New Co-operative Creameries Limited v Mugo T/A SN Mugo Transporters (Civil Appeal E163 of 2022) [2024] KEHC 9507 (KLR) (Civ) (26 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9507 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E163 OF 2022

WM MUSYOKA, J

JULY 26, 2024

BETWEEN

NEW CO-OPERATIVE CREAMERIES LIMITED .... APPELLANT

AND

SAMUEL NJUGUNA MUGO T/A SN MUGO TRANSPORTERS RESPONDENT

(An appeal arising from orders made in the ruling of Hon. MW Murage, Senior Resident Magistrate, SRM, delivered on 17th February 2022, in Milimani CMCCC No. 3401 of 2014)

JUDGMENT

1. The suit, at the primary court, was initiated by the appellant, against the respondent, for compensation, for loss of 29,900 litres of milk while being transported, on its behalf, by the respondent. The claim was founded on contract, and was Kshs. 705,374, being the value of spilt milk. The respondent resisted the claim, by a defence, in which he denied liability, and specifically pleaded that the terms of the contract had absolved him from liability, if the loss or damage was as a result of any cause not attributable to any act or commission on his part.

2. A formal hearing was conducted. 3 witnesses testified for the appellant, and 1 for the respondent. Judgment was delivered on 15th April 2021. Liability was apportioned at 100%, and damages were awarded at the amount claimed, plus costs and interests.

3. Subsequent to delivery of the judgment, the respondent filed an application, dated 10th May 2021. The application sought stay of execution, on the basis that he was aggrieved by the judgment delivered on 16th February 2021, and that he had filed an appeal, being Nairobi HCCA No. E240 of 2021, and stay was sought of execution of that judgment pending appeal. A copy of a memorandum of appeal,

lodged in Nairobi HCCA No. E240 of 2021, was attached, dated 7th May 2023. That application was not determined on its merits, for it was withdrawn on 11th June 2021.

4. The withdrawal of the said application was upon the filing of another, dated 27th May 2021, seeking stay of execution of the judgment, and its review. The trial court ruled on that application, on 17th February 2022. The court found that there was an oversight on its part, on grounds that had it noted the "letter," its conclusion would have been different. It concluded that the said "letter" absolved the respondent from liability for the accident, and that the trailer, which transported the milk belonged to the appellant, and was insured by it, and that the respondent only owned the prime mover, and the appellant was not entitled to benefit twice. The court reviewed its judgment, and dismissed the case by the appellant.

5. The appellant was aggrieved by that dismissal, hence the instant appeal. The grounds of appeal, in the memorandum of appeal, dated 19th March 2022, revolve around there being no error on the face of the judgment of 16th April 2021, re-evaluating evidence after having rendered a judgement, misapprehension of the order 45 rule 1(1) of the *Civil Procedure Rules*, entertaining a review application in the pendency of an appeal, and ignoring the submissions and authorities tendered by the appellant.

6. Directions were given, on the disposal of the appeal, on 8th February 2024, for canvassing of the appeal by way of written submissions. Both sides filed written submissions.

7. The appellant has submitted on 2 strands. The first is that the respondent pursued both an appeal and a review, contrary to section 80 of the *Civil Procedure Act*, Cap 21, Laws of Kenya, and Order 45 rule 1(1) of the *Civil Procedure Rules*. *Karani & 47 others v. Kijana & 2 others* [1987] KLR 557 (Nyarangi, Platt & Gachuhi, JJA) is cited, for the submission that both appeal and review cannot be conducted simultaneously. The second strand is that there was no error apparent on the face of the record, brought out in the application. It is argued that failure to consider documentary evidence on record is not a ground for review, for consideration appreciation and analysis of exhibits or issues raised at trial is not a ground for review. *Edward Machi Mitei v. John M. Kileges & 2 others* [2006] eKLR (Musinga, J) is cited on that score. The appellant filed supplementary submissions, to argue that the appeal in Nairobi HCCA No. E240 of 2021 was dismissed for want of prosecution on 16th June 2023, going by proceedings that were conducted before Hon. E Wambo, Deputy Registrar, herein on 6th March 2024.

