REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CIVIL APPEAL NO. E015 OF 2024

(CORAM: HON. CHARLES M. KARIUKI – J)

(Being an appeal against the Judgment of the Chief Magistrate's Court at Narok delivered by Hon. H.M. Nyaberi(C.M.) on 12th March 2024, in CMCC No. 153 of 2018)

ILKERIN LOITA INTERGRAL DEVELOPMENT-FOUNDATION…...…APPELLANT

-VERSUS

WILD GEESEFOUNDATION.…….…….....……...RESPONDENT

JUDGMENT

INTRODUCTION

1) This is an appeal arising from the judgment of the Chief Magistrate's Court at Narok delivered on 12th March 2024 by Hon. H. M. Nyaberi (C.M.) in CMCC No. 153 of 2018, in which the trial court entered judgment in favour of the Plaintiff, Wild Geese Foundation, against the Defendant, Ilkerin Loita Integral Development Programme, for restitution of Kshs. 3,223,970.07, together with interest and costs.
2) The dispute before the trial court arose from an admitted erroneous electronic funds transfer made on 22nd January 2015, when the Respondent (then Plaintiff) inadvertently transferred Kshs. 3,223,970.07 to the Appellant's account. The funds were intended for a different entity—Nkoilale Community Development Organization. According to the

Respondent, despite engaging the Appellant for a refund through various correspondences, including email communication acknowledging receipt of the funds, the Appellant failed or declined to remit the money, prompting the filing of the civil suit.

3) The Appellant (then Defendant) filed a defence denying receipt of the funds and further contended that, if any monies were indeed remitted, the Respondent's cause of action lay against the remitting bank (KCB) and not the Appellant. The Appellant also raised a limitation defence, asserting that the claim—allegedly grounded in tort—should have been filed within three years from the date of the transaction.

4) At trial, each party called one witness. The Respondent's witness (PW1), Earnest Eisma, adopted his statement and produced documentary evidence, including SWIFT transfer records and email correspondences in which the Appellant acknowledged receipt of the funds. The Appellant's witness (DW1), Mark Kitaanyu Karbolo, similarly adopted his statement and conceded during cross-examination that the Appellant had received the funds through a SWIFT transfer, though he claimed the organization needed time to confirm the transaction.

5) Upon considering the pleadings, evidence, and submissions, the learned magistrate rejected the limitation defence and found that the claim was one for recovery of a liquidated debt governed by Section 23 of the Limitation of Actions Act, not a tort. The court held that the Respondent had proved its case on a balance of probabilities and accordingly entered judgment as prayed.

6) Aggrieved by that decision, the Appellant lodged the present appeal vide Memorandum of Appeal dated 21st June, 2024, on the following grounds;

i. ***THAT the Learned Trial Magistrate erred in law and fact in interpreting the evidence and consequently holding that the Appellant had acknowledged receipt of the alleged amount, thus liable to pay the decretal amount.***

ii. ***THAT the Learned Trial Magistrate erred in law and fact by failing to consider that the Respondent did not adduce certified documents for the alleged deposited amount.***

iii. ***THAT the Learned Trial Magistrate erred in law and fact by failing to consider who was the owner of the account to which the alleged funds were deposited.***

iv. ***THAT the Learned Trial Magistrate erred in law and fact by failing to appreciate that the alleged erroneous transaction was purported to have been done in Netherlands, yet the evidenced adduced indicated that the same was done in London.***

v. ***THAT the Learned Trial Magistrate erred in law and fact by holding that the Appellant is liable, yet the alleged individual who purportedly deposited the amount did not testify.***

vi. ***THAT the learned judge erred in law and fact by concluding that the Respondent had proved its case on a balance of probability.***

7) The Appellant made the following prayers;

a. **That the judgment delivered on 12th March 2024 be set aside.**

b. **Cost of this appeal be provided for**.

Directions of the court

8) The appeal was canvassed by way of written submissions.

The Appellant's submissions.

