**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**HIGH COURT CIVIL APPEAL NO. 42 OF 2016**

**ANN MWANGI.....APPELLANT**

**VERSUS**

**JANE MAINA.....RESPONDENT**

***(Being an appeal from the judgment and Decree of Hon. V. Kachuodho RM dated 13th July 2016 in Karatina PMCC NO.5 of 2015)***

**JUDGMENT**

By a plaint dated 26th January 2015 Jane Maina (plaintiff) sued through M.C Kamwenji & Co. Advocates Anne Mwangi (defendant) seeking judgment against her in the following terms:-

*i) An order that the defendant does surrender the salon business forthwith in its entirety but not limited to all equipments.*

*ii) The payment of Kshs.5000/- to the plaintiff as agreed monthly income from August 2013 to the time the salon is surrendered to the plaintiff plus interest thereon.*

*iii) Costs of the suit*

The plaintiff's claim was that she decided to start a salon business in 2013 in Karatina. She then approached the defendant to employ her to run the salon. They identified a suitable shop and thereafter on diverse dates between 9th July 2013 and 16th July 2013 she gave money to the defendant to set up the business giving her Kshs. 48,000/- for rent, Kshs. 81,000/- for salon equipment accessories and fittings.

After all these, the plaintiff then sought to reconcile the Accounts so that they could begin the business. To her shock and disbelief she found that the defendant had done everything in her name including payment of rent and purchase of equipment. It was at this point that the defendant told her that she thought the plaintiff was loaning her money to set up the salon and proceeded to make proposals to reimburse the money – a proposal which the plaintiff rejected.

She testified that they both agreed that the defendant would continue to run the saloon as an employee of the plaintiff and remit the sum of Kshs.5000/- put to the plaintiff every month. That from then the defendant had made only one remittance of Ksh.5000/- on 22nd October 2014 that that is what provoked the suit.

The defendant through the firm of Maina Karingithi & Co. Advocates filed a defence dated 2nd March 2015 in which she averred that the two had formed a partnership – the plaintiff contributed the sum of Kshs. 143,500/-, to set up the business while the defendant would run the salon and earn Kshs.5000/- pm as her contribution. That after one month in operation, in August 2013, the partnership was dissolved and it was agreed that the defendant would run the salon as a sole proprietorship and refund the plaintiff's contribution plus interest all totaling to Kshs.167,000/- which she paid in full in September 2013 and August 2014. She denied ever being an employee of the plaintiff. That the plaintiff had no claim/interest in the salon.

The matter was heard by Hon. Kachuodho RM.

The plaintiff testified and reiterated the contents of her plaint. She produced as exhibit MPESA statement showing that she had paid defendant Kshs. 20,000/- on 19th July 2011. She testified that the defendant was running the business she had set up. That she wanted it surrendered to her, and Kshs.6000/- per month paid to her by the defendant until the business was surrendered to her.

On cross-examination she said the salon was about 50m from her Animal Feeds Shop – that she was not aware it was called Ann's Salon.

She said the defendant was to give her Kshs.5000/- per month that the defendant was her employee. She said that defendant never gave her any receipts for the expenditure and purchases she made out of the Kshs. 150,000/- she gave her to set up the business. She said defendant's husband was her cousin but neither him nor her own husband were involved in the business. She confirmed that she had no dealings with the landlord saying she was not aware of the tenancy agreement.

She denied terminating the partnership or even attending any arbitration proceedings by anyone or Kikuyu council of elders as alleged. On re-examination she said she never visited the salon, that they never discussed the defendant's salary because it was a start-up. She said the arbitration was attended by their respective husbands. PW2 Esther Mumbi sister to plaintiff testified that she accompanied the defendant to Nairobi to purchase salon equipment.

The defendant testified that plaintiff first spoke to her husband, who is her cousin about setting up a salon business. He told her to call his wife – the defendant. Later the defendant met with the plaintiff at her shop and plaintiff floated the idea – that she would contribute the money and defendant would manage the business and after 6 months – defendant would start to give plaintiff Kshs.5000/- per month.

At that time, she working in another salon on commission. She was now to move to the new salon not as an employee but as a partner. A month after the salon began, the plaintiff called demanding accounts. The defendant felt that this was outside their agreement, and she said so. She told the plaintiff that this was a change in the terms of agreement and therefore she would return to her former place of work.

