



**Airtel Kenya Networks Limited v Raburu (Civil Appeal E814 of 2024)
[2025] KEHC 13854 (KLR) (Civ) (1 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 13854 (KLR)

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

CIVIL

CIVIL APPEAL E814 OF 2024

LP KASSAN, J

OCTOBER 1, 2025

BETWEEN

AIRTEL KENYA NETWORKS LIMITED APPELLANT

AND

WILLIS WAYNE RABURU RESPONDENT

*(Being an appeal from the judgment of Hon. R.L. Musiega (SRM) delivered
on 11th March, 2024 in Nairobi Milimani CMCC No. 198 of 2023)*

JUDGMENT

1. This appeal emanates from the judgment delivered on 11.03.2024 in Nairobi Milimani CMCC No. 198 of 2023. The suit was commenced by way of a plaint filed by Willis Wyane Raburu, the plaintiff in the lower court (hereafter the Respondent) against Airtel Kenya Networks Ltd (hereafter the Appellant) the defendants in the lower Court. The claim was grounded on an unauthorized use of trademark and or trademark infringement, to wit, the Respondent sought a permanent injunction to restrain the Appellant, whether by itself, its directors, officers, employees, or agents from infringing on the Respondent's registered trademark No. 116744; a permanent injunction to restrain the Appellant from publishing any material in print and broadcast media in respect of the Respondent's registered trademark No. 116744 in respect to the mark 'BAZU' and or any confusing or deceptive mark that directly or substantially is similar to that of the Respondent; special damages amounting to Kshs. 5,000,000/- attributed to the loss of any potential license fee that the Appellant may have paid to the Respondent in lieu of the Appellant's infringing activities; an order that profits earned by the Appellant by wrongful and or unauthorized use of the mark alike to that of the Respondent be awarded to the Respondent as may be found due on calculating the accounts; general damages; interest on the above at Court's rates until payment in full; and costs of the suit.



2. The Respondent averred to being the registered owner of trademark No. 116744 'BAZU' in class 25, 35 and 38, effective 13.04.2021, to wit, he has since utilized the trademark in advertising, business management, branding, trading and telecommunications service through media, including the internet which records millions of viewership per day. That on 16.12.2021, the Respondent became aware that the Appellant is engaged in unauthorized use of the trademark in connection with marketing and promotion of the Appellant's internet products and services. It was further averred that the Appellant's unauthorized use of the Respondent's trademark constituted trademark infringement.
3. The Appellant filed a statement of defence denying the key averments in the plaint. It went on to aver that it has over the years advertised numerous well-known adverts and promotions meanwhile the core message in the impugned advertisement was its well-known internet bundle products thus any other words including 'BAZU' were of no material impact on the sale of the Appellant's product.
4. The suit proceeded to full hearing during which both parties adduced evidence. In its judgment, the trial court found in favour of the Respondent proceeded to grant the injunctions as sought for in the plaint, awarded special damages in the tune of Kshs. 5,000,000/-, general damages to the tune of Kshs. 1,500,000/-, interest on the above at Court's rate until payment in full and costs of the suit.
5. Aggrieved with the outcome, the Appellant filed a memorandum of appeal challenging the judgment of the trial Court on the following grounds:-

- " 1. That the learned Magistrate erred in law and fact in failing to find and or hold that the Court did not have requisite jurisdiction to hear and determine the Plaintiff's suit contrary to Section 49 as read together with Section 2 of the Trademarks Act.
 - a) That the learned Magistrate erred in law and in fact when he held that the High Court by independently transferring the matter to the Magistrate Court then the Magistrate Court had obtained the requisite jurisdiction to determine the matter.
 - b) That it has been widely held by this Court and all superior Courts that jurisdiction is only conferred by *the Constitution* of Kenya and or through legislation or both. Further and in holding so, the same superior Court's have held that jurisdiction cannot be conferred by a Court of law and or consent of the parties.
 - c) That the learned Magistrate was only required to assume jurisdiction of the matter pursuant to *the Constitution* of Kenya and or legislation and not by conferring by another Court.
 - d) That the subject matter before the learned Magistrate was alleged infringement of a registered trademark which is governed by the Trademarks Act. That the said Act only grants the High Court and the Registrar of Trademarks with the jurisdiction to handle any proceedings brought pursuant to a registered Trademark.
2. That the learned Magistrate erred in law and in fact in finding that the Respondent had proved his case despite the Appellant formally producing his filed documents in Court during the hearing of the matter before the trial Court.



