



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CIVIL APPEAL NO. E118 OF 2024**

**MARCIANA AUMA MUMALI .....**

**APPELLANT**

**VERSUS**

**JAMES AMUKOYA KWEYU .....**

**RESPONDENT**

***(Being an appeal arising out of the decree emanating from the judgment of Hon. Atanga Thomas Obutu (C.M), which was delivered on 30<sup>th</sup> May 2024 in Mumias C.M.C.C No. E014 of 2021)***

**JUDGMENT**

**Background**

1. The Appellant herein had filed a suit, where she averred that she met the Respondent in 2019 while in the process of establishing an investment venture, which was the purchase of raw sugar cane from farmers and

the sale of the same to sugar cane millers. She claimed that the Respondent informed her that he was well-versed in the business and had expressed his interest in working with her as her agent.

2. The Appellant stated that they were to purchase raw sugar cane and sell the same to private millers, acquire private sugarcane delivery permits from sugar millers and purchase transportation and delivery trucks. She averred that to ensure proper management of the business, she purchased three motor vehicles, that is, a Toyota Noah registration number KBK 395N for the defendant's movement and two lorries registration numbers KAX 346G Mitsubishi Fuso and KAH 501 W Isuzu for the transportation and delivery of the sugarcane.
3. She stated that the motor vehicle registration number KBK 395N Toyota Noah was purchased in the name of the Respondent, while the two lorries were purchased in their joint names. She acknowledged that the Respondent as her agent would orally hire other motor vehicles to help in the transportation and delivery of the raw sugarcane to the various factories and it was

agreed between them that for smooth operations of the business, the business and the private raw sugarcane delivery permits would be in the Respondent's name and the business was to be operated through his personal bank account.

4. She averred that they agreed that the Respondent would, during the pendency of the business reveal all transactions regarding the business, including bank documents and grant her unrestricted access to his personal bank accounts as it was used to operate the business.
5. She claimed that the business did pick up, and to improve the image of her agent, she purchased for him clothing accessories, housing, and phone all in the sum of Kshs. 840,740.00/=
6. She averred that she supported the growth of the business through cash and M-Pesa payments but later the Respondent turned against her and since November 2020, started intimidating and threatening her whenever she requested for the financial details and bank accounts transactions, causing her to report the threats to the police station.

7. In her prayers, the Appellant sought the following orders;

- a) *The defendant be ordered to provide an account and delivery of records of transactions and or payment relating to the proceeds of sale of raw sugarcane made via the following permits to Butali Sugar mills Limited Permit No. 315060, Busia Sugar industries Limited permit No. 16330 and Kibos Sugar and Allied Industries limited permit No. 009 to these bank accounts Equity Bank, Mumias Branch account No. 0680193798141, Co-operative Bank, Kawangware Brach Account Number 01192773885700, Kenya commercial Bank Mumias Branch account No. 121327691, Fault Bank, Mumias Branch Account No. 1003328089 and invest and Grow Sacco Limited, Mumias Branch Account No. 0010040673-001-001*
- b) *A permanent injunction do issue restraining the defendant from pursuing the plaintiff, harassing her, telephoning her (via cellar or landline), sending text message to her, emailing her, stalking her, keeping her under surveillance,*

*gathering information about her and or following her movement at her home, place of work social gathering, religious functions and or visiting the plaintiff's home or her properties.*

*c) A declaration that the plaintiff has a lawful lien over the credit balance in the defendant's accounts, Equity Bank, Mumias Branch Account No. 0680193798141, Co-operative Bank, Kawangware Branch Account Number 01192773885700, Kenya Commercial Bank, Mumias Branch Account No. 121327691, Faulu Bank, Mumias Branch Account No. 1003328089 and Invest and Grow Sacco Limited, Mumias Branch Account No. 0010040673-001-001*

*d) A declaration that the defendant bank accounts number Equity Bank, Mumias Branch Account No. 0680193798141, Co-operative Bank, Kawangware Branch Account Number 01192773885700, Kenya Commercial Bank Mumias Branch Account No. 121327691, Faulu Bank, Mumias Branch Account No. 1003328089 and Invest and Grow Sacco*

*Limited, Mumias Branch Account No. 0010040673-001-001 be liquidated to satisfy this claim.*

*e) A declaration that motor vehicle registration numbers KBK 395N Toyota Noah, KAX 346G Mitsubishi Fuso and KAH 501W Isuzu belong to the plaintiff*

*f) The sum of Kshs. 3,192,706.00 with interest from the date of filing this suit until payment in full.*

*g) Costs of this suit with interests thereon at the court's rates.*

8. In response, the Respondent filed a statement of defence and counter-claim, where he denied the contents of the plaint. He denied being the Appellant's agent, stating that he sought out the suppliers, applied for the delivery permit and interacted with the sugarcane farmer in his individual capacity of a businessman.

9. He denied the claim that motor vehicle KBK 395 N was part of the business investment and contends that KAX 346G and KAH 501 W were purchased through a joint effort, and refuted the allegation that he had denied the Appellant access and control of the suit motor vehicles.

He asserted that the Appellant had unlimited access to all transactions relating to the business and maintained that profit was shared equally.

10. He maintained that they had an intimate relationship with the Appellant and that her purchasing of the clothes, the dressing accessories, communication gadgets and housing to the sum of Kshs. 840,740.00/= was a form of appreciation for their relationship. In his counterclaim, he averred that the business was a joint venture and that he is entitled to half the proceeds of the business
11. The trial court, in its judgment dated 30<sup>th</sup> May 2024, considered the parties' evidence and testimony and dealt with the orders sought by the parties.
12. On the first prayer, the trial court held that the Appellant had failed to establish that she had employed the Respondent as the agent since the Respondent produced permits which were issued to him. The court held that there was no evidence that the business was a joint venture as the names in the bank accounts belonged to the Respondent and not the business.

13. The court granted the permanent injunction restraining the Respondent from interfering, stalking, or threatening the Appellant. On the Appellant's prayer for a lawful lien over the credit balances in the defendant's bank account, the court found there was no evidence that the business was jointly owned. The evidence was that the business belonged to the Respondent. Thus, they could not even liquidate the Respondent's bank account as there was no established agency relationship as the permit was in the name of the Respondent which showed that he operated the business.
14. On the ownership of the motor vehicles, the court relied on the sale agreement, holding that the KBK 395N Toyota Noah was in the name of the Respondent, and there was no contrary evidence that the Appellant owned the vehicle.
15. He held that KAH 501 W was purchased by the Respondent at Kshs. 300,000/= and the Respondent paid Kshs. 270,000/=, and he had produced a sale agreement to support his case. The trial magistrate finally held that the motor vehicle registration No. KAX

346 G Mitsubishi Fuso was jointly purchased by the two parties, and they had to agree on its fate.

16. The Appellant, being dissatisfied with the judgment of Hon. Atanga Thomas Obutu, appealed the finding based on the following grounds;

- a) *THAT the learned trial magistrate erred in law and in fact in disregarding the evidence of PW2, PW3 and PW4 and by doing so made an erroneous decision*
- b) *THAT the learned trial magistrate erred in law and fact in failing to analyse and decide on all the issues it had highlighted for determination, thereby rendering a decision without giving reasons, and by doing so made an erroneous decision.*
- c) *THAT the learned trial magistrate erred in law and fact in totally disregarding the Appellant's pleaded claims for damages and loss, the sugarcane business profits, image improvement funds and injected business capital which she solely provided and by doing so made an erroneous decision.*
- d) *THAT the learned trial magistrate erred in law and fact in finding that the Appellant had not established that there existed an oral agency business for supply of*

*sugarcane between her and the Respondent when in fact the Respondent had admitted to the existence of the business for supply of sugarcane as a joint venture and vide a counterclaim sought to be awarded half of the profits.*

- e) THAT the learned trial magistrate erred in law and fact in making a finding that the Appellant had claimed that she used to pay the Respondent commission despite the absence of evidence to support such a finding.*
- f) THAT the learned trial magistrate erred in law and fact in finding that motor vehicle registration number KAH 501 Isuzu had been purchased by the Respondent solely, that the Respondent had produced a sale agreement in support of the purchase and that the motor vehicle belonged to the Respondent solely when in fact the Respondent had not only admitted that motor vehicle registration number KAH 501 Isuzu was purchased by sugarcane business finances but also failed to produce any sale agreement before the trial court and by so finding relied on non-existence evidence and by doing so made an erroneous decision.*

