Wetungu v Wafula (Civil Appeal E080 of 2021) [2023] KEHC 3626 (KLR) (28 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3626 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL E080 OF 2021

JRA WANANDA, J

APRIL 28, 2023

BETWEEN

ROBERT EKAM WETUNGU .... APPELLANT

AND

ROMANO WAFULA .... RESPONDENT

JUDGMENT

1. In the suit before the lower Court, the Respondent (Plaintiff) claimed that sometime in the year 2009, he and one Francis Kunania Wetungu, now deceased (hereinafter referred to as "Francis") entered into an agreement whereof the Respondent sold a section of his shop building on Plot No. 30 situated within Mayanja Market to the said "Francis".
2. The Respondent produced a handwritten letter dated 16/11/2014 allegedly written by Francis whereof the above Agreement is documented.
3. Francis was a brother to the Appellant and was a son-in-law to the Respondent. The parties are therefore related through marital ties.
4. According to the Respondent, the purchase price was Kshs 200,000/-, Francis paid a total of Kshs 104,000/- leaving a balance of Kshs 96,000/- which was to be cleared by 15/09/2009. Unfortunately, Francis died on 29/12/2014 before clearing this balance.
5. The Respondent stated further that before he died, Francis had informed the Respondent of his inability to clear the balance and had therefore offered to give to the Respondent a piece of land from his rural home in exchange and/or in settlement of the said balance. However, the Appellant received information about his brother Francis' offer to give the rural land to the Respondent in exchange for the debt and upon receiving the information the Appellant stepped in and undertook to clear the balance on his brother "Francis" behalf.

6. According to the Respondent, as proof of the Appellant's commitment to pay the debt, the Appellant even made a part-payment of Kshs 6,000/- thus explaining why the amount claimed in the Plaint was Kshs 90,000/-.

7. Further, the Respondent produced alleged Minutes of a meeting held among some members of the deceased's clan after the death of the deceased. It was stated that such meeting known as lufu", also known as "shaving ceremony", is held as a tradition in the Bukusu community upon the death of a person, to deliberate on the personal matters of a deceased, including collection, distribution and inheritance of his assets and settlement of his liabilities. The minutes produced are however not signed but indicate that a Resolution was reached that the Appellant would settle the balance of the debt.

8. On his part, the Appellant filed a Statement of Defence denying the claim. He stated that no cause of action against him had been disclosed, he was not the legal representative nor the Administrator of the deceased's estate and could not therefore be called upon to settle the deceased's liabilities. He denied that he at any time undertook to take over the debt nor that he had made a part-payment of Kshs 6,000/- as alleged.

9. In his Witness Statement, he confirmed that Francis died on 29/12/2009 as was also pleaded by the Respondent. He also stated that the late Francis had 3 wives who were now the personal and legal representatives and who should be the right people to take over the debt.

10. The case then went through a full trial wherein both parties gave evidence. The Respondent called as a witness, one Charles Furukha Wepukhulu (PW2) who allegedly chaired the "lufu" meeting and who confirmed the contents and Resolutions of the minutes as correct. PW2 described himself as an Assistant Chief and also disclosed that both the Appellant and the Respondent were present in the "lufu" meeting and even shook hands at the end as a gesture of signifying agreement.

11. After the close of the trial, both parties filed Written Submissions.

12. By the Judgment delivered on 22/11/2021 by Hon. A. Odawo (SRM), the trial Court reached the finding that the Respondent had proved his case on a balance of probabilities and accordingly, entered Judgment in favour of the Respondent against the Appellant at the said sum of Kshs 90,000/- plus costs and interest.

Grounds of Appeal

13. Being dissatisfied with the Judgment, the Appellant lodged this appeal on 20/12/2021 citing 7 grounds as follows:

    i. That the trial Magistrate erred in law and fact in allowing the Respondent's claim when the same was not proved on a balance of probabilities.

    ii. That the trial Magistrate erred in law and fact in allowing the Respondent's claim when there was no documentary evidence to show that the Appellant was bound to shoulder the deceased's debt.

    iii. That the trial Magistrate erred in law and fact in allowing the Respondent's claim when there was no privity of contract or estate between the parties.

    iv. That the trial Magistrate erred in law and fact in compelling the Appellant to pay the Respondent Kshs 90,000/- on behalf of the deceased's brother when the Appellant was not the personal representative of the estate of the deceased.

v. That the trial Magistrate erred in law and fact in compelling the Appellant to pay the Respondent Kshs 90,000/- on behalf of the deceased on customary law hence arriving at a wrong finding.

vi. That the trial Magistrate erred in law and fact in sympathizing for the Respondent thus deviating from the law and practice.

vii. That the trial Magistrate erred in law and fact in allowing the Respondent's claim and which claim was not proved as the law so requires.

viii. That the trial Magistrate erred in law and fact in allowing the Respondent's claim on the ground that he was present in the meeting that discussed the deceased's debts hence arriving at the wrong findings.

ix. That the trial Magistrate erred in law and fact in failing to appreciate the law hence arriving at a wrong decision.

