



REPUBLIC OF KENYA



KENYA LAW
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**Kabati v Kabati & another (Civil Appeal 109 of 2013)
[2023] KEHC 24216 (KLR) (25 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24216 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL 109 OF 2013
FN MUCHEMI, J
OCTOBER 25, 2023**

BETWEEN

MAGELLAN GITONGA KABATI APPELLANT

AND

JOHN MURIUKI KABATI 1ST RESPONDENT

JAMES MARAGWA KABATI ALIAS JAMES MWANGI

KABATI 2ND RESPONDENT

*(Being an Appeal from the Judgment of Hon. J. N. Onyiego (SRM) delivered
on 8th March 2007 in Kerugoya SRM Civil Case No. 185 of 2006)*

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Kerugoya Senior Resident Magistrate in SRM Civil Case No. 185 of 2006 where the court entered judgment to the amount of Kshs. 2,006/- plus costs and interest based on a contract entered by the parties.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 3 grounds of appeal summarized as follows:-
 - a. The learned magistrate erred in law and fact in by failing to find that the appellant had proved his case to the requisite burden of proof.
3. Parties put in written submissions to dispose of the appeal.



Appellant's Submissions

4. The appellant submits that the appeal emanates from the trial court suit being Civil Case No. 185 of 2006 where he sued his brothers, the respondents for a refund of Kshs. 113,763/- being the costs he incurred filing a land case Embu RMCC No. 32 of 1985. He submits that he and the respondents agreed on 21/8/1987 to file the said suit in Embu to pursue their interests on their father's land parcel number Mutira/Kathare/198 and 199 and share the costs equally. Contrary to the agreement, he states that he met all the costs of the suit amounting to Kshs. 113,763/-.
5. The respondents denied ever entering into such an agreement with the appellant and stated that the said sum of Kshs. 113,763/- was unsustainable. The appellant states that despite him proving his case, and producing the judgment of the said suit, the trial court awarded him the sum of Kshs. 2,006/-. He further argues that his evidence in the trial court was uncontroverted as the matter proceeded ex parte. He further relied on the cases of *Curtis vs Clearing & Dyeing Co. Ltd* [1995] ALL ER 631 and United Kingdom Supreme Court decision of *RTS Flexible Systems Ltd vs Milkorei Alis Muller GMBH & Co. KG (UK production)* [2010] UKSC14 and submits that parties are bound by the terms of their contract. As such, he submits that since the respondents agreed to refund all the costs incurred in filing the suit, they ought to have performed their obligations.
6. The appellant further states that although he and the respondent did not agree on the amount of costs, he went ahead and filed the case in court and the mutation forms for subdivision of the land. There is no doubt that he incurred costs of legal fees of the case and the surveyor's costs for subdivision and processing of the resultant parcel titles. For this reason, the appellant argues that the trial court erred by awarding him Kshs. 2,006/- and did not consider the other receipts he tendered.

The Respondents' Submissions

7. The 1st respondent submits that the appellant and the 2nd respondent, now deceased had an interest in land parcel number Mutira/Kathare/198 and 199. The registered owners of those parcels were Mugo Kabati and Gacugo Kabati who had threatened to evict them. Thus, to protect rights of the family, a suit Embu SRMCC No. 32 of 1985 was filed through the appellant. The matter was finalized on 6th June 1994 in their favour and the court ordered that costs to be paid by Mugo Kabati and Gacugo Kabati. The 1st respondent states that the appellant did not pursue the issue of costs from the said defendants but sought it from his brothers.
8. The 1st respondent argues that it is the duty of the appellant to prove the amount he sought to be paid as the court could not know the amount claimed by the appellant. The 1st respondent further states that the appellant ought to have filed a review on the grounds of discovery of new evidence if he had all the receipts but did not produce some of them at the time of the trial.

Issue for determination

9. The main issue for determination is whether the appellant proved his case on a balance of probabilities.

The Law

10. Being a first Appeal, the court relies on a number of principles as set out in *Selle and another vs Associated Motor Boat Company Ltd & others* [1968] 1EA 123:

“.....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. 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 into account of particular circumstances or probabilities materially to estimate the evidence.”

11. It was also held in *Mwangi vs Wambugu* [1984] KLR 453 that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence.
12. Dealing with the same point, the Court of Appeal in *Kiruga vs Kiruga & another* [1988] KLR 348, observed that:-

“An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand.”
13. Therefore this court is under a duty to examine the factual details and revisit the facts as presented in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

Whether the appellant proved his case on a balance of probabilities.

14. This degree of prove is well enunciated in the case of *Miller vs Minister of Pensions* [1947] cited with approval in *D.T. Dobie Company (K) Limited vs Wanyonyi Wafula Chabukati* [2014] eKLR. The court stated:-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say ‘we think it more probable than not’, thus proof on a balance or prepondence of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally unconvincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”
15. Further, section 107 of the *Evidence Act* cap 80 places the burden of proof on the party who wants the court to rely on the existence of any set of facts to make a finding in his favour, to prove those facts.
16. The appellant filed a suit against the respondents for the refund of Kshs. 113,763/- being the amount he spent as costs in Embu RMCC No. 32 of 1985. The matter proceeded ex parte and the appellant produced the agreement where the respondents agreed to refund the appellant part of his expenses that he would incur in prosecuting the family land. Thus it is my considered view that the agreement amounted to a binding contract between the parties.
17. The appellant claimed for a sum of Kshs. 113,673/- in form of special damages. The law requires that special damages must be both pleaded and proved, before they can be awarded to a party. This was stipulated in the Court of Appeal decision of *Hahn v. Singh* Civil Appeal No. 42 of 1983 [1985] KLR 716 where the court held:-

Special damages must not only be specifically claimed (pleaded) but also strictly proved..... for they are not direct natural or probable consequence of the act complained of and may



not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.

18. In support of his claim, the appellant produced court receipts for the said court case and from the lands office which amounted to Kshs. 2,006/-. Receipt No. 86 dated 7/10/2000 for Kshs. 400/- and receipt no. 87 dated 9/10/2000 for Kshs. 100/- are ordinary cash sale. For the two receipts, the author is not known and therefore they do not support his claim. Under the *Evidence Act*, the appellant is obligated to discharge the burden of proof as to the special damages claimed of Kshs.113,763/-. He only produced receipts of Kshs.2006 which the court below found were related to Embu SRMCC No. 32 of 1985 which amount the court awarded. Although the appellant preferred an appeal, he could not validly challenge the judgement of the magistrate because he had no valid grounds of appeal. It is trite law that anyone who alleges must prove. The court will only award special damages in the event that the claimant has proved to the standards required. The court awarded the amount proved herein and awarded costs of the suit. I do not find any fault in the judgement of the honorable magistrate.
19. In conclusion, I find no merit in this appeal and it is hereby dismissed.
20. Each party to meet its own costs of this appeal.
21. It is hereby so ordered.

DATED AND SIGNED AT KERUGOYA THIS 25TH DAY OF OCTOBER, 2023.

F. MUCHEMI

JUDGE

Judgement delivered through video link this 25th day of October, 2023

