



REPUBLIC OF KENYA
IN THE SMALL CLAIMS COURT AT MILIMANI
SCCCOMM NO. E17173 OF 2024

MARA NOMADS LTD..... CLAIMANT
VERSUS
DENNIS OHURU.....RESPONDENT

JUDGEMENT

I. Facts of the Case

1. The Claimant made an application dated 6.1.2025 praying that this Court reviews its judgment delivered on the same date. It was the Claimant's position that the Court did not consider 2 statements and documentary evidence filed by the Claimant. The Respondent was not opposed to the application and therefore the court is now exercising its power to review the judgment and considered the evidence of the Claimant.
2. Briefly, the Claimant has sued the Respondent to recover a sum of USD 1,453.53 which funds are alleged to have been collected from the Claimant's YouTube AdSense revenue between March, 2024 and October 2024 which the Claimant alleges that the Respondent has withheld and failed to account plus interests and costs of the suit. The Respondent on the other hand takes the position that the said amount belongs to him being an over and above payment as agreed between the parties herein.
3. The Claimant states that they hired the Respondent in October 2021 to provide freelance video editing services for its YouTube channel "The Mara Nomads" at an initial compensation of Kshs. 150 per minute of the edited content with an understanding that the Respondent was strictly an independent service provider [independent contractor]. The Claimant alleges that they consistently met their financial obligations up to September 2024 which was cumulatively 4 years. The

Claimant alleges that in order to enhance quality of work flow, the Claimant decided to purchase a computer which the Respondent will utilize to produce higher quality videos. It is alleged that the Claimant elected to use revenues generated from its YouTube channel but in order to access the revenue the Claimant used the Respondent's AdSense account since the Claimant did not have an AdSense account. The Claimant further pleads that the Claimant and the Respondent mutually agreed to use the Respondent's AdSense account to harness the income before the Claimant sets up its own account. It is further pleaded that the Respondent held funds generated there own in trust for the Claimant until it is sufficient to purchase a laptop. It is alleged that the Respondent has retained a sum of Kshs. 1,453.53 USD accumulated from the month of March 2024 and October 2024. The Claimant now prays for judgment in the said sum plus costs and interests of the suit.

4. The Respondent filed a Response to the Statement of Claim dated 12.11.2024. The existence of the oral contract is admitted. The Respondent avers that on several occasions he sought a review and an increase of his terms of engagement with the Claimant but the review was not forthcoming and that it is the Respondent who proposed monetization of the Claimant's YouTube account with an understanding that the collection from the account was a payment to the Respondent over and above what the Claimant was paying him. He pleads that the Claimant actualized this agreement by connecting the Respondent's Ad Sense account to the Claimant's YouTube channel and the Respondent collected the revenue thereof until sometime in October 2024 when the Claimant without notice disconnected the Respondent's Ad Sense account. He prays that the claim be dismissed with costs.
5. Matter proceeded by documents only under Section 30 of the Small Claims Court Act. Parties filed submissions which the Court has considered.

II. Issues, the Law, Analysis and Determination

6. I set out the following issues for determination:

a) **Whether the new documents filed by the Claimant upon taking directions on judgment can be admitted and be considered.**

7. Directions on judgment dated was issued on 29.11.2024. Parties thereafter were to file submissions only. The Claimant proceeded to file additional documents after a judgment date has been taken without leave of the Court. Section 30 of the Act requires that subject to the consent of the parties a claim can be determined by documents only. My understanding of this section is that before parties agree to proceed by documents only, all documents have to be placed before the Court and parties considered them and determine whether the interests of their clients will be protected if a decision is arrived on the basis of the documents. It is on the basis of the documents availed that parties' contract to proceed under Section 30 of the Act. Consequently, any other documents produced after parties have agreed to proceed by documents only fall outside the contract entered by the parties and ought to be disregarded unless the said consent/contract is varied and adopted by the Court. Consequently, the Claimant's Supplementary List of Witnesses dated 5th December 2024, the Claimants Supplementary Witness Statement by Edgar Rutto dated 5th December 2024 and the Witness Statement by Esther Wambui dated 5th December 2024 are hereby struck out from the record since they were filed without leave of the court and did not form part of the record when the consent to proceed under Section 30 of the Act was made.

b) **Whether the Claimant has proved their case against the Respondent on a balance of probability.**

8. The existence of the contract is not disputed. However, the point of departure is on the Ad Sense account. Whereas the Claimant insists that the proceeds from the channel to the Respondent's Ad Sense was to be held by the Respondent in trust for the Claimant, the Respondent insists that the proceeds were a payment over and above what he used to be paid for editing the videos as mutually agreed by the parties.

