



**Lusoso Enterprises Limited v Direct Pay Limited t/a 3G Direct Pay t/a Direct Pay Online
(Civil Appeal 123 of 2020) [2024] KEHC 2661 (KLR) (15 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2661 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL 123 OF 2020
AN ONGERI, J
MARCH 15, 2024**

BETWEEN

LUSOSO ENTERPRISES LIMITED APPELLANT

AND

**DIRECT PAY LIMITED T/A 3G DIRECT PAY T/A DIRECT PAY
ONLINE RESPONDENT**

*(Being an appeal from the judgment of Hon. M. W. Murage
(CM) in Milimani CMCC No. 7904/2014 delivered on 25/2/2020)*

JUDGMENT

1. The appellant was the plaintiff in Milimani CMCC No. 7904 of 2017 where the appellant was seeking judgment for a sum of USD 33,000 (Exchange rate as at May 2016) with interest thereon until full payment.
2. The sum was in respect of payments illegally withheld under the false allegation that respondent had been fined kshs.75,000 by visa inc for illegal and fraudulent activities carried out by the appellant using the defendants online payment processing platforms.
3. The respondent filed a defence denying the entire claim.
4. The appellant's evidence was that in the month of February 2016, the appellant entered into an agreement with magic Private Limited to market for them garments using the website known account Fab and Fashion under the Fab n Fashion Company.
5. The appellant was doing good business and were giving the respondent between 15,000 and 25,000 per month until May 2016 when the respondent maliciously and/or illegally withheld the sum of USD 33,000/= belonging to the plaintiff.



6. The respondent did not call any witness. The trial court held that it was not clear how the sum of USD 33,000 was arrived at and dismissed the appellant's case.
7. The appellant has now appealed to this court on the following grounds;
 - i. THAT the learned magistrate erred in law and in fact by dismissing the plaintiff's case and arriving at a decision that was wholly against the weight of evidence adduced.
 - ii. THAT the learned magistrate erred by disregarding and failing to take into account the evidence adduced by the appellant in Nairobi CMCC No. 7904 of 2017 and in so doing arriving at a wrong decision.
 - iii. THAT the learned magistrate erred in failing to consider the appellant's submissions and evidence on why judgment should have been entered against the respondent.
8. The parties filed written submissions as follows; the appellant submitted that the trial court misapprehended and failed to consider the Appellant's evidence on record, more particularly, the fact that the Appellant pleaded indebtedness of \$33,000 by the Respondent, which claim remained uncontroverted by the Respondent in its pleadings as well as its submissions hence arriving at an erroneous finding.
9. The appellant submitted that throughout the entire proceedings during the trial, and contrary to the final disposition of the trial court, the amount claimed by the Appellant (USD33,000) was neither disputed by the Respondent nor did the Respondent take issue as to how the same had been arrived at.
10. Indeed, it was the Appellant's witness testimony under oath that the Respondent had been collecting funds on behalf of the Appellant from May-October 2016, despite the Respondent's false allegations on fraudulent activities on the Appellant's part. The witness testified that it was not until the Appellant started demanding its payments that the Respondent deactivated its account and withheld its monies for 180 days.
11. It was the appellants argument therefore that having failed to consider the Appellant's evidence, the trial court considered extraneous factors and thus arrived at an erroneous decision. The trial court belabored itself to question how the Appellant arrived at \$33,000 which amount the Respondent neither challenged nor disproved. Additionally, the trial court failed to frame and analyze the same as an issue for determination as required under law.
12. The respondent submitted that the Appellant has failed to discharge this essential burden, and the same is the reason for the dismissal of its suit by the trial Court. The sum allegedly owed and the existence of a contract, though there is none, would provide ample proof of a contractual relationship between the Appellant and the Respondent.
13. The respondent argued that the appellant did not provide evidentiary proof to establish a case specifically showing sums owed. There was therefore no error on the finding of the trial court, none based on evidence, misapprehension or acting on wrong principle.
14. This being a first appeal, the duty of the first appellate court is to re-evaluate the evidence adduced before the trial court and to arrive at its own conclusion whether to support the findings of the trial court bearing in mind that the trial court had the opportunity to see the witnesses.



15. The sole issue for determination in this appeal is whether the appellant proved their case to the required standard.
16. I have re-evaluated the evidence adduced before the trial court and I find that the appellant did not stipulate the particulars of fraud as required by law.
17. In the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR, Tunoi JA (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”
18. I find that the appellant did not distinctly plead and distinctly prove the acts that were done fraudulently by the respondent.
19. The appellant did not also show how the figure USD 33,000 was arrived at.
20. There is no evidence that the respondent admitted any part of the appellant’s claim.
21. I find that the appellant did to prove its to the required standard in civil suits which is on a balance of probabilities.
22. I dismiss the appeal with no orders as to costs.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 15TH DAY OF MARCH, 2024.

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A. N. ONGERI
JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent

