Kosgey v Okal & 6 others (Civil Appeal E11 of 2023)
[2024] KEHC 15260 (KLR) (Civ) (29 November 2024) (Judgment)

Neutral citation: [2024] KEHC 15260 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E11 OF 2023

RC RUTTO, J

NOVEMBER 29, 2024

BETWEEN

JOSEPH KIPLIMO KOSGEY ..... APPELLANT

AND

MICHAEL OTIENO OKAL ..... 1ST RESPONDENT

ABIGAEL AWINO WERE ..... 2ND RESPONDENT

JOAN JEPCHIRCHIR ..... 3RD RESPONDENT

JARDINE MWANYUMBA ..... 4TH RESPONDENT

ROSELINE MUTHONI MUGO ..... 5TH RESPONDENT

MOSES MUGO MWAI ..... 6TH RESPONDENT

ABEDNEGO MUTUNGA KITILI ..... 7TH RESPONDENT

(An appeal from the judgment of the Honourable J. Mwatsama delivered on 16th December 2022 in the Tribunal Case No. 458 of 2018)

JUDGMENT

1. This appeal emanates from the decision of the Co-operative Tribunal in which the Tribunal entered judgment in favour of the Respondents by ordering the Appellant to compensate the Respondents the amounts deducted from their shares.

2. The background of the appeal is that the Respondents lodged a complaint on 29/3/2018 before the Co-operative Tribunal seeking a refund of a total of Kshs 1,192,009.25 paid by the Respondents on behalf of the Appellant.

3. The facts of the case as set out was that the Respondents guaranteed the Appellant a loan of Kshs. 2,000,000/= of which he partially paid leaving a balance of Kshs. 1,362,399.15/= which he defaulted to pay. Subsequently, the Respondents' shares were attached by Sheria Savings & Credit Co-operative Ltd (herein the Sacco) to recover the defaulted sum at Kshs. 170,299.90/= from each of the Respondents.

4. In response to the claim, the Appellant vide the statement of defence dated 20/11/2020 denied the Respondents as his guarantors and if at all they were, they willfully and deliberately took the risks, were aware of the consequences of their actions and thus he should not be made to indemnify them. It was also stated that the default to repay the loan was actuated by his dismissal from employment. The Appellant urged the court to dismiss the Respondents claim.

5. Vide a judgment delivered on 16/12/2022, the Co-operative tribunal found that the Appellant's default in paying the loan was negligence and the Respondents ought to have been compensated for the amounts deducted from their shares. The tribunal thus ordered payment of Kshs. 670,299.90/= being the deducted amount plus costs and interest.

6. Being dissatisfied with the decision of the Tribunal, the Appellant filed the instant appeal vide Memorandum of Appeal dated 9/1/2023 seeking to set aside the Tribunal's judgment. The appeal is premised on the following grounds set out verbatim;

    a. That the honorable Tribunal erred in law and fact by failing to appreciate that the burden of proof lay squarely with the Respondents;

    b. That the honorable Tribunal failed to consider that the Respondent (Appellant herein) did not cross examine the 2nd to 7th Claimants;

    c. That the honorable Tribunal misdirected itself on the assessment of quantum on general damages;

    d. That the honorable Tribunal misdirected itself on the assessment of interest as against the purported claim of kshs 1,192,099.25 which claim is unfolded;

    e. That the honorable Tribunal failed in totality to consider as to whether the Respondents produced documents in court to confirm whether the Appellant owed the Respondents the alleged claim of Kshs 1,192,099.25;

    f. That the Appellant cross examined only the 1st Claimant, Micheal Otieno Okal;

    g. That the honorable Tribunal, misdirected itself to engage for a pre trial as by the provisions of Order 11 of the Civil Procedure Rules;

    h. That it is fair and just that this Honourable Court do issue an order of stay of execution pending the hearing of this appeal ;

    i. That it is fair and just that this honourable court do grant leave for appeal.

7. The appeal was canvassed by way of written submissions. The Appellant filed submissions dated 19/6/2024 whereas the 1st Respondent filed submissions dated 26/6/2024 on behalf of all the Respondents.

Parties Submissions

8. The Appellant relied on the contents of the memorandum of appeal and submitted that the Tribunal erred in failing to appreciate that the burden of proof laid squarely on the Respondents.

9. Further that there was great miscarriage of justice in the Tribunal since it failed to consider that the Appellant did not cross examine the 2nd - 7th Respondents. That the 1st Respondent did not have the authority to testify and/or plead on behalf of the 2nd-7th Respondents. It was his submission that the 2nd Respondent was included in the claim but excluded in the final submission and that the Tribunal did not consider his submissions filed on 22nd September 2022. The Appellant faulted the Respondents for introducing new evidence and/or documents in their final submissions.

