REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. E032 OF 2020

WORLD EXPLORERS SAFARIS LIMITED.....APPELLANT

VERSUS

COSMOPOLITAN TRAVEL LIMITED.....1st RESPONDENT

GIDEON KIPKOECH KIMAIYO.....2nd RESPONDENT

(Appeal from the Judgment of the Hon Grace M'Masi (Mrs.) SPM, in Milimani CMCC No. 4708 of 2018, Nairobi delivered on 29th May, 2020).

JUDGMENT

Introduction

1. By a Plaint dated **17th** May 2018, the appellant sued the Respondents in the lower court claiming **US $ 129,329.00** allegedly due and owing from the Respondents to the appellant on account costs of air tickets allegedly supplied by the appellant to the Respondents as more particularly pleaded in the Plaint. It also prayed for the loss of benefits under the agreement and lost revenue that it would otherwise have received thereunder. Lastly, it prayed for costs of the suit together with interests thereon at such rate and for such period of time as this court may deem fit to grant and any such other or further relief as the court may deem appropriate.

2. In their written Statement of defense filed in court, the Respondents denied the claim.

3. The appellant's case is anchored on the testimony of its director, a one Reshma Shah whose evidence was that the appellant had a business relationship with the Respondents since 2013, but in October 2016, the Respondents started defaulting in payments, and, despite promises, the Respondents never paid. Her evidence was that the appellants claim was for **US$ 1,329,900** and **Kshs. 1,057,081.02** plus interests and general damages plus costs of the suit. However, upon cross-examination she admitted that the sum of **Kshs. 1,057,081.02** was not pleaded in the Plaint.

4. On behalf of the Respondents is the evidence of Mr. Gideon Kimaiyo and a Mr. Amos Kimondo. Mr. Kimaiyo denied owing the appellant any money. However, he stated that the first defendant, a limited liability company owed the appellant **US $ 39,915**. He stated that there was no provision for interest. He stated that he paid the appellant **US$ 90,000** in cash which it acknowledged via WhatsApp SMS a print out of which he produced in the court. He stated that in the Plaint there is no prayer for the **Kshs. 1,000,000/=.**

5. His evidence was collaborated by Mr. Amos Kimondo who testified that on **15th** February 2018, under instructions from Mr. Kimaiyo, he delivered cash **US $ 90,000** to the Plaintiff who upon receiving the money in his presence spoke on phone to Mr. Kimaiyo and acknowledged receipt of the cash.

6. In her judgment, the trial Magistrate observed that the Plaintiff admitted that she did not exhibit copies of the tickets. She also noted that no delivery notes were produced nor was it clear whether the contract was oral or written. She concluded that the terms of the agreement were not disclosed. She noted that no certificates were produced on the e-mails under section **65 (5) (c)** of the Evidence Act on the e-mails relied upon by the Plaintiff. The Magistrate also noted that in court the Plaintiff stated that it was claiming **USD 1,329,900,** but in the Plaint the appellant claimed **USD 129,329.00.** The trial Magistrate believed the Respondent's testimony that the amount owing was **USD 33,915** which was admitted and awarded the said sum. She found that the claim for loss of business and damages was not proved. She ordered each party to pay its costs.

The appeal

7. Aggrieved by the decision, the appellant appealed to this court citing the following grounds: -

a. The Learned Magistrate erred in fact and in law by relying upon WhatsApp messages between the appellant and Respondents, as prove of payment of USD 90,000, which communication did not corroborate the particulars of amount given, purpose of the money or the dates paid.

b. The learned Magistrate erred in fact and in law by failing to find that the burden of proof of the existence of payment of the debt shifted from the appellant to the Respondent when the Respondent alleged that he made payments.

c. The learned Magistrate erred in fact and in law by admitting that there was an oral agreement but failed to draw inference that the conduct of the parties amounted to a valid agreement.

d. The learned Magistrate erred in fact and in law by failing to establish the exact amount of debt that was pleaded by holding that the Plaintiff had proved its claim to an extent of USD. 33,915.00/= instead of the amount claimed in the Plaint of USD. 129,329.00/=

e. The Learned Magistrate erred in law by disregarding the numerous binding authorities cited by the Appellants Counsel and thereby basing the ruling on wrong principles.

f. That the learned Magistrate erred in law, misapprehended and misunderstood the principles governing awarding of costs leading to a wrong exercise of discretion by failing to award costs to the plaintiff for the suit.

