REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

APPELLATE DIVISION

CIVIL APPEAL NO. E990 OF 2023

APELLO VENTURES LIMITED……………………………………APPELLANT

VERSUS

MOBIL COMPATT (U) LTD……………………………………1st RESPONDENT

KEN PAUL MUHORO……………………………………………2nd RESPONDENT

(***Being an Appeal from the Judgement of Hon B.M Cheloti (Mrs) Principal Magistrate delivered on the 8th day of September, 2023 in the Millimani Commerical court COMMSU NO 864 OF 2019)***

ARISING BETWEEN

MOBIL COMPATT (U) LTD …………………………………………… PLAINTIFF

VERSUS

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APELLO VENTURES LIMITED.. DEFENDANT

KEN PAUL MUHORO..THIRD PARTY

J U D G M E N T

A. Introduction

1. This appeal challenges the judgment delivered by ***Hon B.M Cheloti (PM)*** dated 8th September 2023, in ***Nairobi Millimani Commerical Civil Case No 864 of 2019***, where the said learned trial Magistrate entered judgment in favour of the 1st respondent herein in the sum of ***Kshs.976.150.40/=*** and further awarded them Special damages in the sum of ***Kshs.327,760.90/=*** plus interest at court rates from the date of delivery of the said judgment until date of payment in full.

2. Being dissatisfied by the said judgment the Appellant did file their Memorandum of Appeal which raised the following grounds in challenging the said judgment;

a) That the learned Honourable Magistrate erred in law and in fact by failing to appreciate the law as it stands.

b) That the learned Honourable Magistrate erred in law and in fact by failing to apply the law.

c) That the learned Honourable Magistrate erred in law and in fact by failing to consider the

ORIGINAL

evidence adduced by the Defendant, the submissions and admission by the third party.

d) That the learned Honourable Magistrate erred in law and in fact by failing to apply the principles of the law of evidence.

e) That the learned Honourable Magistrate erred by noy factoring in evidence that was part of the Exhibits produced and admitted in Court.

3. The Appellant therefore prayed that this Appeal be allowed and the entire judgment of the trial court be set aside. They also prayed to be granted the costs of this Appeal.

4. The 1st respondent too, was dissatisfied by the said judgment, and also did file their cross Appeal contending that the said decision ought to be varied or reversed on ground that;

a) The learned Magistrate erred in law and in fact in failing to appreciate that the 1st respondent had proved her case on a balance of probabilities and was therefore entitled to the relief sought in the Amended plaint.

b) The learned Magistrate erred in fact by failing to take into account and consider the evidence of the 1st respondent and the admission by the appellant that the sums owed to the 1st respondent was UGX 39,920,865.90/=.

c) The learned Magistrate misdirected herself and based her finding on the wrong arithmetic calculations by failing to find the 1st respondent is entitled to a refund of the sum of UGX

ORIGINAL

39,920,865.90, Which is equivalent to Kshs.1,129,942.42/= using the conversion rate of 1.35.

d) ***The learned Magistrate erred in law and fact by failing to award the 1st respondent herein the costs of prosecuting the suit against the Appellant.***

e) ***The learned Magistrate failed to appreciate that the commercial nature of the transaction between the parties, in particular the interest thereon.***

f) ***The learned Magistrate failed to appreciate the submissions of the learned counsel for the 1st respondent.***

g) ***In all circumstances of the case, the finding of the learned Magistrate are insupportable in law or on the basis of the evidence adduced.***

5. The 1st respondent thus also prayed that their cross Appeal be allowed and that the judgment of the trial court be varied and the 1st respondent be awarded a sum of **Ksh 1,129,942.40** plus interest thereon from 1st April 2019 until date of payment in full.

B. Background Facts

6. The 1st respondent filed the primary suit where they averred, they were a Ugandan registered company but were trading in both Uganda and Kenya. That on diverse dates in the month of October 2018, they contracted the Appellant to procure for them a performance Bond to

ORIGINAL

enable then supply, deliver and fit office furniture for the new URA headquarters building under contract No ***URA/GDS/CSD/17-18/01432-2***. In consideration for the said undertaking, they did pay the appellant a sum of ***UGX 57,920,865.60/=*** being equivalent of ***Kshs1,639,424.40/=*** being value of the performance bond.

7. Despite upholding their side of the bargain, the Appellant failed to deliver the performance bond as agreed and later on diverse dated in 2019 refunded them ***UGX 18,000,000/=*** leaving a balance of ***UGX 39,920,865.60*** equivalent of ***Ksh.1,129,942.40***. The 1st respondent thus sought that judgment be entered in their favour for the said sum plus interest at 10% per month from 1st April 2019 until date of payment in full.

8. Later, the 1st respondent did amend their plaint and pleaded that their representative had to travel to Nairobi on several occasions to meet the Appellants representative in an effort to amicably resolve the dispute and incurred extra expenses to do so amounting to ***Kshs.327,760.90/=*** which they also claimed.

9. The 1st respondent thus urged the court to enter judgment in their favour in the sum of ***Kshs.1,129,942.40/=*** at the

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exchange rate of ***UGX 35.33*** per 1 Kenya shilling and further for the pleaded and proved special damages in the sum of **Kshs.327,760.90/=** plus interest on both sums at the rate of 10% per month from 1st April 2019 until payment of the said sum in full.

10. In response, the appellant filed their Amended statement of defence stating that the suit filed was incompetent, ambiguous and did not disclose any course of action. But in the alternative admitted that the 1st respondent did approach them through the 2nd respondent seeking to procure a performance bond. After discussions and based on the undertaking of the said 2nd respondent the 1st respondent paid a sum of ***UGX 57,920,865.60/=***, equivalent to ***Kshs.1,639,424.40/=*** into their bank account on 2nd October 2018 and they thereafter did deliver the said performance bond for contract No; ***URA/GDS/CDS/17-18/01432-2*** as agreed.

11. The appellant therefore denied the 1st respondent assertion that they did not deliver the performance bond as expected and put the said 1st respondent to strict proof thereof. They further admitted that in 2019 they did refund the 1st respondent a sum of ***UGX 18,000,000/=*** but also noted that they incurred a processing fee for the performed bond of ***Kshs.154,274/=*** also subtracted ***Kshs.521,000/=***

ORIGINAL

which they had refunded to the 1st respondent on diverse dated in 2019. Thus, what was due was a sum of ***Kshs.976,150.40/=.***

12. Further the appellant did aver that the special damages claimed in paragraph 10 of the amended plaint were excessive and were not lawfully expended on account of this transaction nor were they aware and/or involved in any of the meeting between the respondents in trying to amicable resolve the said matter. They thus prayed that the suit as against them be dismissed with costs.

13. The 2nd respondent was joined as a 3rd party to the suit and filed his Amended statement of defence, where he admitted that the contract to procure the bond was between the 1st respondent and the appellant, and he was the one who had supported his friend, (the appellant) by referring the said business to him. Being unable to procure the said bond, the appellant had approached him for assistance, through his company known as M/S Winance Limited as it had extensive experience in procuring performance bonds for companies in need.

14. After negotiations, between him and the appellant, it was agreed that the appellant would let him procure the

ORIGINAL

said performance bond at an agreed fee of ***Kshs.1,125,000/=*** and he did proceed to secure required bond on behalf of the appellant and had it delivered to the 1st respondent. Disagreements arose thereafter on the commission to be retained by the appellant and the 1st respondent also raised a complaint about the fee being charged to obtain the said bond. As a result, the transaction fell through and the 2nd respondent agreed to refund a sum of ***Kshs.521,000/=*** to the 1st respondent on ex gratia basis to retain their business goodwill.

15. The 2nd respondent thus denied being indebted to the 1st respondent and/or the appellant. Further he also stated that the special damages pleaded and claimed were excessive and did not reflect a true account of what could have been spent. The 2nd respondent thus urged the court to dismiss the claim raised as against him.

16. At trial ***PW1 Balira Scovia***, the 1st respondents witness adopted her witness statement and also submitted the documents on her list of documents dated 9th July 2021 as evidence before the court. Under cross examination she admitted having done business with the appellants company and acknowledged that a sum of ***Kshs.212,000/=*** was refunded to her by the 2nd respondent herein.***DW1 Boniface Gachura*** also adopted

ORIGINAL

his witness statement and had his supporting documents admitted as an exhibit before the court. It was his case that they delivered the performance bond as contracted and did not owe the 1st respondent company any amount of money.

17. ***DW2 Ken Paul Muhoro*** also adopted his witness statement and was not asked any questions in cross examination and/or reexamination. The trial Magistrate did consider the pleadings, evidence presented and the parties' submissions and determined that the 1st respondent had proved their case and proceeded to enter judgment against the appellant in the sum of ***Kshs.976,150.40/=*** plus special damages of ***Kshs.327,760.90/=*** plus costs and interest.

C. Parties Submissions.

(i) Appellants Submissions

18. The Appellant filed their submissions dated 1st April 2025, where they pointed out that the learned trial Magistrate had failed to appreciate and comply with provisions of ***Order 1 Rule 15, & 17 of the Civil Procedure Rules***, in establishing who between themselves and the 2nd respondent was to be blamed for the botched transaction and thus was liable for refunding the appellant the sums sought and had proceeded to wrongly determine that they were at fault,

when that was not the case. Reliance was placed in the case of ***Family Bank Ltd Vs Mutisya & Another (Civil Appeal E076 of 2021, (2024) KEHC 5740 (KLR)*** where it was emphasized that direction on how liability is to be determined must be established and it is an issue which can also be simultaneously determined at trial.

19. Secondly the learned trial Magistrate had erred and arrived at the wrong conclusion that they had breached the contract to secure a bank guarantee for the 1st respondent, yet specifically PW1 had confirmed in her evidence adopted through her witness statement, that the performance bond had been provided through Sidian Bank Ltd and was even extended for three months until April 2019. If that be the position, the 1st respondent then could not be heard to complain about any breach of contract, the basis of which they could claim for refund of their money and/or for special damages alleged to have been incurred.

20. In the alternative, they further submitted that based on the agreement signed between the respondents (after delivery of the performance bond), any claim that arose therefrom, should have been settled by the signatories to the said agreement, since the parties thereto had their own arrangement to refund a sum of ***Kshs 976,150/=***. It was also to be noted that DW2 and one Mr Christopher Momanyi had fraudulently signed the said agreement on a document bearing their letterhead, but since they were directors of

Winace Ltd and not the appellant company directors, no legal obligation arose and/or attached to them.

21. Finally, the appellant did reiterate that based on the evidence adduced it was clear that it was the 3rd party (2nd respondent) who had agreed to refund the appellant part of the money sent to secure the performance bond and that the trial court had therefore erred in not arriving at the said finding. They thus prayed that this Appeal be allowed with costs.

(ii) **1st Respondents Submissions**

22. The 1st respondent relied on their submissions dated 14th October 2025 and pointed out to the fact that consent judgment on was entered as against the Appellant on 17th March 2021 by Hon A. Ogonda (Ms) and at paragraph 2(a) of the said consent it was expressly provided for that; "***Judgment is entered against the defendant for the admitted sum of Kshs.976,150.40 as the rest of the plaintiffs claim amounting to Kshs.153,792/= proceeds to trial."*** The said consent Order had not been set aside and liability to settle the same could not be transferred to the 2nd respondent as it is on the same day that the court granted the appellant leave to serve the third-party notice upon the 2nd respondent herein.

23. Secondly, it was the appellant who should have sought for directions on how liability as between them and the 2nd respondent ought to have been determined, as provided for

under ***Order 1 rule 22 of the Civil Procedure Rules***, but failed to do so. During trial too, the appellant had an opportunity to make out his case as against the 2nd respondent but failed to do so and therefore could correct the same by filing this Appeal. Reliance was placed in ***Sieley & 3 Others (Suing as the adminstrators of the estate of the late Nathaniel Kibitok Sieley) Vrs Kenya Commercial Bank Limited & Another; Kimutai & Another (Third party), (Civil suit No 23 of 2019), {2025} KEHC 12889 (KLR)*** to emphasize on the said point.

24. On the cross Appeal filed, the 1st respondent noted that the same was not opposed and urged the court to grant the same, but nevertheless further submitted that they had appeal on two fundamental issues, which in summary was; for correction of mathematical errors in the said judgment based on the pleading filed and seeking to be awarded costs of the primary suit.

25. Based on the pleadings filed the appellant and the 2nd respondent had received a sum of **UGX 57,980,865/20** and in the statement of defence, the appellant confessed to refunded a total of ***UGX 18,000,000/00*** on diverse dated before the suit was filed. The difference between the two sums was ***UGX 39,920,865/20***, for which the court used a conversion rate of ***1:35***, leading to a conversion sum of ***Kshs.1,129,942.40/=*** as the sum remaining as due and owing. It was therefore unclear how the trial court had

reduced this sum to ***Kshs.976,150.40***, yet the evidence lead had conclusively proven otherwise. The 1st respondent thus urged the court to rectify the same.

26. On the issue of costs, the 1st respondent submitted that costs follow the event and since they were the successful party, the trial court should have awarded them costs and/or given reasons as to why it declined to do so. They relied on the case of ***Horizon Coach Company Limited & Another Vs Elizabeth Mutave Muli & 4 Others {2021}KEHC 5740 (KLR***), where Justice Odunga (As he was then) held that ***" it has been said there is one panacea which heals every sore in litigation and that is costs, seldom, if ever, do you come across an instance where a party has made a mistake which has put the other side to such disadvantage or that it cannot be cured by the application of that healing medicine.***"

27. The 1st respondent thus urged the court to find that the appeal has no merit and be pleased to dismiss the same and on the same vein find that the cross Appeal has merit and do allow the same with Costs.

