



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ali v Kaab Investments Limited (Civil Appeal 115 of 2016)  
[2023] KEHC 22208 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 22208 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL 115 OF 2016**

**F WANGARI, J  
APRIL 20, 2023**

**BETWEEN**

**ALI SALIM ALI ..... APPELLANT**

**AND**

**KAAB INVESTMENTS LIMITED ..... RESPONDENT**

*(An Appeal against the Judgment/Ruling by Hon. G.O. Kimanga delivered on 24th August, 2016 by Honourable Rabera in Mombasa Senior Resident Magistrate's Court Case No. 463 of 2015 Ali Salim Ali v Kaab Investment Limited)*

**JUDGMENT**

1. This is an appeal against the judgement delivered by the Subordinate Court dated on August 24, 2016 where the court dismissed the Appellant's suit. The Plaintiff (now Appellant) appealed against the said judgement. The Appellant relied on nine (9) grounds of appeal in urging the court to allow the appeal and consequentially, set aside the Lower Court's judgement on liability and award costs to the Appellant.
2. I note that directions on appeal were not formally issued but the Appellant filed his submissions in support of the appeal and relied on various decisions in support thereof. The Respondent did not file any submissions its advocates having ceased from acting.
3. As the first appellate Court, it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of *Selle & Ano vs Associated Motor Boat Co Ltd (1968) EA 123*). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in *Mwanasokoni – versus- Kenya Bus Service Ltd (1982-88) 1 KAR 278* and *Kiruga –versus- Kiruga & Another (1988) KLR 348*).



4. I have carefully perused and understood the contents of the pleadings, proceedings, judgement, grounds of appeal, submissions and the decisions referred to by the Appellant. To be able to ascertain whether the Lower Court's judgement ought to stand or otherwise I will carefully revisit the record.
5. The Appellant instituted his claim vide a plaint dated March 20, 2014 and filed on even date. He was seeking for general and special damages for injuries sustained at his work place. The claim was defended. The Lower Court having heard the case rendered its judgement on August 24, 2016 wherein it dismissed the Appellant's claim with costs. Being dissatisfied with the said judgement, the Appellant lodged this appeal.

### **Analysis and Determination**

6. As earlier stated, Appellant filed submissions which I have duly considered. After considering the pleadings, submissions, judgement and the law, I find that the following are the issues for determination: -
  - a. 'Whether the Trial Court was correct in dismissing the Appellant's suit;
  - b. What is the order as to costs?'
7. On the first issue, the case before the Lower Court was in the nature of injury at work place. It is trite that whoever alleges is duty bound to prove that which he/she alleges. That is the construction of sections 107 to 109 of the *Evidence Act*. From the plaint, the Appellant sustained a prick injury to his right fourth finger on November 3, 2013. The medical report by Dr Ajoni Adede confirmed the date and the nature of injury. From the report, the doctor clearly indicated that he relied on treatment notes from Railway Dispensary and Coast General Hospital. The treatment notes from the two (2) institutions show that the Appellant was attended to on November 21, 2013 and November 22, 2013 respectively.
8. In his evidence, the Appellant stated that he was injured on the first right finger and not the fourth finger as per the medical report. Similarly, he stated that he was treated at Railways Dispensary on the same day he was injured and at Coast General Hospital the following day.
9. In its judgement, the Lower Court held that there were glaring inconsistencies and conflicts in the evidence presented by the Appellant in proof of its case. This was based on among others the date he was injured vis a vis when he was treated. The Lower Court had the benefit of seeing the witnesses and assessing their demeanor. In *Peters v Sunday Post Limited [1958] EA 424*, the Court of Appeal of East Africa held thus: -

' It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.'
10. I have looked at the treatment notes both from Railways Dispensary and Coast General Hospital. There is no doubt that the Appellant was treated at the said facilities on 21<sup>st</sup> and November 22, 2013 respectively. It is equally settled that as per the plaint, the Appellant was injured on November 3, 2013. He visited Railways Dispensary on the same day he was injured, that is, on November 3, 2013. He went to Coast General Hospital the following day, that is, November 4, 2013. Common sense dictate that the treatment notes from the said facilities would bear the dates of 3<sup>rd</sup> and November 4, 2013. Was



that the case? I am afraid that it was not. This was a red herring. Further, the Appellant in his own testimony stated that he was injured on the first right finger and not the forth. It is trite that parties are bound by their own pleadings.

11. The Court of Appeal in [Independent Electoral & Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others](#) [2014] eKLR citing the Nigerian Supreme Court's decision in [Adetoun Oladeji \(NIG\) v Nigeria Breweries PLC SC 91/2002](#) held as follows: -

' 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.'

12. Nothing stopped the Appellant from amending his pleadings to fit into the evidence he was possessed off. Having not done so, I have no reason to interfere with the Trial Court's findings dismissing the Appellant's case. Had the case succeeded, the sum of Kshs 50,000/= as proposed by the Trial Court would have been sufficient noting the nature of the injury as well as the period the Trial Court's judgement was delivered.
13. On the second issue, costs follow the event. That is the import of Section 27 of the [Civil Procedure Act](#). However, this court has the discretion to order otherwise and as such, I direct that each party to bear its own costs.
14. Following the foregone discourse, the upshot is that the following final orders do hereby issue: -
- a. The Appeal is found to be lacking in merit and is hereby dismissed.
  - b. Each party to bear their own costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 20<sup>TH</sup> DAY OF APRIL, 2023.**

.....

**F. WANGARI**

**JUDGE**

**In the presence of;**

N/A for the Appellant

N/A for the Respondent

Guyo, Court Assistant