8. The respondent has reacted to the submissions by the appellant sequentially. On entertaining a review application during the pendency of an appeal, he cites *Multichoice (Kenya) Limited v. Wananchi Group (Kenya) Limited & 2 Others* [2020] eKLR (Ouko P, Makhandia, Kiage, Gatembu & Sichale, JJA), to make the point that such a review application can be entertained, where the appeal had been withdrawn, and submits that in the instant case the appeal had been withdrawn, vide a notice of withdrawal, dated 27th May 2021. On the second issue, of error apparent on the face of the record, he submits that the trial court conceded, in its ruling, that it had not considered material that had been placed before it, and concluded that if it had, the outcome would have been different. He submits that the fact that the trial court conceded that it did not analyse material that was before it was evidence of an error apparent on the face of the record. *Jeremiah Chelanga (suing as the guardian ad litem of John Chelanga Chepkongai) v. Board of Management Kamatony Primary School & 3 others* [2021] eKLR (Nyagaka, J) and *Kenya Orient Insurance v. Zachary Nyambane Omwenga* [2021] eKLR (Ongeri, J) are cited. He also cites *Jayesh M. Sutaria v. Jambo Biscuits (K) Ltd* [2014] eKLR (ON Makau, J) and *Jeremiah Chelanga (suing as the guardian ad litem of John Chelanga Chepkongai) v. Board of Management Kamatony Primary School & 3 others* [2021] eKLR (Nyagaka, J), to support the

argument that failure to consider documents on record is an error apparent on the face of the record. Lastly, the respondent argues that to allow the claim against him, would amount to unjust enrichment, for the appellant had already been paid by its insurer for the spilt milk.

9. The appeal turns on only 2 issues, around determining a review application during the pendency of an appeal, and on failure to consider documents on record.

10. On the matter of pendency of an appeal when the review application was considered, it is not disputed that the respondent had filed an appeal prior to filing the review application. The issue is as to whether that appeal was still pending when the review application was being determined. The law, in section 80 of the *Civil Procedure Act* and Order 45 rule 1 of the *Civil Procedure Rules*, does not countenance a situation where the aggrieved party seeks both remedies simultaneously. That is a pata potea sort of approach to litigation. The 2 remedies are alternative to each other. A party has to choose whether he will appeal or seek review, but he cannot pursue both. Where he files an appeal, and afterwards changes his mind, in favour of review, then, as stated in *Multichoice (Kenya) Limited v. Wananchi Group (Kenya) Limited & 2 Others* [2020] eKLR (Ouko P, Makhandia, Kiage, Gatembu & Sichale, JJA), he has to withdraw the appeal, to allow the trial court to entertain his review application. The converse is also true, so that where the party initially files a review application, and later decides against it, in favour of an appeal, then he should withdraw the review application, so that the appellate court can determine the appeal. The law does not envisage concurrence of both remedies, and it would be abuse of process to have both pending.

11. So, what was the case here? The appeal had been filed earlier, for the application, dated 10th May 2021, was meant to obtain stay of execution orders pending that appeal. The respondent then decided to pursue a review, and withdrew the application, dated 10th May 2021, and replaced it with an application for review, dated 27th May 2021. Did he withdraw the appeal, before the review application was entertained? The application, dated 10th May 2021, was withdrawn on 11th June 2021, and the intention to withdraw it was first evinced on 31st May 2021. The record for both dates makes no mention of the withdrawal of Nairobi HCCA No. E240 of 2021. The appellant submits that there was no evidence of withdrawal of the said appeal, and goes on to refer to proceedings that were conducted in this appeal on 6th March 2024, before Hon. Wambo, the Deputy Registrar, where he confirmed that Nairobi HCCA No. E240 of 2021 was dismissed on 16th June 2023, for want of prosecution. The respondent asserts that there was a notice of withdrawal, dated 27th May 2021. However, I have not seen that notice in the record before me, and if ever there was such a notice, it would appear that it was not acted upon, for that appeal remained alive, until 16th June 2023, when it was dismissed. The court could not possibly have dismissed a non-existent appeal, if that appeal had been withdrawn in 2021 as alleged. My conclusion then is that Nairobi HCCA No. E240 of 2021 was still pending, when the trial court was reviewing the judgment of 16th April 2021, on 17th February 2022. Nairobi HCCA No. E240 of 2021 had been filed earlier than the review application. The higher court was seized of it before the trial court, and, in view of section 80 of the *Civil Procedure Act* and Order 45 rule 1 of the *Civil Procedure Rules*, the trial court could not entertain the review application while the High Court was seized of the appeal. Section 80 of the *Civil Procedure Act* and Order 45 rule 1 of the *Civil Procedure Rules* go to jurisdiction, so that where an appeal and a review application both pend, the 2 courts, seized of the 2 causes, that is to say the appellate court and the trial court, would both lack jurisdiction to handle either of the 2 causes, and jurisdiction would only be regained by either court upon withdrawal of 1 of the 2 causes. In the instant case, there was no jurisdiction for the trial court herein to determine the review application while Nairobi HCCA No. E240 of 2021 was still pending. The decision of 17th February 2022 was made without jurisdiction, and it was a nullity.

12. Let me advert to the second aspect, on whether there was an error apparent on the face of the record. The claim by the respondent, in the review application, was that he had placed a document on the record, in evidence, which the trial court did not consider, hence his application, on the basis that the failure or omission to consider that document was an error apparent on the face of the record. And what document are we talking about? It is the contract dated 28th August 2007, between the 2 parties, according to the application, dated 27th May 2021. Presumably, it is that document that the trial court concluded was on record, but it did not consider it.

13. So, what does the trial court record reflect? The said contract document was produced by PW3, on 11th March 2020, as PEXH3. He was cross-examined on paragraph 2.5 of the said contract. DW1 also testified on the said contract, and paragraph 7.5 of the contract was read to him at re-examination, although he is not recorded as saying anything in response. Both sides made reference to the contract, and specifically to paragraph 7.5, which allegedly absolved the respondent from liability. In the judgment of 15th April 2021, the trial court considered the contract, dated 28th August 2007, and found the respondent liable for the loss, on the basis of paragraph 7.1 thereof, which had stated that the transporter would be liable for any loss or damage, due to negligence, arising during transportation of the product, including during loading and unloading. There was a finding that the milk was lost while in the possession of the respondent.

14. So, that contract document was considered by the trial court. Indeed, its paragraph 7.1 was the basis upon which the court found the respondent liable. Consequently, there can be no basis for concluding that that contract was not considered. The court considered its paragraph 7.1, but not its paragraph 7.5. The fact that the trial court did not refer to paragraph 7.5 cannot be a matter of an error in the record. The fact that the court considered one paragraph of the contract but not the other was a matter of exercise of discretion, not a matter of an error on the record. If the argument was that the court should have considered paragraph 7.5, instead of paragraph 7.1, that would not be an error on the record, but a matter of analysis and deliberation, where the court chose the provision that it thought was relevant to the controversy. Any person aggrieved by that analysis or deliberation ought to challenge the decision on appeal, but not review, for there was no error at all in choosing to rely on one provision and not the other.

15. Curiously, in the ruling of 17th February 2022, the trial court made no reference whatsoever to paragraph 7.5 of the said contract, which the respondent has lurched on his response to the appeal. There was nothing on the face of the ruling, which indicated that the trial court founded its decision on the said paragraph 7.5 of the contract. Secondly, the determination in the ruling was founded on some unidentified letter, where it was alleged that, in that letter, the appellant had absolved the respondent of liability. It was unfortunate that the trial court based its decision on a document that it did not identify. It simply referred to a letter, without stating the date of the letter referred to, and without indicating whether the same had been produced at the oral hearing.

16. For clarity, let me refer to the relevant portion of the ruling, where reference is made to that letter. The trial court wrote:

> " I agree that there was an oversight on the part of the court. Had the said letter been noted, the decision of the court would have been different. The above letter clearly absolves the defendant of any liability for the accident. The letter also confirms that the trailer ZB 1208 from which the milk was being transported was the property of the plaintiff and was insured by the plaintiff…"

17. So what was this letter that the trial court was talking about in its third last paragraph? I note from the Motion, dated 27th April 2021, that ground iv, on the face of that Motion, referred to a letter dated 21st December 2010, which talked about the appellant having absolved the respondent of liability, and the trailer ZB 1208 as belonging to the appellant. The same information was regurgitated, word for word, in the supporting affidavit, where that letter was annexed as SNM3. In the affidavit and the Motion the said letter was described as forming part of the bundle of documents in the list of documents filed by the respondent. Ideally, the trial court should have clearly indicated that the letter, that it was talking about, was that dated 21st December 2010. I have seen the list of documents filed by the respondent, on 19th June 2017, dated 16th June 2017, and I have noted that the letter dated 21st December 2017 appeared as item number 3, in that list. The issue then would be whether the trial court was justified to rely on the contents of that letter to dispose of the review application.

