

REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL NO. E003 OF 2022

MARY MUTHONI KABOGO.....
APPELLANT

VERSUS

DAKIKA
LIMITED.....RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. F. Muguongo (Resident Magistrate) dated 17.12.2021 arising from Nyeri CMCC No. 350 of 2016.
2. The Memorandum of Appeal dated 7.1.2022 raised the following grounds:
 - a. The learned magistrate erred in law and fact in finding that the Plaintiff's witness, Henry Karanja did not have the capacity to prosecute and testify on the Plaintiff's case.
 - b. The learned magistrate erred in law and fact in finding that the Plaintiff was not entitled to the claim despite confirming the validity of the contract.

- c. The learned magistrate erred in law and fact in allowing the Defendant a loophole to avoid liability despite the colossal sum of money owed to the Plaintiff.
- d. The learned magistrate erred in law and fact in coming up with a non-issue and finding that the Plaintiff had not proved her case on a balance of probabilities.
- e. The learned magistrate erred in law and fact in failing to consider and determine material and substantive questions of law in dispute.
- f. The learned magistrate erred in law and fact in failing to consider the Plaintiff's submissions and evidence.

Pleadings

3. The Plaintiff dated 15.6.2016 claimed a sum of Ksh. 4,000,000/= with 12% interest from the date of the contract, 14.11.2014, plus the costs of the suit.
4. It was averred that on 14.11.2014, the Appellant and the Respondent entered into an agreement where the Appellant invested Ksh. 4,000,000/= towards the renovation and upgrade of the Respondent's hotel known as Central Hotel Nyeri Limited.
5. It was pleaded that it was a term of the agreement that the monthly returns to the Appellant would be Ksh. 200,000/= from 31.1.2015 for the contract period of 10 years.
6. Further, that the Appellant paid Ksh. 1,000,000/= as a down payment, which the Respondent acknowledged, and it was also

agreed that any default would attract a penalty of 10% on the monthly Ksh. 200,000/=.

7. By 17.1.2015, the Appellant had remitted Ksh. 1,240,061.47 via MoneyGram. It was also averred that while the Appellant continued to fulfil his part of the bargain, the Respondent fell in breach of contract by not remitting the monthly obligation of Ksh. 200,000/= and the arrears were Ksh. 5,400,000/= by 31.4.2016.
8. The Respondent entered appearance and filed defence dated 7.11.2016 denying the averments in the plaint. The Respondent specifically denied the existence of a contract stating that it was a mere expression of interest and the proposal was not accepted.
9. It was contended that the hotel business was frustrated by a hostile environment and could not make a return of Ksh. 200,000/= per month.

Evidence

10. During the hearing, PW1 was Henry Mwangi Karanja. He was a donee of the power of attorney dated 5.5.2017. The donor was one Mary Kabogo who lived in Texas, USA. He relied on and adopted the witness statement of Mary Kabogo. He also produced the documents in the list.
11. It was the case of the Appellant that the business did not do well due to insecurity and harsh business environment. On cross examination, it was his case that he was given power of

attorney on 15.5.2019. In 2016 and 2017 there were terror attacks. The directors were not personally affected by the calamity. No amount was paid.

12. Further, he testified that Mary Kabogo's signature was on the power of attorney. He could not tell if Mary failed to sign the power of attorney.

13. The Respondent called DW1, Nami Chepleting Kagwe. She relied on her witness statement. It was her case that she executed an agreement with one Mary Muthoni Kabogo in November 2014. They started business in March 2015 but there were Al Shaabab so the business stalled for 6 months. It was her case that the Plaintiff never came to the country to sign the power of attorney.

14. On cross examination, it was her case that the Appellant only paid Ksh. 3,000,000/= in bits. They had not deliberately refused to refund. It was frustration. The power of attorney was not registered. The hotel was auctioned.

Submissions

15. The Appellant filed submissions dated 20.5.2025. It was submitted that the power of attorney granted powers as anticipated in the Land Registration Act to "ask, demand, sue for and recover, of and from all persons whomsoever and more specifically DAKIKA LIMITED... all such sums of money which now are or may at any time here after become due, owing, payable or belonging to me upon and by virtue of any

contracts, or other securities whatsoever, and in default of payment or delivery or delivery to, use and take all lawful ways and means for recovery therefore for the attachment, ejectment or otherwise also if necessary for and in my name to commerce, prosecute, defend, any actions, suits, at law or equity in any court of Kenya.”

16. The Appellant maintained that in their pleadings, the appellant never raised the issue of lack of capacity or the “nullity” of the power of attorney for want of donee’s signature and its registration.

