

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI
COMMERCIAL & TAX DIVISION
CIVIL APPEAL NO. E313 OF 2023

USALAMA TECHNOLOGY LTD 1ST APPELLANT

EDWIN INGANJI 2ND APPELLANT

-VERSUS-

FREDRICK BERNARD KINYWA RESPONDENT

*(Being an Appeal against the Judgment of Hon. Munene, Resident Magistrate, delivered on
27 October 2023 in Miliani Small Claims Court Case No. E1510 of 2023)*

JUDGEMENT

1. This appeal arises from a suit in the Small Claims Court filed by the Respondent against the Appellants, seeking:
 - (i) Judgement in the sum of Kshs 1,060,000 plus interest thereon from 15 March 2018 until payment in full;
 - (ii) General damages;
 - (iii) Costs of the claim;
 - (iv) Other appropriate relief that the court may deem fit.

2. The factual background giving rise to the claim is largely common ground, though the interpretation of the facts is hotly contested. In 2017, the directors of the 1st Appellant approached the Respondent with a view to developing a safety and security mobile application (the App). The 1st

Appellant is a technology start-up company, while the Respondent is a professional with expertise in security systems. After a series of engagements where the Respondent provided industry advice, the Respondent expressed an interest in investing in the venture.

3. Following discussions, the Respondent paid a total of Kshs 1million to the 1st Appellant in two equal tranches on 15 March 2018 and 23 June 2018. The Respondent further paid Kshs 60,000/= as a contribution towards a professional market research study for the App. These facts are not disputed.
4. The Respondent's case before the trial court was that this investment was predicated on an agreement that the funds would be applied for the specific purposes of financing the development of the App, expanding the sales and marketing team and formulating a direct route to the market. Conversely, the Appellant's position was that the transaction was one for the purchase of shares in the 1st Appellant company. They contended that in exchange for his investment, the Respondent became a shareholder and was appointed as a director of the 1st Appellant. The funds paid constituted the Respondent's share capital.
5. The business venture did not achieve the commercial success that the Respondent had anticipated. The Respondent contended that the App was never fully developed or launched, and that the Appellants subsequently moved on to a new, separate venture, effectively leaving the 1st Appellant as a "shell" company. Consequently, in early 2021, the Respondent sought to divest and demanded a full refund of his investment. When the refund was not forthcoming, he filed the suit in the Small Claims Court.

6. Upon hearing the parties, the trial court entered judgment in favor of the Respondent, ordering the Appellants, jointly and severally, to refund the Respondent the sum of Kshs 1,060,000/= together with costs of the suit.

7. Aggrieved by the decision, the Appellants lodged this appeal on the following grounds:

That the Honourable Magistrate erred in fact and in law in:

- (i) Determining that a shareholder was entitled to full reimbursement of share capital paid without ceding shareholding through the established legal mechanism;
- (ii) Determining that a shareholder could call for a meeting without due process;
- (iii) Determining that a director could call for a meeting without following the established legal mechanism;
- (iv) Determining that a company was liable to refund share capital contributed for shares already allocated at the same price they were paid for;
- (v) Determining that a company has no autonomy to determine the appropriation of share capital;
- (vi) Determining that an unwritten contract was established before the date when the offer was accepted;
- (vii) Importing terms to an unwritten contract that are unenforceable and untenable;
- (viii) Determining that imported terms were fundamental and repudiated an unwritten contract;
- (ix) Determining that an agreement for the purchase of shares could be converted to a debt purchase agreement without consensus ad idem of the parties;

- (x) Determining that monies paid to a third party were recoverable from the Appellant;
- (xi) Determining that a shareholder can retain shareholding despite illegally an unlawfully demand share capital refund;
- (xii) Determining that public policy is in favor of forcing a company to refund share capital despite economic downturns currently facing the country;
- (xiii) Determining that despite privity of contract a shareholder can demand a refund of the share capital without consensus ad idem with the company;
- (xiv) Determining that a shareholder can force a share buyback without a contract;
- (xv) Determining that a Director-Shareholder is liable for costs of the suit against a company without formally lifting the corporate veil;
- (xvi) Determining that an amendment of pleadings could be entertained at the hearing stage;
- (xvii) Determining that substitution of parties could be done at the hearing stage;
- (xviii) Determining that supplementary list of documents could be presented at the submissions stage of the main suit;
- (xix) Determining that the Advocate for the Appellants did not have audience to address the Court despite attending to a medical emergency.

