Mukuyu Mobile Techonoligies Ltd v Mburu & another (Civil Appeal 12 of 2020) [2022] KEHC 15747 (KLR) (30 November 2022) (Judgment)

Neutral citation: [2022] KEHC 15747 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAHURURU

CIVIL APPEAL 12 OF 2020

CM KARIUKI, J

NOVEMBER 30, 2022

BETWEEN

MUKUYU MOBILE TECHONOLIGIES LTD ..... APPELLANT

AND

EDITH MUKAMI MBURU ..... 1ST RESPONDENT

GRACE NJAMBI MBURU ..... 2ND RESPONDENT

(Being an appeal against the Judgment of Honourable H S Wanyanga , senior Resident Magistrate delivered on 27th July 2020 in the Chief Magistrate Court at Nyahururu Civil Suit No. 245 of 2018)

JUDGMENT

1. Appellant, a limited liability company, filed the plaint on the October 1, 2018 against Respondents, praying for a judgment of Kshs 113,000/= being the principal sum given to the 1st Defendant for the purposes of banking but was lost in her custody. 2nd Defendant was sued by dint of being a personal guarantee for any loss in respect to 1st Defendant. The Appellant also prayed interests in the Principle amount at court rates until payment is in full.

2. The suit was heard in full, and on dismissal of the suit appellant lodged the instant appeal and set out 5 grounds of appeal, namely;

    i. That the Learned trial Magistrate erred in Law and in fact, in failing to take into consideration the evidence adduced by the appellant and in finding that the Appellant failed to prove his case on probability.

    ii. That the Learned trial Magistrate erred in Law and, in fact, in holding that the suit as against the Respondents ought to have been filed after criminal charges have been instituted and determined against the 1st Respondent.

iii. That the Learned Trial Magistrate erred in Law and, in fact, in failing to give effect the employee's indemnity and guarantee dated February 22, 2016 between the Appellant and the Respondents whose terms were clear and enforceable by law.

iv. That the Learned Trial Magistrate erred in law and, in fact, in holding that the suit stands as a nullity as the Special Resolution dated October 19, 2018 filed by the Appellant, who is a company, was filed after the suit was already filed in court and that the same ought to have been filed before the suit was instituted in court.

v. That the learned Trial Magistrate erred in law in law and, in fact, in dismissing the Appellant's case against the weight of evidence and submissions of his counsel.

3. Parties were directed to put submissions to canvass appeal.

4. Only the Appellant complied with directions

5. The evidence adduced in the case can be summed up as follows:

6. PWI, in his testimony on behalf of the Appellant, produced a special resolution dated October 19, 2018 confirming that he had the authority to testify on behalf of the Appellant. He stated that on November 5, 2017, he had sent the 1st Defendant to go deposit Kshs 113,000/= in his NIC Account towards loan repayment. He further stated that he was called by the bank on November 11, 2017 and asked why he had defaulted in paying his loan. He produced a bank statement for the month of November 2017 to confirm that no amount was deposited in the said account. He concluded and urged the court to have the Respondents compelled to pay Kshs 113,000/=together with costs and interests.

7. On cross-examination, he stated that they opted for civil litigation rather than criminal proceeding as the 1st Defendant had a guarantee.

8. DWI, the 1st Defendant herein testified and stated that she never stole any money from her employer. She stated that she deposited the Kshs 113,000/= as instructed. She had a clean record while working for the Appellant as her testimony that she was a trustworthy employee. She stated that her employer had intended to transfer her to Subukia, which transfer she declined on November 6, 2017. She then stopped coming to work. She was only called by her Employer a week later to be informed about the missing Kshs 113,000/=. In her defense, she stated that she handed the deposit slip to the company auditor after she deposited the money.

9. Appellant produced the following documents: -

a. Letter of authority dated October 19, 2018.

b. Employee's indemnity and guarantee dated February 22, 2016.

c. Two photographs passport size.

d. Photocopy of identity cards

e. Bank statement from NIC Bank for the month of November 2017.

f. Demand Notice.

g. Reply to the demand Notice dated March 8, 2018 and April 3, 2018.

10. Appellants' case against the Respondents was for Kshs 113,000/=, being the Principal amount 1st Defendant allegedly failed to bank as was instructed by the Appellant.

On that testimony, the trial court held in part. The civil proceedings will only come in after the determination by a criminal court. Be that as it may, proof of probability can only be qualified after the proper criminal liability process.

