



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CIVIL APPEAL NO. E111 OF 2023**

EZRA MUGAMBI.....

.....APPELLANT

VERSUS

MERU HIGHLANDS DAIRY LIMITED.....

RESPONDENT

***(Being an Appeal from the Judgement of Hon. L.W.MAINA  
(Adjudicator) delivered on 22<sup>nd</sup> June of 2023 in Meru CMCC No.E170  
of 2023)***

**JUDGEMENT**

1. This appeal arises from a judgment delivered on 22<sup>nd</sup> June of 2023 by the Hon. L.W.MAINA (Adjudicator) in Meru CMCC No.E170 of 2023.
2. According to the statement of claim filed in court, on or about 31<sup>st</sup> March, 2021, the Respondent, through its supply

team, supplied LISHA & MAZPOA UHT milk to the Appellant on terms that he would make full payment. Despite several demands, the Appellant failed to settle the debt, which accumulated to Ksh. 376,993.98/=.

3. The Appellant denied the claim and pleaded, inter alia, that he was employed by the Claimant as a sales supervisor, responsible for visiting all routes to deliver milk to customers and perform supervisory functions. He stated that customers purchased milk in cash and on credit, and that upon route change, he was required to reconcile outstanding customer debts and forward the customers' names and contacts to the Claimant's finance and credit department for follow-up. He maintained that he fulfilled these duties and that the Respondent ought to have pursued the respective debtors.
4. In his counterclaim, the Appellant averred that he earned a monthly salary of Ksh. 52,600.00 and allowances of Ksh. 6,000/=. He stated that he resigned due to frustration caused by the Respondent's management, and alleged that he was underpaid, was not provided with medical cover and not granted 24 days annual leave which he was entitled to.

He claimed that the Respondent owed him Ksh. 301,428/= and prayed for judgment in that sum.

5. The matter proceeded to full hearing, during which each party testified in support of their respective cases.
6. After the trial, the trial court entered judgment in favor of the Respondent in the sum of Ksh. 376,993.98/- plus costs and interests.
7. The appellant was dissatisfied with the decision and has, therefore, appealed to this Honourable Court. In the memorandum of appeal dated 11<sup>th</sup> July, 2023, he raised the following grounds:-

- a) That the Learned Magistrate erred in Law and fact in finding that it was the willful duty of the Respondent to collect the proceeds of sale.
- b) That the Learned Magistrate erred in Law and fact in finding that the discrepancies in the statements were the Responsibility of the Appellant and no one else.
- c) That the Learned Magistrate erred in Law and fact in awarding the claim in its entirety ignoring the evidence by the Appellant.

- d) That the Learned Magistrate erred in Law and fact in her application and interpretation of the law regarding the suit.
- e) That the Learned Magistrate erred in Law and fact in failing to consider and/or disregarding the Appellant's evidence, submissions and case law cited.
- f) That the Learned Magistrate ruling was biased in favour of the Respondent against the Appellant is full of errors, against the weight of evidence and a travesty of justice.

8. The Appellant thus prayed that the Appeal be allowed and the trial's court judgement be set aside and the costs of this Appeal and in the lower court be awarded to him.

9. The Appeal was canvassed by way of written Submissions. Both parties filed their respective submissions.

### **Appellants' Submissions**

10. The Appellant submitted that it is trite law that parties are bound by the terms of their contract and the courts cannot re-write contractual obligations under the guise of interpretation. To support this proposition, the Appellant placed reliance on the case of **Promotions Limited v Standard Group PLC [2025] KEHC 1693 (KLR)**
11. The Appellant argued that the trial court erred by adopting the Respondent's unsupported claim that he was responsible for collecting sale proceeds specifically on milk taken on credit by customers yet no contract was produced to ascertain the same.
12. He posited that his role was limited to delivery and handling of cash sales, and the Respondent had no basis to recover any arrears and/or amounts from him.
13. The Appellant submitted that having resigned from employment on 24<sup>th</sup> May, 2021, it was illogical for the Respondent to claim that he was still expected to collect proceeds of sale on its behalf.

14. He thus argued that the trial court erred in holding him liable for collecting the proceeds and debts as he had neither the mandate nor capacity to collect.

### **Respondent's Submissions**

15. The Respondent submitted that it is undisputed that there existed a contractual relationship between it and the Appellant whereby the Appellant was tasked with distributing and selling milk to third parties on its behalf, and as such the Appellant was duty bound to remit proceeds from his dealings to it. To buttress its submissions, the Respondent relied on the case of **Lucy Nungari Ngigi & 4 others v National Bank of Kenya Limited & another [2015] eKLR**

16. The Respondent cited the case of **SYT v TA [2019] eKLR** where the court held that the party's pleadings remain mere unsubstantiated statement of fact if a party fails to call evidence in support of his case, and argued that the Appellant's contention that he was required to compute and submit all the debt that the customers owed and their contacts to its Credit and Finance Department which would

thereafter demand from the customers was not backed by any evidence.