14. The Appeal was canvassed by way of written Submissions. The Appellant filed his Submissions on 13/11/2023 through his Advocates, Messrs Emmanuel Wanyonyi & Co., while the Respondent filed his on 16/01/2023 through his Advocates, Messrs Khakula & Co.

Appellant's Submissions

15. The Appellant's Counsel began his Submissions by responding to a preliminary issue raised by the Respondent, namely, that the Appeal is incompetent because the Appellant failed to include the Decree appealed against in the Record of Appeal. In Counsel's view, such failure was excusable, did not go to the root of the Appeal and does not render the Appeal fatal.

16. On the merits, Counsel has submitted that under Section 107(1) of the *Evidence Act*, the Respondent bore the burden of proof which he did not discharge and that the minutes of the "lufu" meeting did not anywhere demonstrate that the Appellant had agreed to take over or settle the debt.

17. He then referred to a letter that the Appellant had produced in evidence. The letter is dated 28/07/2020 and is from the Respondent's Lawyers addressed to a person whom the deceased had put in occupation of the shop. In the letter, the Respondent's Lawyers demanded that the said occupant either vacate the shop or purchase it by settling the outstanding balance of Kshs 96,000/- left behind by the deceased. According to Counsel, this demand was proof that the Respondent knew that the Appellant was not the person obligated to pay.

18. Further, Counsel submitted that there was no privity of contract between the Appellant and the Respondent to justify any compulsion on the Appellant to pay the debt, there was no documentary evidence demonstrating that the Appellant undertook to take over the debt, the Appellant was not the Administrator of the estate of the deceased, the Magistrate improperly applied customary law to the matter by wrongly invoking Section 3(2) of the *Judicature Act* and that the minutes of the "lufu" meeting should not have been relied upon because the Magistrate had asked the Respondent to produce a clearer copy thereof which the Respondent never did.

19. Counsel produced several authorities in support of his Submissions.

Respondent's Submissions

20. On his part, the Respondent's Counsel has submitted that there was sufficient evidence to demonstrate that the Appellant undertook to pay the debt. To buttress this point, he quoted the Black's Law Dictionary on the definition of the word "undertaking" as follows:

> " undertaking" in general means, an agreement to be responsible for something. In legal context, it typically refers to a party agreeing to surety arrangement, under which they will pay a debt or perform a duty if the other person who is bound to pay the debt or perform the duty fails to do so"

21. Counsel then argued that the letter dated 16/04/2009 which he alleged to have been written by the Appellant was sufficient proof of the Appellant's undertaking to pay, that by the time that the Appellant allegedly wrote the said letter the deceased was still alive and that in the "lufu" meeting the Appellant's commitment to pay was reiterated.

Analysis and determination

22. I have considered the appeal and submissions by both parties. I have also read the record of the trial court and the impugned Judgment.

23. Being a first appeal, this Court has the duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing a conclusion from that analysis. The Court has however to bear in mind the fact that it neither saw nor heard the witnesses first hand. This duty is captured under Section 78 of the *Civil Procedure Act* which espouses that the role of a first appellate court is to: '…… re-evaluate, reassess and re-analyze the extracts of the record and draw its own conclusions (see also Peter M. Kariuki v Attorney General [2014] eKLR).

Issues for determination

24. In my view, the issues that arise for determination in this appeal are the following;

    i. Whether the failure by the Appellant to include the Decree in the Record of Appeal renders the Appeal incompetent.

    ii. Whether the Appellant's alleged undertaking or commitment to take over the debt left behind by the deceased was proved.

    iii. Whether therefore the lower Court was justified in entering Judgment against the Appellant.

25. I now proceed to analyse and answer the said issues.

i. Whether the failure by the Appellant to include the Decree in the Record of Appeal renders the Appeal incompetent

26. On this point, I have perused various authorities from various Courts. It appears that different Courts have taken different views on the issue. On my part, I align myself with the decision of Hon. Judge Njoki Mwangi delivered in Elizanya Investments Limited v Lean Energy Solutions [2021] eKLR where the Judge stated as follows:

> " 25. The respondent's Counsel took a preliminary point of law to oppose the appeal on the ground that it is defective since the decree from which the appellant was appealing from was not included in the Record of Appeal.