- a) That it has been held by superior Court's that a document though filed in Court does not become part of the evidence and or judicial record unless tendered or produced in evidence as an exhibit and the Court admits it in evidence.
 - b) That during examination in chief of the Respondent by his counsel, the Respondent never produced his documents thus the learned Magistrate also never admitted the said documents in evidence.
 - c) That apart from the Respondent's witness statement that was admitted, the Respondent's allegation in his plaint were never corroborated by tangible documentary evidence.
 - d) That any consideration of the Respondent's documents by the learned Magistrate was therefore in error.
3. That the learned Magistrate erred in law and in fact when he failed to consider the Appellant's defence and evidence of prior use and common use of the Respondent's alleged Trademark name/phrase 'BAZU' in Kenya.
- a) That it has been held by this honorable Court once a claim of prior use is made and in the absence of other strong and cogent evidence, the mere registration of a Trademark does not invariably constitute a prima facie case with a probability of success.
 - b) That the Respondent failed to adduce any evidence in this matter and or dispute the Appellant's defence of prior use. That on the contrary, the Appellant produced (which was admitted by the Court in evidence) evidence showing prior use of the term 'BAZU' before the alleged registration by the Respondent.
4. That the learned Magistrate erred in law and in fact by failing to consider the Appellant's defence and evidence of the common use of the term 'BAZU' in Kenya in particular for being a term/phrase that is widely used among the Kenyan youth.
- a) That the Appellant produced evidence that showed that the term 'BAZU' was a phrase in the 'sheng' dialect meaning someone/ something big and or a loss.
 - b) That it has been held by this honorable Court that descriptive expression and or terms that are in general use cannot entitle an individual or entity to relief of injunction simply because he has his possession a registration document issued by a sleeping public officer who is not conscious of the legal consequences of allowing such registration.
 - c) That the term/phrase 'BAZU' is widely used and is familiar with public domain especially the youth speaking the 'sheng' dialect therefore the Respondent cannot restrict its use whether for business or otherwise.



5. That pursuant to aforesaid grounds, the learned Magistrate therefore erred in law and in fact issuing a permanent injunction against the Appellant from use of the alleged Trademark as enumerated in order (a) and (b) of the judgment. The Appellant further appeals against order (c) and (d) in terms of the general and special damages awarded as being unjustified and excessive” (sic)
6. The appeal was canvassed by way of written submissions, of which this Court has duly considered alongside the entirety of the record of appeal.
7. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in *Selle v Associated Motor Boat Co.* [1968] EA 123. Further, an appellate Court will not ordinarily interfere with a finding of fact made by a trial Court unless such finding was based on no evidence, or it is demonstrated that the Court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & Another vs Duncan Mwangi Wambugu* [1982 – 1988] 1KAR 278. Upon review of the memorandum of appeal and submissions by the respective parties before this Court, it is the Court’s view the appeal turns to the twin question whether the trial Court’s finding that the Appellant was liable for infringement and or passing of the phrase ‘BAZU’ was well founded, and if so, whether the damages awarded were reasonable in the circumstances.
8. In *Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank* [2004] 2 KLR 91, it was settled that cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings. Hence a review thereof is apposite before dealing with evidentiary matters. That said, the gist of the respective parties’ pleadings had earlier been captured in this judgment as such the same do not warrant a restatement at this juncture.
9. Nevertheless, the trial Court after restating and examining the evidence on record pronounced itself in its judgment by stating in part that:-

“ 16. Against the summary of the pleadings I have highlighted above, the parties’ witnesses duly testified along the lines I set out in the pleadings. In addition to the extensive pleadings the parties produced documents and filed written submissions supported by copious authorities. I do not intend to reproduce the testimony and submissions but will refer to the relevant parts in determination of the following consolidated agreed issues settled by the parties for determination.