10. The Appellant submitted that the Tribunal misdirected itself on the assessment of quantum on general damages as the purported claim of Kshs 1,192,099.25 was unfounded. He urged the Court to dismiss the statement of claim dated 29th March 2018 with costs and in the alternative, to set aside the judgment delivered on 16th December 2022 and direct a new trial before any other court or tribunal.

11. The Respondents submitted that they proved their case by providing evidence in form of first, a copy of the duly completed and approved loan application form demonstrating that they guaranteed the Appellant access to a loan of kshs 2,000,000 from Sheria Sacco; second, the initial recovery of the outstanding loan balance of kshs 1,362,399.25 through a uniformed deduction of kshs 170,299.90 from each of the Respondents; third, a share deduction letter from Sheria Sacco with a uniform deduction of kshs 170,299.9 which was later corrected through letter dated 8th February 2022 upon refund of the over deduction.

12. The Respondent also noted that the 2nd Respondent was incorrectly referred to as the 7th Respondent however the personal number 23832 is accurate and the duplication of the 7th Respondent in the list of guarantors further demonstrates the typographical error.

13. It was their submission that the 1st Respondent was authorized to plead on behalf of the 2nd to 7th Respondents through an authority to swear verifying affidavit under Order 4 Rule 3 of the Civil Procedure Rules. Further that they was no new evidence presented in the final submissions as alleged by the Appellant. The Respondents urged the Court to dismiss the Appeal in its entirety and uphold the decision of the Co-operative Tribunal.

Analysis and Determination

14. The duty of the first appellate court to re-examine and re-evaluate evidence to come up with its own findings was set out in Selle vs. Associated Motor Boat Co. (1968) E.A 123 as follows: -

> " ... Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect ..."

15. This Court has considered the entire Record of Appeal and submissions by the parties and notes that though the Appellant framed several grounds of appeal, it is deductible that only two issues arise, namely; the procedural issues where the Appellant asserts that he was not accorded a fair hearing during hearing, and secondly, that the Tribunal erred in finding that the Appellant ought to have compensated the Respondents for the amounts deducted from their shares.

16. As to whether the Appellant was accorded a fair hearing, this Court notes the Appellant's assertion that the 1st Respondent did not have the authority to testify and/or plead on behalf of the 2nd-7th Respondents and as a result he was not accorded an opportunity cross examine the 2nd to 7th Respondents. Secondly, that despite filing his submissions, the Tribunal did not consider them while arriving at its decision.

17. I have considered the proceedings before the Tribunal and note that there was an Authority to Act dated 29th March 2018 signed by all the Respondents giving authority to the 1st Respondent to sue and sign any affidavit as a representative in the suit against the Appellant herein. Further the proceedings show that during hearing the 1st Claimant testified in plural. He sought to have the witness statements filed on 21st September 2020 and dated 23rd January 2020 adopted as evidence in-Chief. Notably, the Appellant was given an opportunity to cross-examine the 1st claimant on the witness statement.

18. At that point, the Appellant did not raise any objection as to the 1st Claimant testifying on behalf of the other Claimants. He never once complained or communicated his need to cross-examine any or all of the Respondents. Instead, he proceeded with his case and closed the Respondent case paving way for filing of submissions. Therefore, this ground of appeal comes as an after thought and the same must fail. In any event, having not been raised before the Tribunal, it cannot be raised now on appeal. An appellate Court considers matters that were raised and determined by the court/tribunal below.

19. Besides this Court also notes that the dispute/cause of action arose from a single transaction where the Respondents herein guaranteed the Appellant a Sacco Loan and upon default by the Appellant, all their respective shares' contributions were deducted. Thus, it would have been redundant to call all seven Respondents to give similar testimonies. Indeed, Section 143 of the Evidence Act provides thus:

> "No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."
>
> Hence, where a fact can be proved by a single witness, it will be preposterous to require a total of seven witnesses to testify giving similar evidence.

20. The Appellant's complaint that the Tribunal failed to conduct pre-trial is also misleading as the Tribunal gave numerous directions on pre-trial which the Appellant continuously failed to comply with and the Tribunal was eventually compelled to proceed with the hearing after adjourning the same on several occasions as evidence from the record of appeal. Thus, this Court takes great exception in the conduct of the Appellant during hearing at the Tribunal. It is evident that the Tribunal over-indulged him and eventually the matter proceeded for hearing.