He contended that the present appeal was defective and contravened the provisions of Order 42 Rule 13(4)(f) of the Civil Procedure Rules, 2010. This court was urged to strike out the appeal on the said ground.

26. Order 42 Rule 13(4)(f) of the Civil Procedure Rules, 2010 provides as follows-

"(4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say:

(a) ....

(b) ....

(c) ....

(d) ....

(e) ....

(f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal." (emphasis added).

27. ....

28. Order 42 Rule 13(4)(f) of the Civil Procedure Rules, 2010 is specific that what is required at the appellate stage is the Judgment, order or decree appealed from. In the present case, the appellant attached a copy of the lower court Judgment in compliance with the said provisions. It is discernible from a reading of the above provisions that it is not a mandatory requirement for an appellant to include both the Judgment and the decree of the lower court in the Record of Appeal. It would however not be useful to attach a decree and leave out the Judgment of the Trial Court.

29. In the case of Nyota Tissue Products v Charles Wanga Wanga & 4 Others [2020] eKLR, when addressing the issue of failure by an appellant to file a decree, the court stated thus-

" The rule applicable to the appeals to the High Court makes provision under Order 42 rule 13 (f) of the Civil Procedure Rules for the filing of a copy of the "judgment, order or decree appealed from and does not make it mandatory to attach the judgment and the decree. The Record of Appeal herein attached the Judgment of the trial court according to the requirements of Order 42 rule 13 (4) (f) of the Civil Procedure Rules, and in my respectful view, I would agree with the Court in Silver Bullet Bus case on the point, that it would be too draconian to strike out the appeal in these circumstances."

30. I am of the view that the use of the conjunction "or" means that an appellant is not mandatorily obligated to attach both the Judgment and the decree. Further, a decree is an extract of the

Judgment appealed from. A decree is defined under Section 2 of the *Civil Procedure Act*, Cap 21, Laws of Kenya as follows:

> " decree means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91 but does not include— (a) any adjudication from which an appeal lies as an appeal from an order; or (b) any order of dismissal for default:

Provided that, for the purposes of appeal, "decree" includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up;" (emphasis added).

31. In the present appeal, the appellant filed Kilifi Senior Principal Magistrate's Court Civil Case No. 326 of 2018. After hearing the parties, Judgment was delivered dismissing the appellant's suit, with costs to the respondent. In this court's view, the failure to include a certified copy of the decree in the Record of Appeal should not invalidate the present appeal for reasons of non-compliance as this court has had the benefit of reading Judgment which was rendered by the Trial Court.

32. It is the finding of this court that the lack of a certified copy of a decree does not in any way affect the appellant's appeal and the right to be heard as enshrined under Article 50 of *the Constitution*. It is thus incorrect for the respondent to assert that the appellant's appeal is defective. I therefore decline to strike out the appeal on the said ground."

27. I associate myself fully with the above reasoning. I will only add that in any event, for Appeals to the High Court, the entire record of the lower Court is normally forwarded to the High Court before "admission" of the Appeal. In the circumstances, although there is no evidence in the record that the Appellant made any attempts to extract the Decree, I have the benefit of the entire record before me.

28. Despite my position above, I would still nevertheless advise parties that it is good practice to always extract Decrees for various purposes, inclusion in the Record of Appeal being only one of them. Until the Court of Appeal or the Supreme Court lays this matter to rest, other Judges may not share the same view as mine and Appellants who fail to include Decrees in the Record of Appeal risk their Appeals being struck out. They are forewarned.

29. I therefore find that the Appellant's failure to include the Decree in the Record of Appeal, though regrettable, is not fatal in the circumstances of this Appeal and does not render the Appeal incompetent.

ii. Whether the Appellant's alleged undertaking or commitment to take over the debt left behind by the deceased was proved

30. The first thing that I notice is that although the Respondent submits that the handwritten letter dated 16/04/2009 drafted in the Kiswahili language was written by the Appellant and is proof that the Appellant undertook to settle the debt, my perusal reveals that this is not the correct position. The letter was in fact written by the late Francis and is in fact the agreement between the said Francis and the Respondent whereof the Respondent purchased the shop.

31. In the circumstances, the letter will not form this Court's reasoning in the determination of the issue herein. What therefore remains is the minutes of the "lufu" meeting and the oral evidence given by the parties.

32. I take cognizance of the fact that the Appellant has not denied that the "lufu" meeting took place, he has not denied that the meeting took place in the manner and under the circumstances described by the Respondent and PW2, he has not denied that PW2 is the person who chaired the meeting and he has also not denied that both himself and the Respondent attended the meeting.

33. Further, he has not denied the authenticity of the minutes produced, he has not denied that the resolutions listed in the minutes were indeed the resolutions reached in the meeting, he has not denied that one of the resolutions reached in the meeting was that he would take over the debt in question and he has also not denied the veracity and accuracy of the specific resolution that he would take over the debt.

34. The Appellant has also not challenged PW2's assertion that upon adoption of the resolutions reached in the "lufu" meeting, the Appellant and the Respondent stood up and shook hands as a gesture of signifying agreement.

35. It is apparent to me that rather than respond to the substantive issues that were raised regarding the "lufu" meeting, the Appellant chose to only raise technicalities such as that the minutes were not signed and that the Respondent was directed by the Court to supply a clearer copy.

36. With all respect, proof in civil matters being on a balance of probabilities, what was important for the trial Court was to establish whether the meeting took place and what was resolved therein. Even without looking at the minutes, these two aspects were established through the evidence of the Plaintiff and PW2 which the Appellant did not controvert and which in fact the Appellant admitted. With or without the minutes therefore, the holding of the meeting and the resolutions reached therein were proved.

37. I also take into account the fact that there is no evidence that the Appellant at any time during the meeting or even subsequently, opposed or raised any objection or challenged the resolutions alleged by the Respondent and PW2 and listed in the minutes. If he never raised any objections then, why is he raising the objections at this late stage? It is not clear to me when the meeting took place but since Francis died in December 2014, then the meeting must have taken place around that time or in January 2015. Since the suit was filed in November 2018, the Appellant had almost 4 years to raise a challenge. That he never did points to the presumption that the objection raised after the suit was filed was an afterthought.

38. According to the Respondent, the Appellant even made a part-payment of Kshs 6,000/- which reduced the Kshs 96,000/- to the Kshs 90,000/- claimed in the Plaint. On his part, the Appellant denied making this payment. Since the Respondent did not produce any evidence on this point, this Court rules that the payment of Kshs 6,000/- has not been proved. However, this finding alone does not outweigh the rest of the findings above made in favour of the Respondent.

39. On the issue of customary law, the Appellant's Counsel has protested that the Magistrate unnecessarily applied customary law into the matter. I agree with Counsel on this protest since, in my view, this suit was determinable simply on application of the law of contract. Unfortunately for the Appellant, the Respondent provided sufficient evidence to prove that the Appellant took over the debt and thus a fresh separate contract arose between the Appellant and the Respondent ensued. Even without applying customary law therefore, the Magistrate had sufficient material before her to reach the same finding.

40. This finding also answers the Appellant's submission that there was no privity of contract between the Appellant and the Respondent.

41. Regarding the ground that the Appellant was not the legal representative or the Administrator and could not therefore be called upon to settle a liability left behind by his deceased brother, my finding is that the Appellant was not sued as a legal representative or an Administrator but was sued in his own personal capacity as a debtor. The Respondent's cause of action was that the Appellant took over the debt left behind by the deceased. This was therefore a separate fresh and enforceable contract entered into between the Appellant and the Respondent.

42. As already stated, the Appellant's Counsel also referred to the letter dated 28/07/2020 from the Respondent's Lawyers addressed to a person whom the deceased had put in occupation of the shop. In the letter, the Respondent's Lawyers demanded that the said occupant either vacates the shop or purchases it by settling the outstanding balance of Kshs 96,000/- left behind by the deceased. According to Counsel, this demand was proof that the Respondent knew that the Appellant was not the person to pay.

43. I have perused the said letter and my view is different. To me, the letter is simply asking the occupant to vacate to enable the Respondent repossess the shop since the Respondent had not been fully paid. The invitation to the occupant to himself purchase the shop by paying the balance, if he so wished, was simply in the alternative and was, in any case, the correct thing to do in the circumstances. There was nothing wrong with the invitation. It will be to stretch imagination too far to argue that the letter in any way exonerated the Appellant from his obligations simply because it was addressed to the occupant of the shop. The fact that the letter was copied to the Appellant buttresses my view.

44. This Court therefore finds that the Appellant's undertaking or commitment to take over the debt left behind by his deceased brother Francis was proved on a balance of probabilities.

iii. Whether therefore the lower Court was justified in entering Judgment against the Appellant

45. In light of the foregoing, this Court makes a finding that the Magistrate had before her sufficient material to enter Judgment in favour of the Respondent. The Appellant did not controvert the evidence put before the Court by the Respondent.

46. The Respondent therefore proved his case on a balance of probabilities and the Court was accordingly justified in entering Judgment against the Appellant.

Final orders

47. In view of the said findings, this Appeal is not merited and is accordingly dismissed with costs.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 28TH DAY OF APRIL 2023

....

JOHN R. ANURO WANANDA

JUDGE