9. I have considered the 2 statements filed by the Claimant through Edgah Ruto Tarus and Victor Augustus Onyango. I have equally considered the documents submitted in evidence by the Claimant now produced as exhibit no. 1 to 7. I note that the 2 witness statements are similar in content.
10. The Claimant in their statement states that the Respondent was engaged by the Claimant around October 2021 solely to provide freelance video editing services for the Claimant's YouTube channel, "The Mara Nomads" on an independent contractor basis, with both parties agreeing on an initial rate of Kshs 150 per minute of edited content. The Claimant states that they upheld its obligations by compensating the Respondent for every project delivered. The Claimant states that to improve the quality of content and streamline our workflow, the Claimant decided to purchase a high-performance laptop dedicated to video editing for exclusive use on the Claimant's YouTube channel projects. They also state that the Respondent, who already had an active AdSense account, volunteered to temporarily route the channel's earnings through his account while the Claimant finalized its AdSense setup. No evidence was tendered to show that the Claimant was following up on their AdSense account. The Claimant states parties agreed that the AdSense earnings generated from the Claimant's channel would be held in trust by the Respondent until sufficient funds were accrued for purchasing the video editing laptop. They further state that since March 2024, the Respondent has retained USD 1,453.53, equivalent to KES 187,505.37, accumulated from the Claimant's YouTube channel which forms the basis of the suit herein.
11. To counter the claim, the Respondent filed a Response to the Statement of Claim which I have summarized in paragraph 3 of this judgment. The Respondent also filed a Witness Statement and a bundle of documents dated 26.11.2024 which he sought to rely on. He states that he wrote up a YouTube Monetization plan on March 5th 2024 and sent it to the Claimant. To him this YouTube monetization plan was to help the Claimant explore more revenue earning streams and as a result be better and able to pay him the new rates I had proposed to charge them. In the YouTube Monetization

plan he states that suggested that the Claimant take advantage of the size of its YouTube channel and incorporate other avenues of YouTube monetization. He further pleads that after convincing its director Edgar that he was leaving a lot of money on the table by not monetizing the Claimant's YouTube Channel, even though it had attained the threshold for YouTube Monetization (1000 subscribers and 4000 hours of watch time) the Claimant agreed to monetizing the YouTube channel and letting him keep whatever the YouTube channel would make in Ad revenue as an increase in his compensation and he states that this was an oral agreement that happened around March of 2024.

12. What this Court requires to determine is the terms of agreement on the operations of the AdSense account. The existence of the oral agreement on monetization is not an issue under contention. The Claimant has not presented credible evidence demonstrating that the AdSense revenue was to be held in trust by the Respondent for the sole purpose of purchasing a video editing laptop for the Claimant. The evidence on record demonstrate that it is the Respondent who notified the Claimant that he will utilize the proceeds to purchase a laptop. The Claimant was not clear to the Court that the alleged laptop to be purchased was to be a property of the Claimant. I have considered the materials placed before me. It is clear that Respondent was being fully compensated as per the initial agreement but the Claimant has failed to demonstrate that upon agitation for better pay, they did not enter into an oral agreement that the Respondent monetizes the account and utilize the revenue generated to be a payment over and above his usual earnings. The Claimant herein did not even raise a demand for the sum accrued between March 2024 to October 2024 but basically proceeded to disconnect the AdSense account without notice to Respondent. There is no evidence on record to show that there was a dispute regarding the said amount before the disconnection. This suit was filed on 12th October, 2024. The record does not show that the Claimant issued a demand notice since no demand letter was produced. On 11th of October 2024 the Respondent herein uploaded a video titled "*who moved my geese/ I have suffered a major setback*", which in my view led to the filing of this suit.

