

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
(CIVIL DIVISION)
HCCA NO. E101 OF 2025**

DELSON MOSES BENJAMINAPPELLANT

VERSUS

SATGURU TRAVEL MANAGEMENT COMPANYRESPONDENT

JUDGMENT

Introduction

1. In a statement of claim dated 22nd January 2025, the respondent sought judgment for the sum of Kes 739,000, comprising Kes 609,000 allegedly diverted by the appellant from the company to his personal account by fraudulent means and Kes 130,000 on account of a personal loan advanced on 21st June 2024. The respondent also sought interest and costs from June 2024 to the date of payment in full.

2. When served, the appellant filed a statement of response dated 12th February 2025 in which he denied indebtedness. The appellant also denied the small claims court's jurisdiction on the grounds that the respondent sought to prosecute criminal complaints and employment disputes before the small claims court. It was further stated that the claim was marred by prejudices, non-disclosures, and inconsistencies, and was ambiguous as to when the cause of action arose.

3. The appellant thus sought to have the claim dismissed with costs.
4. In a judgment delivered on 28th February 2025, the small claims court deemed the appellant's defense a bare denial. The court also found that there was nothing wrong with a party pursuing a civil claim alongside a criminal cause. In doing so, the court below relied on the decision of Ngaah, J, in **Alfred Lumiti Lusiba v Pethad Pank Shantilal & 2 others [2016] eKLR**, in which it was held that civil and criminal cases involving the same parties could be prosecuted concurrently.
5. The learned adjudicator, the Hon Gatambia Ndungu, found that the evidence of the respondent was credible, reliable, and probable and entered judgment for the respondent in the sum of **Kes 739,000**. The court made no orders as to costs in view of the provisions of section 3 (3) (a) and 33 of the Small Claims Court Act.

The Appeal

6. The respondent was aggrieved by the decision and filed the instant appeal. The memorandum of appeal dated **27th March 2025** raises 3 grounds of appeal, *to wit*: -
 - a. That the learned magistrate/adjudicator erred in law in finding that the claimant had proved the allegation of fraud, yet there were not specifically pleaded and strictly proved as required in law;

- b.** That the learned magistrate/adjudicator erred in law in finding that the respondent's defence contained mere denials, and did not raise triable issues; and
- c.** That the learned magistrate/adjudicator erred in law in awarding the claimant Kes 739,000 together with costs of the claim.

The appellant thus sought to have the judgment of the lower court set aside and to be awarded costs.

Hearing of the Appeal

- 7.** The appeal was canvassed by way of written submissions pursuant to the directions issued by this court on **13th May 2025**.

Submissions of the Appellant

- 8.** The appellant filed written submissions dated 5th June 2025. The appellant identified issues for determination as being: -
 - a.** Whether the respondent set out particulars of fraud and strictly proved them against the appellant;
 - b.** Whether the appellant's defence dated 12th February 2025 contained bare denials;
 - c.** Whether the honorable court should allow appellant's appeal; and
 - d.** Who shall bear the costs of the appeal?
- 9.** Counsel submitted in respect of the first issue that the respondent herein alleged fraud in the court below and ought therefore to have proved it. He

urged that the respondent did not prove fraud, as the evidence was not exact, definitive, or unequivocal. He further urged that fraud must be specifically pleaded and strictly proved. He stated that there was nothing to connect the loss of funds to the appellant. He relied on the cases of **Kuria Kiarie & 2 others v Sammy Magera [2018] KECA 467 (KLR)** and **Kinyanjui Kamau v George Kamau [2015] eKLR**.

10. On the question as to whether the defence was a sham or a bare denial, counsel submitted that it wasn't. Mr Kahindi, learned counsel for the appellant, submitted that the court did not properly analyze the specific issues raised in the defence. In support of the said contention, counsel for the appellant relied on the case of **Desbro (Kenya) Limited v Polypipies Limited & another [2018] KEHC 455 (KLR)**, where it was held that: -

“14. I am alive to the fact, that striking out of a suit or defence is a jurisdiction, which a court should exercise sparingly and in a clear and obvious case that the defence raised by the Defendant is a mere smoke screen meant to divert the court’s attention to the real question in issue and cannot amount to a prima facie defence warranting judicial examination or trial. That, unless the defence is sham, vexatious, frivolous, and an abuse of the court process, a party to a civil litigation should not be deprived of their right to have their day in court and have the suit determined in a full trial. The court should act cautiously and carefully, consider all facts of the case without rushing to embark on striking out the defence which otherwise raises triable issues in respect of the would-be action of the case.”

11. Counsel for the appellant contended that the question as to how much money was actually lent, when the cause of action arose, and the specific months of nonpayment were triable issues that warranted a thorough interrogation by the court and could not be dismissed as mere denials.
12. Counsel submitted that the appeal should be allowed. He urged that, had the court below properly analyzed the evidence, it would have found that the case was not proved, as the respondent did not present any iota of proof in support of its case against the appellant herein.
13. On costs, counsel urged that it should follow the events. Mr Kahindi, learned counsel for the appellant, relied on the case of **Rai & 3 others v Rai & 4 others [2014] KESC 31 (KLR)**, where it was held that: -
- “It emerges that the award of costs would normally be guided by the principle that “costs follow the event”:** the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by the ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.”