- g) THAT the learned trial magistrate erred in law and fact in failing to address the issue of trust that had been pleaded by the Appellant and by doing so made an erroneous finding that motor vehicle registration number KBK 395N Toyota Noah was solely owned by the Respondent and that motor vehicle registration KAX346 G Mitsubishi Fuso was jointly owned by the Appellant and the Respondent when in fact it is the Appellant who had financed their entire purchase.*
- h) THAT the learned trial magistrate erred in law and in fact in disinheriting the Appellant's evidence on payment of the entire purchase price for KBK 395 N Toyota Noah and KAX 346 G Mitsubishi Fuso and by doing so made an erroneous finding.*
- i) THAT the learned trial magistrate erred in law and fact by misapprehending the nature of the Appellant's claim.*
- j) THAT the learned trial magistrate erred in law and in fact in failing to consider adequately or at all the submissions that had been made by the Appellant and the authorities that were tendered, in so doing, arrived at an erroneous decision.*

17. The Appellant prays that the appeal be allowed and the learned trial magistrate on ownership of the motor vehicles, credit balances and liquidation of bank accounts be set aside.
18. The appeal was canvassed by way of written submissions.

### **Appellant's Submissions**

19. In support of her appeal, the Appellant submits that she operated with the Respondent as her agent. She avers that the business commenced around 2020 during the COVID-19 pandemic, and due to the travel restrictions, she was not able to be physically involved in the establishment of the business, and she had to delegate the business management, including the acquisition of the business permit, to the Respondent.
20. She maintained that she fully financed the business and even purchased motor vehicles to run the business effectively and even managed to revamp the image of the Respondent when he financed his wardrobe change to improve future business but that later the Respondent turned against her when she demanded an

account of the business operations and financials forcing her to file the claim at the lower court.

21. She sets out several grounds for determination, and in the first ground, she addresses the issue of whether she solely financed the purchase of the two motor vehicles that are KBK 395N Toyota Noah and KAX 346 G Mitsubishi Fuso. She avers that she bought the KBK 395 Toyota Noah at KShs. 530,000/= and KAX 346G Mitsubishi Fuso at Kshs. 730,000/= and further that she paid for the Mitsubishi Fuso using RTGS and Mpesa, and the KBK 395N Toyota Noah was paid via the Respondent's KCB bank account 1212327691, as was corroborated by PW2 and PW3, who were present when the motor vehicles were purchased and confirmed that she made payments.
22. According to the Appellant, although the Respondent claimed that he had purchased KAX346G Mitsubishi Fuso at Kshs. 750,000/= alone, the record showed that it was purchased through RTGS and Mpesa funds received from her which show she financed the purchase of the vehicle. In respect to KBK 395 N Noah, she asserts that from the record, on 3<sup>rd</sup> March 2020,

when the vehicle was purchased, she transferred Kshs. 600,000/= to the Respondent's KCB account No. 1212327691.

23. She submits that the Respondent failed to provide documentary evidence that he had solely purchased the vehicles, and further, from his evidence, he did not provide the clear amount used of the purchase of the motor vehicles, and the trial court erred in failing to consider the evidence of PW2 and PW3, who were the brokers for motor vehicle registration number KBK 395 N Toyota Noah and KAX 346 G Mitsubishi Fuso.
24. The Appellant contends that she financed the entire establishment of the raw sugarcane delivery business by injecting the initial working capital and financing the purchase of the motor vehicles for management, transportation and delivery of the raw product to the factories, yet she never benefited from the business. She posits that the Respondent built his financial position through the business and was now vying for an MCA Position.
25. She accuses the Respondent of taking advantage of her trust and unjustly enriching himself by putting the

company's vehicles in his personal name without her authority, considering she solely purchased the vehicles contrary to his allegations.

26. The Appellant submits that she maintained the two motor vehicles KAX 346G Mitsubishi Fuso and KAH 501H Isuzu which were in good condition at the time of purchase but under the control of the Respondent, the vehicles had sustained extensive damages and were even impounded by the police for which she had to meet the costs of repair and further that PW3 was present when the motor vehicle was seized and towed.
27. She submits that despite proof of special damages to the subject motor vehicles through the assessment reports, payment and towing receipts which was corroborated by PW1 and PW3 and despite the Respondent not controverting her claim, the trial court erred in failing to award the amounts under the head.
28. On whether there was raw sugarcane delivery business between her and the Respondent and whether she injected working capital into the company, she relies on her amended plaint where she avers that she they had agreed that she would finance the business and the

Respondent would manage the business, the money was to be deposited in the Respondent's personal account and she would have unlimited access. She contests the finding by the trial court that she would pay the Respondent a commission or that the raw sugarcane delivery permits and bank accounts were in the joint names.

