



Muchedu v K-Unity Savings and Credit Co-opetative Society Limited & 2 others (Civil Appeal E295 of 2022) [2024] KEHC 13164 (KLR) (30 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13164 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E295 OF 2022
AM MUTETI, J
OCTOBER 30, 2024**

BETWEEN

THOMAS NJUGUNA MUCHENDU APPELLANT

AND

**K-UNITY SAVINGS AND CREDIT CO-OPETATIVE SOCIETY
LIMITED 1ST RESPONDENT**

NANCY MUTHOMI KIUNGU 2ND RESPONDENT

BEN KIHKA GATHIGI 3RD RESPONDENT

(Being an appeal from the judgement of Chief Magistrate's Court at Kiambu Hon. Mr. W. Rading delivered on 27th October, 2022 in Kiambu CMCC NO. 279 OF 2010)

JUDGMENT

Introduction

1. The appellant has come to this Court on appeal challenging the decision of the learned Honourable on the following: -
 - a. That the Learned Magistrate erred in both law and fact in allowing the Respondent's prayers in the plaint against the Appellant with costs contrary to the weight of the evidence adduced during trial.
 - b. That the learned Magistrate erred in law and in fact in failing to address the case against the 2nd and 3rd respondents despite there being default judgement against them and in so doing wrongly rendered judgement against the Appellant only.



- c. The Learned Magistrate erred in law and in fact in finding that the Appellant owed the 1st respondent a duty of care and that his conduct of cashing out of cheques which later bounced breached that duty of care and amounted to negligence.
 - d. That the Learned Magistrate erred in both Law and fact in failing to take into account the evidence of the Appellant and solely relied on the evidence of the 1st respondent and his witnesses and thus erred in arriving at the decision that he did.
 - e. That the Learned Magistrate erred in law and fact in awarding the Respondent the sum claimed in the plaint contrary to the evidence adduced that not the entire amount was lost.
 - f. That the Learned Magistrate erred in law and fact in dismissing the Appellant's counterclaim contrary to the weight of evidence and the law.
 - g. That the learned magistrate erred in law and in fact in failing to appreciate the totality of evidence adduced before him which clearly supported entering of Judgment against the 1st Respondent.
 - h. The Learned Magistrate erred in law and in fact in arriving at the decision he did against the weight of the evidence and law.
2. The appellant was the 1st defendant in the Lower Court.
 3. The case against him was that during the period between 1st Nov 2007 and 12th November 2007 while working with the 1st Respondent he caused the 1st Respondent to suffer a loss of Ksh 1,194,000 in collusion with the 2nd and 3rd Respondents.
 4. The matter was heard and judgement was entered against him thus prompting this appeal.

Analysis

5. As a first appellate Court this Court is required to analyze the evidence tendered in the Lower Court and draw its own conclusions thereon remembering that the Court unlike the Court of first instance did not have the advantage of hearing the witnesses- *Selle v Associated Motor Boat Co. Ltd* 1968 EA 123.
6. The appellant and the Respondents have all filed their submissions which I have duly considered.
7. The thrust of the appellants appeal is that the learned Honourable Magistrate misdirected himself in the analysis of evidence thus arriving at the wrong decision in law.
8. The appellant maintains that the Lower Court failed to appreciate that this being a claim for money lost the same was recoverable as against the Appellant the 2nd and 3rd Respondent.
9. In the alternative, the Appellant submits that in respect of the claim for monies lost through bounced cheques, the 3rd Respondent should have been held liable since the money claimed in the plaint was advanced to him.
10. According to the Appellant the 3rd respondent being the sole beneficiary he ought to have made good the claim.
11. The appellant further argues that the 3rd Respondent had undertaken to meet the sum in any of the cheques that would be returned uncleared.
12. The appellant urges this Court to find then the 3rd respondent should have borne liability for the entire sum since according to the appellant he was the sole beneficiary.