17. The Appellant submitted that the trial court misapprehended the provision of Article 159 of the constitution where it went all out and violated sub article (2) (d) by openly taking due regard to a technicality which was neither procedural nor warranted.

18. The Respondent filed submissions dated 18.7.2025 by which it was submitted that Henry had no locus standi to prosecute the suit for the Appellant. The power of attorney was not registered and therefore null and void. Reliance was placed on Section 19 of the Stamp Duty Act based on which it was submitted that the power of attorney was not admissible in evidence.

19. It was further submitted that the power of attorney was not registered as required under section 4 of the Registration of Documents Act and as such was void. Reliance was placed on

Francis Mwangi Mugo -Vs- David Kamau Chege (2018)

eKLR where it was held *inter alia* that:

I do not think that capacity is a technicality curable under article 159 of the constitution.....
At the time of filing suit, Francis Mwangi Mugo in my view did not have the capacity because he has not registered the power of attorney.....”

Analysis

20. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a subordinate court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

21. This Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong. In the case of **Mbogo and Another vs. Shah** [1968] EA 93 the court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

22. The duty of the first appellate court was set out in the case of **Selle and another Vs Associated Motor Board**

Company and Others [1968]EA 123, where the Judges in their usual gusto, 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 re-trial and the Court of Appeal is not bound to follow the subordinate Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”

23. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the subordinate court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

24. This court’s the jurisdiction to review the evidence should be exercised with caution. In the cases of **Peters vs Sunday Post Limited [1958] EA 424**, the court therein rendered itself as follows:-

“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...”

25. This court does not have the advantage of seeing and hearing the witnesses as did the lower court, yet it must reconsider the evidence, evaluate it itself and draw its own conclusions.

26. The Appellant urged the court to find that the lower court erred in dismissing the suit. This court is entitled to reevaluate by way of a retrial the pleadings and evidence at the lower court. On the proof of allegations of breach of contract in **Raghibir Singh Chatte v National Bank of Kenya Limited [1996] eKLR** the Court of Appeal stated thus:

“When a party in any pleading denied an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum, or any part thereof, or else set out how much he received. And so, when a matter of fact is alleged with divers circumstances, it shall not be sufficient to deny it as alleged along those circumstances, but fair and substantial answer must be given.” ...

...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.”

27. The burden was with the Appellant to prove the case against the Respondent. On this subject, Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

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.

28. A party who invokes the aid of the law and asserts affirmative of an issue has the burden to prove the matters in issue. In **Anne Wambui Ndiritu -vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334**, the Court of Appeal held that:

“As a general proposition under Section 107 (1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”

29. It follows that the initial burden of proof lies on the Plaintiff, but the same may shift to the Defendant, depending on the circumstances of the case. The burden of prove also

casts upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. In **Evans Nyakwana -vs- Cleophas Bwana Ongaro [2015] eKLR** it was held that:

“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 (i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore, the evidential burden...is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side.”

30. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in **William Kabogo Gitau -vs- George Thuo & 2 Others [2010] 1 KLE 526** stated that:

“In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is

probable than not that the allegations that he made occurred.”

31. Courts have established that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Lord Nicholls of Birkenhead in **Re H and Others (Minors) [1996] AC 563, 586** held that;

“The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.....”

32. The preponderance of probabilities as degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. Furthermore in **Palace Investment Ltd -vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR**, the Judges of Appeal held that:

“Denning J, in Miller -vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-

“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 a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

This burden 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...are equally (un)convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

33. It will be observed that the Respondent submitted that a power of attorney is among the documents that require registration pursuant to Section 4 of the Registration of Documents Act. I have looked at that Section which is drawn as follows :-

4. Documents to be registered:

All documents conferring, or purporting to confer, declare, limit or extinguish any right, title or interest, whether vested or contingent to, in or over immovable property (other than such documents as may be of a testamentary nature) and vakallas shall be registered as hereinafter prescribed:

Provided that the registration of the documents following shall not be compulsory—

(i) any composition deed;