29. She avers that notwithstanding the initial working capital of Kshs. 2,351,966, which was payment for the farmers Lilian Musiandlo, Kshs. 1,851,021.00, Ernest Mangula Kshs. 300,525 and Maurice Oduor Kshs. 200,400, and she has not been able to recover her investments and profits as the Respondent has failed to disclose the operations of the business and the business's account records.

30. She avers that the Respondent was a man of meagre means and was not financially capable of financing the business, although in his counterclaim he seeks to be awarded half the profits from the business despite the fact that he never produced any documentary evidence to back his assertion that he funded the business but

only produced copies of records and a logbook for the motor vehicles.

31. According to the Appellant, the Respondent was ordered to provide account and delivery of records of transaction relating to proceeds of sale of raw sugarcane made via the business permit and bank accounts under his name which he failed to while she was able to plead and proof she purchased the motor vehicle and financed the raw sugar delivery business. She posited that the Respondent orchestrated the failure of the sugar delivery business, withheld the funds and profits and was therefore not entitled to a share of the business.
32. The Appellant further submits that she had advanced the Respondent Kshs. 840,740 to improve his image for the benefit of the business, a fact that the trial court failed to acknowledge and that further, the amount should be awarded to her as the trial court erred in failing to address the claim despite her pleading and proving it.

### **Respondent's Submissions**

33. The Respondent filed his submissions dated 30<sup>th</sup> June 2023 and raised one issue for determination, being whether the appeal has merit. On whether a principal-agent relationship existed, he denies the narrative that he was the Appellant's agent as there was no such agreement expressed or implied. He asserts that all business permits and transactional dealings were handled by himself using his own resources and personal bank account and that he is the one who took lead of the business.
34. In relation to the repairs of the vehicles, he contended that they required maintenance and repairs and which were exclusively paid for by the him and the Appellant played no role in maintaining the vehicles.
35. He maintains that he got the business permits from the sugar companies and had the authorisation to operate the business, and that he independently engaged the sub-contractors to supply the raw sugarcane. He denied the allegation that it was ever a joint venture since the bank accounts all belonged to the, and there was no agreement that he was to disclose the running of the business to the Appellant.

36. He finally submits that the Appellant failed to establish on a balance of probability, that there existed a principal-agent relationship with him and that her claim lacked evidentiary support. He avers that the business and the vehicles all belonged to the him and he bore the expenses for maintenance and repair, and the Appellant never proved that she financed the same or demonstrated any beneficial ownership.

### **Evidence in Brief**

37. PW1 Marciana Auma Mumali adopted her witness statement and produced the bundle of documents that he used as evidence in chief (25/2/21 page 1-673- PExh 1-29. During cross-examination, she stated that she was in a business relationship with the Respondent and that the money she had given him was for business purposes and the agreement was that the Respondent was her agent and they were to both benefit from the profit. She stated that she bought the motor vehicle registration number KBK 395 N in March 2020, and she paid Kshs. 600,000/= although her name was not in the sale agreement. She said that motor vehicle

registration number KAX 346G was registered in both their names, and the vehicles were put up to help in the running of the business.

38. During re-examination, she averred that they were strictly in a business relationship with the Respondent for buying and selling sugarcane and that all the monies from the business went to the Respondent's account. She stated that she attached proof that she paid for the motor vehicle registration number KBK 395N and that KAS was paid for by the Respondent, but using the proceeds from the sugarcane business.
39. PW2 was Henry Onzere, who adopted his record statement dated 11/4/2023. During cross-examination, he said that he was the broker for the vehicle KBK and that he went with the Respondent to purchase the vehicle as an agent and that the agreement was between the Respondent, James Amukoya and Gathoni and that it was transferred to the name of the Respondent.
40. PW3 was Gerald Wesonga who adopted his witness statement as his evidence-in-chief. He avers that he was not present when the vehicle was being purchased,

but knew the Appellant as his boss. During re-examination, he stated that he knew the Respondent as he was employed by the Appellant as her agent.

41. PW4 was Kassim Ishmael Musa, who equally adopted his witness statement. During cross-examination, he confirmed that he knew about KAX 346G as he was the broker. He confirmed that the Respondent gave him instructions to purchase the vehicle in the presence of the Appellant, and an agreement was prepared between him and the Appellant.
42. DW1 was James Amukoya, who testified that the Appellant was his wife of 2 ½ years. He denied the claim that the vehicles were solely hers, stating that they did business together in Kibos, Shikunga, Butali and Busia. He stated that he got sugarcane from the farmers. He stated that motor vehicle registration number KBK 395N Noah was registered in his name and asserted that the business accounts were his personal bank accounts.
43. He avers that the relationship between himself and the Appellant started in 2018 after he had already opened the bank account, and that the Appellant operated an

M-Pesa shop. He denied that the Appellant gave him money, stating that the motor vehicle registration number KAH 501 W belonged to his brother, who sold it to him after he paid Kshs. 300,000/=, and that he purchased it together with the Appellant.

44. During cross-examination, he stated that he was already in business when he met the Appellant in 2018. He claimed that motor vehicle registration number KVK 099 was the vehicle he used to do the brick business with. He conceded that they purchased the two lorries KAX 346G together with the Appellant as a family. He stated that the vehicle was brought at Kshs. 750,000/= by the Appellant through her account, but he had contributed to its purchase. He stated that KBK 395 N was purchased by him, but the Appellant transferred the Kshs. 600,000/= to his account

45. He stated that he filed a counterclaim claiming half of the business proceeds and half of the property, although he avers that no evidence was produced that the Appellant was his wife. He claimed that the Appellant never participated in the business, although he had no evidence that he contributed to the business.

### **Analysis and Determination.**

46. As this is a first appeal, this court is guided by the principles in ***Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123***, that an appellate court must reconsider the evidence, evaluate it afresh, and draw its own conclusions, while bearing in mind that unlike the trial court, it did not see or hear the witnesses. In the said case, the Court of Appeal held:-

**“This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it 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 this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some**

**point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally”**

47. I have considered the record of appeal as well as the parties' written submissions, and find the following issues for determination;

*a) Whether the Appellant proved the existence of an agency or business relationship with the Respondent.*

*b) Whether the Appellant proved that she solely financed the acquisition of the motor vehicles KBK 395N, KAX 346G and KAH 501W.*

*c) Whether the Appellant is entitled to the special damages.*

*d) Whether the Appellant proved entitlement to an account, profits, or credit balances held in the Respondent's bank accounts.*

**(a) Whether the Appellant proved the existence of an agency or business relationship with the Respondent**

48. The Appellant avers that she had intended to start an investment venture, and when she conversed with the Respondent, he informed her that he had a good footing in the business and was well versed in the running of the said business, which involved approaching farmers for the raw sugar cane and delivering it to the various factories. He admitted to being able to get the permits to run the business.
49. According to the Appellant, this was an oral agency agreement since she solely financed the business by providing the capital for running the venture and avers that it was convenience since the business was running during the COVID pandemic, which restricted her movement as she was based in Nairobi.
50. The Respondent, on the other hand, denied that it was an agency relationship and claimed that it was a joint venture and he was entitled to an equal share of the business, including all the profits. He further avers that the Kshs. 840,740/=, which the Appellant demanded that she finance his dressing, accessories, and communication was because they were in an intimate

relationship and that it was not an investment in the business.

51. The Appellant avers that there was an oral agreement between the two parties, and as such, the trial court ought not to have dismissed her claim.
52. For an oral agreement to be enforceable, there has to be a preponderance of evidence, which would include circumstantial evidence such as funding patterns and witnesses to corroborate the claim that there was a relationship between the Respondent and the Appellant.
53. An agency relationship may be established expressly or implied through conduct. An implied oral agency can arise where the conduct, words, or circumstances between the parties demonstrate that one party was the agent and was authorised to act on behalf of another, that is, the principal, even though no written or express agreement was made. In ***Lucy Nungari Ngugi & 4 others v National Bank of Kenya & another [2015] eKLR (Gikonyo, J)***, it was held that where there is no express consent to create such a relationship, the same could be implied, from word and conduct, and the parties themselves may not recognize

it as such, and they might even have denounced it. Kenyan courts recognise such relationships when intention and conduct show that agency was reasonably inferred. In ***Mboga (Deceased) v Kenya Forest Service; Nyamwea Mamboleo Advocates (Interested Party) (Cause 2 of 2014) [2024] KEELRC 2677 (KLR) (29 October 2024) (Ruling)***

agency is defined as a **'Fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf subject to his control, and the other manifests assent so to act.'**