13. The Respondent herein produced a monetization plan submitted to the Claimant in which he provided Mara Nomads Monetization plan for YouTube AdSense revenue, YouTube memberships, YouTube Shopping, Affiliate Marketing and Website AD revenue which clearly stipulates that the Respondent was to keep the YouTube AdSense revenue. This was never challenged by the Claimant. In my humble view, the Claimant was not able to establish that the reason for connecting their channel to the Respondent's AdSense account was to generate money for the purchase of a laptop. This partly explains why demand was issued to the Respondent and that the account was disconnected without notifying the Respondent.
14. There is another issue arising that the Respondent admitted that the revenue accruing to the YouTube AdSense account was not meant for him. In particular reference is made with regards to the below excerpt translated from a video done by the Respondent.
15. *"These four videos from the Victoria Falls trip were intended to help buy a video editing laptop because we've struggled with that for a very long time. I edit videos using this HP laptop, which is not a video editing laptop, and for a long time, we've struggled with that. I remember at some point, we said that I would work, and the Mara Nomads would keep my earnings until they reached an amount where they could buy a video editing laptop. But very quickly, I changed my mind about that because I thought, 'I can't work, and you keep my money. How am I going to survive? How am I going to pay rent, buy food, and things like that?' So, because of how well these videos were doing, we said, 'Let's take this money and purchase a video editing laptop.' I even sent a message on WhatsApp to the leader of the Mara Nomads about that. I WASN'T GOING TO USE THE MONEY FOR MYSELF - I WAS GOING TO USE IT TO BUY A VIDEO EDITING LAPTOP, which would make my video editing work better. It would mean better videos for the Mara Nomads because, as of now, we upload videos in 1080p. With the video editing laptop, we could start uploading videos in 4K, so overall, it would be a win-win for both of us... and that was the agreement we had."*

16. A pre cursor of the excerpt demonstrates that indeed the Respondent herein was desirous of buying a new laptop for purposes of video editing. Clearly, the excerpt indicates that the Respondent at one point recommended that the Claimant retains part of his pay which will be channeled toward purchasing a laptop which position the Respondent changed. In this Court's view, it is clear that the Respondent herein was using his own laptop and wanted the Claimant to keep some of his pay to pull resources together to assist him buy a laptop. This would imply that indeed to further his dream of acquiring a laptop, they had an arrangement that the Respondent retains revenue generated from YouTube AdSense account towards the purchase of a laptop. The Claimant herein has not demonstrated that he was the one who provided the tools of trade to the Respondent to do the video editing work. The evidence on record leads this Court to conclude that the Respondent herein as independent contractor who had his own tools of trade and therefore having failed to demonstrate that they were the ones supplying the laptop used in editing the Claimant cannot conclude that the proceeds from the Respondent's AdSense account were meant to purchase tools of trade belonging to the Claimant to be utilized by the Respondent.
17. It is not disputed that the Respondent herein equally had his own YouTube Channel which generated income that was generated to the same AdSense account. The Respondent is clear that he received payments from that period until his AdSense account was disconnected in October 2024. He further stated that at no point did the Claimant ever claim for a refund of that money ever since he started receiving the said payments in May 2024. He further stated that in May 2024, the Claimant's YouTube channel earned USD 177 in ad revenue from YouTube. This money was directed to his AdSense account, together with ad revenue earnings from his own YouTube and paid out to him by AdSense on 21st June of 2024. In the Month of July 2024, the Claimant's YouTube channel earned USD 190 in ad revenue from YouTube. This money was directed to the Respondent's AdSense account, together with ad revenue earnings from his own YouTube channel Dennis Ohuru and paid out to me by AdSense on 21st August of 2024. In the Month of August 2024, the Claimant's YouTube channel earned USD 78.50 in ad revenue from YouTube. This money was directed to Respondent's

AdSense account, together with ad revenue earnings from my own YouTube channel Dennis Ohuru and paid out to him by AdSense on 22nd September of 2024. It is clear that if payments to the AdSense account started accruing from the month of May to October 2024 and the Claimant did not make any attempt to request the accrued amount from the Respondent. All these payments were subjected to taxation and would include amounts received from the Respondent's YouTube Channel. I note that the Claimant did not take this into consideration. The only reasonable conclusion this Court makes is that the Claimant has failed to demonstrate the funds received by the Respondent were held in their trust and that it does not include separate revenue earned by the Respondent.