The plaintiff called a meeting with defendant and her husband where she was categorical that if the defendant did not consider herself her employee then the agreement was over. She told the defendant to refund the capital spent at 13% interest which came to Kshs. 160,000/- and the defendant was to pay Kshs. 13,000/- per month from August 2013. She paid up to August 2014. She would take the money to the plaintiff on the 9th of every month. There was no written agreement. Upon completion of payment of the loan she gave the plaintiff Kshs. 10,000/- as gratitude. That after September 2014, the plaintiff called her demanding a monthly payment of Kshs.5000/-. The defendant refused saying that having refunded the full capital she would not pay another cent.

She produced the arbitration report where the plaintiff demanded an additional Kshs. 200,000/-.

In cross-examination she said that the plaintiff had wanted the business to be a secret between her cousin and herself. She said the disagreement arose when the plaintiff wanted the defendant to be her employee. That it was agreed that everything would be in defendant's name because plaintiff did not want her family to know that she was involved in the business. That the elders concluded that she had paid the plaintiff Kshs.7000/-.

The defendant's husband Michael Mwangi was DW2. He testified to confirm what defendant had said and that she had refunded plaintiff's money paying Kshs. 12,000/- per month. He testified that everything was done in trust – nothing was recorded – that plaintiff had contributed all the money and defendant had refunded it when the partnership broke.

In the judgment delivered on 13th July 2016 the learned magistrate framed the issues;-

***-Whether the subject matter of the suit was a partnership.***

***-whether the plaintiff was entitled to her prayers***.

She found that there was no partnership, that the defendant on her own admission had come on board only to manage the business. She also found that since the defendant had neither counter claimed/ nor proved the claim of refunding the money to defendant- she would not consider the issue. She found for the plaintiff.

That judgment provoked this appeal.

The defendant/appellant raised 6 grounds of appeal: -

**1. That the Learned trial Magistrate erred in law and fact in determining the suit as a partnership while no partnership by either party.**

**2. That the Learned trial Magistrate erred in law and fact in concluding that the appellant was an employee of the respondent without a concurrent finding of whether she was entitled to any benefits of an employee including and not limited to salary.**

**3. That the Learned trial Magistrate erred in law and fact in opining and framing into two issues for determination while the parties by their pleadings had framed and filed several issues which were thus not considered.**

**4. That the Learned trial Magistrate erred in law and fact in not considering the issue of reimbursement by the appellant to the respondent yet it was a central pleading and issue for determination.**

**5. That the Learned trial Magistrate erred in law and fact in finding that the Respondent had proved her case on a balance of probabilities and therefore allowing the plaint as prayed which amounted to a coup on a legally licensed running business which the appellant had run to the exclusion of the Respondent.**

**6. That the Learned trial Magistrate erred in law and fact in not considering the defence of the appellant without a**

**determination of any or all the triable issues raised therein.**

Counsel for each party filed written submissions. For the appellant it was argued that the trial magistrate ignored the 10 issues dated 15th July 2015 and filed on 17th July 2015 listed thus:

*1. Did the plaintiff and the defendant start a salon business?*

*2. What was the nature of the business? Was it a partnership or sole proprietorship?*

*3. Did the plaintiff contribute the capital in the sum of Ksh? 143,500/- towards the business?*

*4. How much was the plaintiff to earn from the business?*

*5. What was the status of the defendant in the business?*

*6. If there was any partnership was it ever dissolved?*

*7. Has the defendant over taken the business from the plaintiff?*

*8. Was the plaintiff reimbursed her contribution?*

*9. Is the plaintiff entitled to the relied sight?*

*10. Who should pay the costs of the suit?*

That by framing only 2 issues out of the pleadings by both parties the trial magistrate led herself to the wrong conclusion.

Each party argued each ground separately relying merely on the evidence.

For the respondent it was argued that the trial magistrate had considered all the issues and arrived at the right conclusion.

This being a first appeal I am guided by the case of **Selle vs. Associated Motor Boat Company Ltd (1968) EA 23 at page 126** where it was held: -

*"Briefly put they (the principles) are that the Court must reconsider the evidence, evaluate 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 that respect.*

*In particular, this Court is not bound necessarily to follow the Trial Judge's finding of fact if it appears that he clearly failed on some points to take account of particular circumstances or probabilities materially to estimate the evidence; of if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally"*

This duty of the first appellate Court was echoed most recently by the Court of appeal in **Peterson Ndung'u and 5 Others vs. Kenya Power & Lighting Company Ltd (2018) eKLR** where the Court cited its earlier holding in **Abok James Odera & Associates vs. John Patrick Machira t/a Machira & Co. Advocates (2013) eKLR** thus: -

*"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kusthon (Kenya) Limited 2000 2EA 212 wherein the Court of Appeal held, inter alia, that: -*

*"On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."*

I have considered the submissions and the evidence on record. I consider the list of issues set out by the defendant in the lower court to have been quite comprehensive and to touch on the issues that were raised. Be that as it may, the broad issues for determination are where there was an agreement to set up a partnership business between the parties?