- i) Whether the trademark registration and use of the work ‘BAZU’ is class 25,35 and 38 is lawful?
 - ii) Whether the Defendant is liable for infringement?
 - iii) Whether the Plaintiff is entitled to the relief sought
- Whether the trademark registration and use of the work ‘BAZU’ is class 25,35 and 38 is lawful?

17.
18.
19.
20. ...



- ..
21. I do not think it is in dispute that the proprietor of a trademark enjoys rights and protection granted by Section 7 of the Trademark Act...
22.
23. Considering the above, the Plaintiff is the sole proprietor and owner of the trademark 'BAZU' under class 25,35 and 38, is entitled under Section 7 aforesaid to the exclusive use of the mark in relation to goods for which it is registered.
24.
25. I therefore find and hold that as the registered owner of the Trademark
Whether the Defendant is liable for infringement?
- 26..... As a general proposition of law, I think I am right in stating that the burden of satisfying the Court that there has been an infringement of its trade mark is on the Plaintiff company.....
27.
28.
29.
30. The plaintiff proved that he attained registration of the Trademark 'BAZU' on the 13.04.2021 which was before the defendant has started using the aforementioned mark to promote its internet products which was about 16.12.2022. The defendant alleged that the trademark 'BAZU' was not similar to the products offered by the plaintiff as there was a difference between 'BAZU' and 'BAZU' Bundles. Following the registration of the trademark, the plaintiff states that he continued to provide promotional and advertising services to various organizations including 22 Bet Kenya under the brand name 'BAZU'. The plaintiff further admitted that the general public had already created a perception that he had endorsed the defendant following the use of the term 'BAZU' within their promotional internet bundle which was not the case. I therefore find that the defendant continued to use the plaintiff's trademark in a manner that might have led the public to believe that those two parties had entered into an endorsement agreement.
31. I find and hold the plaintiff herein has proved that the defendant is liable for infringement and passing off the brand name 'BAZU'.
32. ...
...
33.
34.
- 35...Accordingly, the present suit succeeds and I hereby make the following order-;



- a. A permanent injunction be and is hereby made and directed at the defendant restraining it, whether by its directors, officers, employees, servants, agents or any person whatsoever authorized by it from infringing on the plaintiff's registered trademark No. 116744.
- b. A permanent injunction is hereby issued restraining the defendant from publishing any material in the print and broadcast media in respect of the plaintiff registered trademark No. 116744 in respect to the mark 'BAZU' and or confusing or deceptive mark that directly or substantially is similar to that of the plaintiff's
- c. Special damages amounting to Kenya shillings five million Kshs. 5,000,000 attributed to the loss of any potential license fee that the defendant may have paid to the plaintiff in lieu of the defendant's infringing activities.
- d. The defendant is hereby directed to pay to the plaintiff general damages in the amount Kshs. 1,500,000/-
- e. Interest shall accrue on (c) and (d) above at Court rates from the date of this judgment until payment in full.
- f. Costs of this suit are awarded to the plaintiff." (Sic).

10. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. The duty of proving the averments contained in the plaint lay upon the Respondent likewise were the averments advanced by the Appellant in its statement of defence. See the Court of Appeal decision in *Karugi & Another v Kabiya & 3 Others* [1987] KLR 347.

11. That said, as earlier noted in this judgment, the Respondent's claim as against the Appellant was premised on alleged unauthorized use of trademark and or trademark infringement. However, before this Court and the lower Court, the Appellant contended that the latter Court was ousted of jurisdiction to entertain the Respondent's suit as presented. Therefore, it would be pertinent before addressing the substratum of the appeal to dispose of the issue of jurisdiction, as its boon or banes would have a direct influence on the outcome of the instant appeal.

