



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 25 OF 2020

RUFUS KANGETHE KAMAU.....APPELLANT

VERSUS

GRACE NJERI KAMAU.....RESPONDENT

(An appeal from the judgment and decree of Honourable N. Makau Senior Resident

magistrate in Nakuru Cmcc suit No. 527 of 2018)

JUDGMENT

INTRODUCTION

1. The appellant herein filed this appeal through memorandum of appeal dated 25th February 2020 challenging the judgment and decree issued on 10th September 2020 in Nakuru CMCC No. 527 of 2018 where the appellant who was plaintiff in trial court by plaint dated 23rd May 2018 claimed a sum of kshs 510,000/= being balance of kshs 620,000 which the appellant alleged was owing from the respondent to him for maize that was disputed. Defendant/respondnet filed a defence on 2nd August 2018 denying the claim and admitted owing kshs 300,000 and not 620,000 and that he had paid kshs 100,000.

2. After trial the trial magistrate held as follows:-

“ what is owed to the Plaintiff looking at proceedings of the court in Cmcc 753 of 2013 is kshs 200,000/= . He stated that this the defendant admitted while under oath in court and not at the police station as he stated in his evidence before me in court. Plaintiff partially succeeds only to the extent of being paid Kshs 200,000/=and the rest of the claim fails as she has not provided further evidence of the balance owed to her. The plaintiff had not availed the evidence of proceedings I believe the entire claim would not have seen the light of day. That as it may plaintiff has proved her case on a balance of probability plaintiff will thus have half cost.”

3. Aggrieved by the said judgment the appellant urged the court to set aside the said judgment and substitute it with a judgment of this court. The appellant raised 7 grounds for the appeal set out as hereunder:-

- a. *That the trial magistrate erred in law and fact in failing to consider the evidence on record hence arriving at an erroneous finding.*
- b. *That the trial magistrate erred in law and in fact in addressing herself on extraneous issues not borne of pleadings and evidence hence arriving at erroneous findings.*
- c. *That the learned trial magistrate erred in law and in fact in failing to consider the appellant's submissions in making her determination hence arriving at an erroneous finding.*
- d. *That the learned trial magistrate erred in law in failing to frame and analyses the issues for determination as by law required hence arriving at an erroneous finding.*
- e. *That the learned magistrate erred in law and in fact by misunderstanding and misapplying the provisions of 34(1)c of the Evidence Act and in adopting the proceedings of Nakuru CMCC 753 of 2013 hence arriving at an erroneous finding.*
- f. *That the learned magistrate erred in law and in fact in failing to examine the adopted proceedings holistically hence arriving at an erroneous finding.*

g. That the trial magistrate erred in law and in fact in referring to non-existent parties and issues not borne of pleadings or evidence presented hence arriving at an erroneous finding.

4. The parties agreed to dispense the appeal by way of submission. The Appellant filed submissions on 14th October 2021, with the Respondent filing her submissions on 29th November 2021.

APPELLANT'S SUBMISSIONS

5. The appellant submitted that this being a first appeal, the court should re-evaluate, re-assess and re-analyze the record and determine whether the conclusions reached by the learned trial magistrate are to standard.

6. The appellant submitted that the respondent failed to discharge her legal burden to prove that the appellant owed her money as per **Section 107 (1) of the Evidence Act** which provide 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 exist.”

7. The appellant further submitted that the respondent had testified that she had given the appellant a sum of Kshs 620,000/= on 29th August 2012 and the appellant repaid a sum of Kshs 110,000/= but failed to produce any evidence in support; and further the appellant failed to prove that the alleged Kshs. 300,000 was related to Kshs 620,000 as alleged.

8. Further that the trial court found the respondent failed to prove her case as she only produced proceedings in CMCC 753 of 2013 where the appellant admitted owing the respondent a sum of Kshs 300,000/= and cited the case of **Kipkebe Limited Vs Peterson Ondiek Tai (2016) eKLR**. where the court stated as follows:-

“ The plaintiff ought to properly to have been called formally to prove his claim, that is to say, to prove everything the burden of proof of which, on the pleadings, lay on him in order to establish his claim.”

9. The appellant further submitted that the trial court failed to consider the appellant's submission on the issue of burden of proof and arrived at an erroneous finding.

10. The appellant submitted that the trial court in its finding stated the respondent had not proved her case on a balance of probability as required by law and ought to have proceeded to dismiss the respondent's case but erroneously proceeded to analyze the trial courts proceedings in CMCC No. 753 of 2013 and awarded the respondent Kshs. 200,000/= and cited the case of **Kenya Commercial Bank Ltd vs Mwa Nzau Mbaluka & Anor (1998) eKLR** where the the court stated as follows:-

“ by raising and determining the suit on an issue which was neither pleaded nor evidence adduced on thereby introduced a new cause of action against the appellant. He clearly went astray and his judgment cannot be left to stand on that account.”

