



**Kalume v Mwashighadi (Civil Appeal E059 of 2023)
[2023] KEHC 18670 (KLR) (4 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18670 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E059 OF 2023**

DKN MAGARE, J

MAY 4, 2023

BETWEEN

TWALM DENA KALUME APPELLANT

AND

ADELA MALEMBA MWASHIGHADI RESPONDENT

JUDGMENT

1. This appeal ensues from the claim for money reported borrowed by the appellant. The respondent pleaded that the appellant took Ksh 629,050 as her contribution to business.

Duty of court on issues of law

2. *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited* [2020] eKLR

“This is a second appeal. I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the 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. (See: *Stanley N Muriithi & Another versus Bernard Munene Ithiga* (2016) eKLR).

3. In *Peter Gichuki King'ara Vs Iebc & 2 Others*, Nyeri Civil Appeal No. 31 Of 2013 (Court of Appeal) (Visram, Koome & Odek, JJA) Of 13.02.2014,

“It was held that it is trite law that the exercise of judicial discretion is a point of law and that the trial court in denying a prayer of scrutiny is exercising judicial discretion. The Court concluded that it would not be feasible for the Court of Appeal to order for a recount and scrutiny as this would involve matters of fact that were within the jurisdiction of the trial court. The court further held that the question of whether the trial judge



properly considered and evaluated the evidence and arrived at a correct determination that is supported by law and evidence – with the caveat that the appeal court did not see the witness demeanor – is an issue of law.”

4. The duty of the 1st Appellant 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:-

“An appeal from the High 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.”

5. The Court is to bear in now that if need her seen 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.

6. 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 overriding view sometimes called Four Corners of an Instrument, which insists that a documents meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed...”

7. The trial court and this court will construct documents in a similar manner as there are no witnesses required to know the content of a document.

8. Therefore, where the findings of the trial Court are consistent with the evidence generally, this Court should not interfere with the same.

9. In evidence she gave a narrative how she loaned the Appellant Ksh 300,000. Not the Pleded amount. This money was paid by instalments ranging form 100 to about 30,000/=. Mpesa statement was produced to show the sending.

10. In November, 2022 at Sun Africa, in her statement she stated that she sent Ksh 31,900 thought M-pesa and cash Ksh 300,000. She paid her work phone and Ipad and give 47,000 totaling to 660,000.

11. The court heard the evidence, and gave judgment for the respondent for Ksh 309,790. She had deduced Ksh 110 sent to the claimant.

12. The small claims court is not bound by strict rule of evidence. However, the court cannot deal with unpleaded claims. In other words, if the court enters judgment on basis of no evidence, it is a point of law. Under Section 3 of the *Contract Act*, a contract for dealing in business, trade or obtaining money must be in writing. The said act provides as doth: -

Certain contracts to be in writing:

1. No suit shall be brought to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person unless the agreement upon which such suit is brought or some memorandum or note thereof, is in writing and signed by the party to be charged with or some other person thereunto by him lawfully authorized.



13. There is no written contract for leading Ksh 300,000. Effectively, the parties were in court entirely on an oral contract. This is not a good reason. The only documents capable of leading money relate to the Respondent borrowing. In the circumstances the court fell into an error of law in finding existence of a contract to lend money.
14. Secondly, the Respondent pleaded that the Ksh 629,050/=. This was said to be contribution to business. If that was so, then only profits and losses are to be shared and not capital. What came out appears to be money lending but not for the amount. This was never contribution to business. The amounts tendered in evidence relate to a series of monies sent. DW2, Alluded that it relates to offering for amorous services for which, he DW 2 partook till things went south.
15. Those are issues of fact. However, the payments were not pleaded. It is not for the court to do arithmetics from monies sent. It turns out it is for a series of days. It is not as pleaded. In *David Bagine Vs Martin Bundi* [1997] eKLR, the court of appeal was of the view that special damages must be particularized and specifically proven. They cannot be thrown to the court,

“We must and ought to make it clear that damages claimed under the title “loss of user” can only be special damages. That loss is what the claimant suffers specifically. It can in not circumstances be equated to general damages to be assessed in the standard phrase “doing the best I can”. These damages as pointed out earlier by us must be strictly proved. Having so erred, the learned judge proceeded to assess the same for a period of nearly three years. There the learned judge seriously erred. Damages for loss of user of a chattel can be limited (if proved) to a reasonable period which period in this instance could only have been the period during which the respondent’s lorry could have been repaired plus some period that may have been required to assess the repair costs. There was no evidence before the learned judge of what period the vehicle would have needed for repairs or for assessment of repair costs. The learned judge quite erroneously proceeded to award general damages at the rate of Kshs 500/= per day from the date of accident until date of judgment.”

16. Parties are strictly bound by their pleadings. In the case of *Daniel Otieno Migore v South Nyanza Sugar Co Ltd* [2018] eKLR, justice as A C Mrima stated as follows at paragraph 11 and 12: -

“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.”

17. The court also relied on 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 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.....”

18. The claim is for Ksh 629, 050. The appellant sent a series of though M-pesa, some sent more than once a day between November 20, 2012 of December 2, 2021. The amount of 110 sent is not pleaded in set of. The court therefor proceeded to deal with claim other than a claim for business contribution. the amount pleaded is different from mount proved. The court left its tangent, and proceeded to prove and issue of a loan which was not pleaded.
19. After reviewing the record, I am satisfied that the adjudicator erred in failing to dismiss the claim. It is not necessary to deal with the rest of the grounds for appeal.
20. Consequently, I find and hold that the appeal is merited.

Determination

21. The appeal is allowed. The case of the lower court, is hereby set aside, and *in lieu* thereof, is substituted with an order dismissing the small claim case, with costs of Ksh 20,000.
22. The Appellant will have costs of 30,000 in the appeal

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 4TH DAY OF MAY 2023. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

N/A for the Appellant

N/A for the Respondent

Court Assistant - Firdaus