18. As can be seen from above, from the month of May 2024 to the month of October 2024 the Claimant allowed the Respondent to receive and utilize the amounts obtained from the AdSense account. There is no evidence on record showing that the Claimant ever requested for the said amount. By their conduct the Claimant proceeded to waive his right over the said monies and they cannot now appear to claim the amount.
19. Waiver is an intentional relinquishment or abandonment of a known right or privilege. In the case of **Banning vs Wright (1972) 2 All ER 987, at page 998** the House of Lords stated thus: -

"The primary meaning of the word waiver in legal parlance is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted. A person who is entitled to a stipulation in a contract or of a statutory provision may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waivers are not always in writing. Sometimes a person's actions can be interpreted as a waiver - waiver by conduct".
20. The Court of Appeal also did explore at some length the issues of waiver, estoppel and acquiescence in the **Serah Njeri Mwobi case** and we adopt its analysis in respect of waiver and estoppel by conduct, thus: -

*"The doctrine of waiver operates to deny a party his right on the basis that he had accepted to forego the same rights having known of their existence. The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person. See **Seascapes Limited vs Development Finance Company of Kenya Limited, [2009] eKLR**. The words waiver, estoppel and acquiescence have also been defined by the Halsbury's Laws of England, 4th Edition, Volume 16. At page 992 waiver has been defined as follows: -*

„Waiver is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct. It may sometimes resemble a form of election, and sometimes be based on ordinary principles of estoppel, although, unlike estoppel, waiver must always be an intentional act with knowledge. A person who is entitled to rely on a stipulation existing for his benefit alone, in a contract or of a statutory provision, may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waiver of this kind depends upon consent, and the fact that the other party has acted on it is sufficient consideration. Where the waiver is not express it may be implied from conduct which is inconsistent with the continuance of the right... The waiver may be terminated by reasonable but not necessarily formal notice unless the party who benefits by the waiver cannot resume his position, or termination would cause injustice to him?"

21. Returning to the current dispute the Claimant proceeded to connect Respondent's AdSense account to the YouTube channel owned by the Claimant. Revenue is generated for several months and the Claimant does not follow for the same or demand for it from the Respondent. The Claimant then proceeds to unilaterally disconnect the Respondent's AdSense account without notice to the Respondent. The parties agreed that proceeds from the revenue generated to the AdSense account were meant to purchase a laptop for editing. The Claimant was not supplying tools of trade to the Respondent and there is an indication that there had an arrangement at one point that the Claimant can retain part of fees payable to the Respondent to assist him purchase a laptop. In my own view, the Claimant having given the Respondent unfettered access to the resources generated in the month of May 2024 to October 2024 which is roughly 6 months is estopped from laying a claim on revenue they had waived in favour of the Respondent.

22. Having considered the various aspects of this case as highlighted above, I do not think that the Claimant has proved his case against the Respondent on a balance of probability. I dismiss it.

c) **Who bears the costs of the suit?**

23. The SCC Act provides that costs can be awarded to a successful party. I have been guided by the case of [Kenya Commercial Bank & another \(Suing as the Executor of the Estate of Simon Hongo Ominde \(Deceased\) v Muiruri t/a Leakeys Auctioneers & 6 others \[2023\] KEELC 21873 \(KLR\)\)](#) that costs follow events. The Supreme Court has set forth guiding principles applicable in the exercise of that discretion to award costs in the case of **Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR**, as follows: -

24. *“(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.”*

25. In the instant case the Respondent being the successful party is entitled to costs. The costs shall be assessed at the registry

III. Orders and Disposition

26. In the final analysis I find that the Claimant has not proved their case against the Respondent on a balance of probability and the suit is dismissed. The Respondent is awarded costs of the suit to assessed at the registry. The right of appeal is 30 days and I have ordered for 30 days stay of execution.

27. Pursuant to Rule 23 (4) (b) and (5) of the Small Claims Court Rules this judgment is delivered to the parties by uploading it to the Judiciary CTS.

Judgment Dated, Signed and Delivered this 7th Day February 2025



HON. Justine Asiago RM
ADJUDICATOR