54. In the case at hand, the Appellant financed the business. She produced the statement of accounts, including M-Pesa and cash payments, showing how she made payments to the raw sugarcane farmers between July 6, 2020, and August 13, 2020, which totaled Kshs. 2,351,966. This was not controverted by the Respondent.
55. The Appellant further averred that she purchased three motor vehicles: KBK 395N, Toyota Noah and two lorries, KAX 346 G Mitsubishi Fuso and KAH 501 W Isuzu, for

the transportation of the raw sugarcane from the farmers to the sugar factories, being Kibos Sugar & Allied Industries Limited, Busia Sugar Industry Limited and Butali Sugar Mills Limited. She further provided the records of the account proving that she financed and managed the business.

56. PW2, PW3 and PW4 corroborated the Appellant's claim that the Respondent acted as the Appellant's representative at motor vehicle purchases and in sugarcane dealings.

57. The Respondent, on the other hand, claimed that the Appellant was his wife. He claimed that they had entered into a joint venture with the Appellant and averred that he purchased motor vehicles KAX 346 G and KAH 501 H for Kshs. 750,000 and Kshs 300,000 respectively, and bought the KBK 395 N Toyota Noah using his own funds. He admitted that he secured the permits for the business and approached the farmers to secure the raw sugarcane, and the proceeds from the business were transferred to his individual personal bank accounts.

58. The Respondent did not deny the fact that the Appellant funded the business and claimed that it was a joint venture. The burden of proof lay on the Appellant to prove that she was the sole proprietor of the business. As a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (1) of the Evidence Act Cap 80, which provides: **“107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”** and **in the absence of evidence, the assertion collapses. Similarly, in Peter M. Kariuki v Attorney General & 3 others [2014] eKLR**, the High Court held that a mere denial or counter assertion without supporting evidence cannot displace cogent documentary and oral evidence tendered by the opposite party.
59. The Appellant’s evidence that she was the initiator of the process to acquire the motor vehicles was corroborated by her witnesses, PW2, PW3 and PW4.

However, she was unable to explain how she entrusted such a capital intensive business and business assets to the sole hands of the Respondent. She also failed to tender evidence of payment of agency commission to the Respondent to prove that he was merely her agent. In my mind, the Respondent was more than an agent, as he ran the business as if he was the individual owner. I find the Appellant's conduct towards the Respondent in respect to management of the business at odds with her assertion that he was a mere agent.

60. The Respondent, on the other hand, claimed that they were in a joint venture, although he never produced any documentary evidence that he financed the business or that he provided the capital to start the business. There was no bank statement, Mpesa records or a single witness that he financed the business or paid the farmers from his own funds, to support claim that he was entitled to half the proceeds from the business. Further despite claiming that the said business was a family venture, and that they were married with the Appellant, the allegation was not supported by any evidence to prove so.

61. Despite the absence of written documents, the irresistible conclusion is that the two parties had an oral agreement to jointly conduct the business, referred to by the Respondent as a joint venture, in which the Appellant provided the initial and working capital while the Respondent leveraged his connections to secure the business from the sugar factories and the cane from the farmers. The Respondent was also the one who actively engaged himself in the business and his active engagement and business connections was instrumental to its success.
62. It is my finding that the trial court erred in holding that there was no agency relationship based on the fact that the permits and business accounts were in the name of the Respondent. An agency relationship can indeed be made through an implied oral agreement and supported by the actions and surrounding circumstances and where one is an agent of the other, he owes the principal a fiduciary duty.
63. In ***Waica Reinsurance (Kenya) Limited v Commissioner of Legal Services and Board Coordination (Tax Appeal E543 of 2023) [2025]***

**KETAT 124 (KLR) (7 February 2025)**, it was held that for a principal/agency relationship to exist, there must be a fiduciary relationship where the agent undertakes to act for the principal.

64. A fiduciary relationship imposes duties of utmost good faith, loyalty, and avoidance of conflicts, as affirmed in ***International Air Transport Association & another v Akarim Agencies Limited [2014] KEHC 7523 (KLR)***, where it was noted that fiduciary relationships may arise in contractual contexts requiring disclosure and accountability.
65. In ***KCB Bank Limited v Odhiambo t/a Karo Wholesalers & another [2023] KEHC 17948 (KLR)***, the court emphasised that an agent has a fiduciary duty to the principal, which includes full disclosure and non-enrichment at the principal's expense.
66. A joint venture partner is deemed an agent of the other partner even if the business is in the agent's sole name. The two parties herein were jointly carrying out the case business with a view to profit. Their conduct from the outset is that of partners and not of a proprietor-agent relationship notwithstanding the fact that the

Respondent was carrying out the business in his sole name. The trial court's finding that the business belonged solely to the Respondent was against the weight of the evidence and is hereby set aside.