D. Determination

28. I have considered this appeal and the impugned Judgement. I have also considered the submissions filed, the decisions relied on, and perused the trial court's record. This being a first appeal, it is by way of a retrial, and this court, as the first

appellate court, must re-evaluate, re-analyze, and re-consider the evidence afresh and draw its conclusions on it. The court should, however, bear in mind that it did not see the witnesses as they testified and give due allowance for that. (see ***Selle v Associated Motor Boat Co Ltd & Others*** **[1968] EA 123) &** ***Peters Vs Sunday Post Limited (1968) EA 123).***

29. A first appellate court is also the final court of fact, and litigants are entitled to full, fair, independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of **Section 78 of the Civil Procedure Act**, a court of first appeal can appreciate the entire evidence and come to a different conclusion. See ***Kurian Chacko Vs Varkey Ouseph, AIR 1969 Kerala 316.***

30. The issues that arise for determination in this Appeal is whether on a balance of probability;

(a) The 1st respondent proved their case before the trial court and/or whether the appellant ought to have be absolved from refunding the sums claimed by the 1st respondent and the same directed to be settled by the 2nd respondent (the 3rd party before the trial court).

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(b) Whether the 1st respondent was entitled to be awarded costs of the primary suit and who should bear the costs of this Appeal.

31. The Appellant in the Amended statement of defence filed, expressly admitted at paragraph 10 and 11 to owning the 1st respondent a sum of **Kshs.*976,150.40/=*** which they were willing to settle and not ***Kshs.1,129,942.40/=*** as claimed by the said 1st respondent. Subsequently on 17th March 2021 their counsel did record a consent judgment admitting to owing the said sum, while at the same time stating that the disputed sum of **Ksh.153,792/=** would go for trial. The trial court awarded this sum and clearly, they have no bases to appeal as against the said award.

32. As to whether the judgment ought to have been entered in favour of the 1st respondent in the sum of ***Kshs.974,150.40 (UGX 34,165,264)*** as decreed by the trial court. The evidence adduced at trial show that after the fall out between the appellant and the 2nd respondent in sharing the spoils of the business, the appellant snitched on the 2nd respondent and told the 1st respondent, that she had been over charged. The appellant subsequently engaged the parties and in settlement of the matter ***signed an agreement with the 2nd respondent and one Mr Christopher Momanyi*** that they would refund the 1st respondent, the sum claimed as stated hereinabove.

ORIGINAL

33. It should be noted even though the 2nd respondent and the said Mr Christopher Momanyi used the appellant letterhead to give the said undertaking, they were not the appellants directors and had no express or implied authority which could bind the appellant in the said undertaken, given that the parties had fallen out of favour with each other. To that extent no liability was established as against the appellant to settle the demanded balance of ***Kshs.153, 972/=.***

34. This fact too is admitted to by the 1st respondent, who extensively alludes to the said facts at paragraph 14 to 18 her witness statement, which was adopted as her evidence in court. The 2nd respondent also admitted that he owes the 1st respondent ***Kshs.521,000/=*** on account of this business and had agreed to refund the same on exgratia basis. He even purposed to sell his car to raise this sum and exchanged communication with the 1st respondent to that effect.

35. The 1st respondent therefore failed to prove that the extra sum demanded of ***Ksh.153,972/=*** is due from the appellant and since she did not sue the 2nd respondent and Mr Christopher Momanyi to recover the said sum, the cross appeal fails on this score.

ORIGINAL

36. As regards costs, I do find that the trial court did not exercise her discretion in the proper manner by directing that each party would bear their own costs. ***Section 27 (1) of the Civil Procedure Act***, provides that, ***"the costs of any action, cause or other matter or issue shall follow the event unless the court or judge for good reason otherwise order."***

37. The appellant admitted to being indebted to the 1st respondent and failed to pay the debt on time forcing the 1st respondent to take legal action. There were expenses incurred and as stated in the case of ***Horizon Company Limited (Supra)***, **"the panacea which heals every sore in litigation is costs."** Under the aforestated circumstance the 1st respondent was entitled to be awarded costs

C. Disposition

38. For the above stated reasons, I do find that the Appeal filed has not merit and the same is dismissed. The cross Appeal to lacks merit but partially succeeds on the issue of costs. The trial court judgment is thus set aside with regard to her order that each party will bear their own cots and the same is substituted with an order awarding the 1st respondent the costs of the primary suit.

ORIGINAL

39. Each party will bear their own costs of this Appeal and cross Appeal on the basis that both Appeals have failed on the substantial issues raised for determination.

40. It is so ordered.

Dated, signed, and **delivered** in open court at **MARSABIT** this **6th** day of **MARCH, 2026.**

FRANCIS RAYOLA OLEL
JUDGE

Delivered on the virtual platform, Team this **6th** day of **MARCH,2026.**

In the presence of: -
N/A ....Appellant
N/A .... Respondent
Mr. Jarso..Court Assistant`

ORIGINAL