17. The Respondent thus posited that the Appellant acted outside his scope as an agent in selling the milk on credit and unreasonably by expecting it to demand the debt from third parties who are strangers to it.
18. The respondent submitted that the appellant was thus in breach of his contractual duties and it is entitled to recover the loss suffered. In buttressing its submissions, the Respondent relied on the case of **Dormakaba Limited v Arcitectural Supplies Kenya Limited [2021] KEHC 210 (KLR)**
19. The Respondent further argued that the Appellant ought to have enjoined(sic) the alleged creditors as third parties considering he alleged liability against them in his Response to the statement of claim. To support this position, reliance was placed on the case of **Kenya Commercial Bank v Suntra Investment Bank Ltd [2015] eKLR**
20. Regarding the Appellant's counterclaim for Ksh.301, 428.00, the Respondent submitted that the trial court lacked

jurisdiction to determine the same as it was founded on employment and labour relations. In support of this position, the Respondent relied on Section 13(5) of the Small Claims Act and case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KECA 48 (KLR)**.

21. In light of the above, the Respondent urged this court to dismiss the Appeal with costs.

### **Analysis and Determination**

22. The court has carefully considered the appeal, the entire record of the trial court, and the parties' rival submissions. This court is reminded of the provisions of Section 38 of the **Small Claims Court Act** which limits appeals from the Small Claims Court to matters of law only.

23. Therefore, I must first address the issue as to whether this Appeal is on matters of law.

24. Section 38 of the Act provides;

***"1. A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.***

**2. An appeal from any decision or order referred to in subsection (1) shall be final.”**

25. A matter of law or issue of law is a question of law as defined in the 9th Edition Black’s Law Dictionary as follows:

**“An issue to be decided by the judge, concerning the application or interpretation of the law; or A question that the law itself has authoritatively answered, so that the court may not answer it as a matter of discretion; or**

**An issue about what the law is on a particular point; an issue in which parties argue about, and the court must decide, what the true rule of law is.”**

26. In the case of **J N & 5 Others -vs- Board of Management, St. G School Nairobi & Another** [2017] eKLR, in addressing a point of law and a point of fact, Justice Mativo stated thus:

***“In law, a question of law, also known as a point of law, is a question that must be answered by applying relevant legal principles to interpretation of the law. Such a question is distinct from a question of fact, which must be answered by reference to facts and evidence as well as inferences arising from those facts. In law, a question of fact, also known as a point of fact, is a question that must be answered by reference to facts and evidence as well as inferences arising from those facts. Such a question is distinct from a question of law, which must be answered by applying relevant legal principles. The answer to a question of fact (a "finding of fact") usually depends on particular circumstances or factual situations.”***

27. In **Kitui Flours Ltd vs Kirimi and Another Civil Appeal No. E172 of 2023**, the court examined the above provision and held as follows;

**“It is trite that an appeal on a matter of law includes the inquiry whether the conclusions of the trial court are sound on the evidence availed before it and, therefore, with respect to counsel for the respondents, this involves the re-evaluation of the evidence. In the very decision cited by Counsel for the Respondents, Peter Gichuki King'ara v IEBC & 2 Others [2014] eKLR, the Court of Appeal (Visram, Koome(as she then was) & Odek,JJ.A.) where after considering the authorities held“Having established that we have jurisdiction to determine only issues of law as per the provisions of Section 85A of the *Elections Act*, to us the whole question of whether the trial Judge properly considered and evaluated the evidence and arrived at a correct determination that is supported by law and evidence with of course the usual caveat, that we did not see the witnesses demeanor is an issue of law.”**

28. Having perused the Memorandum of Appeal, I note that the grounds therein are on both fact and law. However, guided by the foregoing authorities, this Court finds that the appeal is competent and will identify the issues for determination and confine itself strictly to matters of law. Therefore, the issues arising for determination are;

a) Whether the trial court had jurisdiction to determine the Appellant's counterclaim.

b) Whether the respondent proved his case against the appellant on the balance of probabilities.

29. I will now proceed to determine the above issues.

30. It is trite law that jurisdiction is everything, and without it, the court cannot take one more step in the case. The locus classicus on jurisdiction is the celebrated case of **Owners of Motor Vessel 'Lillian S' vs Caltex Oil (Kenya) Limited (1989) eKLR**, where the Court held that:-

***"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 a continuation of proceedings."***

31. The Appellant in his counterclaim claimed Ksh. 301,428/= from the Respondent, citing that he was underpaid, denied medical cover and not granted 24 days' annual leave which he was entitled to.
32. The trial court held that the Appellant had proved his case against the Respondent on a balance of probabilities but did not award him the claimed sum.
33. Section 13(5) of the Small Claim's Act expressly provides that:

***“A claim shall not be brought before the Court if the cause of action is founded upon defamation, libel, slander, malicious prosecution or is upon a dispute over a title to or possession of land, or employment and labour relations”***

34. Additionally, the Chief Justice vide the gazette notice number 6024 of 2018 issued on 10<sup>th</sup> June, 2018, appointed all Magistrates of the rank of Senior Resident Magistrates and above as Special Magistrates designated to hear and determine the employment and labour relations cases within

their respective areas of jurisdiction and specifically where the employees' salaries fall below 80,000/=.

