

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
CIVIL APPEAL NO. E285 OF 2023

PRISCILLA LINTARI.....APPELLANT

-VERSUS-

SIMON
KARIRI.....RESPONDENT

KIROBI

(Being an appeal from judgment and decree of the Small Claims Court at Thika (Hon. O.J. Muthoni RM) claim number E321 of 2023 dated 18th August 2023)

JUDGMENT

This appeal arises from judgement and decree of the small claims court at Thika dated 18th August 2023 in its claim number E321 of 2023 where the respondent had sued the appellant for refund of Kshs 600,000.00 which the respondent had given the appellant for purposes of processing and facilitating issuance of licence for the respondent's private security company known as motherland Security Services. The licence was to be issued by Private Security Regulatory Authority.

The appellant, in response to the claim pleaded that she delivered her assignment to assist the respondent get the licence which the respondent personally collected. She stated further that the entire work was to cost Kshs 800,000.00 but she was only paid Kshs 600,000.00 and that once the licence was issued, the respondent rushed to collect and refused to pay the balance.

The matter was heard by way of viva voce evidence where it was common ground that the parties did not enter into a written contract and upon evaluation and analysis of the evidence and submissions of the parties, the Adjudicator entered judgement for the respondent prompting this appeal which raises the following five grounds;

- 1. The learned Magistrate erred in law and in fact in holding that the appellant proved on a balance of probabilities that monies paid to the respondent was to be refunded despite the fact that the contract was between the respondent and a limited liability company which was not a party to the suit.*
- 2. The learned Magistrate erred in law and in fact in failing to appreciate that the licence which was to be procured was for a limited liability company and not for the benefit of the respondent.*
- 3. The learned Magistrate erred in law and in fact in failing to appreciate that the claimant and the limited liability company were separate and distinct. Therefore, the proper claimant ought to have been the limited liability company.*
- 4. The learned Magistrate erred in law and in fact in failing to appreciate the gist of the respondent's submissions in their totality.*
- 5. The learned Magistrate erred in law and in fact in relying on extraneous matters other than the evidence adduced in court.*

This appeal was heard by way of written submissions. In her submissions dated 4th July 2025, the appellant has argued grounds 1 to 3 together and grounds 4 and 5 together. The issue arising from the first limb of the appeal is whether the court

erred in finding that there was contract between the parties whereas the services were rendered to a company which was not a party to the claim. In other words, the appellant argues that there was no privity of contract between her and the respondent.

The respondent has in his submissions dated 14th August 2025 submitted that the contract was between him and the appellant. He was also quick to point out that this court has no jurisdiction over this matter by virtue of Section 38(1) of the Small Claims Court Act. That Section provides that;

‘A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.’

It is obvious to me that the issue of whether there was privity of contract between the parties is a matter of law. It is contested that the respondent was a legal entity separate from her limited liability company who the appellant was to assist in processing the licence. I therefore dismiss the respondent’s argument that the appeal is purely on matters of facts.

I have looked at the pleadings filed in the trial court. The response to the claim which has eight paragraphs did not raise the issue of privity of contract. The appellant at paragraphs 5 and 6 admitted receiving Kshs 600,000.00 from the respondent. She did not in the entire response raise the issue of the limited liability company being the right party to the claim. Even in her evidence before the court including the written witness statement dated 25th May 2023, she did not deny receiving money from the respondent and at no time did she state that she received the money from the limited liability company. The appellant’s only defence was

that she delivered her part of the deal and it was the respondent who failed to pay her the balance of the agreed cost.

It is trite law that parties are bound by their pleadings. The law would not allow and the appellant did not have the liberty to depart from her pleadings. What she pleaded as her defence is what the court expected her to advance in her testimony and evidence. In ***Tolksdorf v Mwangi & 3 others (2025) KEELC 848 (KLR)***, the court restated this principle by holding that;

‘Additionally, this is an issue that was not pleaded in them Plaintiff dated 8th April 2022. It is trite that parties are bound by their pleadings and cannot be allowed to depart from the same.’

On the same note, the appellant has no luxury of raising an issue in this appeal which she did not raise in the lower court. An appellate court cannot be the first recipient of new issues unless there is need for additional evidence and within the parameters allowed by the law and even where further or additional evidence is found to be necessary and allowable, it cannot introduce new issues at the appeal stage. In ***Yaa & 3 others v Kithi & another (2025) KEELC 7835 (KLR)***, it was held that;

‘The jurisdiction of an appellate court is limited to reviewing issues presented adequately before the trial court. A court cannot be deemed to have erred on an issue that was never argued. This precisely reflects the position the appellants are attempting to establish with this ground of appeal.’

Having said the above, I hold that the first limb of the appeal though based on matters of law and appealable to this court has no basis. It is dismissed for want of merits.

The second limb of the appeal is the argument that the Adjudicator failed to consider the appellant's submissions particularly on whether the appellant met her obligations. For the court to make a decision on this issue, it must interrogate the truth of what was pleaded. In doing so, the court will be delving to issues of facts which it has no jurisdiction over pursuant to the aforesaid Section 38(1) of the Small Claims Court Act. In that regard, I decline the invitation to evaluate the evidence in respect of whether the appellant was the one who processed the licence. The trial court interrogated that fact and jurisdiction on that rested with it.

The upshot of the above short discussion is that, this appeal lacks merits and the same is dismissed with costs to the respondent

Dated, signed and delivered at Nairobi this **28th** day of **November** 2025.

B.M. MUSYOKI
JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Miss Maina holding brief for Mr. Thuku for the appellant and Miss Nyawira Kinyua for the respondent.