



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kissinger v Kengwara & another (Civil Appeal E046 of 2023)
[2025] KEHC 18957 (KLR) (19 December 2025) (Judgment)**

Neutral citation: [2025] KEHC 18957 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL E046 OF 2023
TA ODERA, J
DECEMBER 19, 2025**

BETWEEN

HENRY KIMONDE KISSINGER APPELLANT

AND

NATHAN QADAFI KENGWARA & ANOTHER RESPONDENT

*(Being an appeal against the Judgment dated 3rd May 2023 in Kisii CMCC
E 317 of 2016- Henry Kissinger Kimonge v Nathan Q Kengwana & Another.)*

JUDGMENT

1. The appellant filed the plaint dated 27.5.2016 in the lower court seeking for judgment against the respondents for:
 - a. Kenya Shillings Three Million (Kshs.3,000,000/=).
 - b. Costs of and incidental to this suit.
 - c. Interest on (a) and (b) above at court rates.
 - d. Any other relief this Honourable Court deems fit for and just to grant.
2. The facts of the case are that the appellant entered into an oral partnership agreement with the 1st respondent 50 % shares in Texas bar, restaurant and Discotheque (referred to as Texas Club) at Kshs. 3,000,000/=. The appellant deposited the consideration in the bank account of no. 0091126087 Navan Hire + Taxi services which he said was owned by 2nd respondent i.e Navana Tours and travels Limited. The parties later differed and the appellant demanded a refund of his Kshs 3,000,000/= and hence he filed the suit in the lower court. The 1st respondent does not deny that the appellant paid Kshs. 3,000,000/= being the value of a half share of the business. He however said that the business went under due to difficult financial times. The 2nd defendant pleaded and lead evidence to the effect that it



had no privity of contract with the appellant as it had already sold the business to the 1st respondent before he entered into the agreement with the appellant. The 1st respondent admits that the appellant contributed Kshs, 3,000.000.00 towards the business and said the business collapsed due to economic factors.

3. The trial magistrate heard the case and dismissed it for want of jurisdiction on the grounds that the partnership Act defines the court as the “High Court. Also, that the jurisdiction of magistrate’s court jurisdiction of the court in partnership matters is capped at Kshs. 300,000/= “ while relying on the case of Lilian S vs Caltex (Kenya) Limited 1989 KLR.
4. The appellant filed the instant appeal against the judgment of Hon. P.Mutai (PM) on the following grounds:
 - a. That the Learned Trial Magistrate erred in law and in fact in finding that the Appellant and the Respondent were in a Partnership when there was no evidence in proof of the existence of the same.
 - b. That the Learned Trial Magistrate totally misconstrued and/or misapprehended the claim as had been presented by the Appellant as against the Respondents.
 - c. That the Learned Trial Magistrate erred both in law and in fact in failing to hold that even though the parties had expressed an intention to form a partnership, the same never materialized and/or actualized.
 - d. That the Learned Trial Magistrate wholly misapprehended the law in finding that it did not have pecuniary jurisdiction when it was evident that the provisions of the Partnership Act were not applicable to the nature of the dispute presented before him.
 - e. That the Learned Trial Magistrate erred in law and in fact in not making a finding that the money advanced to the respondents were in the form of a soft loan.
 - f. That the Learned Trial Magistrate fundamentally and grossly erred in dismissing the Appellant’s suit.
 - g. That the Learned Trial Magistrate grossly and fundamentally erred in not proceeding to assess the amount of damages that the Appellant ought to be awarded had his suit succeeded.
 - h. That the Learned Trial Magistrate grossly and fundamentally erred when he failed, refused and/or neglected to comprehend, appreciate and apply the provisions of Section 1, IA, 1B, 3 and 3A off the *Civil Procedure Act*.
 - i. That The judgment of the Learned Trial Magistrate has occasioned a failure of justice and/or resulted in a gross miscarriage of justice.
5. The Appellant has prayed that this Honourable Court allows this appeal, sets aside the judgment of the lower court and in its place, enters judgment for the Appellant as prayed in the plaint dated 27th May 2016.

The duty of the court.

6. This is a first appellate court and it has a duty to re-evaluate the entire evidence on record and arrive at its own determination on the law and facts bearing in mind that it neither saw nor heard the witnesses during their testimony as per Section 78 of the *Civil Procedure Act* (Cap 21)(see the case of Selle &



another v Associated Motor Boat co. Ltd.& others (1968) EA 123 and in Peters v Sunday Post Limited (1958) EA 424.

Burden of proof.

