



**Alusi Tours and Travel Limited v Kadima (Commercial Appeal E012 of 2024)  
[2025] KEHC 11561 (KLR) (Commercial and Tax) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11561 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL APPEAL E012 OF 2024**

**PM MULWA, J**

**JULY 31, 2025**

**BETWEEN**

**ALUSI TOURS AND TRAVEL LIMITED ..... APPELLANT**

**AND**

**SILVIA LUKONDO KADIMA ..... RESPONDENT**

*(Being an appeal against the judgment and order of the Small Claims' Court at Milimani, by Hon. M. N. Olonyi on 1st December 2023 in SCCCOMM/E6877/2023)*

**JUDGMENT**

1. This is an appeal from the judgment and decree of the subordinate court delivered on 1<sup>st</sup> December 2023. The dispute between the parties arose from a travel booking transaction in which the Respondent engaged the Appellant, a travel agent, to facilitate the purchase of air tickets.
2. By a Statement of Claim dated 1<sup>st</sup> September 2023, the Respondent sought judgment against the Appellant for a sum of Kshs. 294,731.66, being a refund of unutilized payments and additional expenses allegedly incurred after the Appellant failed to issue the requested air tickets. The Respondent averred that she paid Kshs. 350,000.00 to the Appellant for two return tickets to Boston, USA, but the tickets were never issued, and the Appellant ceased further communication. Consequently, the Respondent procured alternative tickets at an alleged cost of Kshs. 249,731.66. She stated that only Kshs. 175,000.00 was refunded, leaving a shortfall of Kshs. 175,000.00 and additional expenses amounting to Kshs. 74,731.66.
3. The Appellant, by a Defence and Counterclaim dated 15<sup>th</sup> November 2023, denied liability and asserted that it was the Respondent who caused the failure of the transaction by altering travel dates and delaying confirmations. The Appellant averred that these actions led to cancellation penalties and administrative charges amounting to USD 600 and Kshs. 20,000.00, which she counterclaimed.



4. Upon hearing the parties, the trial court entered judgment in favour of the Respondent, awarding her Kshs. 175,000.00 as the outstanding refund and Kshs. 64,715.00 as additional expenses incurred. The Appellant's counterclaim was dismissed, hence this appeal.
5. The Appellant filed the memorandum of appeal dated 15<sup>th</sup> January 2024, resting on thirteen (13) substantive grounds which may be summarized as follows:
  - i. That the trial court erred in awarding Kshs 64,715.00 without sufficient proof of additional expenses;
  - ii. That the Respondent had not produced any receipts for the claimed cost of USD 1,712.25, nor evidence of actual travel on Lufthansa Airlines;
  - iii. The court relied on incomplete or contradictory evidence, particularly regarding travel itineraries.
  - iv. The court failed to properly evaluate the Appellant's evidence, including the documentary bundle.
  - v. The court wrongly dismissed the Appellant's counterclaim despite uncontroverted evidence.
  - vi. That the court erred in awarding costs to the Respondent.
6. The appeal was canvassed by way of written submissions. The Appellant's submissions are dated 25<sup>th</sup> November 2024, while the Respondent's submissions are dated 13<sup>th</sup> November 2024.

### **Analysis and determination**

7. I have carefully considered the record of appeal, the pleadings, the submissions of both parties, and the applicable law. The issues that arise for determination are:
  - a. Whether the trial court erred in awarding the Respondent Kshs. 64,715.00 as additional expenses.
  - b. Whether the trial court erred in dismissing the Appellant's counterclaim.
  - c. Whether the judgment of the trial court should be set aside.
8. It bears noting that the appeal arises from a decision of the Small Claims Court. Section 38 of the *Small Claims Court Act* provides thus:
  - (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.
9. What constitutes, points of law, has been settled. In the case of Peter Gichuki King'ara v IEBC & 2 Others, Nyeri Civil Appeal No. 31 Of 2013, (Court of Appeal) (Visram, Koome & Odek, JJA) - 13.02.2014, the court of Appeal stated as follows:

“It was held that it is trite law that the exercise of judicial discretion is a point of law and that the trial court in denying a prayer of scrutiny is exercising judicial discretion. The Court concluded that it would not be feasible for the Court of Appeal to order for a recount and scrutiny as this would involve matters of fact that were within the jurisdiction of the trial court. The court further held that the 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 the caveat that the appeal court did not see the witness demeanor – is an issue of law.”

### **Whether the award of Kshs. 64,715.00 was justified**

10. The trial court awarded the Respondent Kshs. 64,715.00 as additional expenses incurred in purchasing a replacement ticket. The Appellant disputes this, arguing that no receipts or bank records were tendered, and the only documents produced were email itineraries. The Appellant further notes that the Respondent admitted to having procured a cheaper ticket at USD 960.
11. It is trite law that special damages must be specifically pleaded and strictly proved. In this case, there was no production of receipts, boarding passes, bank statements, or e-ticket confirmations to support the alleged expenditure of Kshs. 249,731.66. In contrast, the Respondent’s oral evidence indicated that she travelled on a cheaper ticket, thus contradicting the claimed loss.
12. I therefore find that the award of Kshs. 64,715.00 was not anchored on proper evidentiary material and was contrary to the principle that special damages must be strictly proved. The trial court’s finding in this regard cannot be upheld and must be set aside.

### **Whether the counterclaim was improperly dismissed**

13. The Appellant’s counterclaim was premised on alleged non-refundable charges by IATA and cancellation penalties amounting to Kshs. 20,000.00 and USD 600. The Appellant contended that these deductions were automatic and standard in the travel industry.
14. The trial court dismissed the counterclaim on the ground that no documentary evidence was presented to substantiate these deductions. Indeed, no correspondence from IATA, the airline, or any invoices or policy documents were exhibited to demonstrate the deductions or their legitimacy.
15. I find that while the Appellant’s argument is plausible, the lack of any supporting documentation meant that the trial court acted correctly in law by dismissing the counterclaim. As noted earlier, even a counterclaim must be proved on a balance of probabilities.

### **Whether the judgment should be set aside**

16. From the foregoing, I find that the award of Kshs. 64,715.00 was not supported by the evidence and should not have been made. However, the trial court’s finding in respect of the Kshs. 175,000.00 refund was not contested and remains intact. Similarly, the dismissal of the counterclaim was warranted in the absence of supporting documents.
17. On the question of costs, Section 27 of the *Civil Procedure Act* provides that costs follow the event unless the court orders otherwise. The Respondent partially succeeded in her claim, and the trial court did not err in awarding her costs.

### **Disposition**

18. In conclusion, the appeal partially succeeds. The judgment of the subordinate court delivered on 1<sup>st</sup> December 2023 is hereby varied as follows:
  - i. The award of Kshs. 64,715.00 as additional expenses is hereby set aside.
  - ii. The award of Kshs. 175,000.00 to the Respondent as refund of money paid is upheld.
  - iii. The dismissal of the Appellant’s counterclaim is upheld.



iv. Each party shall bear their own costs of the appeal.

It is so ordered.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 31<sup>ST</sup> DAY OF JULY 2025.**

**PETER M. MULWA**

**JUDGE**

In the presence of:

N/A for Appellant

Mr. Migale for Respondent

Court Assistant: Carlos

