Kamau (Legal Representative of the Estate of the Late Alexander Kamau Githinji - Deceased) v Gitonga (Civil Appeal E20 of 2021) [2023] KEHC 1391 (KLR) (28 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1391 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CIVIL APPEAL E20 OF 2021

LN MUGAMBI, J

FEBRUARY 28, 2023

BETWEEN

BEATRICE WAMBUI KAMAU (LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE ALEXANDER KAMAU GITHINJI - DECEASED) .... APPELLANT

AND

MOSES NGATIA GITONGA .... RESPONDENT

(Being an appeal from the judgement and decree of J.A Agonda (PM) delivered on 26th January, 2021 in Ruiru CMCC No. 357 of 2019))

JUDGMENT

1. This appeal arises from a suit filed in the lower court on the 11th October, 2019 by the Respondent (then the Plaintiff) who sued the Appellant (then the Defendant) as the legal representative of her late husband's estate in which he claimed payment of Kshs. 1,468,000/= as per terms of a written agreement executed between him and the late husband or in the alternative rent proceeds from Plot Number 2672 Githunguri Ranching Company Limited to be deposited in the Plaintiff's account until payment in full, costs of the suit and interest.

2. The Appellant filed her defence dated 25th November, 2019 in which she denied the allegations in the plaint. She stated that she was not a privy to the agreement entered by her late husband and the Respondent.

3. On 22nd October, 2020, the matter came up for a hearing and both parties were heard. In its judgement, the trial found in favour of the Respondent against the Appellant and entered judgement for payment of Kshs. 1,468,000/= plus costs and interest.

4. Aggrieved by the judgment by the lower Court, the Appellant filed this appeal. In her Memorandum of Appeal she listed seven grounds of appeal of appeal as follows:

   a. That the Honourable Magistrate erred in law and in fact by failing to appreciate the plaintiff had a legal duty to prove his case on a balance of probability that:

      i. The plaintiff advanced a friendly loan to the deceased amounting to Kshs. 1, 468, 000/=.

      ii. That the agreement produced by the plaintiff was valid and that the same had been executed by the deceased as well as witnessed as required by the law.

      iii. The alleged friendly loan was disbursed to the deceased.

   b. That the Honourable Magistrate erred in both law and fact by making a finding that there existed a valid and binding oral contract between the Appellant's deceased husband and the Respondent and proceeded to make the said oral agreement the basis of her judgment despite the fact that parties never pleaded the same in pleadings.

   c. That the Honourable Magistrate erred in law and in fact creating a claim based on un-pleaded oral agreement, thereby disregarding the written agreement pleaded by the plaintiff and proceeded to submit on the said oral agreement on behalf of the plaintiff and eventually found judgment in favour of the plaintiff.

   d. That the Honourable Magistrate erred in law and in fact by disregarding the Appellant's defence to the plaintiff's case and further disregarded all the submissions by the Appellant thereby giving undue advantage to the plaintiff.

   e. That the Honourable Magistrate erred in law and in fact in entertaining extraneous matters while disregarding critical issues raised by the case thereby arriving at the wrong decision.

   f. That the Honourable Magistrate erred in law and in fact in showing an open bias against the Appellant and her case.

   g. That in all instances the judgment and decree of the court is unsupported by law and fact.

5. The appellant prayed that the appeal be allowed and the judgement and decree of the subordinate court dated 26th January 2021 and all consequential orders be set aside and dismissed with costs.

Appellant's submissions

6. The Appellant filed her submissions on 4th July 2022 and discussed the grounds in two parts. On grounds 1, 2, 3 and 5, she submitted that the respondent did not prove his case on a balance of probabilities as he neither adduced evidence that he had disbursed Kshs. 1468,000/= or any amount to the deceased nor the purported agreement for the advancement of a friendly loan. She submitted that the respondent did not lead any evidence to show that there was a valid and binding agreement executed by himself and the deceased in her presence. None of the witnesses called to testify on behalf of the respondent witnessed the execution of the agreement hence their evidence lacked any probative value.

7. She stated that the trial court not only disregarded her defence submissions but it additionally framed and decided a claim based on oral contract that had not been pleaded to assist the respondent in his case which was extremely prejudicial to the estate of the deceased. She placed reliance on the decision in *Independent Electoral and Boundaries Commission & Ano v Stephen Mutinda Mule & 3 others (2014)* eklr where the Court of Appeal cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) vs. Nigeria Breweries* PLC SC 91/2002 where Adereji, JSC, expressed himself thus on the importance and place of pleadings:

> " ....it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."
>
> "In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

8. On Ground 4, 6 and 7, she submitted that despite the estate of the deceased having two administrators, the respondent sued her only instead of both representatives hence the suit is fatally defective.