8. As a consequence of the foregoing, the appellant prays that this appeal be allowed and the Judgment be set aside and /or vacated. It also prays for an order that the appellant's case be heard on merit without undue regard to procedural technicalities. Lastly, the appellant prays for any other orders this court may deem fit and just to grant plus costs of the appeal.

The appellant's advocates submissions

9. The appellant's counsel submitted that the trial Magistrate erred in fact and in law by relying on WhatsApp messages between the appellant and Respondents as prove of payment of **USD 90,000**, despite absence of direct evidence. He cited *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another*[1] which held that:-

> *"As a general proposition under section 107(1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act."*

10. He faulted the trial Magistrate for failing to find that the parties had an agreement and for failing to make an inference that the party's conduct amounted to an intention to create a contract. He faulted the trial Magistrate for failing to establish the exact amount of debt that was pleaded by holding that the Plaintiff had proved its claim to an extent of **USD. 33,915.00** instead of **USD. 129,329.00** claimed in the Plaint and **Kshs 1,057,081.02.**

11. Additionally, the appellant's counsel argued that the trial Magistrate *"failed to prove how she reached into a conclusion that the Respondents only owed the Plaintiff USD 33, 915"* because the evidence adduced by the Respondents did not collaborate the amount of money claimed to be paid. He argued that the learned Magistrate failed to appreciate that the Respondents had not sufficiently discharged their burden of proof. Further, counsel submitted that the defense evidence was contradictory in that in their written Statement of defense, they denied the appellant's claim, but in their testimony, the Respondent admitted the claim. He argued that the appellant proved its claim by producing invoices and cited *D.T. Dobie & Co. Ltd v Wanyonyi Wafula Chebukati*[2] for the holding that the defendants defense remained mere allegations which had not been proved. He submitted that the evidence on record does not support the court's findings.

12. To further fortify his submissions, counsel cited *Boniface Ndwiga Mbogo v Jamleck Mwaniki* for the proposition that when the court is faced with two probabilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other. He argued that the trial court's decision was arrived at in total disregard of the underlying facts and total disregard of the requirement for balance of convenience.

13. Regarding costs, counsel cited section **27** of the Civil Procedure Act[3] and *Supermarine Handling Services Ltd v Kenya Revenue Authority*[4] for the proposition that costs follow the event and *Party of Independent Candidate of Kenya & Another vs. Mutula Kilonzo & 2 Others*[5] for the holding that the successful party should be awarded costs.

The Respondent's Advocates submissions

14. The Respondent's counsel cited section **79** of the Civil Procedure Act and Order **42** Rule **1** of the Civil Procedure Rules, 2010 and submitted that failure to file the decree emanating from the judgment of the lower court renders the appeal incompetent. He cited *James Komu & Another v David Musa & 2 Others* which held that an appeal is incompetent in the absence of a decree of the court whose decision is appealed against.

15. Counsel also submitted that the record of appeal as presented is incomplete for excluding material evidence produced before the trial court. He submitted that the appellant failed to include the Certificate of Authentication under section **65** of the Evidence Act. To buttress his argument, counsel cited *Trans Mara Sugar Co. Ltd vs James Omondi Obudho*[6] which stated:

"23. I will also add my voice on the subject. First, from the reading of Section 65{1} of the Act it is the decree or part thereof that is appealed from the surbodinate court to the High Court. Second, under Order 42 Rule 13{4} of the Rules a Court may dispense with any document to be part of the Record of Appeal except the memorandum of appeal, the pleadings and the judgment, order or decree appealed from and in appropriate cases the order giving leave to appeal. Third, the saving grace under Article 159{2}{d} of the Constitution is inapplicable in this case. That is because the provision only applies to matters relating to procedure or form and not the substance thereof. Fourth, despite clear provisions on extension of time the Appellant never sought for any extension of time to file the decree neither did it explain any difficulty in obtaining the decree. The appeal was filed around 60 days post the delivery of the judgment appeal against. That was clearly out of the stipulated time.

