Mliwa v Mkoji (Civil Appeal 36 of 2019) [2023] KEHC 3398 (KLR) (26 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3398 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CIVIL APPEAL 36 OF 2019

OA SEWE, J

APRIL 26, 2023

BETWEEN

RENSON MWAISAKA MLIWA ..... APPELLANT

AND

JAMES MWANG'OMBE MKOJI ..... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. A.N. Karimi, Resident Magistrate, delivered on 2nd October, 2019 in Voi PMCC No. 49 of 2019)

JUDGMENT

1. This appeal arises from the decision of the Resident Magistrate (Hon A.N Karimi) in Voi Principal Magistrate's civil case No 49 of 2019: Renson Mwaisaka Mliwa v James Mwangombe Mkoji. The appellant had, in that suit, sued the respondent for the payment of Kshs 210,000/= being the balance of some Kshs 250,000/= contributed by him as capital for a joint cereal business. He had complained that, in June 2016, the defendant, without any lawful cause, kicked him out of their business premises and declared their partnership dissolved. He added that the defendant later paid him only Kshs 40,000/= by way of refund of his investment but had declined to pay the balance. Thus, the appellant prayed for the sum of Kshs 210,000/= together with his share of the profits from the business for the period he was denied access. He also prayed for interest and costs of the suit.

2. On his part, the respondent maintained that the appellant was his employee; and that his services were terminated because of misconduct, whereupon he was paid his outstanding dues of Kshs 40,000/=. He accordingly denied that there was any partnership agreement between them.

3. Upon hearing the parties, the learned trial magistrate came to the conclusion that, although a partnership could be inferred from the conduct of the parties, the appellant had failed to prove that he was owed any monies by the respondent. Accordingly, the appellant's suit was dismissed with costs to the respondent.

4. Being aggrieved by that decision, the appellant filed the instant appeal on October 15, 2019 on the following grounds:

   (a) That the learned magistrate erred in law and fact by failing to consider that there was a Cooperative Bank account fully operated by both the appellant and the respondent before the respondent chased the appellant from the business.

   (b) That the learned magistrate erred in law and fact by failing to consider why there was a bank account opened by both the appellant and the respondent and the reason for the said account.

   (c) The learned magistrate erred in law and fact in failing to consider the evidence produced by the appellant, which was sufficient to prove his case beyond reasonable doubt.

   (d) The learned magistrate erred in law and fact by dismissing the appellant's suit.

5. Accordingly, the appellant prayed that his appeal be allowed and the judgment of the lower court dated October 2, 2019 be set aside. He also prayed for such other or further relief that the court may deem just and fit to grant.

6. Upon the appeal being admitted to hearing for purposes of section 79b and rule 11 of order 42, *Civil Procedure Rules*, directions were given on September 22, 2021 that the appeal be canvassed by way of written submissions. Accordingly, the appellant filed his written submissions on October 25, 2021 in which he reiterated his version of the disputation and proposed the following issues for determination:

   (a) Was there a Cooperative Bank Account No 0xxxxx0 in the joint names of the appellant and the respondent?

   (b) If there was such a bank account in the names of the appellant and the respondent, what was it opened for?

   (c) Whether the appellant proved beyond reasonable doubt that there was a business and joint account that he ran jointly with the respondent.

   (d) Whether it is appropriate for an employer to open a joint account which showed activities of deposit and withdrawal by both the appellant and the respondent, if indeed the appellant was only a casual labourer to the respondent.

7. On behalf of the respondent, written submissions were filed by Mr Ratemo, Advocate, on July 8, 2022 in which the following two issues were proposed for determination:

   (a) Whether or not the appellant proved the existence of a joint partnership contract between him and the respondent.

   (b) Whether or not the appellant proved that the defendant owed him Kshs 210,000/= plus profits from the cereal business as alleged.

8. According to Mr Ratemo, the appellant neither proved the existence of a partnership contract nor his claim for Kshs 210,000/=. He made reference to sections 3(1) and 4 of the *Partnership Act*, chapter 29 of the Laws of Kenya and *Halsbury's Laws of England*, 4th Edition volume 35, paragraph 2 on page 4, as to the definition of a partnership and urged the Court to find that the learned magistrate came to the correct conclusion based on the evidence presented by the parties. Counsel also relied on sections 107 to 109 of the *Evidence Act*, chapter 80 of the Laws of Kenya and the cases of *Joseph Chesire Sirma v Erick Kipkurgat Kiprono*, Eldoret HCCC No 45 of 2004 and *M W K v C N*, Nairobi HCCC No 650 of 2015, to underscore his argument that the burden of proof was on the appellant to prove his

allegations on a balance of probabilities, which he failed to discharge. He consequently prayed for the dismissal of the appeal with costs to the respondent.

