Tobbo v Nyagamukenga (Civil Appeal 723 of 2017)
[2023] KEHC 21079 (KLR) (Civ) (28 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21079 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 723 OF 2017

CW MEOLI, J

JULY 28, 2023

BETWEEN

MARTIN EBELE-TOBBO ..... APPELLANT

AND

YVONNE NYAGAMUKENGA ..... RESPONDENT

(Being an appeal from the judgment of Hon. P.N Gesora, (CM) delivered on 29th November, 2017 in Nairobi Milimani CMCC No. 5510 of 2003)

JUDGMENT

1. This appeal emanates from the judgment delivered on November 29, 2017 in Nairobi CMCC No 5510 of 2017. The suit commenced by a plaint dated June 10, 2003, was brought by Yvonne Nyagamukenga, the plaintiff in the lower court suit (hereafter the Respondent) against Martin Ebele –Tobbo, the defendant in the lower suit (hereafter the Appellant) seeking the sum USD 3,454.71 approximately Kshs276,376/- at the time as well as costs and interest.

2. It was averred that at all material times, between June 1998 and October 2002, the Respondent carried out translation and typing work for the Appellant for which the latter owed the Respondent the sum USD 3,454.71 (approximately Kshs276,376/-). Pursuant to an agreement dated 29.10.2002 particulars whereof were well within the Appellant's knowledge. It was further averred that despite demand and notice of intention to sue, the Appellant had failed, refused and or neglected to pay for the services rendered by the Respondent to the Appellant at the latter's request.

3. The Appellant filed a statement of defence dated May 3, 2005 denying the key averments in the plaint , and averred that on or about the year 2002, the Appellant gratuitously proposed to assist the Respondent by assisting as a translator in any function of interest to the Appellant, to enable the Respondent earn some money; that there was no legal contract enforceable in law due to lack

of consideration; and in any event, no function materialized in respect of the gratuitous request. It was further averred that the Appellant, being an employee of the United Nations Environment Programme, was immune and privileged from any civil and criminal prosecution and an appropriate objection would be raised prior to trial.

4. The suit proceeded to full hearing during which only the Respondent adduced evidence. In its judgment, the trial court found that the Respondent had proved her case on a balance of probabilities and thus proceeded to enter judgment against the Appellant in the sum of USD 2,954.71, costs of the suit and interest thereon, calculated from the date of filing the suit until payment in full, at prevailing market rates (exchange rates).

5. Aggrieved with the outcome, the Appellant preferred this appeal challenging the finding of the lower court based on the grounds in his memorandum of appeal as follows; -

> "(1). That the honorable Chief Magistrate erred in law and fact by granting judgment for US Dollars 2,954.71 plus costs and interest at court rates without any supportive documentary evidence and or strict proof of the principal sum claimed.
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> (2). That the honorable Chief Magistrate erred in law and fact by admitting into evidence and or relying upon a schedule dated October 29, 2002 which was not produced or adduced by the Respondent/Plaintiff in her testimony.
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> (3). That the honorable Chief Magistrate erred in law contrary to Section 6(1)(c) of the *Immigration Act* [Chapter 172 of the Laws of Kenya] by enforcing an unlawful or illegal agreement for services prohibited by the cited provisions of Law.
>
> (4). That the honorable Chief Magistrate erred in law and fact by enforcing an illegal or unlawful contract against public policy." (sic)

6. The appeal was canvassed by way of written submissions. Counsel for the Appellant in addressing ground 1 of the memorandum of appeal contended that the Respondent did not produce tangible documentary evidence in strict proof of the claim for USD 3,454.71 save for a cheque dated March 29, 2001 for USD 230 while that the schedule of services dated October 29, 2002 was not adduced in evidence. He submitted that the Respondent's attempted production of the schedule purported to be an agreement between the parties was successfully objected to and disallowed by the trial court. Hence the Respondent did not specifically prove the claim as pleaded.

7. Concerning ground 2, it was submitted that only one cheque, and not emails, as stated in the body of the judgment of the trial court, were produced at the trial. That the emails referred to by the trial court did not capture a specific amount to support the award in the judgment. And that the single cheque that was produced in evidence was insufficient proof of the Respondent's claim.

8. Regarding ground 3 relating to Section 6(1)(c) of the *Immigration Act*, it was submitted that the provision prohibits a foreigner from engaging in any employment, occupation, trade, business or profession, whether or not for remuneration or profit, other than the employment, occupation, trade, business or profession in respect of which a permit was granted by Kenyan authorities. That the Respondent having been permitted into Kenya specifically for engagement as employee of the PTA Bank had acted in breach of Section 6(1)(c) of the *Immigration Act* by the purported contract with the Respondent to provide translation services and the contract of service was therefore unenforceable.

9. Lastly, submitting on ground 4 of the appeal, counsel relied on the *dicta* of Bingham LJ in the English decision in *Saunders v Edwards* [1987] 1 WLR 1116, 1134 as cited in *Root Capital Incorporated v Tekangu Farmers' Co-operative Society Ltd & Another* [2016] eKLR and *Heptulla v Noormohamed*, [1984] KLR as cited in *Kenya Airways Limited v Satwant Singh Flora* [2013] eKLR to contend that no court ought to enforce an illegal contract where the illegality is brought to its notice, and if the person invoking the aid of the court is himself implicated in the illegality. In conclusion the court was urged to allow the appeal as prayed.

10. The Respondent defended the lower court's findings. As a preamble it was submitted that the Appellant is estopped from denying liability having failed to adduce evidence before the lower court. Moreover, the issue relating to the cheques did not arise before the lower court, nor did counsel for the Appellant cross-examine thereon. Hence the issues cannot be canvassed at the appellate stage through submissions. The decisions in *Fiber Link v Star Television Production Ltd* [2015] eKLR, Machakos Civil Appeal No 28 of 2015, *Efil Enterprises Ltd v Mathamyo Kilonzo and Ngnaga & Another v Owiti & Another* [2008] KLR were called to aid in that regard. It was further submitted that the Appellant is estopped from denying that he owed the Respondent monies claimed in view of his conduct of issuing a cheque for USD 500 upon visiting the Respondent's advocates offices, without coercion and following up the same with an email.

11. Asserting that the Respondent's claim was established on a balance of probabilities, counsel submitted that the Respondent produced a cheque dated 29.03.2001 for USD 230 being one of two cheques made good by the Appellant and that no rebuttal evidence was tendered in that regard. That although the schedule produced did not amount to a contract, it was an acknowledgment of the amount owed, hence the Appellant was estopped from denying that he owed the amounts claimed.

12. On whether the trial court erred in law in enforcing an illegal or unlawful contract, counsel argued that the dispute between the parties herein related to a simple debt for work done and issues pertaining to the Immigration Act were neither raised in the pleadings nor during cross examination at the trial. That these matters were raised as an afterthought and that the Respondent was entitled to judgment in the sum of USD 2954.71 the Appellant having settled USD 500. The court was thus urged to dismiss the appeal with costs.

13. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in *Selle v Associated Motor Boat Co*. [1968] EA 123 in the following terms: -

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.
>
> An appeal to this court from a trial by the High 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.
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> In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

14. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & Another v Duncan Mwangi Wambugu* [1982 – 1988] 1 KAR 278. The court has considered the record of appeal, the pleadings, and the original record of the proceedings as well as the submissions by the respective parties.

15. The key question for determination is whether the trial court's findings on the issues falling for determination were well founded. In *Wareham t/a A.F. Wareham & 2 Others Kenya Post Office Savings Bank* [2004] 2 KLR 91, the Court of Appeal stated in this regard that: -

> "We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail."