24. The Record of Appeal is therefore incomplete. In the words of the Supreme Court in Civil Application No. 20 of 2014 Bwana Mohamed Bwana {supra} 'such an appeal would be incomplete and hence incompetent.'"

16. The Respondent's counsel pointed out that the appellant, contrary to the Rules, had placed new documents / evidence in the Record of Appeal. He pointed out *Pages 47 – 51 of the Record of Appeal* contained purported WhatsApp chats which were not part of the evidence before the trial court. He cited Order **42** Rule **27** of the Civil Procedure Rules, 2010 which provides that;

{1} *The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the court to which the appeal is preferred....{2} Wherever additional evidence is allowed to be produced by the court to which the appeal is preferred the court shall record the reason for its admission*.

17. Counsel cited *Mount Elgon Beach Properties Ltd vs Harrison S. Mwanongo & Ano*[7] in which the Court stated that;

"*{i} The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful, and*

{j} A party who has been unsuccessful at the trial must not seek to adduce additional evidence to make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case."

18. Additionally, counsel cited *Omega Enterprises {Kenya} Ltd v Kenya Tourist Development Corporation & 2 others****[8]***which decried attempts to introduce a supplementary record of appeal without invoking the rules. He argued that the appellant never complied with the provisions of section **65** of the Evidence Act.

19. The Respondent's counsel urged the court to be guided by section **78** of the Civil Procedure Act and re-evaluate the evidence tendered in the lower court (Citing ***Selle V Associated Motor Boat Company Ltd [1968] EA 123).*** He urged the court to find that the trial court properly applied its mind and exercised its discretion based on the facts of the case, the evidence presented and the law in arriving at its decision.

20. Counsel argued that copies of the tickets or delivery notes were not presented before the court. He argued that the appellant relied on e-mails but failed to comply with section **65** of the Evidence Act. He submitted that the Respondents produced WhatsApp messages in support of the payment they made to the appellant and admitted a sum of **US $ 33,915**. He argued that the appellant did not discharge its burden of prove as provided by section **107 (1)** of the Evidence Act. (Citing *Francis Joseph Kamau Ichatha v Housing Finance Company of Kenya Limited [2014] eKLR).*

21. He argued that the Respondent tabled evidence that it paid **US$ 90,000** and admitted a debt of **US $ 33,915.** Counsel argued that the existence or non-existence of an oral agreement in the manner the parties conducted business was not an issue before the trial court. He submitted that the appellant in its Plaint pleaded **USD 129,329.00**, but during examination in chief, the appellant's witness stated that the appellant was claiming **USD 1,329,900** and **Kshs. 1,057,081.02.** He argued that the trial court awarded the amount admitted by the Respondents, hence, and that the appellant never proved its claim. Counsel submitted that the trial Magistrate based her decision on the facts and evidence presented by the parties.

22. On costs, he submitted that the court considers the circumstances leading to litigation, the conduct of the parties and the outcome of the case. (*Citing Section 27{1} of the Civil Procedure Act* and *Party of Independent Candidates of Kenya versus Mutula Kilonzo & 2 others, HC EP No. 6 of 2013).*

The Duty of a first appellate court

23. A first appellate is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in *Selle & another v Associated Motor Boat Co. Ltd.& others*[9] as follows:-

"*… Briefly… this 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, this 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."*

24. The Court of Appeal for East Africa in *Peters v Sunday Post Limited*[10] stated: -

> *"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."*

25. A first appellate court has jurisdiction to reverse or affirm the findings of the trial court. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it.[11]

26. A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust.[12] The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of Section **78** of Civil Procedure Act, a court of first appeal can appreciate the entire evidence and come to a different conclusion.

Determination

27. The Plaintiff's counsel placed heavy reliance on *D.T. Dobie & Co. Ltd v Wanyonyi Wafula Chebukati and* urged the court to find that the that the Respondents defense remained mere allegations which had not been proved. However, the applicability and relevancy of the said decision to the facts and circumstances of this case is in doubt. It is settled law that a case is only an authority for what it decides. This is correctly captured in the following passage: -

> *"A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. ... every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. ...a case is only an authority for what it actually decides...."*

28. The ratio of any decision must be understood in the background of the facts of the particular case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it. It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.

29. Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. In deciding cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. Precedent should be followed only so far as it marks the path of justice, but one must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches.

30. *D. T. Dobie & Company (K) Ltd v Wanyonyi Wafula Chebukati**[13]* cited by the appellant's counsel applies to a situation where a party files a pleasing but fails to adduce evidence to support the pleadings. In such a scenario, the averments in the pleadings remain mere allegations. Such is not the situation in the instant case. The Respondents in the lower court called two witnesses.

31. Turning to the appellants case, it was clearly enumerated in its Plaint dated **17th** May 2018.The prayers sought were summarized earlier in this judgment. It will add no value to rehash them here. It will suffice to state that in the Plaint the Plaintiff claims **US $ 129,329.** However, in her testimony, the Plaintiff's witness stated that the Plaintiff was claiming **US$ 1,329,900** and **Kshs. 1,057,081.02.** The said amounts are not pleaded in the Plaint. The appellant's counsel either in the lower court or before this court said nothing about this glaring disparity in the amounts pleaded and claimed in the evidence. The core issue here is to understand the function of and purpose of good pleadings. In this regard, I may profitably benefit from the following excerpt from an Australian Court*[14]* decision on the principles of good pleadings: -

> *"In a mathematical proof, elegance is the minimum number of steps to achieve the solution with greatest clarity. In dance or the martial arts, elegance is minimum motion with maximum effect. In filmmaking, elegance is a simple message with complex meaning. The most challenging games have the fewest rules, as do the most dynamic societies and organizations. An elegant solution is quite often a single tiny idea that changes everything. … Elegance is the simplicity found on the far side of complexity.*
>
> *While elegance in a pleading is not a precondition to its legitimacy, it is an aspiration which, if achieved, can only but advance the interests of justice. A poorly drawn pleading, on the other hand, which does not tell a coherent story in a well ordered structure, will fail to achieve the central purpose of the exercise, namely communication of the essence of case which is sought to be advanced.*
>
> *… Crafting a good pleading calls for precision in drafting, diligence in the identification of the material facts marshalled in support of each allegation, an understanding of the legal principles which are necessary to formulate complete causes of action and the judgment and courage to shed what is unnecessary.*
>
> *Although a primary function of a pleading is to tell the defending party what claim it has to meet, an equally important function is to inform the court or tribunal of fact precisely what issues are before it for determination."*[15] *(Emphasis supplied)*

32. The function of a pleading in civil proceedings is to alert the other party the case they need to meet, (and hence satisfy basic requirements of procedural fairness) and further, to define the precise issues for determination so that the court may conduct a fair trial. The cardinal rule is that a pleading must state all the material facts to establish a reasonable cause of action (or defence). Material facts are only those relied on to establish the essential elements of the cause of action.