- (ii) *any document relating to shares in a joint stock company, notwithstanding that the assets of such company consist in whole or in part of immovable property;*
- (iii) *any debenture issued by such a company, and not creating, declaring, assigning, limiting or extinguishing any right, title or interest to, in or over any immovable property, except in so far as it entitles the holder to the security afforded by a registered instrument, whereby the company has mortgaged, conveyed or otherwise transferred the whole or part of its immovable property, or any interest therein, to trustees upon trust for the benefit of the holders of such debentures;*
- (iv) *Any endorsement upon or transfer of any debenture issued by any such company*
- (v) *any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest to, in or over any immovable property but merely creating a right to obtain another document, which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest;*
- (vi) *any lease or licence of land for any term not exceeding one year; or*
- (vii) *any document registrable under the provisions of the Government Lands Act (Cap. 280), the Registration of Titles Act (Cap. 281), the Land Titles Act (Cap. 282) or the Registered Land Act (Cap. 300):*
- Provided that, if any such document relates to land registrable under any such Act and also to land not so*

registrable, such document shall also be registered under this Act

34. While the Appellant submitted that the Respondent did not raise the issue of the validity of the power of attorney and locus standi in the defence, the issue could not be available in the first instance because the suit was filed on 13.9.2016 in the name of the Respondent. The introduction of Henry Muregi Karanja as the person prosecuting the suit was made much later, when the power of attorney dated 5.4.2017 was filed, vide the further list of documents dated 11.5.2017.

35. All instruments that seek to declare certain rights or limitations over immovable property must be registered. Thus, a power of attorney that confers upon the donee a right to deal with immovable property must be registered. However, the power of attorney herein did not relate to immovable property. If a document is not registered but requires registration, I do not think one can claim any rights under it unless and until it is registered.

36. Sections 19 and 20 of the Stamp Duty Act provides as detailed below:

19. Non-admissibility of unstamped instruments in evidence; and penalty

(1) Subject to the provisions of subsection (3) of this section and to the provisions of sections 20 and 21, no instrument chargeable with stamp duty shall be

received in evidence in any proceedings whatsoever, except—

(a) in criminal proceedings; and

(b) in civil proceedings by a collector to recover stamp duty,

(2) No instrument chargeable with stamp duty shall be filed, enrolled, registered or acted upon by any person unless it is duly stamped.

(3) Upon the production to any court (other than a criminal court), arbitrator, referee, company or other corporation, or to any officer or servant of any public body, of any instrument which is chargeable with stamp duty and which is not duly stamped, the court, arbitrator, referee, company or other corporation, or officer or servant, shall take notice of the omission or insufficiency of the stamp on the instrument and thereupon take action in accordance with the following provisions—

(a) if the period of time within or before which the instrument should have been stamped has expired and the instrument is one in respect of which a person is specified in the Schedule to this Act as being liable for the stamping thereof, the instrument shall be impounded and, unless the instrument has been produced to a collector, shall forthwith be forwarded to a collector;

(b) in any such case, before the exclusion or rejection of the instrument, the person tendering it shall, if he desires, be given a reasonable opportunity of applying to a collector for leave under [section 20](#) or of obtaining a certificate under [section 21](#);

(c) in all other cases, unless otherwise expressly provided in this Act, the instrument shall, saving all just exceptions on other grounds, be received in evidence upon payment to the court, arbitrator or referee of the amount of the unpaid duty and of the penalty specified in [subsection \(5\)](#), and the duty and penalty, if any, shall forthwith be remitted to a collector with the instrument to be stamped after the instrument has been admitted in evidence.

(4) If any person is empowered or required by any written law to act upon, file, enrol or register a duplicate or copy of any instrument, and if the original of that instrument would require to be duly stamped if acted upon, filed, enrolled or registered by that person, that person may call for the production of the original instrument or for evidence to his satisfaction that it was duly stamped, and no person shall act upon, file, enrol or register any such duplicate or copy without production of the original instrument duly stamped or of evidence thereof.

(5) The penalty on stamping any instrument out of time referred to in paragraph (c) of subsection (3) shall be ten shillings in respect of every twenty shillings and of any fractional part of twenty shillings of the duty chargeable thereon and in respect of every period of three months or any part of such a period after the expiration of the time within or before which the instrument should have been stamped.

20. Stamping out of time

(1) Where an instrument is chargeable with stamp duty under this Act and should have been stamped before a certain event or before the expiration of a certain period, but has not been so stamped, a collector may

give leave for the stamping of the instrument if he is satisfied—

(a) that the omission or neglect to stamp duly did not arise from any intention to evade payment of stamp duty or otherwise to defraud; and

(b) that the circumstances of the case are such as to justify leave being given.