Now to re-evaluate, re-assess and reanalyze the extracts on the record. The Plaintiff/respondent was setting up a business where the defendant/appellant would run the same as both a manager and an employee. According to her, the defendant would run the business and give her at the end of every month the sum of Kshs.5000/- after deducting all expenses. The record will show that under cross-examination she said that even if the appellant was to make Kshs. 100,000/- in a month, the respondent was expecting Kshs.5000/- per month.

The appellant on the other hand had a different approach that she was coming in as a partner where the respondent put in the capital (money) and she would put in the human resource capital – run the business, make the money and begin to give Kshs.5000/- per month to the

respondent after 6 months.

It was submitted for the appellant that the trial magistrate erred by determining the case on the basis of a partnership while the plaintiff/ respondent's case was based on employer/employee relationship. That any intended partnership had clearly broken up one month after the initiation of the business. That it was not in dispute that all along the appellant had continued to run the business alone.

Further that the trial court failed to consider the appellant's contribution to the business, and after finding that the appellant was an employee of the respondent the trial magistrate failed to consider her rights and entitlements as an employee.

It was also argued that the appellant was running a legally licenced business in her name and the order to hand over the business to the respondent was not enforceable. That there was no partnership, that the business was a sole proprietorship, legally licenced as such and that the same could not be handed over to the respondent. That the trial magistrate erred by failing to consider the issue of reimbursement as raised by the appellant on the basis that there was no counterclaim.

It was argued for the respondent that it was the appellant who had raised the issue of partnership and the court had to look into the issue. That there was no way the court could have considered any salary on the part of the appellant while she had been running the salon and keeping all the income to herself. The appellant pleaded that she had refunded the money, it was denied by the respondent but no evidence was produced to prove that.

Neither party cited any authority.

From the word go, it is evident that each party had its own ideas as to what the business was all about, and it was not clear to each party what kind of business relationship they were getting into. What stands out from the evidence is that one brought in all the money, while the other brought in the human resource. The fact that the business fell apart within a month of setting up is clear evidence of this clash of the minds.

Hence it cannot be argued that the appellant contributed nothing. She did all the legwork – went to buy the accessories, equipment, supervised the installment, and single handedly set up the business.

Clearly if the respondent had just placed her money somewhere and dreamed up a salon, it would not have been without the input of the appellant.

It is a fact that there was an agreement to set up a business: hair salon. What was the nature of the agreement? Nothing was written so we have to deduce the terms from the evidence. The parties had intended that they begin the business and the appellant would run the same. That agreement fell apart within one month as there was no meeting of minds.

What stands out is the fact that the plaintiff respondent brought in the money, and the defendant/ appellant brought in the skill. The former confirmed that she was running an Animal Feeds Shop, and the former was working in different hair salon. That is significant in determining whether either party proved its claim.

Is there any basis for an order to the defendant to surrender the whole salon business to the respondent?

The respondent needed to establish that she was the sole owner of the salon business and the appellant had somehow taken it over unlawfully. It is evident from the testimony on record that the two established the salon business together. That except for the money the appellant contributed to set up the salon after the first month in business there was no joint salon business.

The respondent's averment that they agreed that the appellant would continue as an employee remitting the sum of Kshs.5000/- put to the respondent was not proved by evidence – the single transaction of Kshs.5000/- on 22nd October 2014 cannot be said to be proof of that arrangement. The business continued to be in the appellant's name. The tenancy agreement continued to be in the appellant's name. The respondent made no single effort despite the alleged discovery that the appellant had dumped her to do anything to correct that scenario.

She did not obtain a new licence in her name, she did not approach the landlord as the owner. She did nothing except as she says to wait for her employee to remit Kshs.5000/- to her every month.

Clearly this part of the claim and evidence do not add up – that the respondent would stay without income from her employee, in a running business about 50m from her other business from August 2013 to November 2014 – when she went to a lawyer to have a demand notice written to the appellant. The letter dated 4th November 2014 and it states:-

> *"That after the business was set up she discovered that you had fraudulently acquired the premises and all the other items in your names that after discussion you agreed to be remitting to her income after deducting your pay.*
>
> *…… our instructions are to demand which we hereby do that you provide an account of business income to date".*

The demand letter and the orders sought for surrender of the business have no relationship. Clearly the respondent slept on her rights if she truly considered herself the owner, and it is not clear what woke her up from that slumber to demand accounts. The demand letter does not mention the other order sought:-

> *"Payment of the agreed monthly income of Kshs.5000/-"*

There was no mention in the demand notice that the there was an agreed monthly pay of Ksh. 5000 which the appellant would deduct from the income from the salon. There was no evidence of this agreement.

On the issue of the refund, it is conceded by the appellant that the respondent contributed the initial capital – all of it in 2013. However, she contended in her defence that she refunded the whole amount plus interest. This contention was not denied by the respondent in any response to the defence but was denied only in her testimony. Be that as it may the defendant/appellant did not produce any evidence that she had repaid the money. No accounts from her business, no MPESA transaction, nothing. Taking into consideration the kind of dispute that the two had it would be incredible that the appellant would just hand over such a great amount of money without any accounts/or record, and especially with the availability of MPESA.

I have to find that she did not provide any evidence of refunding the respondents Kshs. 167,000/-.

Hence the final question is whether the respondent proved the claim on a balance of probabilities?

The claim was for an order for ***the defendant to surrender the salon business in its entirety to the plaintiff forthwith, and the payment of Ksh.5000/- to the plaintiff as agreed monthly income from August 2013 to the time the salon is surrendered to the plaintiff plus interest thereon and costs of the suit plus interest.***

The learned trial magistrate correctly found that there was no partnership and the Partnership Act was not applicable to this relationship. This is supported by the evidence on the record which clearly shows that the plaintiff only gave out money and did nothing else. She did not establish that she had an established business where she brought in the defendant who proceeded to 'grabbed' it from her. Without this evidence, she was not entitled to the order for the surrender of the business in its entirety.

There was also no evidence that there was any agreement for the payment of Ksh.5000/- per month by the defendant. Hence she was also not entitled to that order.

The defendant appellant admitted to receiving the money to set up the business. However, she too never produced any evidence that she had refunded the money to the plaintiff.

Hence the first line of approach that had been taken by the respondent of taking accounts would have been the best to determine the status of the business and growth in capital if at all. That was abandoned.

However, it would not be in the interests of justice to allow the appellant to benefit from the respondent's money and not pay. That would be unjust.

Hence in my view and after considering the evidence and the pleadings, it is an admitted fact that the appellant received up to Ksh.143,500/- from the respondent. It is also my finding that did not prove refund. The respondent did not seek reimbursement but sought payment of Ksh.5000/- per month from the appellant. In the circumstances of this case the only remedy available to her is a refund of the value of the money she gave to the appellant which became due from the date their business arrangement fell apart.

The justice of the case therefor is to set aside the orders of the trial made on the 13th July 2016 and substitute it with an order for the payment of Ksh.143,500/- with interest at court rates from the month of August 2013 to the date of this Judgment.

Unfortunately, the record of appeal did not contain the decree appealed from as required by s.66 of the CPA. In Chege v Suleiman [19eighty eight) eKLR the Court of Appeal stated:

> *But we concur positively in the submission of Mr. Lakha that this is not a procedural but a jurisdictional point. Those holdings were founded on a proper interpretation of section 66 of the Civil Procedure Act which confers a right of appeal from the High Court to this Court from "decrees and orders of the High Court". And those holdings were predicated on the fact that since the appeal could only lie against a decree or order, no competent appeal could be brought unless those decrees or orders were formally extracted as the basis of the appeal.*

See also:

> **Municipal Council Of Kitale Vs Nathan Fedha[1983] eKLR**
>
> **Paul Kurenyi Leshuel v Ephantus Kariithi Mwangi & another [2015] eKLR**
>
> **Nancy Wamunyu Gichobi v Jane Wawira Gichobi [2018] eKLR**

I am bound by the Court of Appeal authorities.

The appeal is incompetent and is struck out with costs**.**

**Dated, signed and delivered at Nyeri this 7th Day of June 2019**

**Mumbua T. Matheka**

**Judge**

In the presence of: -

Court Assistant: Nancy

Mr. Karweru for Mr. Karingithi for Appellant

N/A for Mr. Kamwenji for Respondent

**Judge**