

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT THIKA**  
**CIVIL APPEAL NO. E337 OF 2024**

**CHRISTOPHER KARANJA NGUGI.....**  
**APPELLANT**

**VERSUS**

**MONICA WANGUI KAGO.....**  
**RESPONDENT**

*(Being an appeal from the judgment of honourable M. W. Kamau, RM at the Small claims court at Thika in SCCCOM NO. E927 of 2024)*

**JUDGEMENT**

1. The appeal herein emanates from a claim for breach of contract. The Respondent lodged an undated Statement of Claim in 2024 where she alleged that on various dates in the month of October 2022, the Appellant approached her with an idea that he will operate a forex trade business on her behalf and be remitting monthly profits to the Respondent. Consequently, the Respondent advanced Kshs. 638,000 to the Claimant to start the said project. Nevertheless, the Appellant reneged on the agreement and failed or neglected to refund the advanced sums despite demand. Instead, the appellant only refunded Kshs. 40,000 leaving a balance of Kshs. 598,800. The Respondent therefore sought judgment for Kshs. 598,800 against the Claimant.
2. The Appellant denied the claim vide the Response to statement of claim dated 9<sup>th</sup> August 2024. He contended that he did not owe the Respondent. He further averred that any alleged agreement between him and the Respondent to operate a forex trading business without a license would be void ab initio and ultra vires the **Banking**

**Act.** Thus, the Appellant sought that the claim be dismissed with costs.

3. The matter proceeded to trial where the Respondent testified that the Appellant had failed to disclose the losses that were associated with the business. It was her contention that had the potential losses been explained to her, she would not have borrowed money to invest in the business. She maintained that she did not get a share in the business, instead, it is the money that she had invested that worked for her. She denied the existence of a partnership but admitted to receiving a total of Kshs. 278,212.00 from the Appellant.
4. The Appellant on the other hand admitted that the Respondent was his mutual friend. He testified that he had a part time business of buying and selling dollars online and upon informing the Respondent of the same, she opted to enter into a partnership with him. The Appellant admitted to receiving Kshs. 200,000.00 from the Respondent as a prerequisite for partnership. Contrary to the Respondent's assertions, the Appellant maintained that the Respondent was duly informed of the risks associated with the business as he had communicated the same to her. He also maintained that they were both partners thus entitled to both the profit and loss incurred by the business.
5. The trial court found that the Appellant had failed to prove the existence of a partnership deed. Nevertheless, since there was evidence that the Respondent had advanced Kshs. 638,000 to the Appellant, and that the appellant had refunded only Kshs.278,212. The trial court entered judgement in favour of the Respondent against the Appellant for the sum of Kshs. 359,788.00 together with

interest and costs limited to disbursements assessed at Kshs. 10,000.

6. Aggrieved and dissatisfied with the decision of the trial court, the Appellant lodged the instant appeal vide a Memorandum of Appeal dated 14<sup>th</sup> November 2024 on ten grounds including that:

- i. The learned trial magistrate erred in law and in fact by finding that the burden of proof had shifted from the Respondent to the appellant to prove the existence of a partnership while failing to comprehend that there was indeed a partnership agreement for sharing profits and losses;
- ii. The learned magistrate erred in law and fact by failing to recognize the existence of oral partnership by conduct of the parties as espoused in **JK Kinoti versus G.J Kibanga [2013] Eklr.**
- iii. The learned trial magistrate erred in law and fact in failing to appreciate that the Respondent's testimony proved that the partnership was profitable.
- iv. The learned trial magistrate erred in law and fact by failing to appreciate the partnership business customary norms usage and rates with regards to the sharing of profits and losses
- v. The learned trial magistrate erred in law and fact in awarding the Respondent Kshs.359,788 which had not proved to the required standard.

7. The Appellant therefore prayed that the appeal be allowed and that the judgement delivered on 7<sup>th</sup> November 2024 be set aside.

8. The court directed that the appeal be canvassed through written submissions.

9. The appellant challenged the jurisdiction of the trial court to determine the suit. The jurisdiction of the trial court was

ousted by **section 2 of the Partnership Act** which vests jurisdiction on the Resident Magistrate Court for partnership whose assets do not exceed Kshs. 300,000. Therefore, the Small Claims Court lacked jurisdiction to entertain the suit as the parties had a partnership.

10. Accordingly, the respondent was to share in both the profits and the losses of the partnership. The trial court therefore erred in finding that there existed no partnership between the parties.

11. The Respondent did not file any submissions.

12. This being a first appeal, it is the duty of the court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded, while bearing mind that it did not have the opportunity to see or hear the witnesses. In **Selle & another v Associated Motor Boat Co Ltd & others [1968] EA 123**, this principle was enunciated thus:

***“...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 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...”***

13. The issues that commend themselves for determination are:

- i. Whether a partnership existed between the Appellant and the Respondent; and

- ii. Whether the Small Claims Court had jurisdiction to determine the dispute.

14. **Section 107(1) of the Evidence Act, chapter 80 of the Laws of Kenya**, is explicit 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. The Appellant herein did not deny receiving money from the Respondent, instead he simply contended that the Respondent was not entitled to a refund as the parties operated a partnership and therefore were to share both profits and losses of the partnership.***

15. The Appellant having admitted receiving the money from the Respondent, the onus therefore shifted on him to prove the existence of a partnership as the reason for failing to refund the Respondent the money due to her.

16. It is instructive therefore that, in **Anne Wambui Ndiritu v 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 cast 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.”***

17. **Section 3 of the Partnerships Act** defines a partnership as, the the relationship which subsists

between persons carrying on a business in common with a view of profit.

18. It is clear from that definition that partnership is the relationship which exists between persons carrying on a business in common with a view to profit. That relationship involves firstly an agreement between the parties to enter into a legally binding relationship which essentially is contractual in the nature. Tindal C.J. stated in this respect **in Green Vs. Beesley [1885] 2 Bing NC:-**

***I have always understood the definition of partnership to be a mutual participation.***

19. It should however be noted that such participation mentioned in the instant case does not create a legal entity called a partnership. A partnership is essentially composed of people who have entered into a contract with each other. In my view, having reviewed the evidence tendered and having read counsel's well-presented submissions, I find that the appellants forex trading business was a sole proprietorship of the appellant. The Respondent was merely a customer of the business based on the representations made by the Appellant.

20. I cannot find in the evidence before me an agreement to either run or form a partnership. There was no contract in that regard. The relationship between the Appellant and the Respondent fails the test of the definition of partnership in the Partnership Act. James L.J. in **Smith Vs. Anderson [1880] 15 Chan D.** saw the concept of creating a partnership as:

***"An ordinary partnership is a partnership composed of definite individuals bound together by contract between themselves to continue combined for some joint project either during pleasure or during a limited time, and is***

***essentially composed of persons originally entering into contract with one another.”***

21. There is no evidence of a contract, either express or implied, between the parties to suggest that they intended or had in fact created a partnership.

22. Having found that there existed no partnership between the parties, it follows that the jurisdiction of the Small Claims Court was properly invoked. The pecuniary interest in the Respondent’s claim was Kshs. 598,800 which is within the limits of the pecuniary jurisdiction of the Small Claims Court.

***23. The upshot of the matter is that the instant appeal lacks merit and the same is dismissed with costs.***

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 12<sup>TH</sup> DAY OF MARCH, 2026.**

**HON. T. W. Ouya  
JUDGE**

**For Appellant.....Wamahiu  
For Respondent.....No Appearance  
COURT ASSISTANT.....Brian**