(2) If the collector grants leave under subsection (1) for the stamping of an instrument, the instrument shall be stamped on payment of the unpaid duty including any additional stamp duty and of a penalty of one shilling in respect of every twenty shillings and of any fractional part of twenty shillings of the duty chargeable thereon and in respect of every period of three months or any part of such period after the expiration of the time within or before which the instrument should have been stamped:

Provided that—

(a) the penalty chargeable under this subsection shall not exceed one hundred per centum of the principal duty outstanding; and

(b) the collector the collector may remit the penalty under this section up to a maximum of one million five hundred shillings, but shall not remit any penalty exceeding that amount without prior approval from the Minister.

(3) If any person applying for leave under this section is dissatisfied with the decision of the collector upon that application, that person may require his application to be referred to the Minister, whose decision thereon shall be final for all purposes.

(4) Upon any application for leave under this section, the collector, or the Minister, may require sworn or other evidence in support of the application.

(5) When an instrument has been stamped by leave under this section it shall be deemed to have been duly stamped.

(6) Notwithstanding the provisions of this section, no bill of exchange or promissory note shall, except as provided in sections 21, 22, 34 and 36, be stamped after execution.

(7) In this section, "collector" does not include the Senior Collector of Stamp Duties.

37. From the foregoing sections of the law, there is a difference between the requirement of registration and the requirement to pay stamp duty. Registration is a formal entry of a document in a specified register so that certain rights may pass by such entry or so that the public may be notified of the existence of the said document. Stamping on the other hand is a question of revenue collection by the Government.

38. To this court, the power of attorney herein was not in respect of immovable property. It purported to allow the donee to do certain acts including recovery of what the Respondent owed the Appellant. This could be in this case or any other liability owed to the Appellant.

39. Be that as it may, a power of attorney was not similar to a sale agreement or a lease, whose value is only evidentiary. The power of attorney here, fell under the purview of capacity, for one cannot act for another without having the legal capacity to do so. I hold the view, that before a donee of a power of

attorney could act on a matter, at least that involving immovable property, then he must register that power of attorney before he can allege to have capacity to act. Munyao Sila J (as he then was) in **Francis Mwangi Mugo v David Kamau Gachago [2017] KEELC 2804 (KLR)** stated as follows:

The power of attorney in this instance, is not similar to a sale agreement or a lease, whose value is only evidentiary. The power of attorney here, falls under the purview of capacity, for one cannot act for another without having the legal capacity to do so. I hold the view, that before a donee of a power of attorney can act, on a matter, at least that involving immovable property, then he must register that power of attorney before he can allege to have capacity to act.

40. However, there was no strict legal requirement for a power of attorney relating to movable property to be registered. Registered or not registered, a power of attorney could only gain validity from the time it came into existence or was registered. I do not fathom a power of attorney which, without specifically stating so, would act retrospectively.
41. The question would be when did the power of attorney take effect? The suit herein was filed by the Appellant in her own name. The power of attorney was not specific that Henry Muregi Karanja would prosecute Nyeri CMCC No. 350 of 2016 from which this appeal arose. It alluded to suing for and recovery of money including from the Respondent. It also

stated that the donee would commence, prosecute, defend any suit.

42. In my view, the power of attorney herein did not give the capacity to sue. The suit had already been commenced vide the Plaint and Verifying Affidavit both in the name of the Appellant and the Appellant retained that capacity. There was no specific instruction to taking over this suit. The mandate and capacity remained with the Appellant. The Appellant could not commence the proceedings and along the way abandon them for Henry Muregi Karanja to take over without specific instructions. Therefore, even if this court were to find that the power of attorney was not necessarily invalid for want of registration since it did not relate to immovable property, the suit would still fail for want of capacity to sue. Henry Muregi Karanja testified as a witness for the Appellant but not as a person with the capacity to sue in an existing suit.

43. The Appeal fails.

44. The issue of costs is governed by Section 27 of the Civil Procedure Act, which provides as follows:

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that

the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

45. Costs are generally discretionary. However, the discretion is not arbitrary. The Court of Appeal in the case of **Farah Awad Gullet v CMC Motors Group Limited** [2018] KECA 158 (KLR) had this to say:

"It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

46. Given the circumstances of the case, the Respondent should have costs of the appeal. A sum of Ksh. 135,000/= will suffice.

Determination

47. In the upshot, I make the following orders: -

a) The appeal lacks merit and is dismissed *in limine*.

- b) Respondent should have costs of the appeal of Ksh. 135,000/=.
- c) 30 days stay of execution the file is closed.

DELIVERED, DATED, and SIGNED at **NYERI** on this **16th** day of **February, 2026**. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE
JUDGE

In the presence of: -

Ms. Nanjala for the Appellant

No appearance for the Respondent

Court Assistant - Michael