7. This is a civil matter and it is trite law that the burden of proof in Civil cases is on a balance of probability as held in the cited case of James Muniu Mucheru v National Bank of Kenya Ltd 120191 eKLR, the Court stated as follows: "Indeed, it is settled law that in civil cases the standard of proof is on a balance of probability. Also, in Miller —vs- Minister of Pensions (1947) 2 ALL ER 372, Lord Denning held that: -

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained was heard and the learned trial magistrate dismissed the case for want of jurisdiction on the grounds that the partnership Act defines the court as the “High Court. Also, that the jurisdiction of magistrate’s court jurisdiction of the court in partnership matters is capped at Kshs. 300,000/= “ while relying on the case of Lilian S vs Caltex (Kenya) Limited 1989 KLR.

8. I have seen the record of the lower court and their respective submissions. The issues for determination are as follows;
- a. Whether the Magistrate’s court had jurisdiction to hear and determine this matter and if so.
 - b. Whether the appellant proved his case on a balance of probability

Whether the Magistrate’s court had jurisdiction to hear and determine this matter

9. It is the case of the appellant that this case is based on [sale of goods Act](#) and thus the court has jurisdiction to hear and determine it. The 1st respondent submitted that the trial court had no jurisdiction to hear the case by virtue of the [Partnerships Act](#), 2012. Section 2 of the partnership Act defines the Court as follows: -

“Court” means the High Court or, where the gross assets of a partnership do not exceed three hundred thousand shillings, the Resident Magistrate’s Court.”

Partnership as per section 2 of the Act is defined as - "partnership" means the relationship which exists between persons who carry on business in common with a view to making a profit; "partnership agreement" means an agreement between, persons carrying on business in common with a view to making a profit; "partnership document"

10. Section 68 - (1) of the Act provides as follows -A person who wishes to register a partnership shall deliver to the Registrar an application for registration together with a statement specifying—(a)the name under which the limited partnership is to be registered;(b)the names and addresses of the proposed general partners;(c)the name of each proposed limited partner and the amount of capital contribution made by the partner to the partnership;(d)the location and address of the proposed registered office; and(e)if the application relates to an existing general partnership, the date of its



formation. Section 69 (3) – provides that -If the partnership to which the application relates was not formed before registration, the partnership is formed when it is registered.

11. It is clear to me from Section 68 (1) and 69 (3) of the *partnerships Act* 2012 that it is not mandatory to register a partnership and that general partnerships are recognized by the law. Though the appellant says he bought 50 % of the business and he submitted that *Sale of Goods Act* applies to the agreement. In his evidence kept referring to the business venture as a partnership and on cross examination he even admitted he participated in the management of it. This was a Bar, restaurant and Discotheque business as per the acknowledgment dated 5.11.14. It is clear from the foregoing that the venture was a general partnership as it was not registered.
12. The Appellant's suit was for a sum of Kshs. 3,000,000.00, which he contributed to the business as 50 % of the capital. This is above the sum of pecuniary Jurisdiction of the Magistrates Courts under the Act which is limited to Kshs. 300,000.00. Section 2 of the Act also defines the court as High court.
13. In the cited case of Samuel Kamau Macharia vs KCB & 2 Others, Civil Application No.2 of 2011 the Supreme Court held 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 Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in the Matter of the Interim Independent Electoral Commission (Applicant), Const. Apple No. 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*.

Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a Court or tribunal by statute law.”

Also, in celebrated the case of The Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd (1989) KLR 1 at page 14-15, Nyarangi J. stated:

“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 continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds that it is without jurisdiction.

14. It is also trite law that that ex nihilo nihil fit (“Nothing comes from nothing as was held in the cited case of Macfoy V United Africa Co. Ltd [1961] 3 All E.R. 1169 where Lord Denning held that; ...if an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded



on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

15. Jurisdiction is the core of every case and it is donated to courts by the constitution or statute. Where the court has no Jurisdiction to hear a matter then it must cease handling the matter it. It is clear that the Magistrate's court had no jurisdiction to deal with the matter by matter by virtue of Section 2 of the partnerships Act 2012 as the value of the business was Kshs. 6,000,000.00 and the claim was for Kshs, 3,000,000.00 as rightly found by the Learned Trial Magistrate.
16. I however noted that upon finding that he had no jurisdiction in the matter, the Learned Trial Magistrate proceeded to dismiss the matter while it was not determined on merit which was an error on his part as the matter could have been struck out in the circumstances. The appeal thus partly succeeds on the issue of dismissal and I substitute the order for dismissal with that of striking out of the suit. Each party will bear its own costs.

30 days right of appeal.

T.A ODERA

JUDGE

19.12.25

Delivered virtually Via teams Platform on this 19th day of December 2025 in the presence of:

Onsongo for 1st Respondent and hold brief for Ken Omollo for 2nd Respondent Appellant absent

Court Assistant Matiko