9) The Appellant filed written submissions pursuant to the directions of the Court and urged the Court, as a first appellate court, to re-evaluate the entire evidence afresh in accordance

with the principles in *Selle & Another v Associated Motor Boat Co. Ltd [1968] EA 123* and *Ephantus Mwangi & Another v Duncan Mwangi (1982–1988) 1 KAR 278.*

10) The Appellant consolidated its six grounds of appeal into three broad issues:

(i) whether the trial court misinterpreted the evidence.

(ii) whether the court erred in finding that the Appellant acknowledged receipt of the funds; and

(iii) whether the Respondent proved its case on a balance of probabilities.

11) On the first issue, the Appellant argued that the Respondent failed to produce certified or authentic documentation of the alleged funds transfer. In particular, the remittance document at page 150 of the Record of Appeal bore the account name "Nkoilale Community Development Organization," not the Appellant's name, and lacked any bank stamp. PW1 also admitted he was not the person who effected the transfer, and that the banking was done in London rather than the Netherlands, which the Respondent had initially alleged. The Appellant submitted that the trial court erred by failing to interrogate these inconsistencies.

12) On whether the Appellant acknowledged receipt of the money, the Appellant relied on **Sections 107, 109, and 112 of the Evidence Act** on legal and evidentiary burdens of proof, citing ***Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334***. It argued that the burden lay on the Respondent to prove that the funds were indeed deposited into the Appellant's account. The Appellant submitted that the email relied upon by the Respondent (at page 156 of the Record) did not constitute an acknowledgment of receipt but merely indicated that the Appellant had noted an inward transfer and was still

verifying the sender. The Appellant contended that the trial court misapprehended this evidence.

13) On whether the Respondent proved its case on a balance of probabilities, the Appellant cited ***Miller v Minister of Pensions [1947] 2 All ER 372*** **a**nd submitted that the Respondent failed to establish that the account into which the money was transferred belonged to the Appellant. The Appellant argued that without such proof, the order for restitution could not stand.

14) In conclusion, the Appellant urged the Court to find that the Respondent did not discharge the requisite burden of proof and that the trial court's findings were therefore erroneous. It prayed that the appeal be allowed and the judgment delivered on 12 March 2024 be set aside.

The respondent's submissions.

15) The Respondent opposed the appeal and submitted that the grounds raised are without factual or legal foundation. It was their position that the Appellant expressly admitted receiving the disputed funds, both in email correspondence and in oral testimony before the trial court, and that the judgment of the lower court was therefore sound.

16) On grounds 1, 2, 3 and 6 of the appeal, the Respondent referred the Court to page 156 of the Record of Appeal, where the Appellant's Director (DW1), Mark Karboro, responded to emails from Ernst Eisma (PW1) acknowledging receipt of funds referenced as AT-DPCINTL FCSTONE LT FIRST FLO, the same reference appearing in the payment confirmation at page 150 of the Record. At page 130 of the Record, DW1 also stated in cross-examination: "I confirm we received the money." The trial court captured this admission at paragraphs 7 and 8 of its judgment.

17) The Respondent further submitted that the Appellant's pleadings at pages 144–145 of the Record were evasive and inconsistent, amounting to implied admissions under the principles set out in ***Choitram v Nazari [1984] KLR,*** where the Court of Appeal held that constructive admissions arise from evasive denials. They added that facts may be proved by express or implied admission, citing ***Njeru v Mugambi [2023] KEHC 2921,*** which reaffirmed that admissions—whether oral, documentary, or by conduct—constitute valid proof under Order 13 Rule 2 of the Civil Procedure Rules. The Respondent emphasized that the Appellant's admission in correspondence and testimony was unequivocal and satisfied the threshold for reliance on admission as stated in ***Winfred Nyawira Maina v Peterson Onyiego Gichana [2013] eKLR.***

18) On grounds 4 and 5, the Respondent submitted that the Appellant's contestation regarding whether the money originated from the Netherlands or London was irrelevant, as the fact in issue was not the geographical origin of the funds but whether they were credited into the Appellant's account. They argued that the Foreign Exchange Confirmation at page 150 shows that the funds were sent from the Respondent and were undeniably received by the Appellant. PW1, as a project officer conversant with the Respondent's financial processes, was a competent witness, and the Appellant never applied for summons to call any other person it deemed crucial to its case. The Respondent relied on ***Bombo v Kitumbo [2024] KEELC 4993***, which clarified that either party may apply for summons of witnesses and that failure to do so lies at the party's own risk.

19) The Respondent submitted that the cause of action was restitution for funds transferred in error, an issue already addressed before the trial court. They argued that equity forbids a party from retaining money received by mistake and invoked the principle against unjust

enrichment, citing ***Maina & 87 Others v Kagiri [2014] KECA 880*****,** where the Court of Appeal held that no party should benefit from his own wrongdoing.

20) In conclusion, the Respondent maintained that the trial court properly evaluated the evidence and correctly found it in their favor. The Appellant admitted receiving the funds but failed to account for or return them, despite undertaking to investigate the transaction. The Respondent submitted that the appeal is frivolous, raises no substantive issue of law or fact, and should be dismissed with costs.

ANALYSIS AND DETERMINATION.

21) I have carefully considered the Record of Appeal, the grounds raised, the rival submissions, the impugned judgment, and the applicable law. As a first appellate court, I am guided by the well-established principles in ***Selle & Another v Associated Motor Boat Co. Ltd [1968] EA 123*****,** that this Court is mandated to re-evaluate, reconsider, and re-analyze the evidence on record and draw its own independent conclusions, while bearing in mind that it neither saw nor heard the witnesses testify. Similar guidance was reiterated in ***Peters v Sunday Post Ltd [1958] EA 424 and Ephantus Mwangi & Another v Duncan Mwangi Wambugu (1982–88) 1 KAR 278*****.**

22) Having studied the record and submissions, the key issues for determination are:

a. ***Whether the trial court erred in finding that the Appellant acknowledged receipt of the funds.***
b. ***Whether the Respondent proved, on a balance of probabilities, that the funds were transferred into the Appellant's account.***
c. ***Whether any procedural or evidentiary defects in the documents rendered the Respondent's case unproved.***

d. ***Whether failure to call the person who executed the bank transfer was fatal to the Respondent's case.***

e. ***Whether the trial court erred in its application of the law on restitution and unjust enrichment.***

23) I now address each issue in turn.

Issue 1: Whether the Appellant acknowledged receipt of the funds

24) The record is unequivocal that the Appellant expressly admitted receiving the disputed funds. At page 130 of the Record of Appeal, during cross-examination, DW1 (Mark Karboro), the Appellant's Director, stated***:" I confirm we received the money."***

25) Further, at page 156, the Appellant responded to correspondence from PW1 acknowledging receipt of funds referenced as AT-DPCINTL FCSTONE LT FIRST FLO —the same reference appearing in the payment confirmation at page 150.

26) These admissions, both oral and documentary, satisfy the criteria for express admissions under the Civil Procedure Rules. Order 13 Rule 2 provides that judgment may be entered on admissions, and the Court of Appeal in **Choitram v Nazari [1984] KLR 327** held:

"***Admissions may be made formally, informally, in correspondence, or 'otherwise'. What matters is that they be plain and obvious, not requiring elaborate argument."***

27) The Appellant's own words—both in writing and in sworn testimony—are unequivocal acknowledgments. The trial court correctly captured these admissions at paragraphs 7 and 8 of its judgment.

28) I therefore find that the trial court did not err in holding that the Appellant acknowledged receipt of the funds.

Issue 2: Whether the Respondent proved the transfer into the Appellant's account on a balance of probabilities

29) The burden of proof in civil cases is set out in Sections 107–109 of the Evidence Act, and the principle was concisely stated in ***Anne Wambui Ndiritu v Joseph Kiprono Ropkoi [2005] 1 EA 334*** that the party who asserts must prove.

30) The Respondent discharged its burden through bank transfer documents (page 150), email correspondence linking the Appellant to the transaction (page 156), and oral testimony by PW1, who explained the financial procedures of the organization.

31) In addition, an adverse inference arises where a party admits receipt of funds but fails to produce any evidence contradicting such receipt or explaining the ultimate disposition of the funds. See **R. G. Patel v Lalji Makanji [1957] EA 314,** where the Court held that a court must weigh the balance of probabilities based on the evidence presented and that a party's conduct may tilt that balance.

32) Once the Respondent proved that the funds were transferred and the Appellant admitted receiving them, the evidentiary burden under **Section 112 of the Evidence Act** shifted to the Appellant to show that: the funds were not received, or if received, they were returned or duly accounted for.

33) The Appellant provided no such evidence. Mere denial or assertions that the document was uncertified did not dislodge the combined documentary and oral evidence, nor the Appellant's own admissions.

34) I find that the Respondent proved its case on a balance of probabilities.

Issue 3: Whether lack of certification of documents was fatal

35) The Appellant challenged the authenticity of the remittance documents because they lacked certification or bank stamps.

36) However, under Sections 65–68 of the Evidence Act, electronic transfers, SWIFT messages, and financial statements are admissible as business records. The Court of Appeal in ***Kenneth Nyaga Mwige v Austin Kiguta & 2 Others [2015] eKLR*** reaffirmed that objections to documentary admissibility must be raised at trial when the document is tendered.

37) The Appellant did not object during trial; the documents were admitted without challenge. They cannot now be rejected on appeal. Further, uncertified documents do not automatically become inadmissible—what matters is whether they are authentic and credible. The Appellant's admission of receipt cured any alleged formal defect.

38) This ground fails.

Issue 4: Whether the Respondent's failure to call the individual who executed the transfer was fatal

39) The Appellant argued that the person who physically made the bank transfer should have testified.

40) This argument is misplaced. PW1 testified as a project officer conversant with the Respondent's financial operations. Under Sections 59 and 60 of the Evidence Act, direct evidence of a fact may be given by a person with knowledge of the transaction, not necessarily the individual who pressed the "send" button.

41) More importantly, the Appellant, if it felt the witness was crucial, had the statutory right to summon that witness under Order 16 Rule 1 of the Civil Procedure Rules. The court in ***Bombo v Kitumbo [2024] KEELC 4993*** held that:

"Either party may apply for summons of a witness. The court will not penalize the opposing party for a witness they never sought to call."

42) The Appellant cannot fault the Respondent for its own failure to call witnesses.

43) This ground, therefore, fails.

Issue 5: Whether the trial court misapplied the law on restitution and unjust enrichment

44) The essence of the Respondent's claim is restitution of money paid under a mistake. Kenyan law recognizes restitutionary claims grounded in the equitable doctrine of unjust enrichment. The principle is that:

"No person should be allowed to unjustly enrich himself at the expense of another."

45) In **Kenya Ports Authority v Kuston (Kenya) Ltd [2009] 2 EA 212, the** Court of Appeal emphasized that unjust enrichment requires the defendant to restore benefits obtained without legal justification.

46) Similarly, the Court of Appeal in Maina & 87 Others v Kagiri [2014] KECA 880 stressed:

"Equity shall suffer no wrong without a remedy; no man shall benefit from his own wrongdoing; and equity detests unjust enrichment."

47) In the present appeal, the Appellant: received funds admittedly sent in error, promised to investigate, failed to return them, and did not show that they were applied to any lawful purpose.

48) The trial court properly applied the doctrine of restitution based on mistake, consistent with the overarching equitable principles and the modern law of unjust enrichment.

49) I therefore find that the trial court correctly appreciated and applied the applicable law.

Disposition

50) Upon re-evaluating the entire evidence and applicable law, I find no basis to interfere with the findings of the trial court. The Appellant admitted receiving the funds, provided no explanation for their retention, and cannot rely on technical or peripheral arguments to defeat a clear restitutionary obligation.

51) Consequently, the appeal has no merit and must fail.

52) Final Orders

i) The Appeal is hereby dismissed in its entirety.

ii) The Judgment of the Chief Magistrate's Court delivered on 12th March 2024 in CMCC No. 153 of 2018 is hereby upheld.

iii) Costs of the Appeal shall be borne by the Appellant.

53) It is so ordered.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 28TH DAY OF NOVEMBER, 2025

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CHARLES KARIUKI

JUDGE