21. The Appellant also asserted that the Tribunal did not consider his submissions. This court notes the Tribunal's sentiments that as at the time of writing the judgment, the Respondent's (Appellant herein) submissions were not on file. Also, this Court notes that the Appellant was given several opportunities to file his submissions. I refer to the proceedings of 11/5/22 where the Appellant was given 14 days to file his submissions, with a mention date of 22/9/2022 to get a judgment date. On 22/9/202, the Respondent informed the Tribunal that he had filed his submissions on 15/9/2022, the Tribunal directed that the Respondent to ensures that they had filed written submissions and proceeded to issue a judgment date. From the record the Respondent submissions were filed and date stamped 22 September 2022. Thus, the question is what is the impact of failing to consider the Respondent's submissions.

22. The meaning of submissions and their import was underscored by the Court of Appeal in Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR. The Court stated thus:-

> "Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."

23. Consequently, guided by the above, the Appellant's assertion that the Tribunal did not consider his submissions cannot hold. In any event, rules of procedure are made to be adhered to. A party cannot openly disregard procedural directions by a Tribunal as regards filing of submissions then turn around and cry foul. The Appellant was given time to file his submissions but chose to file them late in the day, without leave of the Tribunal. The Tribunal observed that at the time of writing the judgment, his submissions were not on record. Suffices it to hold that having been filed out of time without leave, the Tribunal was justified in disregarding them.

24. The Appellant's was dissatisfied with the Tribunal's finding that it failed to appreciate that the burden of proof lay squarely on the Respondents. It is trite that he who alleges must proof as provided for under Section 107 and 108 of the Evidence Act. The burden of proof thus laid with the Respondents to proof their assertions against the Appellant before the Tribunal. See the cases of Kenya Pipeline Company Ltd v Corporate Business Forms (2019)eKLR and Alice Wanjiru Ruhiu vs Messiac Assembly Yahweh (2021) eKLR .

25. I have reviewed the record of appeal before me. It is evident that the Appellant took a loan of kshs 2,000,000/- from Sheria Sacco which was guaranteed by the Respondents herein. This was corroborated by the production of the loan application form. It is also not in dispute that the Appellant later defaulted in its repayment as evident in his witness statement. I note that the Tribunal found that the Respondents had provided copies of the original loan form filled by the Respondents, evidence that the appellant had been informed of his loan balance, evidence of uniform deductions of Kshs. 170,299.09/=, and certified loan statements. There was also evidence of a formal inquiry to Sheria Sacco which took note of the irregularities and refunded the Respondents with the over deduction of the defaulted amount.

26. The Appellant on the other hand stated that there are glaring shortcomings in the Respondents case, that he used his shares to offset the loan and faults the Sacco for failing to issue him with any statement/ document to show how the same had been done. While he blames the Sacco, the Sacco were not party to these proceedings.

27. This Court finds that the tribunal considered all the documentary evidence produced by the Respondents and found that the Appellant indeed owed them. This Court has taken time to go through the documents filed before the Tribunal on 21/9/2020 and finds that there was overwhelming evidence to proof that the Respondents indeed guaranteed the Appellant's loan which he later defaulted despite demand. There was also evidence that the Respondents' shares had been deducted as pleaded.

28. Consequently, it cannot be said that the Tribunal did not test the Respondents' case against the evidence adduced. The burden of proof squarely laid on the Respondents and they duly discharged it to the required standard. This ground of appeal thus has no merit.

29. The appellant also brought the appeal on grounds that the Tribunal misdirected itself on the assessment of quantum on general damages and assessment of interest. I have considered the entire judgment and note that the Tribunal did not make any award for general damages. The Tribunal awarded the actual deducted amount of Kshs. 670,299.90/= plus costs and interest. The Tribunal did not also assess interest at any point. This ground also fails.

30. The Appellant's reason for defaulting payment was unsatisfactory and it was indeed arrogant for him to plead that the Respondents were aware of the consequences of the guarantee and he was not liable to compensate them of their deducted amounts. It would be unreasonable and indeed deceitful for one

to take out a loan with assistance of guarantors and proceed to negligently default repayment of the loan on the expectation that the guarantors would face the consequences whereas he walks scot free.

31. The Appellant had the responsibility to ensure that the loan was repaid according to the applicable terms and conditions and it was not for him to shift the burden of repayment to the guarantors on grounds that he had been dismissed from work. There was no effort taken to re-negotiate payment with the Sacco and the Appellant ignored the notice of default that was communicated to him. This Court agrees with the Tribunal's finding that the Appellant was irresponsible in failing to repay the loan and the Respondents ought to have been compensated for their individual share deductions to settle the loan. I see no reason to interfere with that finding.

32. The upshot is that the memorandum of appeal dated 10/6/2024 is unmeritorious and the same is hereby dismissed with costs to the Respondents. The judgment rendered by the Co-operative Tribunal dated 16/12/2022 is hereby upheld.

Orders accordingly

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 29TH DAY OF NOVEMBER 2024

For Appellant:

For Respondent:

Court Assistant: