



REPUBLIC OF KENYA



KENYA LAW
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**Njeru v Mugambi (Civil Appeal E177 of 2021)
[2023] KEHC 2921 (KLR) (30 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2921 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E177 OF 2021
TW CHERERE, J
MARCH 30, 2023**

BETWEEN

PAUL NJAGE NJERU APPELLANT

AND

DR KAJIRA K MUGAMBI RESPONDENT

*(An Appeal from the Judgment and Decree in Meru CMCC
77 OF 2014 by Hon. H. Ndung'u (CM) on 17th May, 2018)*

JUDGMENT

1. By plaint dated 10th March, 2014 filed on 14th March, 2014; Respondent filed suit against Appellant seeking payment of \$ 9,333 equivalent to Kshs. 811,971/- with interest at court rates from March, 2017 until payment in full.
2. Appellant by his statement of defence dated 05th May, 2014 denied the claim and stated that it was time barred.
3. At the hearing, only the Respondent testified. By judgment dated 17th May, 2018, the learned trial magistrate found Respondent's case proved and entered judgment against the Appellant for \$ 9,333 equivalents to Kshs. 811,971/- with interest at court rates from date of filing suit
4. Appellant being greatly aggrieved filed this appeal on 23rd December, 2021 mainly on two grounds: -
 1. Respondent was not entitled to leave to file suit that was time barred
 2. Respondent's claim was not proved



Determination

5. I have considered the appeal in the light of the trial court record, the submissions and authorities cited by the parties.
6. This being a first appeal, the role of this court is to re-evaluate and subject the evidence to afresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. The court also takes note of the fact that it did not have the benefit of seeing or hearing the witnesses testify and therefore has to make an allowance for the same. (See *Selle vs Associated Motor Boat Co.* [1986] EA 123, *Peters v Sunday Post Ltd* [1958] EA 424 and *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR).
7. Concerning whether Respondent's suit was time barred, Appellant pleaded in his defence that he would raise a preliminary objection on the issue of leave granted to Respondent to file suit out of time.
8. Appellant neither prosecuted the preliminary objection nor his defence having failed to tender any evidence and thus squandered his opportunity which he cannot reclaim on appeal.
9. In the case of *Francis Otile vs. Uganda Motors* Kampala HCCS No. 210 of 1989 where it was held that the court cannot be guided by pleading since pleadings are not evidence and nor can they be a substitute therefor. Before that the then East African Court of Appeal held in *Mohammed & Another vs. Haidara* [1972] EA 166 that the contents of a plaint are only allegations, not evidence. According to *Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter* Civil Appeal No. 23 of 1997, where a defendant does not adduce evidence the plaintiff's evidence is to be believed as allegations by the defence is not evidence. In *CMC Aviation Ltd. vs. Cruisair Ltd.* (No. 1) [1978] KLR 103; [1976-80] 1 KLR 835, Madan, J (as he then was) expressed himself as hereunder:

“Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of “evidence” as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth.”

10. The consequences of a party failing to adduce evidence was considered in the case of *Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited* Nairobi (Milimani) HCCC No. 834 of 2002, Lesiit, J (as she then was) citing the case of *Autar Singh Bahra and Another vs. Raju Govindji*, HCCC No. 548 of 1998 appreciated that:

“Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.”

11. Again in the case of *Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others* [2009] eKLR Lesiit, J (as she then was) citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings.



12. From the foregoing, I find that there was no defence to counter Respondent's claim and the learned trial magistrate's finding that Respondent's claim had been proved cannot therefore be faulted.
13. From the foregoing, I find that the trial magistrate's finding was well founded and I have no reason to interfere with it,
14. Consequently, I find that this appeal has no merit and it is dismissed with costs to the Respondent.

DATED IN MERU THIS 30TH DAY OF MARCH 2023

WAMAE. T.W. CHERERE

JUDGE

Appearances

Court Assistant - Morris Kinoti

For Appellant - Mr. Ngentu for B.G.Kariuki & Co Advocates

For Respondent - Mr. Karanja for Mwirigi Kaburu & Co Advocates