33. It is a basic principle that particulars of claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto. This must be seen against the background of the further requirement that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise. Pleadings must therefore be lucid and logical and in an intelligible form; the cause of action or defence must appear clearly from the factual allegations made. The Court of Appeal in *Dakianga Distributors (K) Ltd vs. Kenya Seed Company Limited*[16] rendered itself as follows: -

> *"A useful discussion on the importance of pleadings is to be found in Bullen and Leake and Jacob's Precedents of Pleadings, 12th Edition, London, Sweet & Maxwell (The Common Law Library No. 5) where the learned authors declare:-*
>
> *"The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial."*

34. The issues in civil cases should be raised on the pleadings and if an issue arises which does not appear from the pleadings in their original form an appropriate amendment should be sought. Parties should not be unduly encouraged to rely, in the hope, perhaps, of obtaining some tactical advantage, to treat un-pleaded issues as having been fully investigated. The need for pleadings to be precise cannot be doubted. In *M N M vs. D N M K & 13 Others*,[17] it was held that: -

> *"Decisions abound from this Court that unequivocally declaim the power of a court to determine issues which the parties have not raised in their pleadings or otherwise by consent allowed the court to determine. For example in Chalicha FCS Ltd v. Odhiambo & 9 Others [1987] KLR 182, the Court held that:*
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> *"Cases must be decided on the issues on the record. The court has no power to make an order, unless by consent, which is outside the pleadings. In this instance, the issues raised by the Judge and the order thereon, was a nullity."*
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> *Later in Kenya Commercial Bank Ltd vs. Sheikh Osman Mohammed, CA No. 179 of 2010 the Court expressed itself thus:*
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> *"It is not the function of a court in civil litigation to speculate or surmise as to the nature of the plaintiff's claim. Pleadings must be deployed to serve their function, namely to inform the other party, and the court, with sufficient clarity what their case is so that the other party may have a fair opportunity to meet that case and more importantly, so that the issues for determination by the court are clear."*
>
> *A court may validly determine an unpleaded issue where evidence is led by the parties and from the course followed at trial it appears that the unpleaded issue has been left to the court to decide (See Odd Jobs v. Mubea [1970] EA 476). However, that was clearly not the case in this appeal."*

35. It is a principle of law that parties are generally confined to their pleadings unless pleadings are amended during the hearing of a case.[18] This being the case, there was no basis for the court to award sums which were not pleaded in the Plaint. On this ground alone, the appellant's appeal collapses.

36. Notwithstanding the above finding, I will examine the merits of the appeal. The appellant faults the trial court for failing to find that it had proved its case to the required standard. It claims that the evidential burden had shifted to the Respondents who never discharged it.

37. It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case, the onus is obviously not as heavy as it is in a criminal case. Nevertheless, where the onus rests on the plaintiff, or where there are two mutually destructive stories, the plaintiff can only succeed if he satisfies the court on a preponderance of probabilities that his version is true, accurate, and therefore acceptable, and the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding, whether that evidence is true or not, the court will weigh up and test the plaintiff's allegations against the general probabilities.

38. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the Plaintiff then the court will accept his version as being probably true. If, however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false. I must stress that in such circumstances when one talks about a plaintiff having discharged the onus, which rested upon him on a balance of probabilities, one really means that the court is satisfied on a balance of probabilities that he was telling the truth and that his version was therefore acceptable. Where a consideration of probabilities fails to indicate where the truth probably lies, the court estimates the relative credibility of the witnesses.

39. In finding facts or making inferences in a civil case, it seems to me that one may, as Wigmore conveys in his work on evidence, "…by balancing probabilities select a conclusion which seems to be more natural or plausible conclusion amongst several conceivable ones, even

though that conclusion may not be the only reasonable one."[19] The burden of establishing the allegations in support of the case rested on the appellant who was under an obligation to discharge the burden of proof. All cases are decided on the legal burden of proof being discharged (or not). Lord Brandon in *Rhesa Shipping Co SA vs Edmunds*[20] remarked: -

> *"No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take."*

40. Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in *Britestone Pte Ltd vs Smith & Associates Far East Ltd*[21] **:-**