9. This being a first appeal, it is the duty of the court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded, while bearing mind that it did not have the opportunity to see or hear the witnesses. In *Selle & another v Associated Motor Boat Co Ltd & others* [1968] EA 123, this principle was enunciated thus:

> ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. 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..."

10. The appellant testified on July 8, 2019 as PW1. His testimony was that, on the October 15, 2014, he opened a joint account with the respondent at Cooperative Bank for the specific purpose of their cereals business through which he injected some Kshs 250,000/=; and that they operated the business for a period of 1 year and 4 months before the respondent unilaterally terminated the contract. He produced a set of documents, including bank deposit slips to demonstrate that he made financial contributions to the subject cereals business. He added that, in response to his demand to be paid back his share contribution, the respondent only paid him Kshs 40,000/=, leaving a balance of Kshs 210,000/=. He therefore complained that, in addition to the fact that the respondent had no cause at all to unilaterally dissolve their partnership, he had refused to refund the balance of Kshs 210,000/= aforementioned.

11. On his part, the respondent testified on August 21, 2019 and stated that he started his cereals business in the year 2007 as a sole proprietor; and that as the business expanded, he engaged employees, including the appellant to assist him in his business operations. He denied that he entered into a partnership with the appellant as alleged by the appellant. He likewise denied that the appellant ever made any financial contribution to his business. While conceding that they had a joint bank account with the appellant, the respondent explained that the sole purpose was to enable them save for the future, and nothing more and that the appellant would withdraw his savings in the event of need without any hindrance. The respondent called two other witnesses, including his daughter, Faith Mwachocho Mwang'ombe (DW3), to concretize his assertion that his business remained a sole proprietorship throughout and that at no time did he enter into a partnership with the appellant.

12. From the summary of the evidence, it is common ground that the respondent had commenced his cereals business long before he got to involve the appellant in 2014. Although divergent positions were taken by the parties as to whether the appellant was a partner or employee of the respondent, the learned magistrate found in favour of the appellant in that regard and held on the authority of *Joseph Chesire Sirma v Erick Kipkurgat Kiprono* [2005] eKLR that:

> ...it is clear that though there was no written agreement between the parties, the conduct of the plaintiff towards the defendant's cereals business was more than that of a casual labourer. The defendant did not prove any wages he paid to the plaintiff as a result of the labour he did for him. In essence, the defendant has not proved that the plaintiff was his casual labourer thereby tilting the evidence in favour of the plaintiff's allegation...It is my considered view that even if there were other accounts proven to have been registered with the defendant with other people which did not allegedly touch on the business, it is on a balance of probability that the dealings with the plaintiff based on their conduct was more than that of an employee employer relationship. It leaves no doubt that there existed a *prima facie* evidence of existence of a partnership."

13. In the premises, the only issue for determination is whether or not the appellant proved, on a balance of probabilities that the respondent owed him Kshs 210,000/= plus profits from the cereal business as alleged.

14. Needless to say that the legal burden of proof was on the respondent, for, section 107(1) of the *Evidence Act*, chapter 80 of the Laws of Kenya, is explicit that:

> Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

15. The onus was therefore on the appellant to prove that he injected Kshs 250,000/= to the subject business; and that he was entitled to a refund of Kshs 210,000/= from the respondent on termination of their partnership. In his evidence, the appellant made reference to certain deposits he made. None of them supported the sum of Kshs 250,000/=. Indeed, he conceded in cross-examination that:

> We joined hands on October 15, 2014. I don't know the name of the business the defendant ran after I joined him. I just know he sold cereals. The total amount I contributed was Kshs 250,000/=. He only refunded through my phone Kshs 40,000/=. The partnership was equal in contribution. From the contributions I have given the same total to Kshs 170,000/= (20,000 + 70,000 + 40,000 + 40,000). The total 70,000/= was a cheque deposited into the account. I don't have the receipt to prove I deposited the cheque..."

16. It was incumbent upon the respondent to satisfy the lower court that he injected funds to the tune of Kshs 250,000/= into the respondent's business that was, admittedly, already a going concern. It is also noteworthy that the respondent gave a plausible explanation about the joint account and the transactions made by the appellant in connection with the account. Indeed, sections 109 and 112 of the *Evidence Act* provides that:

> 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
>
> ...
>
> 112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

17. It is instructive therefore that, in *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another* [2005] 1 EA 334, the Court of Appeal held that:

> As a general proposition under section 107(1) of the *Evidence Act*, cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in sections 109 and 112 of the Act."

18. The appellant having failed to prove his allegations to the requisite standard lower court cannot be faulted for dismissing his claim for Kshs 210,000/= as well as the claim for a share of the profits which he, in any case, did not define succinctly. I therefore find no basis for interfering with the decision of the lower court.

19. In the result, I find no merit in the appeal. The same is hereby dismissed with costs.

20. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 26TH DAY OF APRIL 2023

OLGA SEWE

JUDGE