13. The Court notes that the 2nd and 3rd Respondent did not participate in the Lower Court. This Court will therefore not benefit from hearing from them in this appeal.
14. The Lower Court in issued a default judgement against both the 2nd and 3rd Respondent.
15. The 1st Respondent has submitted that the record of Appeal in incomplete thus fatally defective.
16. I have gone through the 1st Respondents submissions in order to establish what documents are said to be missing in the record of Appeal. The 1st Respondent indicates that it is the bundle of the Plaintiff's documents relied on at the trial dated 2nd October 2017.
17. The record of Appeal does not contain the said documents thus the respondent's submission is correct to that extent.
18. The issue that arise is, are the extended documents crucial to the hearing and determining of the Appeal and if so, what is the effect of their exclusion.
19. Ms. Wachanga Advocate for the Appellant stated before me on the 7th June 2024: -

“ We shall rely on the record as filed. The Respondent ought to have filed a supplementary record annexing whatever documents were missing.”
20. The position taken by counsel for the Appellant left this Court wondering why would counsel for an Appellant approach such a serious matter so casually.
21. The record as filed does not include the documents relied on in the Lower Court by the Plaintiff. It is thus a case of an appellant proceeding with an appeal without giving due attention to order 42 Rule 13 (4) of the *civil procedure rules*.
22. The excluded documents fall within the documents enumerated under order 42 Rule 13 (4) (e).
23. Whereas under order 42 Rule 13 (4) (ii) the judge may dispense with the production of any document or part of a document which is not relevant, the appellant cannot simply assume that a judge will as a matter of course dispense with a document simply because it is not included in a record of appeal.
24. It is the duty of the Appellant to ensure that at the hearing of his appeal the documents necessary for the Court to peruse in order to do justice to his appeal are included in the record of Appeal.
25. Clearly, this Appellant elected to file only those documents he considered useful to his Appeal without caring about the Court and the Respondents.
26. The omission of those documents that were relied on by the Plaintiff in the Lower Court deprives this Court of the full benefit of scrutinizing them to ascertain whether in fact the documents supported the claim and secondly whether the documents pointed to the 3rd Respondent as being the sole beneficiary of the funds.
27. It would have helped the Court also determine whether the cheques were issued by the 3rd Respondent or not.
28. The Court is left to grapple with the record without the benefits of exhibits.
29. The Court sitting as a first appellate Court is under duty to evaluate the evidence tendered before the Lower Court and draw conclusions from the same independently. It is a task that a Court cannot diligently perform without the benefit of the entire evidence tendered before the Lower Court.



30. The appellant in his appendix indicates the plaintiff's list and bundle of documents and reply to defence and counter-claim is to be found at the pages 3-6 of the record.
31. I have looked at the record but I was only able to find a plaint, verifying affidavit, amended plaint, plaintiff's list of documents, witness statement of one Simon Njenga, reply to defence and Defence to Counterclaim.
32. Although the list of documents appearing at page 11 of the record lists 12 documents, none of them is included in the record.
33. It is this record that the Appellant sought to rely on.
34. In *State Bank of India v. Om Narain Agarwal* AIR 2011 All 19 the main function of evidence is to narrow down the scope of dispute before the Court to the fact relating to the matter which have logical probative value in determining a fact and to prevent giving judgements based on illogical conclusions or prejudices and as an aid to the administration of justice.
35. The Court without the benefit of the evidence relied on by the 1st Respondent in the Lower Court would be venturing into making a judgement on the basis of contested facts by the parties.
It would be a great travesty of justice if the Court were to proceed and determine the appeal without considering the prejudice it might occasion the 3rd Respondent in particular whom the appellant strongly argues was the sole beneficiary of the funds in issue.
36. The appellant by failing to include the documents prevented this Court from undertaking its task of reevaluation of evidence.
37. The result of this is that I must agree with the 1st Respondent that the omission is fatal considering all circumstances of the case.
38. The whole matter revolved around bouncing and uncleared cheques. The appellant chose to keep these from the eyes of this Court.
39. I am therefore unable to determine whether indeed the 3rd Respondent was wholly responsible for the funds lost.
40. This Court cannot also be able to decide whether the appellant was liable for the funds for it would have been only possible for me to do so if I had advantage seeing the documents provided by the 1st Respondent in the Lower Court as well.

Conclusion

41. The omission to include the evidence tendered before the learned Honourable Magistrate by the 1st Respondent was a fatal omission. The appellant had the opportunity to salvage the appeal but squandered the opportunity. The record does not satisfy the requirements of order 42 Rule 13.

I am therefore inclined to find that the record of Appeal incurably defective and is accordingly struck out with costs to the 1st Respondent.

42. It is so ordered.

DATED, SIGNED AND DELIVERED IN VIRTUAL COURT AT NAIROBI THIS 30TH DAY OF OCTOBER 2024.

A. M. MUTETI



JUDGE

In the presence of:

Kiptoo: Court Assistant

J. M Njenga fo the Appellants Absent

Ms Muriada holding brief Mbigi for the 1st Respondent

No appearance for the 2nd & 3rd Respondents