67. By refusing to render accounts from November 2020 despite repeated demands, the Respondent clearly breached his fiduciary duties of loyalty, disclosure, and accountability

**(b) Whether the Appellant proved that she solely financed the acquisition of the motor vehicles KBK 395N, KAX 346G and KAH 501W**

68. The third issue for determination is whether the Appellant financed the purchase of the motor vehicles. The Appellant testified that she bought a motor vehicle registration number KBK 395N Toyota Noah at KSHS. 530,000. She produced evidence of transferring Kshs. 600,000/= directly into the Respondent's KCB Account No. 121327691 on the very day the vehicle was purchased. PW2, Henry Onzee, the broker, confirmed that the Appellant had paid on 3<sup>rd</sup> March 2020 from Muchui Anampiu for Kshs. 530,000 paid by the Appellant to the Respondent.

69. The Respondent's defence stated that he bought the motor vehicle KBK 395 N, which was registered in his name and so was the logbook, although during cross-examination, he confirmed that the Appellant who transferred the Kshs. 600,000 to his KCB bank account No.1212327691 on the day of the transaction. He never produced any evidence to prove he funded the purchase of the said vehicle.
70. The trial court relied solely on registration in the Respondent's name to hold that he was its owner. However, I hold that on a balance of probabilities, it was the Appellant who proved that she had financed the purchase of the motor vehicle KBK 395 N. The trial court, therefore, erred in dismissing her claim.
71. Regarding the second motor vehicle, KAX 346G Mitsubishi Fuso, the Respondent claimed that he had paid Kshs. 730,000 for it, and equally alleged that the Appellant financed part of the purchase price. The sale agreement did indicate that the two were the buyers. The Respondent claimed he had paid Kshs. 730,000/=, but he never produced any documentary evidence to prove he had purchased the lorry. The vehicle was

registered jointly, but the Appellant tendered RTGS and M-Pesa statements showing she paid the full purchase price of approximately Kshs. 730,000/-.

72. PW4 Kassim Ishmael Musa, the broker and driver, testified that the Appellant gave the instructions and made the payments in his presence. The Respondent admitted under cross-examination that the lorries were bought as a family, and KAX 346G was purchased at Kshs. 750,000/= and that Kshs. 730,000/= came from the Appellant's account, and he also contributed, although he did not recall when he gave the money. With no evidence that he contributed towards the purchase of the KAX 346 G Lorry, the Respondent could not claim joint ownership. On the motor vehicle KAH 501W Isuzu, the Respondent claimed he bought this vehicle from his brother for Kshs. 300,000/- and paid Kshs. 270,000/- himself. He told the trial court that he had a sale agreement to prove this. Astonishingly, no such sale agreement was produced in evidence, nor was the alleged brother called as a witness.

73. The Appellant, on the other hand, pleaded and proved that this lorry was purchased using proceeds of the

sugarcane business and was impounded while in the Respondent's possession, and that she paid towing, repair, and release fees, which were supported by receipts from rescue masters, Reagent Automobile Valuers & Assessors Ltd and PW3's testimony and witness statement.

74. The Respondent himself claimed under cross-examination that the lorries were brought through the business and claimed that they belonged to the family meaning himself and the Appellant.

75. In the absence of the alleged sale agreement and any proof of independent funding towards purchase of the motor vehicle, the Respondent's claim collapses. In all three instances, the Respondent's defence amounted to bare denials and unsubstantiated assertions. He admitted receiving the Appellant's money for the express purpose of acquiring the vehicles to facilitate the business, yet failed to rebut the overwhelming documentary and oral evidence of sole payment. The trial magistrate fell into grave error by treating registration as conclusive and by disregarding the binding authorities on beneficial ownership.