12. The locus classicus on the question of jurisdiction is the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1 where Nyarangi. JA (as he then was) famously stated:

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."



13. In Phoenix of EA Assurance Company Limited v S.M. Thiga t/a Newspaper Service [2019] eKLR it was observed that:-

“In common English parlance, “Jurisdiction” denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and to make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae.”

14. Further, it was held in Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] KESC 8 (KLR), that a Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. A Court cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. In Dubai Bank Kenya Limited v Kwanza Estates Limited [2015] KECA 633 (KLR), concerning the question of jurisdiction, the Court emphasized on the fundamental nature of jurisdiction, of which, could be possibly be raised for the first time on appeal whereas an omission to raise the same before the trial Court, cannot confer jurisdiction upon a Court that lack the same.

15. Having set out the above, it would be important to contextualize the question at fore. A cursory review of the record of appeal before this Court, it would seem that at the very outset, the Respondent filed his suit before the High Court. It would further appear that the suit was transferred for hearing and disposal before the lower Court on 06.07.2023 thus leading up to the impugned judgment that is the subject of the instant appeal.

16. By its memorandum of appeal, the Appellant contends that the trial Court erred in law and in fact by failing to find or hold that it lacked the requisite jurisdiction to hear and determine the Respondent’s suit by dint of Section 49 as read together with Section 2 of the Trademarks Act. Section 49 of the Act provides that-;

“In any action or proceeding relating to a trade mark or trade name, the court or the Registrar shall admit evidence of the usages of the trade concerned and of any relevant trade mark or trade name or get-up legitimately used by other persons.”

17. Whereas Section 2 of the Act defines-;

“court” means the High Court;

18. By its submissions both before the lower Court and this Court the Appellant challenged the jurisdictional mandate of the former Court to entertain the proceedings before it. In its judgment the trial Court appeared to entertain the suit when it observed at Paragraph 4 thereof, in the impugned decision, that by dint of the High Court directions rendered on 06.07.2023, the dispute fell within the jurisdiction of the subordinate Court. That said, while calling to aid Section 49 as read together with Section 2 of the Trademarks Act, the decisions in Owners of the Motor Vessel “Lillian S” (supra), Macharia & another v Kenya Commercial Bank Limited (supra) and Aramat & another v Lempaka & 3 others [2014] KESC 21 (KLR), the Appellant submitted that from a plain reading of the meaning of the word “court” as used in the Trademarks Act, it can be discerned that the intention of the drafters was that any dispute arising within the scope of the Trademarks Act and/or relating to any trademark, ought to be adjudicated either before the Registrar and/or the High court.