> *"The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him"*

41. Whoever desires any court to give *judgement* as to any legal right or liability, dependant on the existence of fact which he asserts, *must prove* that those facts exist. 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.* The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

42. The standard determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases the standard of proof is the balance of probabilities. In the case of *Miller vs Minister of Pensions*,[22]**Lord Denning** said the following about the standard of proof in civil cases:-

> *'The …{standard of proof}…is well settled. It must carry a reasonable degree of probability…..if the evidence is such that the tribunal can say: 'We think it more probable than not' the burden is discharged, but, if the probabilities are equal, it is not.'*

43. In *Stellenbosch Farmers Winery Group Ltd & Another v Martell & Others,*[23] the South African Supreme Court of Appeal explained how a court should resolve factual disputes and ascertain as far as possible, where the truth lies between conflicting factual assertions. It stated:-

> *"To come to a conclusion on the disputed issues, a court must make findings on:-*
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> *i. The credibility of various factual witnesses;*
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> *ii. Their reliability; and;*
>
> *iii. The probability or improbability of each party's version on each of the disputed issues*
>
> *In light of the assessment of (a), (b) and (c), the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be a rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the lessor convincing will be the latter. But when all factors equipoised, probabilities prevail."*

44. In both criminal and civil cases the phrase 'burden of proof' is commonly said to be used in two quite distinct senses. In one sense it means 'The peculiar duty of him who has the risk of any given proposition on which the parties are at issue — who will lose the case if he does not make this proposition out, when all has been said and done.'[24] A basic test for determining which party has the burden of proof is contained in the judgment of Walsh JA in *Currie v Dempsey*.[25] His Honour stated "in my opinion [the legal burden of proof] lies on a plaintiff, if the fact alleged (whether affirmative or negative in form) is an essential element in his cause of action, eg if its existence is a condition precedent to his right to maintain the action. The onus is on the defendant, if the allegation is not a denial of an essential ingredient in the cause of action, but is one which, if established, will constitute a good defence, that is, an "avoidance" of the claim which, *prima facie*, the plaintiff has."

45. The general rule in civil cases is that the party who has the legal burden also has the evidential burden. If the plaintiff does not discharge this legal burden, then the plaintiff's claim will fail. Several exceptions to this general rule are to be found in the area of tort law. Before me is not a claim based on the law of tort, so the exceptions do not apply. The burden of proof is always on the person who brings a claim in a dispute. It is often associated with the Latin maxim *semper necessitas probandi incumbit ei qui agit*, a translation of which in this context is: *"the necessity of proof always lies with the person who lays charges*." In civil suits, the plaintiff bears the burden of proof that the defendant's action or inaction caused injury to the Plaintiff, and the defendant bears the burden of proving an affirmative defense.

46. If the claimant fails to discharge the burden of proof to prove its case, the claim will be dismissed. If, however the claimant does adduce some evidence and discharges the burden of proof so as to prove its own case, it is for the defendant to adduce evidence to counter that evidence of proof of the alleged facts. If after weighing the evidence in respect of any particular allegation of fact, the court decides whether the (1) the claimant has proved the fact, (2) the defendant has proved the fact, or (3) neither party has proved the fact.

47. The appellant bore the onus of proving its case. The argument that the burden pf proof shifted to the Respondents to prove the money was not due and owing is legally frail as it is absurd. The testimony tendered by the appellant was contradictory to the extent that it claimed amounts different from those pleaded in the Plaint. The evidence was manifestly inadequate to support the allegations. The appellant relied

on e-mails. However, it failed to adhere to the provisions of section **65** of the Evidence Act. On the contrary, the Respondent proved by WhatsApp texts that the appellant acknowledged receipt of **US $ 90,000** and admitted the balance which the court awarded on admission. I find no basis at all to fault the trial Magistrates findings. Again, on this ground, the appellant's appeal collapses.

48. The appellant purported to introduce documents which were not part of the material presented before the trial Magistrate. This is unacceptable and unprocedural.