76. In **Juletabi African Adventure Limited & Another v. Christopher Michael Lockley [2017] KECA 118 (KLR)**, the Court of Appeal held that a resulting trust automatically arises in favour of the person who provides funds for the purchase of an asset and rendered itself as follows:-

**“...a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial. It is common ground that all the purchase money for both the vehicle and the parcel was advanced by the respondent. The parcel and vehicle were therefore held in trust for the respondent by the 1<sup>st</sup> appellant.”**

77. Accordingly, I find that the trial court misdirected itself in holding that the Respondent and Appellant had a joint ownership of the two lorries KAX 346G and KAH 501 W and that he solely owned the motor vehicle registration KBK 395N. I hold that the Appellant is the sole beneficial and therefore the absolute owner of motor vehicles registration numbers KBK 395N Toyota

Noah, KAX 346G Mitsubishi Fuso. The Respondent holds the logbooks on a resulting trust for the Appellant due to their fiduciary relationship. In respect to motor vehicle registration No. KAH 501W Isuzu Lorry, the evidence was that it was purchased with proceeds from the business.

**(c) Whether the Appellant is entitled to the special damages**

78. Regarding the claim for special damages for the failure by the Respondent to properly use, handle or maintain in good condition, motor vehicles registration numbers KAX 346G and KAH 501W, the Appellant did not adduce any evidence of misuse or improper handling. The subject motor vehicles were being used for the delivery of cane sugar. The constant use would be expected to naturally result in wear and tear. There was no evidence that the resultant breakdown of the vehicles were the result of deliberate action.

79. Regarding the claim for image improvement expenses of Kshs. 840,740.00, there was no nexus established between the improvements and the business. What is

evident is that the parties enjoyed some relationship far above that of an ordinary partnership and that could be what compelled the Appellant to improve the Respondent's image.

**(d) Whether the Appellant proved entitlement to an account, profits, or credit balances held in the Respondent's bank accounts.**

80. On whether the Appellant proved entitlement to accounts and or profits that were made in the business. The Appellant pleaded that the business was financed and operated through the Respondent's bank accounts, and she never received profits. Courts have consistently held that where a fiduciary or business relationship exists, an account must be rendered.

81. The trial court's holding that the Appellant failed to prove that there was joint business, is a strange finding in the face of the Respondents assertion. As analysed above, that finding was erroneous. I find that the Appellant was entitled to accounts by virtue of the joint business between her and the Respondent. However, ordering the liquidation of the Respondent's accounts can only be done after accounts are taken.

82. In **Peter Kihariri Mutahi & Another v. Weru Gitonga & 3 others [2025] KEHC 7789 (KLR)** the court having held that the Respondents were in breach of a joint venture contract that had only been signed by one party; declared that the Respondents were in breach of the fiduciary duty owed to the Appellants and awarded the Appellants the sums paid as capital injection into the joint venture business.
83. Concerning the submissions that the respondents ought not to benefit from the joint venture business because he acted in breach by withholding the funds for his own use, this was in my view an afterthought. Be that as it may, in the event the accounts reveal that the Respondent did indeed divert the funds for his own use, then the court can issue the necessary directions. Concerning the claim for net profit of Ksh. 265,953.70, the same shall await the accounts.
84. Accordingly, I make the following orders:
- a) The appeal is allowed.
  - b) The judgment of Hon. A.T. Obutu delivered on 30th May 2024 is hereby set aside.

c) This Court substitutes the said judgment with the following;

- i. It is hereby declared that the Appellant and Respondent engaged in a joint sugarcane delivery business between 2019 and 2021, and the Respondent owed the Appellant a fiduciary duty to account.
- ii. The Respondent shall within 45 days, render a full account of all business proceeds, expenses, and profits relating to the sugarcane business conducted through the permits and bank accounts as prayed in paragraph 1 of the further amended plaint.
- iii. It is hereby declared that motor vehicle registration No. KBK 395N Toyota Noah and KAX 346G Mitsubishi Fuso belong to the Appellant and the Respondent holds the same in trust for the Appellant. NTSA is therefore ordered to register a transfer of the same in favour of the Appellant.
- iv. Motor vehicle registration number KAH 501W forms part of the business assets.

- v. The permanent injunction issued by the trial court restraining the Respondent from harassing the Appellant is upheld.
- vi. The Appellant shall have the costs of the appeal.
- vii. Costs of the suit in the lower court to abide outcome of the accounts.

Dated, signed, and delivered at Kakamega, this 28<sup>th</sup> day of November 2025.

**A. C. BETT  
JUDGE**

**In the presence of:**

No appearance for the Appellant

Ms. Mideva holding brief for Nechesa Maina for the Respondent

Court Assistant: Polycap