Analysis & Determination

8. Before delving into the merits of the appeal, it is imperative for this Court to define the scope of its appellate jurisdiction in this matter. The Small Claims Court is a creature of the Small Claims Court Act, No. 2 of 2016 (the "Act"). Section 38 of the Act provides for a right of appeal from the decisions of the said court. It stipulates:

A person aggrieved by a decision or order of the Court may appeal against that decision or order to the High Court on a matter of law.

9. The jurisdiction of this Court is, therefore, circumscribed. It is not the function of this Court, on appeal, to re-evaluate the evidence and substitute the trial court's findings of fact with its own. The appellate mandate is confined to considering whether the trial court, in arriving at its decision, correctly apprehended and applied the relevant legal principles to the facts before it. The appeal must succeed or fail on points of law only.
10. The Respondent has raised a preliminary objection, urging this Court to strike out the appeal for being incompetent and incurably defective. The gravamen of the objection is that the Record of Appeal dated 12 November 2024 and the Supplementary Record of Appeal dated 13 November 2024 do not contain a certified copy of the judgement and decree appealed from. The Respondent submits that this omission is fatal, as it contravenes the mandatory provisions of Order 42 Rule 13(4) of the Civil Procedure Rules. The Rule provides that before an appeal is allowed to go for hearing, a judge must be satisfied that certain documents are on the court record. The proviso to that sub-rule states that a judge may dispense with the production of any document "*other than those specified in paragraphs (a), (b) and (f)*". Paragraph (f) lists "*the judgment, order or decree appealed from*."
11. The Respondent has cited a wealth of authorities, including ***Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others eKLR*** and ***Law Society of Kenya vs Centre for Human Rights and Democracy & Others, Supreme Court***

Petition No. 14 of 2013, which affirm the principle that a Record of Appeal without the primary documents such as the judgement or decree, is incomplete and incompetent. This Court has also been referred to its own decisions in ***Trans Mara Sugar Co Ltd v James Omondi Obudho eKLR*** and ***Elvis Anyimbo Sichenga v Orange Democratic Movement & 4 Others eKLR***, which held that such an omission is not a mere procedural technicality that can be cured by invoking Article 159(2)(d) of The Constitution, but is a substantive defect that goes to the root of the appeal.

12. The law as stated in these authorities is, indeed, settled and binding. An appeal is against a decree or order, and the absence of the very decree or order being challenged renders the appellate proceedings a nullity. However, before applying this stringent legal principle, the Court must first satisfy itself as to the factual accuracy of the Respondent's assertion. A court of law determines issues based on the record before it, not merely on the submissions of the parties.
13. Upon careful perusal of the court file, I note that the Record of Appeal filed on 12 November 2024 contains an index at page (iii), which clearly lists, at item 20, the Judgement, and at item 21, the Decree. I have carefully perused the 214 pages of the Record, and not seen the judgement or decree therein. I have equally perused the Supplementary Record of Appeal which contains only the typed proceedings.
14. In short, the appeal is not compliant with the mandatory requirements of Order 42 Rules 13(4)(f) Civil Procedure Rules and is, therefore, incompetent.
15. The Preliminary Objection is hereby upheld. The appeal is struck out with costs to the Respondent, assessed at Kshs 40,000/=.

Dated and Delivered at Nairobi this 31 day of OCTOBER 2025.

HELENE R. NAMISI
JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

For Appellants: Mr. Kaburu

For Respondent: Ms. Wambutta h/b Mr Amol

Court Assistant: Lucy Mwangi

Judgement