9. She submitted that the alleged transaction between the deceased and the respondent involved land and hence squarely fell under the provisions of section 3(3) of the *Law of Contract Act* which ought to have been entered into in writing. Further Section 71 of the *Evidence Act* provided that where a document is required by law to be attested it shall not be used as evidence until one attesting witness has been called for purposes of proving execution.

10. She urged this court to evaluate the facts and make an independent conclusion.

Respondent's submissions

11. The Respondent filed his submissions on 14th July 2022 and outlined multiple issues for determination. On whether the plaintiff had a legal duty to prove his case on a balance of probabilities, he submitted that it was clear from the evidence that building materials were supplied and that the deceased owed the plaintiff the said amount and that is the reason why he consented to be bound in writing accepting to pay the amount of Kshs. 1,468,000/= to be paid in instalments of Kshs. 96235/ =. He stated that the evidence stated by the witnesses and the agreement signed between the deceased and the respondent is a clear indication that the parties intended to be bound and wanted a contract in writing which they signed and exchanged.

12. On whether there was a valid oral agreement between the parties, he relied on the case of *Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri (2014)* eklr where it was held as follows:

> 'In Yaxley – vs- Gotts & Another, (2000) Ch 162, it was held that an oral agreement for sale of property created an interest in the property even though void and unenforceable as a contract; but the oral agreement was still enforceable on the basis of a constructive trust or proprietary estoppel.'

13. He said that in the instant case, it was the appellant's deceased husband who put the respondent in possession of the estate of the deceased, not as licensee but with the intention that he was to pay the loan amount of Kshs. 1,468000/=.

14. On whether there was open bias against the appellant and her case, he submitted that this appeal has fallen short of the test of 'reasonable apprehension of bias' set by the Court of Appeal in the case of Kalpana H. Rawal v Judicial Service Commission and 2 others (2016) eKLR. He urged to uphold the judgment and dismiss the appeal.

Analysis and Determination

15. Having read and considered the submissions together with the memorandum and record of appeal and the law applicable, I reckon that these are the issues that come up for determination of this appeal:

    a. Whether the trial court relied on facts that were not pleaded to reach a decision;

    b. Whether Section 71 of the *Evidence Act* and the law of contract section 3 (3) are applicable in this case

    c. Whether the trial court was biased.

    d. Whether suing one of the administrators to in the estate of the deceased made the application fatally defective;

    e. Who should pay costs of this appeal?

16. As the first appellate Court, it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278 and Kiruga –versus- Kiruga & Another (1988) KLR 348).

17. As is now well known in law, parties are bounded by their pleadings and where a party leads evidence contrary to what they pleaded it should be rejected. The Appellant claimed that during cross examination the respondent alleged that he supplied building materials to the deceased which is a clear departure from his plaint. I closely examined the original plaint. It was not pleaded that Kshs. 1468000/ = allegedly owed by the appellant's deceased husband was as a result of supplying building materials.

18. In the judgment of the trial court, it referred to the money owed to the respondent as a friendly loan, not as money owed for supplying building materials. The trial magistrate referred to the evidence adduced by PW1 which was corroborated by PW3- the taxi driver who used to shuttle the Respondent to meetings with the Appellant's deceased husband. The trial court in its judgment noted that the appellant's deceased husband had an agreement which was reduced into writing for the repayment of the loan but he passed on before he could fulfil it.

19. Nevertheless, when PW 1 Moses Ngatia Gitonga testified, he stated:

> " …Moses Gitonga Ngatia. I reside in Ruiru and I am in transport business. I have sued the defendant who had been supplied with building materials since 2015 and in 2016 the defendant started being sly…"

On cross-examination, he asserted:

> "...I did supply deceased with building materials. It is not indicated in my statement what business I do. It is also not indicated in my statement that I supplied the late Alexander Githinji with building materials..."

20. In my analysis, there was material variance, contradiction or equivocation in the evidence of the Plaintiff (Respondent) which materially departed from the pleadings to the extent that it was not possible to confirm if the claim lay on purported supply of building materials or on the friendly loan. As was held in the case of Galaxy Paints Co. Ltd Vs. Falcon Guards Ltd (2002) 2 E.A. 385 cited by the Appellants Counsel:

> "...It is trite law...that issues for determination in a suit generally flow from the pleadings and unless pleadings are amended in accordance with the provisions of Civil Procedure Rules, the trial court by dint of provisions of Order XX rule 4 of the aforesaid rules may only pronounce judgement on the issues arising from the pleadings or such issues as the parties framed for the court's determination..."

21. On whether Section 71 of the *Evidence Act* is applicable in this suit, the appellant has stated that the respondent failed to call the attesting witness and this was fatal to his case. Section 71 of the *Evidence Act* provides that;

> "If a document is required by law to be attested it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there is an attesting witness alive and subject to the process of the court and capable of giving evidence:
>
> Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document which has been registered in accordance with the provisions of any written law, unless its execution by the person by whom it purports to have been executed is specifically denied."

22. The document in question is the written agreement dated 15th September 2017 and which was produced by PW2 who testified on behalf of the law firm that prepared the document. Her evidence was that the advocate who witnessed the agreement had since left the law firm and she was authorized to produce the agreement. PW2 admitted that Mburu Machua who drafted the agreement is alive but could not confirm that he attested the document. The trial court in its judgment did not address itself on this issue even though it was raised during cross examination.

23. Section 71 of the *Evidence Act* is clear in its provision that an attesting witness should be called when producing a document that the law requires to be attested. An agreement for a friendly loan is no a document t required by law to be attested. Section 71 of *Evidence Act* is thus applicable.

24. On whether the signature on the agreement was proved against the Appellant; The appellant's defence in the lower court was that she did not witness the purported agreement and the signature on the face of the agreement was not hers. She told the court that the I.D. Number on the agreement was hers though the signature was not hers. The evidential burden lay on the respondent to prove on a balance of probabilities that indeed the signature on the document which the appellant disputed was hers. The Advocate who was called to testify on that fact was different from the one who actually witnessed the agreement. It is my finding that the plaintiff (respondent) did not discharge the burden of proving the execution of the document by the appellant or her late husband.

25. On the last issue of whether the suit was fatal for failure to sue both administrators, Order 31 Rule 2 of the Civil Procedure Rules provides that where there are several trustees, executors or administrators, they shall all be made parties to the suit against one or more of them. Provided that the executors who have not proved their testator's will, and trustees, executors, and administrators outside Kenya, need not be made parties.

26. My understanding of the above quoted provision is that where a suit is brought against the estate of the deceased person, where there was more than one administrator, all of them shall be made parties to the suit. The Appellant herein during cross examination admitted that she is one of the administrators to the estate of her late husband together with her son. The said son is not a party in this appeal and neither was he made a party in SPMCC No. 357 of 2019. The Respondent has explained that he sued the Appellant only as she signed the written agreement with her husband. I have already found that this has not been established on a balance of probability. Secondly, even assuming it was so, he did not sue the appellant in her own capacity, he brought the suit against her as the administrator of the estate of her late husband. In the case of *Raffaella Adiyakhiso Ntotoi V Robert Obrian Lenguro[2012]* eKLR an objection was raised to an application for an injunction on the basis that the application is fatally defective as the suit and the application was not filed by both administratix and the administrator. Makau J, after citing the decision of Ojwang J (as he then was) in the case of The Attorney General-Vs-Kenya School of Flying Ltd Civil Suit 215 Of 1999, observed as follows:

> " ...The application cannot stand and as such I find that no prima facie case has been established with probability of success. As the plaintiff's application and/or suit stands now without amendment it has no chance of success for failure to have the suit brought in joint names of the administrators unless there is only one surviving administrator and for which this court finds that there was no evidence that the 2nd administrator was not alive or was out of the country.
>
> The upshot of this application is that the same is found to be incompetent and is struck out with costs to the respondent..."

27. By dint of the same reasoning, it is my finding that it was fatal for the Respondent's suit to fail to enjoin the Appellant's son who was the second administrator as a party to the suit.

28. In the light of reasons advanced in the foregoing, I do find that this appeal succeeds.

29. The consequence is that the entire judgment and decree of the lower court favour of the Respondent delivered on 26th January 2021 is hereby set aside and dismissed with costs to the Appellant.

JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT BUSIA THIS 28TH DAY OF FEBRUARY, 2023.

L.N. MUGAMBI

JUDGE

In presence of:

Appellant-

Respondent-

Advocate for Appellant-

Advocate for Respondent-

Court Assistant- Annette

COURT

This Judgement be transmitted digitally by the Deputy Registrar to the Advocates for the Parties on Record through their respective email addresses.

L.N. MUGAMBI

JUDGE