11. The appellant further submitted that **Section 34(1) of the Evidence Act** is not applicable in the instant case in the production of the lower court proceedings and the trial magistrate erred in law and in fact by misunderstanding and misapplying then provisions of **Section 34(1) (c) of the Evidence Act** and cited the case of **Cube Movers Ltd vs Another vs Victor Ayiecha Okero & another (suing as the legal representative of the estate of Vincent Maiko Okero (deceased)) (2015) eKLR** where the court held: -

“the keywords in subsection (1) are “for purposes of proving the facts which it states” while subsection a, b, c, d further limit the circumstances which such proceedings may be admitted..... The Appellants did not seek any clarification or raised objection under section 34 of the Evidence Act. Be that as it may. It is plain to all that the proceedings in question would run afoul of section 31(1) (b) of the Evidence Act... in the circumstances I would agree with the appellant's submission that the trial magistrate erred in so far as she purported to analyze the witnesses evidence.. And base her findings thereon. This was both unnecessary and improper.”

12. On the issue of costs, the appellant submitted that the award of costs is discretionary and ordinarily follow the event under **Section 27 of the Civil Procedure Act**. The appellant urged the court to grant costs.

RESPONDENT'S SUBMISSIONS

13. The respondent urged this court to reject the ground that the trial magistrate court erred in framing the issues for determination as this court is to re-evaluate, assess the evidence and arrive at a just conclusion.

14. The respondent submitted that the award of Kshs 200,000 shows that the respondent partially succeeded in proving their case and was therefore awarded a portion of the claim.

15. The appellant further submitted that the appellant admitted before the trial court that the engagement between him and the respondent was verbal and is therefore is estopped from objecting to the claim of the respondent on the grounds of the non-existence of documents as proof.

16. That further the admission by the appellant in the trial court of owing the respondent Kshs. 300,000/= is consistent with the proceedings

of CMCC No 753 of 2013. The finding of the court was based on demonstrable evidence. He urged court to find grounds 1, 2, 3 and 7 of the appeal to be without merit and dismiss them.

17. The respondent further submitted that the appellant has failed to demonstrate how the trial magistrate misappropriated herself in construing the provisions of **Section 34 (1) of the Evidence Act**. That there is no contention that the appellant and the respondent were parties in the Nakuru CMCC No 753 of 2013. The appellants had the opportunity to cross-examine each other on the issues of indebtedness; that the issue was substantially the same.

18. The respondent further submitted that the trial court acknowledges that the appellant had in the proceedings in CMCC No.753 of 2013 admitted owing the respondent and which he failed to repay necessitating the filing of CMCC No. 527 of 2018 by the respondent . The respondent urged this court to reject the appeal in its entirety and dismiss it with costs.

ANALYSIS AND DETERMINATION

19. This being the first appellate court I am required to reevaluate and analyse evidence adduced before the trial court this position was held in **Selle & Another Vs Associated motor Boat Co.Ltd & Others (1968) EA 123** where the court stated as follows:-

“...An appeal to this court from the trial court is by way of retrial and the principles upon which the 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...”

20. Further the Court of Appeal in **Kneller & Hancox Ag JJA in Mkube Vs Nyamuro [1983] KLR, 403-415, at 403** stated as follows:-

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”

21. In view of the above, I have perused and considered pleadings, proceedings and submissions before the trial court. I have also also considered the grounds of appeal and submissions filed in respect of this appeal.

22. The trial magistrate found that respondent had not proved on a balance of probabilities that he owed the defendant/appellant owed the respondent kshs 620,000/= but was only able to prove kshs 300,000 which the appellant/defendant which he admitted before the court on oath. Further evidence was adduced by the respondent that the appellant had paid a sum of Kshs 100,000 and the balance owing was therefore kshs.200,000/=

23. **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 a fact which he asserts must prove that those facts exist?”

24. Further, **Section 109 of the Evidence Act** states:

“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”

25. What I consider in issue is whether the respondent discharged the duty of proving whether kshs.520,000 or any part of it was owing from the appellant to the respondent.

26. The appellant argued that the court considered extraneous matters while arriving at a determination that kshs 200,000 was owing from the appellant to the respondent. Record show that proceedings of Case No. ... was availed to the court and there was confirmation that the appellant admitted owing kshs 300,000 and it was not disputed that part of the amount had been paid. It was not also disputed that there was no written agreement and the only written document the respondent could hold on to is admission on oath in court which was not challenged.

27. In my view the burden was discharged by prove that the appellant admitted owing kshs 300,000 and had proceeded to repay a sum of kshs 100,000 towards settling the debt. In my view allegation of coercion by police cannot hold water as the admission was before a magistrate and on oath. This issue of coercion in my view is an afterthought.

28. From the foregoing I find that the trial magistrate did not misdirect herself by finding that the respondent had partially proved her case and awarded a judgment of kshs 200,000. I therefore see no merit in this appeal.

29. FINAL ORDERS

1) Appeal is hereby dismissed.

2) Costs of the appeal to the respondent.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 30TH DAY OF MARCH, 2022

.....

RACHEL NGETICH

JUDGE

In the presence of:

Lepikas - Court Assistant

No appearance by parties