49. The Respondents' counsel urged the court to find that the appeal is incompetent for failure to include a certified copy of the decree. However, Order **42** Rule **13(4)(f)** of the Civil Procedure Rules, 2010 provides: -

> *(4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say:*
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> *(a) the memorandum of appeal;*
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> *(b) the pleadings;*
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> *(c) the notes of the trial magistrate made at the hearing;*
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> *(d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;*
>
> *(e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;*
>
> *(f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal.*

50. The above provision is specific on the requirements. Paragraph (f) requires that the judgment, order **or** decree appealed from be included in the Record of Appeal. A reading of this provision shows that it is not a mandatory requirement for an appellant to include **both the Judgment and the decree** of the lower court in the Record of Appeal. However, it is useful to attach both. I find backing in *Nyota Tissue Products v Charles Wanga Wanga & 4 Others*,[26]in which the court held that the above rule does not make it mandatory for a copy of the judgment, order or decree appealed from to be filed. The use of the conjunction "or" means that an appellant is not mandatorily obligated to attach both the decree and the judgement. Guided by this clear exposition of the law, I decline the invitation to find that the appeal is incompetent.

51. Lastly, the appellant's counsel urged the court to disturb the findings on costs and award the appellant costs of this appeal. Award of costs is essentially an exercise of judicial discretion. An appellate court will not interfere with exercise of discretion unless it is demonstrated that the discretion was exercised arbitrarily or capriciously or in clear breach of the law or by following an erroneous interpretation of the law or ulterior motives. None of these was demonstrated nor do I find any.

52. Flowing from my analysis of the law, authorities, my findings and conclusions herein above, the conclusion becomes inevitable that the appellant's appeal is unmerited. I find no basis at all to disturb the lower court's findings. Accordingly, I dismiss the appellant's appeal with costs to the Respondents.

Right of appeal

Orders accordingly

SIGNED, DATED AND DELIVERED VIA E-MAIL AT NAIROBI THIS 15TH DAY JULY OF 2020

JOHN M. MATIVO

JUDGE

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[1] {2005} 1 EA 334.

[2] Mombasa HCCA No. 88 of 2009.

[3] Cap 21, Laws of Kenya.

[4]Civil Appeal No. 85 of 2006.

[5] HCEP No. 6 of 2013.

[6] Migori Civil Appeal No. 80 of 2018.

[7] Court of Appeal at Malindi Civil Appeal No. 102 of 2018.

[8] COA at Nairobi CA No. 59 of 1993 {1994} e KLR**,**

[9] {1968} EA 123.

[10] {1958} E.A. page 424.

[11] See *Santosh Hazari vs. Purushottam Tiwari (Deceased) by L.Rs* {2001} 3 SCC 179.

[12] See *Kurian Chacko vs. Varkey Ouseph* AIR 1969 Kerala 316.

[13] {2014} e KLR

[14] In SMEC Australia Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd {2011} VSC 492 at [3]-[6]

[15]See also *Downer Connect Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2008] VSC 77 [1-4]; Hoh v Frosthollow Pty Ltd and Ors [2014] VSC 77 at [13] – [20].

[16]{2015} e KLR.

[17] {2017} e KLR.

[18] See *Galaxy Paints Co. Ltd vs. Falcon Guards Ltd* [2000] 2 EA 385 and *Standard Chartered Bank Kenya Limited vs. Intercom Services Limited & 4 Others* Civil Appeal No. 37 of 2003 [2004] 2 KLR 183.

[19] Cited in *Govan v Skidmore*, 1952 (1) SA 732 (N).

[20]{1955} 1 WLR 948 at 955.

[21]{2007} 4 SLR (R} 855 at 59.

[22] {1947} 2ALL ER 372.

[23] 2003 (1) SA 11 (SCA) at para 5.

[24] James B Thayer, A Preliminary Treatise on Evidence at the Common Law (1898) at 355.

[25](1967) 69 SR (NSW) 116.

[26] {2020} e KLR