



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KERUGOYA

(CORAM: R. MWONGO, J)

CIVIL SUIT NO. 72 OF 2019

FLORENCE WAMWEA.....APPELLANT

VERSUS

PATRICK WACHIRA.....RESPONDENT

(Being an appeal from the judgment of Hon. P.M. Mugure, S.R.M

dated 7th October, 2019 in Wangu'ru Civil Case No. 179 of 2018.)

JUDGMENT

Facts of the case and analysis

1. The plaintiff/appellant's case in the lower court was dismissed in the lower court after a full hearing in which the plaintiff and the defendant were the only witnesses. The claim in the plaint was that by an agreement evidenced in a hand written document dated 24th September 2018 (PExb 1), the defendant was to pay 99,000/- to the plaintiff. When the amount was not paid, the plaintiff sent a demand letter (PExb 2) dated 25th October, 2017, through her lawyer.
2. The demand letter states that the defendant entered into an agreement to refund 99,000/- to the plaintiff, of which only 10,000/- had been paid. It demands 89,000/- plus collection costs of Kshs 8,000/-.
3. In evidence, the plaintiff testified that she had given the plaintiff an amount of Kshs 150,000/-; her statement that it was not the first time she had given him money; that he refunded 61,000/-; that there was no document showing she had loaned the defendant 150,000/-; that she deposited the 150,000/- into his Family Bank account at Mwea; that they went to the police station where he wrote the refund letter; that he wrote it voluntarily. The plaint demands the amount in the agreement together with interest and costs.
4. The defendant's defence denies the claim. It states that the defendant was arrested and placed in custody at Wanguru police station, and coerced through duress and intimidation into writing the said letter. The defence seeks dismissal of the suit with costs.
5. In his evidence, the defendant/respondent stated that he was a driver; that he had not received any cash from the plaintiff; that she never deposited Kshs 150,000/- into his account; that he was coerced to write the agreement PExb 1
6. In cross examination he stated that he would carry fire wood for her; that the letter was brought to the tea factory where he works as a driver and given to the manager who said they should go to the police station; that the demand letter was served on him and he was told to write the letter (PExb 1).
7. The trial court recited the parties' evidence. It found that the two were known to each other in that the plaintiff was a supplier of wood to the tea factory where the defendant worked; that there was no document showing that the plaintiff had transferred Kshs 150,000/- to the defendant; that there was no bank deposit slip; that the absence of such evidence of the 150,000/- was pertinent; that the evidence so far was the plaintiff's word against the defendant's; that there were no other witnesses; that the trial magistrate found it difficult to what or if any amount was given to the defendant.
8. The court held that, in the absence of proof, it could not find that the claim of 89,000/-, or that any amount, was owed to the plaintiff. It, correctly, held that the plaintiff:

“..ought to have given the court more documents to substantiate the amount over and above word of mouth”

9. This being a first appeal, this court’s primary role is to re-evaluate, re-assess and re-analyse evidence 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. See **Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR**

10. I have re-hashed all the evidence on record which was fairly brief. I find that the trial court was correct in its final determination that there was no proof of a payment made to the defendant by the plaintiff. The appellant’s claim that the court dismissed the plaintiff’s exhibits produced in court is incorrect as the court merely stated that there was insufficient evidence to prove the claim of the amount owed.

11. Contrary to the appellant’s allegation, the trial court considered all the evidence adduced as shown in the record and judgment. In addition, the trial court correctly awarded costs of the suit to the defendant.

12. The legal principle on proof is that it is for he who alleges to prove the allegation. This is as provided in **Section 108 of the Evidence Act** which states that:

“The burden of proof in a suit or proceedings lies in that person who would fail if no evidence at all were given on either side.”

On the issue of proof, it was held as follows In **Nairobi HCCC No. 3321 of 1993 Susan Mumbi Waititu v Kefala Grebedhin**

“The position in civil cases is that whoever alleges has to prove. It is the plaintiff to prove her case on a balance of probability and the fact that the Defendant does not adduce any evidence is immaterial.”

13. On the appellant’s claim that costs ought not to have been allowed to the defendant, the legal principle on costs is that costs follow the event. This is as provided in **Section 27 (1) of the Civil Procedure Rules**. It means that the winner of a case is entitled to be compensated for the costs incurred in making out his case in court. Costs are left to the discretion of the court.

14. In the case of **Matigari General Merchants Ltd & another v Nelly Wairimu Muthoni & another; Rose Wamuyu Wandaka (Interested Party) [2021] eKLR** the court held that:

“In determining the issue of costs, the Court is entitled to look at inter alia the conduct of the parties, the subject of litigation, the circumstances which led to the institution of the legal proceedings, the events which eventually led to their termination, the stage at which the proceedings were terminated, the manner in which they were terminated, the relationship between the parties and the need to promote reconciliation amongst the disputing parties pursuant to Article 159(2)(c) of the Constitution.”

Disposition

15. From all the foregoing it is clear that there is no basis for this court to interfere with the trial court’s decision.

16. The appeal is therefore dismissed with costs to the defendant/respondent.

17. Orders accordingly.

DELIVERED AT KERUGOYA ON THIS 16TH DAY OF FEBRUARY, 2022

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R. MWONGO

JUDGE

Delivered in the presence of:

1. Florence Wamwea - Appellant in Person
2. Mugo holding brief for Kagio for - Respondent
3. Wanjiru - Court Assistant