14. The submissions of the respondent are dated 1st July 2025. In the said submission, counsel for the respondent urged that the appellant admitted indebtedness at page 18 of the Record of Appeal. In documents found on pages 110 to 114 of the said record, he also admitted to misappropriating funds. She contended that since there was an admission, the respondent was not under a duty to discharge the burden of proof.
15. Counsel for the respondent further submitted that the appeal was instigated by the process of execution. Relying on the case of **Machira t/a Machira & Co advocates v East African Standard Ltd [2002]eKLR**, it was urged that a successful litigant is entitled to the fruits of a judgment in its favour. Counsel submitted that the respondent's evidence was uncontroverted.
16. Regarding the criminal proceedings, it was urged that civil and criminal proceedings could proceed concurrently. In support of the said contention, reliance was placed on the case of **James Mutisya & 5 others v Alphayo Chimwanga Munala & 2 others [2021] eKLR**.
17. Counsel thus prayed that the appeal be dismissed with costs.

Analyses of the Law

18. I have perused the record of appeal, the documents contained therein, as well as the submissions and the authorities filed by the parties in support of or against the appeal. I note that this is a first and only appeal.

That being the case, the general rule is that the court is under a duty to reevaluate and reassess the evidence and draw its own conclusions. It must, however, keep at the back of its mind the fact that the trial court, unlike this court, had the advantage of observing the demeanor of the witnesses and hearing their evidence firsthand.

19. In the case of **Selle & another v Associated Motor Boat Company Ltd and others (1968) EA 123**, the Court of Appeal for Eastern Africa held as follows: -

“This court is not bound, necessarily, to accept the findings of fact by the court below. An appeal to this court is by way of a retrial, and the Court of Appeal is not bound to follow the trial court’s finding of fact if it appears either that it failed to take into account particular circumstances of probability or if the impression of demeanor of a witness is inconsistent with evidence generally.”

20. Further, in the case of **Peters v Sunday Post Ltd (1958) EA 424**, the court held that: -

“It is a strong thing for an appellate court to differ from the findings on a question of fact of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution. It is not enough that the appellate court might have come to a different conclusion...”

21. I note that the court below proceeded by way of documents only, pursuant to section 30 of the Small Claims Court Act, and that the parties made written submissions which the learned adjudicator considered.

22. What then are the issues in this appeal? In my view, the issues identified by the appellant are germane. I shall adopt them in this judgment.

These are: -

- a. Whether the trial court erred in not dismissing the claim on account of want of proper particulars and failure by the respondent to strictly prove them;
- b. Whether the defence of the appellant was a bare denial;
- c. Whether the appeal should be allowed; and
- d. Who should pay the costs?

I will look at each of these issues in turn.

23. Regarding issue number 1, I note that in the statement of claim, the respondent averred that: -

“The claimant further avers that the decision to dismiss /terminate the respondent was reached following investigations into his involvement in fraudulent activities within the company’s finance department, where the respondent illegally and fraudulently diverted Kes 609,000 to his personal account.”

In paragraph 10 of the statement of claim, it was stated that the appellant reached out to the respondent seeking permission to repay the suit amount by instalments.

24. I am in agreement with the submissions that the particulars of fraud must be specifically pleaded and strictly proved. In the case of **Laisu & 2 others v Sharif & another [2024] KEHC 15512 (KLR)**, Githinji J quoted with approval the holding in *Armitage v Nurse* [28] by Millett L.J. where his Lordship expressed himself as follows: -

“In order to allege fraud, it is not sufficient to sprinkle a pleading with words like “willfully” and “recklessly” (but not “fraudulently” or “dishonestly”). This may still leave it in doubt whether the words are being used in a technical sense or merely to give colour by way of pejorative emphasis to the complaint.” In *Paragon Finance plc v D B Thakerar & Co*, the court stated that it is well established that fraud must be distinctly alleged and also distinctly proved, and that if the facts pleaded are consistent with innocence, it is not open to the court to find fraud. The burden is always on the claimant to prove fraud on the part of the Respondent. The standard of proof where fraud is alleged is high. Though it is the same civil standard of proof on a balance of probabilities, it is certainly higher than the ordinary proof on a balance of probabilities but lower than proof beyond a reasonable doubt. It all depends on the nature of the issue and its gravity. Evidence of especially high strength and quality is required to meet the civil standard of proof in fraud cases. It is more burdensome.”

25. I note that this is an appeal against a decision of the small claims court. The proceedings before the said court are *sui generis*. I say so as

section 17 of the Act calls on the court to have regard to the principles of natural justice. Section 32 states that the court shall not be bound by the rules of evidence.

26. Taking the foregoing into consideration, I am of the view that the particulars provided in the statement of claim were sufficient to inform the appellant of the case facing him and that there were enough documents for him to prepare his defence successfully. In my view, the trial court was right to consider the evidence as it did. That being the case, I cannot fault it at all.

27. On the second issue, I note that it was alleged that the appellant committed fraud. The respondent produced what was alleged to be screenshots of a WhatsApp discussion between the appellant and the respondent. The alleged admission, in my view, required a rebuttal. Rather than do so, the appellant merely denied what was stated.

28. In **Mugunga General Stores v Pepco Distributors Ltd [1987] KECA 68 (KLR)**, the Court stated as follows: -

“First of all, a mere denial is not a sufficient defence in this type of case. There must be some reason why the defendant does not owe the money. Either there was no contract, or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient, therefore, simply to deny liability without some reason given.”

- 29.** I have perused the defence of the appellant. I am unable to disagree with the learned adjudicator that what was before him was a bare denial. In my view, he properly considered the matter and made a correct finding.
- 30.** What flows from the foregoing is that the appeal has no merit. The same is for dismissal.
- 31.** As costs follow the event, I award the respondent the costs of this appeal.
- 32.** It is so ordered.

Dated and signed at Mombasa, this 14th day of January 2026. Delivered virtually through Microsoft TEAMS.

Gregory Mutai
JUDGE

In the presence of: -
Mr Kahindi, for the Appellant;
No appearance for the Respondent; and
Esther – Court Assistant.