18. Whether that letter, dated 21st December 2010, could be given any reliance, would depend on whether it was produced as an exhibit at the oral hearing. The fact that a document is placed on the court record, as part of a bundle of documents to be relied upon by the party filing it, does not make it an exhibit in the matter. It would only become an exhibit in the matter, which the trial court can rely on to make its determination, where a witness, who is capable of producing it, is presented, to identify it, bespeak its contents, and produce it as an exhibit. The alternative would be production of that document as an exhibit, without calling any witness to identify, bespeak and produce it, by having its production consented to by the other side. It is only in such scenarios that such a document, although placed on the record as part of the documents that the party filing it wishes to rely on, that it would be evidence that the trial can advert to. In the absence of formal production, the document does not become part of the evidence, and the trial court ought not to refer to and rely on it, in making its final determinations. Did that happen here?

19. The appellant presented 3 witnesses. None of them testified on the letter dated 21st December 2010. None of them were subjected to cross-examination on the contents of that letter. The respondent testified in defence. He made no reference to the letter dated 21st December 2010. He did not produce it as a defence exhibit. He was not cross-examined on it. Indeed, the respondent produced no documents. As the letter, dated 21st December 2010, did not feature at the oral hearing, and, more importantly, it was not produced as an exhibit, it did not form part of the evidence that the trial court could rely on in deciding the dispute before it. I have very closely perused the trial court record, I have not come across an order where that letter was produced as an exhibit by consent of the parties. No basis was laid for relying on it, and the trial court was tricked, by the respondent, through the review application, into relying on material that had not been produced at the trial as evidence.

20. I reiterate, the fact that the letter was in the list of the documents that the respondent had filed in court, did not make it evidence that the trial court could rely on. It could only become evidence, upon identification and production by a witness. The respondent was the only witness for the defence. He did not refer to it, nor produce it. The trial court could not be faulted for not relying on it, in its judgment of 15th April 2021, for it was never produced. The issue, therefore, that the trial court did not consider it, should not arise.

21. The law on production of documents was settled in *Kenneth Nyaga Mwige v. Austin Kiguta & 2 others* [2015] eKLR (Visram, Mwilu & Otieno-Odek, JJA), to the effect that a document marked for identification, or admitted into the record, must be proved, by way of a witness producing the document, tendering it in evidence as an exhibit, and laying foundation for its authenticity and relevance to the facts of the case. That decision has been followed by the High Court, and courts of equal status, in such cases as *South Nyanza Sugar Co. Ltd v. Mary A. Mwita & another* [2018]

eKLR (Mrima, J), *Billiah Matiangi v. Kisii Bottlers Limited & another* [2021] eKLR (Ndung'u, J), *Sammy Wafula Meja v. Republic* [2021] eKLR, *Jackson Ndwiga v. Elizabeth Thara Ngahu* [2021] eKLR (Njuguna, J), *Sofie Feis Caroline Lwangu v. Benson Wafula Ndote* [2022] eKLR (Nyagaka, J) and *Lwangu v. Ndote* [2021] KEELC 2 (KLR)(Nyagaka, J). See also *Finmax Community Based Group & 3 others v. Kericho Technical Institute* [2021] eKLR (Ouko P, Musinga & J Mohammed, JJA).

22. Based on what I have discussed above, I find and hold that there is merit in the appeal herein.

23. There was the argument by the respondent that the appellant had been settled by its insurers, and that any recovery from him would amount to double jeopardy. I understand the suit before the trial court to have had been brought on the basis of the principle of subrogation, which allows the insurer to recover whatever moneys were due to the insured, as compensation from other sources or parties, even after it has honoured its insurance contract with the insured. There can be no basis, therefore, that the award in favour of the appellant was unjust enrichment, or double benefit.

24. I hereby allow the appeal herein, with the consequence that the orders made by the trial court, in the ruling delivered on 12th February 2022, are hereby vacated, and I do substitute those orders with an order dismissing the application, dated 27th May 2021. The appellant shall have the costs of the appeal, and at the court below.

DELIVERED BY EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 26TH DAY OF JULY 2024.

W MUSYOKA

JUDGE

Ms. Veronica, Court Assistant, Milimani, Nairobi.

Mr. Arthur Etyang, Court Assistant, Busia.

Advocates:

Mr. Maina, instructed by Eboso & Associates, Advocates for the appellant.

Mr. Mogire, instructed by Mogire & Company, Advocates for the respondent.