Khisa v Kenya Women Finance Trust & another (Civil Appeal E008 of 2022) [2023] KEHC 26093 (KLR) (30 November 2023) (Judgment)

Neutral citation: [2023] KEHC 26093 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL E008 OF 2022

DK KEMEI, J

NOVEMBER 30, 2023

BETWEEN

ANN SITAWA KHISA ..... APPELLANT

AND

KENYA WOMEN FINANCE TRUST ..... 1ST RESPONDENT

PAWABA AUCTIONEERS ..... 2ND RESPONDENT

(Being an appeal arising from the decree & judgment by Hon. A. ODAWO (S.R.M) in Bungoma Civil Suit no. 334 of 2019 delivered on 10th January, 2022)

JUDGMENT

1. Vide a Plaint dated 3rd August 2001, the Appellant herein sued the Respondents claiming several reliefs inter alia; a permanent injunction restraining the Respondents by themselves or their agents from repossessing and selling motor vehicle registration number KBV 403L; a declaration that the appellant was wrongly listed in the Credit Reference Bureau; a declaration that the appellant serviced the loan borrowed and has no sums due and owing to the 1st respondent; a claim against the 1st Respondent for discharge of the logbook for motor vehicle KBV 403L; a declaration for a refund of the proceeds from the sale of KBX 690G having been sold and not reflected in the loan repayment schedule amounting to Kshs. 550,000/=; general damages for wrongful listing in the Credit Reference Bureau; a refund of the sums overpaid; costs of the suit and interests on the above prayers.

2. In its judgement dated 10th January 2022, the trial Court allowed the plaintiffs claim in terms of prayer 1 of the amended plaint thereby issuing a permanent injunction restraining the respondents from repossessing and selling MV Reg No. KBV 403L and dismissed prayers 2, 3 and 4 and further ordered each party to meet their own costs.

3. Aggrieved by the judgement of the trial Court, the Appellant lodged her Memorandum of Appeal dated 4th January 2022 raising the following grounds:

   a. The learned trial magistrate erred in law and fact when she considered matters that were not canvassed in evidence to the prejudice of the appellant.

   b. The learned trial magistrate erred in law and fact when she failed to consider relevant materials that were placed before her and considered irrelevant matters to the prejudice of the appellant.

   c. The learned trial magistrate erred in law and fact when she failed to consider the evidence of PW2 and the audit report which was undisputed.

   d. The learned trial magistrate erred in law and fact when she found that the respondent had not issued different sets of Accounts.

   e. The learned magistrate completely failed in her duty to sufficiently analyze the evidence before her as required.

   f. The trial magistrate's judgment was against the weight of the evidence on record.

   g. The learned trial magistrate erred in law and fact by failing to consider the appellants submissions.

   h. The learned trial magistrate erred in law and fact when she found that the plaintiff had not proven her case as required in law.

4. She prayed for the appeal to be allowed and that the court do proceed to reevaluate the evidence on record and come up with its own findings plus costs of the appeal.

5. The appeal was canvassed by way of written submissions. Both parties duly filed and exchanged submissions.

6. Vide submissions dated 20th June 2023 and filed on even date, the Appellant submitted that the trial court in its findings issued a judgment that was not concise and conclusive. It was her contention that the trial court erred by finding that neither the appellant nor the 1st Respondent had placed material before it to fully consider the issues in question and more so whether the appellant (the plaintiff in the primary suit) had cleared and/or overpaid the amount due and owing after the sale of MV Reg No. KBX 690G and thus only issuing the injunctive order and declining to grant the rest of the prayers sought.

7. Counsel submitted that the trial court did not reach a reasonable conclusion by failing to evaluate the case on a balance of probabilities.

8. Opposing the appeal, the 1st Respondent vide submissions dated 22nd June 2023 and filed on 7th July 2023 submitted that the appellant failed to prove that she had cleared and/or overpaid the loan facility taken with them as alleged. It was argued that the appellant surrendered the two motor vehicles i.e. KBV 403L AND KBX 690G as security for separate loans advanced to her i.e. for Two Hundred Thousand (200,000/=) and Three Hundred and Nineteen Thousand Seven Hundred and Thirty-Seven, Twenty-three cents (Kshs. 319,737.23/=) respectively and thus both motor vehicles were impounded to recover unpaid monies for separate accounts.

9. It was therefore argued that the appellant failed to prove her case on a balance of probabilities as required under the law. Reliance was placed on the case of Hellen Wangari Wangechi vs. Carumera Muthini Gathua (2005) eKLR and Evans Nyakwama vs. Cleophas Bwana Ongaro (2015) eKLR.

10. The respondents through their counsel submitted that the repossession of the appellant's property herein was proper and anchored on the loan facility agreement entered into between the respondent and the Appellant and by bringing the current appeal the appellant was asking the court to rewrite the contract between them. Reliance was place in the case of Kenya Breweries LTD Vs. Okeyo (2002), Lalji Karsan Rabadia & 2 others vs. Commercial Bank of Africa Limited (2015) eKLR, William Muthee Muthami vs. Bank of Baroda (2014) eKLR.

11. At this juncture, there is need to delve into the evidence presented before the trial court. The Appellant called four (4) witnesses in support of her case. In their evidence, it was stated that the appellant on 6th April, 2016 took up a loan facility of Kshs. 200,000/= and secured it with her MV Reg No. KBV 403L and later on 18th October,2016 took a further loan of Kshs. 319,737/= and secured it with MV Reg No. KBX 609G. The appellant averred that she serviced her loan diligently and defaulted for some three months resulting to the repossession of MV Reg no. KBX609G on 31st January,2018 without notice.

12. It was her claim that on 15th February,2018 she paid to the respondents a sum of Kshs. 227,420/= being the loan default amount plus three months advance repayments to secure the release of the repossessed motor vehicle which was later advertised for sale and later sold despite their attempts to have it sold to PW4.The appellant averred that the respondents failed to disclose to her the selling price of the motor vehicle and to what extent her loan was repaid. The appellant told the court that after the sale of MV Reg No. KBX 609G she was under the impression that she had cleared her dues and that she had in fact made an overpayment of the same but was surprised to see auctioneers in her compound purporting to repossess MV Reg No. KBV 403 to clear pending arrears. The appellant produced into evidence documents in support of her case as Pexhibit No. 1-13. She called a private auditor as well as a prospective buyer of her impounded vehicle as witnesses.

13. The respondents called one witness Kipruto Chemweno, the branch manager Bungoma, who testified that the appellant took up two separate loan facilities and secured them with the two motor vehicles. He testified that the appellant defaulted in making payment and as such they instructed a firm of auctioneers to repossess the motor vehicles without notice as per the agreement. It was his testimony that the repossession of MV Reg No. KBX 609G and MV Reg No. KBV 403 was to recover from two separate and unrelated loans and insisted that the appellant had not cleared her loans. The witness stated that prior to the sale of MV Reg No. KBX 609G they conducted a valuation report (which was not presented to court) but he testified that he was unaware of the amount fetched from the sale and could not ascertain whether the same was keyed in to reduce the loan balance. In support of their case the respondents produced into evidence Exhibits No. 1-10.

14. I have given due consideration to the appeal herein, the evidence before the trial Court, the grounds of appeal and the submissions by the parties in this appeal as well as the parties' submissions in the lower Court. In my humble view, I find the only issues for consideration is whether this Court should interfere with the decision of the trial Court and grant the orders sought.

15. This being a first appeal, parties are entitled to and expect a rehearing, reevaluation and reconsideration of the evidence afresh and a determination of this court with reasons for such determination. In other words, a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that.

16. In Gitobu Imanyara & 2 others v Attorney General [2016] e KLR, the Court of Appeal stated that;

> "[A]n 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 allowances in this respect"

17. In Peters v Sunday Post Ltd [1958] EA 424, the Court held that;

> " Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide"

18. Similarly, in Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] e KLR, the same stated with regard to the duty of the first appellate court;

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way"

19. I have considered the evidence before me and it is not in contention that the appellant took up loans from the 1st respondent and secured the same using two motor vehicles MV Reg No. KBX 609G and MV Reg No. KBV 403L. It is also not in contention that MV Reg No. KBX 609G was repossessed and sold and that the respondents now intend to sell MV Reg No. KBV 403L to recover an alleged loan balance. The question which remains therefore is whether the Appellant has cleared the loan amount and arrears so as to warrant the prayers sought.

20. The law on the grant of injunction in this country is well settled. Conditions for grant of interlocutory injunction as laid down in Giella vs. Cassman Brown & Co. Ltd [1973] EA 358 are as follows:

    a. (i). prima facie case with a probability of success;

    b. (ii). the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages;

    c. (iii). if the Court is in doubt on the existence or otherwise of a prima facie case it will decide the application on the balance of convenience.

21. With respect to what constitutes a prima facie case, in Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] KLR 125, it was held by the Court of Appeal (Bosire, JA) that:

    a. "The principles which guide the Court in deciding whether or not to grant an interlocutory injunction are, first, an applicant must show prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience...A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true that the Court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by "prima facie case", but at least it must mean one on which a reasonable tribunal, properly directing its mind to

the law and the evidence could convict if no explanation is offered by the defence...The terms "prima facie" case, and "genuine and arguable" case do not necessarily mean the same thing, for in using another term, namely a sustainable cause of action, the words "prima facie" are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner of considering, which was in relation to the pleadings that had been put forward in the case. It would be in the appellant's interest to adopt a genuine and arguable case standard rather than one of a prima facie case, the former being the lesser standard of the two...In civil cases a prima facie case is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."

22. On this sole important issue, the law is clear that he who alleges must prove and that the burden of proof is used to mean an obligation to adduce evidence of a fact. Section 107(1) of the *Evidence Act* provides as follows:

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

23. Under section 109 of the *Evidence Act*

> " The burden of proof as to any particular fact lies on that 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"

24. The evidential burden of proof of admissibility is provided for under section 110 of the *Evidence Act* that provides as follows:

> " 110 Proof of admissibility- The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence"

25. The effect of the above provisions is that the burden of proof as to any particular fact lies on the person who wishes to rely on its existence. Whoever has the obligation to convince the Court is the person said to bear the burden of proof. Thus, if one does not discharge the burden of proof then one will not succeed in as far as that fact is concerned.

26. I now proceed to discuss whether the appellant indeed discharged the burden of proof namely that she discharged her obligation under the loan agreements by paying back the loan facilities.

27. In my view, the appellants failed to appreciate that she bore the burden of proof to prove the allegations in her pleadings. It was not enough for the appellant to allege that sher had settled the loan amounts and not demonstrate how the same was cleared. I note the appellant's case is based on assumptions that MV Reg No. KBX 690G was sold at Kenya Shillings Five Hundred and Fifty Thousand (Kshs. 550,000/=) which amount I find is unsubstantiated by documentary evidence and that the court cannot operate in a vacuum and go into a fishing expedition on behalf of the appellant.

28. Notably, and as pointed out by the trial court in its judgment, the appellant abandoned the prayer for comprehensive accounts of the loan account in her amended plaint which in my view would have

cleared the main issue in contention. I agree with the lower courts finding that the Appellant and the 1st Respondent presented conflicting cases unsupported by documentary evidence leaving the court to determine the case on a balance of probabilities. Indeed, the sentiments of the learned trial magistrate showed that she was in a predicament presented by the parties' failure to present the appropriate evidence so as to enable her come up with a way forward. She was in a quandary so to speak. Looking at the submissions by learned counsel for the Appellant, one gets the impression that the Appellant wanted the trial court to rule in her favour owing to the failure by the 1st Respondent to avail the necessary evidence yet it was the burden of the Appellant to prove her case. It seems the trial magistrate came to the view that the entire evidence was nothing short of conjectures and hence her decision to only grant an order of injunction and dismissed the rest of the prayers.

29. It is my humble view that whereas the Appellant ought not to be discharged at this stage until the actual amounts due are established, I find that she is entitled to an order for injunction pending the establishment of the exact amounts due to the 1st Respondent. Bearing in mind that it is not disputed that MV Reg No. KBX 690G was sold, it is imperative that the 1st Respondent makes the requisite computation and notify the Appellant of the status of her loan account to enable her know how much she has in arrears. This simply means that iam in agreement with the holding of the trial Court that the Appellant's loan facility with the 1st Respondent cannot be termed as fully cleared in the absence of evidence to that extent and thus this Court cannot issue orders in terms of prayer ii, iii, iv and vii of the amended plaint dated 26th February,2021.

30. The upshot of my findings is that the appeal lacks merit and the same is dismissed with no orders as to costs.

It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 30TH DAY OF NOVEMBER 2023.

D.KEMEI

JUDGE

In the presence of

No appearance Angima for Appellant

Miss Ngeywo for Respondent

Kizito Court Assistant