obligation of a party to persuade a tribunal to come into one’s way of thinking. The persuasion would be to get the tribunal to believe whatever proposition the party is making. That proposition of fact has to be a fact in issue. One that will be critical to the party with the obligation. The penalty that one suffers if they fail to prove their burden of proof is that they will fail, they will not get whatever judgment they require and if the plaintiff they will not sustain a conviction or claim and if defendant no relief. There will be a burden to persuade on each fact and maybe the matter that you failed to persuade on is not critical to the whole matter so you can still win.
 2. The obligation to adduce sufficient evidence of a particular fact. The reason that one seeks to adduce sufficient evidence of a fact is to justify a finding of a particular matter. This is the evidential burden of proof. The person that will have the legal burden of proof will almost always have the burden of adducing evidence.
8. The pleadings did not deny the debt, only ETR receipts. The court was not called to decide on the legality of not issuing ETR. The Respondent admitted a sum of Kshs. 139,317/=. However, they had no Counter Claim. The court erred in not entering judgment for 139,317/= at least which was admitted. The court cannot walk out of an admission. If the issue of ETR was to be decided, it needed to be pleaded and dealt with as a Counter Claim. In the circumstances, a sum of 515,817 was due and owed.
9. The court recorded a consent on 139,317/= leaving a balance of 376,500/=. The question raised is whether the court could by law depart from pleadings. Though indicated as a question of fact and law, I find that one of the issues raised is a question of law, that is, the place of pleadings and admission in law.
10. In the circumstances the Appeal is merited and is accordingly allowed. I enter judgment for Kshs. 376,500/- in addition to Kshs. 139,317/= entered hitherto to make a total of Kshs. 515,817/=. The Appellant must comply with tax upon payment.

Determination

11. I make the following orders:-
- a. The Appeal herein is merited and is accordingly allowed. I set aside the Judgment in the court below. In lieu thereof, I enter Judgment for Kshs. 376,500/= in addition to the preliminary Judgment for Kshs. 139,317/= making a total of Kshs. 515,817/=.
 - b. The Appellant shall have costs of Kshs. 65,000/=.
 - c. The Appellant shall have costs of Kshs. 30,000/= for the Small Claims Court.



d. 30 days stay of execution.

e. This file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 11TH DAY OF JUNE, 2024.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:

Mr. Owiti for the appellant

No appearance for the Respondent

Court Assistant – Jedidah