16. The dispute between the parties revolves around a purported agreement for translation and typing services between them, and in respect of which the Respondent claimed the sums in the plaint. The gist of the Appellant's case being that, there was no enforceable contract, or at all and any payment made to the Respondent was gratuitous in nature and or made on an ex-gratia basis. The trial court after restating and examining the respective parties' pleadings and evidence stated in its judgment that: -

> "……There is no doubt in my mind that parties herein are known to one another and they both work as translators.
>
> They did interact during the period in question and although the defendant denies there being a contract between them, the exhibits produced therein are clear on this. Why would the defendant issue cheques and write emails if there existed no contract.
>
> The allegations that the defendant was an UN employee were not substantiated. There was a letter issued by the UN Pexh.4 which goes to prove that indeed he was not a UN employee. The allegations that this was not a UN employee. The allegation that this was retaliation as a result of a love affair gone sour was also not proved.
>
> In the end, I find and hold that the Plaintiff has proved her case on a balance of probabilities and I enter judgment in the sum of US$ 2,954.71, costs of the suit and interest thereon to be calculated from the date of filing this suit until payment in full. Interest at prevailing market rates (exchange rates)." (sic).

17. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. The Court of Appeal in *Mumbi M'Nabea v David M.Wachira* [2016] eKLR while discussing the standard of proof in civil liability claims in this jurisdiction stated;

> "In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on

the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:

"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 exists."

The above provision provides for the legal burden of proof. However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:

"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."

The position was re-affirmed by the Court of Appeal in Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No 101 of 2000 [2005] 1 EA 280 where it was held that:

"Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same *Act* recognises that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence."

18. The duty of proving the averments contained in the plaint lay squarely on the Respondent. In *Karugi & Another v Kabiya & 3 Others* (1987) KLR 347 the Court of Appeal stated that:

> " [T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendants' failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...--. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim." (Emphasis added)

19. As earlier stated, the dispute admittedly arises from an alleged agreement for translation and typing services. It is pertinent to observe at the outset that the role of the court in adjudicating a dispute arising between contracting parties is well settled. In the oft-cited decision of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another* [2001] eKLR, the Court held that;

> " A court of law cannot re-write a contract between the parties whereas its role is limited to interpretation of the same. This is because contracting parties are free to specify the terms and conditions of their agreement, and that when parties do contract, the court does not have the right or ability to substitute its judgment for that of the parties."

20. During the trial Respondent testified as PW1. The gist of her evidence was that she was a translator by profession and that she and the Appellant had entered into a professional understanding on mutual sharing of translation work involving documents, for which they exchanged payments. That having translated some documents for the Appellant, he was obligated to pay her USD 5,454.71 but only paid partially, leaving a balance of USD 3,454.71 less the Appellant's further payment of USD 500

vide voucher dated 01.12.2004 (PExh.1). She further stated that afterwards, the Appellant agreed to pay USD 500 every month until the balance of USD 2,954.71 was settled, but defaulted, issuing three cheques which were returned due to insufficient funds. She produced a cheque dated 29.03.2001 for USD 230 as PExh.2 to support the foregoing.

21. The Respondent further testified that the Appellant's plea of immunity based on his purported employment with the United Nations was inconsistent with the letter from the latter (PExh.4) showing that the Appellant was a consultant and not an employee. Hence not covered by the Convention on Immunity and Privileges.

22. Under cross-examination she admitted that she was a Burundian national having first arrived in Kenya in 1989 as an employee of PTA Bank in the position of a senior administrative assistant, which involved translation work, and that she later joined the United Nations. She reiterated the professional understanding/contract with the Appellant for the mutual sharing of translation work involving documents. It was her evidence that she carried out translation work for UNEP Maputo on behalf of the Appellant who failed to pay for work done. She denied that the amount in PExh.1 was settled by him under duress and a love affair with the Appellant.

23. The Appellant on his part did not call any evidence in support of the averments in his statement of defence.

24. The Court is called upon to consider whether the Respondent established on a balance of probabilities that she was entitled to payment of USD 2,954.71. The essence of the dicta in National Bank of Kenya Ltd (supra) is that contracting parties are free to specify the terms and conditions of their agreement, and the court does not have the right or ability to substitute its judgment for the terms in the contract between the parties.

25. The Respondent averred in her plaint that she had provided translation and typing services to the Appellant and that he owed her USD 3,454.71 (approximately Kshs276,376/-) as payment for the work, pursuant to an agreement dated 29.10.2002, particulars which were well within the Appellant's knowledge. Thus, purported agreement dated October 29, 2002 was central to the Respondent's claim. It has not been disputed that neither the agreement nor schedule setting out the terms and scope of work done by the Respondent were produced at the trial. Further, the purported email conversation between the parties was not tendered before the trial court to demonstrate the scope of the agreement between the parties herein.