19. In retort the Respondent cited the provisions of Section 18(1)(a) of the *Civil Procedure Act* and Section 7(1)(a) of the Magistrate Court's Act to posit firstly-; that this Court in its wisdom transferred the matter to the Magistrate Court's; secondly, the Magistrates' Courts Act empowers the Magistrates' Courts to handle intellectual property disputes, including trademark infringement subject to monetary jurisdiction; thirdly, the monetary value of the subject matter of the dispute fell within the jurisdictional limits of the Magistrates' Court; and fourthly, the issue of jurisdiction ought to have been raised at the earliest opportune moment, to wit, the Appellant cannot now raise the issue on appeal as it was neither presented before the trial Court for consideration nor resulted in any determination or order regarding jurisdiction that could form the basis of an appeal.
20. Thus, to address the Respondent's disputation that jurisdiction ought to be raised at the earliest moment. I note from the record of the appeal the Appellant canvassed the question on jurisdiction in its submissions before the trial Court. That said, the latter Court did not expend much industry on the question of jurisdiction save for the statement that the High Court's directions rendered on 06.07.2023 transferring the matter, preordained that the dispute fell within the jurisdiction of the subordinate Court.
21. At the risk of repetition, the Court in *Dubai Bank Kenya Limited (supra)* pithily put it that-;
- “However, we must now determine whether the issue of jurisdiction can be properly raised by the appellant at this stage. In *Floriculture International Ltd v Central Kenya Ltd & 3 Others* [1995] eKLR, the court held that the issue of jurisdiction can be argued at any time. The court remarked as follows:
- “It has been held in the case of *Kenidia Assurance Co. Ltd v Otiende* [1989] 2 KAR 162 that the normal rule that a party could not raise for the first time on appeal a point he had failed to raise in the High Court, did not, and could not apply when the issue sought to be raised de novo on appeal went to jurisdiction.”
- The reasoning is that even where the question of jurisdiction is not raised that does not necessary confer jurisdiction on the court if it has none. Accordingly, we find that the appellants are not precluded from raising the jurisdictional issue for the first time on appeal having not raised it in the superior court.” (sic)
22. As earlier noted, here the question of jurisdiction was raised before the trial Court nevertheless the learned Magistrate did not employ any industry to address himself on the issue. However, it would subtly appear that the learned Magistrate accepted jurisdiction by dint of the High Court directions transferring the file to the lower Court. Nevertheless, I digress. The Respondent's contention that the Appellant cannot challenge jurisdiction at this stage is not well taken in light of the Court of Appeal's decision earlier captured herein.
23. As to whether the trial Court was endowed with jurisdiction to entertain the Respondent's suit? Civil jurisdiction of the Magistrate's Court is provided for in Section 7 of the Magistrate Court's Act. Particularly Section 7(1) & (2) of the Act provides for pecuniary civil jurisdiction of various Magistrate's Court's whereas subsection (3) provides for jurisdiction of specific civil matters under customary law.
24. Indubitably, by the Respondent's pleadings the dispute before the trial Court concerned unauthorized use of the Respondent's trademark and or trademark infringement. The Trademark Act as read alongside the Trademark Rules are and or concern issues surrounding trademarks. Contextualizing the Appellant's contestation on jurisdiction, the Court draws reverence from the rendition of the Court



of Appeal in *Engineers Boards of Kenya v Jesse Waweru Wahome & others & 5 others* [2015] KECA 1 (KLR) wherein it was succinctly stated that “It is our view that there is also the need to give a statute a holistic reading and interpretation in order to ascertain the true legislative intent.” The scope of the Trademark Act is captured as an act of Parliament relating to the registration of trade marks. That said, a reading of Section 2, 5, 7, 8 & 49 of the Act, the purport and intent of the drafters of the Act was that any issue concerning Trademarks that was attendance to the Court meant the High Court and not the Subordinate Court.

25. While the matter may have been transferred by this Court to the Subordinate Court, the same appears to have been an inadvertent omission of the Court. The apex Court in *Macharia* (supra) put it well that a Court’s jurisdiction flows from either *the Constitution* or legislation or both. It was necessary of the trial Court to interrogate the Appellant’s objection concerning jurisdiction whereas it manifestly failed to do so on the face of the impugned decision. Such an omission must be faulted vide this instant appeal given this Court earlier finding that the purport and intent of the drafters of the Trademark Act was that any live issue concerning Trademarks that was referenced to a Court meant a High Court and not Subordinate Court.
26. Given the forestated, the decision of the trial Court must be faulted whereas in light of this Court’s find that the said Court was ousted of jurisdiction to entertain the Respondent’s suit, the commending order is that the trial Court’s decision is set aside in its entirety and substituted with an order striking out with costs the Respondent’s suit as filed with. In the end, the Appellant’s appeal succeeds on the question of jurisdiction, to wit, the Court further directs that Appellant will have the attendant costs of the appeal.
27. Order Accordingly!

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 1ST DAY OF OCTOBER, 2025.

L. P. KASSAN

JUDGE

In the presence of:

Wandete for Appellant

Orombi for Respondent

Carol – Court Assistant