35. From the foregoing, it is evident that the Appellant's claim was founded on employment. Taking into account the provisions of the above section and the fact that the trial magistrate was not of the prescribed rank, I am of the opinion that the trial court lacked jurisdiction to determine the counterclaim and this court equally lacks jurisdiction to determine the Appellant's counterclaim. Therefore, the prayer sought has no legal basis.
36. The law on the burden of proof is found under Section 107(1) of the Evidence Act which provides:

***“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.”***

37. In other words, a party claiming a right or asserting a liability carries the burden of proving the facts on which the claim is based.
38. In civil matters, the standard of proof is on a balance of probabilities, and the court must be satisfied that the facts asserted are more likely than not. See **William Kabogo Gitau v George Thuo & 2 Others [2010] eKLR.**
39. From the respondent's pleadings filed in the lower court, the impression created was that the appellant was one of its clients who had been supplied with goods but failed to pay for them. However, the respondent's own witness admitted that the appellant was actually an employee of the respondent. This is a complete departure from its own pleadings.
40. From the record, it is clear that the Appellant was an employee of the Respondent and not a client. The letter of employment dated 16<sup>th</sup> January 2020 shows that he was a Sales Supervisor. He disputes that the Respondent supplied the milk to him. His position is that, as an employee, he delivered the milk to the respondent's customers, reconciled

customer debts, and forwarded their names and contacts to the Respondent's Credit and Finance Department for follow up and therefore he is not liable. He maintained that sales to customers were either in cash or on credit.

41. There is no dispute that the Appellant was employed as a Sales Supervisor, to sell milk on behalf of the Respondent. The respondent was not clear if the appellant was allowed to sell milk on credit, collect money on behalf of the company or the clients were required to pay for the goods directly to it.
42. The evidence adduced clearly establishes that the appellant acted as an agent of the Respondent in carrying out these transactions, as was rightly held by the trial court.
43. In **Mboga (Deceased) v Kenya Forest Service; Nyamwea Mamboleo Advocates (Interested Party)** (Cause 2 of 2014) [2024] KEELRC 2677 (KLR) (29 October 2024) (Ruling) agency is defined as a 'Fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should

act on his behalf subject to his control, and the other manifests assent so to act.

44. In **Waica Reinsurance (Kenya) Limited v Commissioner of Legal Services and Board Coordination (Tax Appeal E543 of 2023) [2025] KETAT 124 (KLR) (7 February 2025)**, it was held that for a principal/agency relationship to exist, there must be a fiduciary relationship where the agent undertakes to act for the principal.
45. In **International Air Transport Association & another v Akarim Agencies Limited [2014] KEHC 7523 (KLR)**, court noted that fiduciary relationships may arise in contractual contexts requiring disclosure and accountability.
46. In **KCB Bank Limited v Odhiambo t/a Karo Wholesalers & another [2023] KEHC 17948 (KLR)**, the court emphasized that an agent has a fiduciary duty to the principal, which includes full disclosure and non-enrichment at the principal's expense.
47. It is my view that although a fiduciary duty arises in the instant case where the Appellant, as an agent, was entrusted to supply milk on behalf of the Respondent, there is nothing

produced by the respondent that shows that the appellant was allowed to supply milk to clients on credit, to collect funds on behalf of the respondent and if goods were sold on credit, he was liable to the respondent if there was no payment by the customers/clients. The letter of employment does not place any give any details on the onus on him in that respect. The appellant would only have liable if it was shown that he was not authorized to deliver goods on credit, or had collected payment for the goods delivered to the clients and failed to remit the money to his principal, the respondent.

48. The Appellant asserted that what he was required to do was to reconcile outstanding customer debt and forward the customers' names and contacts to the Respondent's Credit and Finance Department for follow-up, which he did. That evidence was not controverted by the respondent.
49. I have perused the document relied upon by the respondent to prove its case, tabulating the amount claimed.
50. It is a statement of account running from 1<sup>st</sup> February 2020 to 14<sup>th</sup> April 2021. During that period the appellant was in employment of the respondent. The balance as at the latter

date is Ksh. 376,993/- which is the sum claimed by the respondent in the lower court.

51. Now, that statement has some very interesting transactions, like **“airtime, fuel, night parking fee, offloading fee, weekly facilitation fee, transporter for spares, road barrier Council parking, driver seat welding, police charges, towing charges ,UN Refugees Camp Parking, night security, mechanic labour”** and so on.
52. Clearly that statement could not form a basis for the respondent’s claim, to show the amount of goods allegedly received by the appellant.
53. In the absence of proper evidence as to how the amount claimed arose, I find that the respondent did not prove its case as required.
54. In the upshot, I find that this appeal has to succeed. The appeal is allowed. The judgment of the lower court is hereby set aside and is substituted with an order that the suit in the lower court is dismissed with costs.
55. The appellant shall have the costs of this appeal.
56. It is so ordered.

**Dated, signed and delivered at Meru this 30<sup>th</sup> day of April,  
2026.**

**H.M. NYAGA**

**JUDGE**

**In the presence of;**

Ms. Kerubo for appellant

Mr. Omamba for respondent