26. While the trial court correctly observed that the parties hereto were known to one another and did interact during the period in issue, the sticking point was whether the Respondent's exhibits marked PExh.1 and PExh.2 were sufficient proof of the Respondent's claim for USD 2,954.71. The court having perused the said exhibits, is not in doubt that some monies, and specifically the sum of USD 500 exchanged hands between the parties. While the Respondent claimed that this payment and returned cheques represented only part payment of a larger agreed sum due under the alleged contract, disputed by the Appellant, the agreement dated 29.10.2002 was not produced at the trial.

27. The Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 Others* [2014] eKLR while discerning the question of legal and evidential burden held inter alia.

> " The person who makes such allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already discharged initial burden. The evidential burden is the obligation to show, if

called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue".

28. As stated in Karugi (supra) the onus is always on a plaintiff to "adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim". It appears that all that the Respondent placed before the trial court by way of evidence in support of her claim was alleged part payment by the Appellant to her of USD 500 and a cheque for USD 230 for work done as per the Respondent's pleadings, between 1998 and October 2002. That the agreement between them was made on October 29, 2002. Pursuant to the two rulings by the subordinate court, the agreement was not produced. Equally, the alleged translation work was not produced to buttress the Respondent's claim for USD 2,954.71.

29. In the absence of the agreement, the Respondent's exhibits PExh.1 and PExh.2 did not suffice in establishing the existence and terms of the agreement and the basis of the claim, all of which were disputed in the Appellant's defence. The Respondent appeared to rely on her oral evidence in proof of the existence and terms of a written agreement, which evidence amounted to parole evidence, ousted by sections 97(1) and 98 of the *Evidence Act*.

30. The above provisions were discussed by the Court of Appeal in *University of Nairobi v Devcon Group Limited* [2016] eKLR. Having set out the provisions, the Court stated that: -

> " That is to say that where parties have entered into contract, they are bound by the terms thereof and where a dispute arises, it is to be governed by the four corners of the contract and no other evidence may be introduced except secondary evidence where the law allows production of such evidence.
>
> .....We agree with learned counsel for the appellant that the learned judge was clearly wrong in entering judgment for the respondent where the course of action was based on a contract, which contract was not produced in evidence at all. The respondent had a responsibility to produce the contract in proof of the same and, absent the contract, judgment could not be entered at all, as there was no proof of the contract and it followed that allegations of breach of the alleged contract could not be proved at all."

31. In conclusion the Court held that: -

> " We have also shown that the learned judge ignored and did not follow the principle that where the case involved an alleged contract which was not produced in evidence judgment could not be entered as the contract could not be proved."

32. Applying the above dicta to this case, and reviewing the evidence at the trial, it is difficult to understand the basis of the trial court's finding that the Respondent had proved her case on a balance of probabilities. Some parts of the portion of the trial court's judgment earlier set out in this judgment appeared to shift the burden of proof on the Appellant. Clearly, the Respondent's evidence did not rise to the standard of proof on a balance of probabilities. Or stated another way, under section 107 of the *Evidence Act*, the burden of proof lay with the Respondent and since her evidence did not support the facts pleaded, she failed as the party with the burden of proof. (See the case of Wareham t/a A.F. Wareham (supra)).

33. Consequently, the appeal herein in merited and is allowed. The lower court judgment is hereby set aside and the court substitutes therefor an order dismissing with costs the Respondent's suit. The costs of the appeal are awarded to the Appellant. In the result, no purpose will be served by giving the reserved

reasons for the court's rejection of the Respondent's motion dated January 27, 2023, that sought that the Appellant deposits security for the due performance of the decree, pending appeal.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 28TH DAY OF JULY 2023.

C.MEOLI

JUDGE

In the presence of

For the Appellant: Mr. Rabala

For the Respondent: Ms. Kitonga

C/A: Carol**