> From the evidence adduced, the Appellant produced the bank account statements to confirm that the monies in issue were never banked by the 1st Defendant as was required.
>
> During the hearing, there was no witness called from the NIC bank to explain the steps taken when the money was never banked, as alleged. A witness from the subject bank would have cleared the air about the missing monies and, more so, the disclaimer notices on the statement of account.
>
> Further, the Appellant witness who testified on behalf of the company is the one who produced the statements. It is my view that he had no capacity to give a proper explanation of the veracity of the account statement. It's only a witness from the Bank who would have cleared the air on this issue. I, therefore, find that the statement from the Bank is inadmissible.
>
> The third point I have looked at is the copy of the special resolution, which was produced as Appellant Exhibit 1. According to the content, the resolution emanated from Mukuyu Mobile Technologies Company Limited. The resolution was passed on October 19, 2018. The proposed resolution was to the effect that Mr Anthony Wagura Karue was authorized to file the suit against the two Respondents through the firm of Waichungo Martin and Company Advocates. This suit was initially filed on October 1, 2018 and a verifying affidavit sworn by the said Anthony Wagura stated that he had the authority. The question one may ask is, does a resolution done days after the suit was filed have a retrospective effect? I don't think so. The suit by the Appellant, in my considered opinion, is fatally defective as no authority was sought from the directors before it was filed. The authority was, in fact, sought and granted after the same was filed. The suit as it stands is, therefore, a nullity. This was the holding in Foss vs Harbottle (1843) 67 ER 189, (1843) 2 Hare 461 and in Court of Appeal in *Amin Akberali Manji & 2 others v Altaf AbduIrasul Dadani & another [2015] eKLR*;
> .....
>
> There are various divergent interpretations, but the common law practice gives that for a company to sue, a resolution must be passed to that effect. The resolution herein was passed way after the suit was filed, and this being a dispute with an outsider, it is my view that a resolution ought to have been made before the suit is actually filed. The suit that was filed is, therefore, defective and nullity.
>
> From my analysis above, the claim against the Respondents was not proved; hence the case against them should be dismissed. The second issue is the Respondent's defence. 1st Defendant, in her testimony, stated that she did bank the monies being claimed against her. No documentary evidence was adduced to confirm this point. I find that the defense is just but a mere denial, and I may have not taken it into consideration.
>
> Further, the case against the second defendant was filed merely because she filed an indemnity to guarantee the 1st Defendant. The defence never called her to come and testify.

The claims against her were, therefore, never controverted. However, the onus of proof would have shifted to the Respondents only if the claim against them was proved.

In conclusion, the claim against the two Respondents has not been proved as required under the law. I will therefore dismiss the suit as filed with costs awarded to the 1st Defendant only"

Analysis And Determination

11. This being the first appellate court, I am required to re-evaluate evidence adduced before the trial court and make an independent determination. This I do with the knowledge that, unlike the trial court, I did not get the benefit of taking evidence firsthand and observing the witness's demeanor. For this reason, I will give due allowance. The principles guiding the first appellate court were set out in the case of *Selle & Another v 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 and draw its conclusions thought it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...."

12. In view of the above, I have perused and considered the evidence adduced before the trial court and submissions filed and consider the following as issues for determination: - whether the appellant proved its case on the balance of probabilities? Was the institution of the criminal proceedings pre-condition to lodging a civil claim? Whether failure to file resolution in filing a suit in the company's name renders the suit a nullity and order as to costs.

13. It is worth noting that the resolution (authority to file suit) was filed before the matter was fixed for hearing. Further, in the pleadings filed by the Respondents, the defence had not raised an issue touching on the Resolution at any given moment and time.

14. It has not been disputed that a resolution to institute suit was not filed at the time of filing suit in the lower court. The question that follows is whether that failure is fatal to the appellant's suit. In *Assia Pharmaceuticals v Nairobi Veterinary Centre Ltd. Nairobi (Milimani) HCCC No 391 of 2000*, the court held as follows: -

> " It is settled law that where a suit is to be instituted for and on behalf of a company, there should be a company resolution to that effect.....As regards litigation by an incorporated company, the directors are, as a rule, the persons who have the authority to act for the company. Still, in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide, even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so, but proceedings started without proper authority may subsequently be ratified."

15. There is no doubt a resolution is required, which, as shown above, is intended to address situations where some persons drag the company to court and bind the company on issues litigated, yet members of the company have not sanctioned their action. The requirement is therefore intended to protect the companies from unauthorized court processes. From the above, it is evident that the omission can

be ratified after the suit has been filed. The authorization is to assure the court that the company is properly in court and that it is not an act of unauthorized members/individuals.

16. In the case of *Leo Investments Ltd v Trident Insurance Company Ltd (2014), eKLR* Odunga J found that the mere failure to file the resolution of the Corporation together with the Plaint did not invalidate the suit and the associated himself with the decision of Kimaru J in the case of *Republic v Registrar General and 13 Others Misc Application No 67 of 2005 [2005] eKLR* where the court held as follows: -

> " ...such a resolution by the Board of Directors of a company may be filed at any time before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. Its absence is, therefore, not fatal to the suit."

17. In the case of *Spire Bank Limited v Land Registrar & 2 others [2019] eKLR*, the Court of Appeal stated as follows: -

> " ...It is essential to appreciate that the intention behind order 4 rule 1 (4) was to safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf. This was to address the mischief of unauthorized persons instituting proceedings on behalf of corporations and obtaining fraudulent or unwarranted orders from the court. The company's seal that is affixed under the hand of the directors ensured that they were aware of and had authorized such proceedings together with the persons enlisted to conduct them. And where evidence was produced to demonstrate that a person was unauthorized, the burden shifted to such an officer to demonstrate that they were authorized under the company seal. With this in mind, we dare say that the provision was not intended to be utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized."

18. In view of the above, it is clear that it was sufficient for the authorized person to depose that he or she was duly authorized. Still, in the event of a complaint that such a person was unauthorized, it was up to the disputing party to demonstrate with evidence that the deponent did not have the requisite authority.

19. In the instant case, I note that the trial magistrate principally relied on failure to file authority with plaint in dismissing the suit. However, on perusal of the pleadings, I note that the issue of failure to file a resolution on authority to file suit was not raised in defense. The issue has been raised in submissions; if this issue had been raised in defence or the defendant had filed a preliminary objection, I believe the plaintiff would have addressed the court on it. Parties should be bound by their pleadings.

20. From the foregoing, it is my considered view that the trial magistrate misdirected himself in dismissing the suit on a technicality not raised in the parties' pleadings.

21. On whether the criminal proceedings ought to have preceded civil proceedings, there is no law that provides that for a Civil suit to be instituted against a person, Criminal charges ought to have been instituted and determined.

22. The suit herein is based on an employee's indemnity and guarantee agreement dated February 22, 2016. The suit herein is not one for malicious prosecution, whereby the outcome of a criminal case gives

bearing and/or acts as evidence in the civil claim for damages. The suit herein was premised on the basis of the indemnity agreement dated February 22, 2016 in which it stipulated that;

> " The employee will keep the employer indemnified of any loss, misappropriation of employers cash, and mishandling of the employer's assets or stock."

23. More so Section 193A of the *Criminal Procedure Code* cap 75 Notwithstanding the provisions of any written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue pending in any civil proceedings shall not be a ground for any stay, prohibition or delay of criminal proceedings."

24. In *Republic v Inspector General of the National Police Service & Another Ex parte Beatrice Hilda Omunia: Peter Nganga Chege & 2 others (Interested parties) (2019) eKLR* cited in the case of *Rana Auto Selection Limited & 2 others V Kenya Revenue Authority & Another (2021) eKLR*, J Mativo while commenting the above provision held as follows at paragraph 30 of his judgment;

> " Even though it is not for this court to consider the defence of the accused persons, which is basically a function of the trial court, the core issue raised by the ex parte applicant is that the dispute is purely civil Section 193A of the *Criminal Procedure Code* permits parallel civil and criminal proceedings, hence, even if there was a civil suit in court, the existence of a parallel civil case is no bar to criminal proceedings. The offence being investigated is known to the law. Hence, the cited provision, The conduct under investigation can attract a criminal sanction if proved."

25. Having said as much, the onus of a party in civil proceedings is to prove its case on a balance of probabilities. By indicating that Criminal charges ought to have been filed would mean that the trial Court was now calling for the appellant to prove his case beyond a reasonable doubt. It acted as both the criminal trial Court in civil trial Court.

26. There are instances where one is found not liable for the Criminal Charges he faces and held liable in civil proceedings. Thus, the Court decision was therefore misguided and an error of facts and law.

27. On whether the appellant/plaintiff proved its case on a balance of probabilities. Based on the evidence on record. It is an undisputed fact that the Kshs: 113,000/- was given to the 1st Respondent for depositing, which she admitted in her defence. She confirmed that her duties were to carry out deposits which she did alone.

28. Though she indicates having deposited the amounts to N.I.C Bank, the statement produced in Court by PWI dated from November 1, 2017 to November 30, 2017 shows no transaction credits for the amounts of Kshs 113,000/= that was to be deposited on November 5, 2017. The 1st respondent quit employment on November 6, 2017, a day after the sum of Kshs: 113,000/- was sent to her to deposit.

29. A deposit of Kshs: 115,000 was made on November 24, 2017, way after the 1st Respondent had stopped working for the Appellant. The deposit slip was never availed in Court, nor was the CCTV footage showing that the 1st respondent deposited the amount. She stated that slips were handed over to Beth, who conducted the audits.

30. The least she could have done is call Beth to verify her statements. The 1st respondent quit employment without notice, in this case, a day after money was misappropriated or lost. This was suspicious.

31. Section 3 (1) of the *Law of Contract*s provides as follows: -

> " No suit shall be brought whereby to charge the Respondents upon any special promise to answer to a debt, default or miscarriage of another person unless the agreement upon which such suit is brought, or some memorandum or note thereof is in writing and signed by the party to be charged therewith or some other person there unto by lawfully authorized."

32. The indemnity dated February 22, 2016 is very clear and unambiguous, and the parties signed the same voluntarily without coercion, undue influence, or duress. The said deed of guarantee is legal, not fraudulent.

33. The terms of their contract bind parties, and it is not the work of the Court to rewrite contracts unless there are extenuating circumstances which was not the case herein. See the case of *Ahmed Mohammed Noor v Abdi Aziz Osman (2019) eKLR*.

34. The 1st Respondent agreed to indemnify the Appellant in case of misappropriation of funds at the cause of business with the 2nd Respondent acting as a guarantor of the 1st Respondent in the event that the 1st Respondent was unable to pay.

35. The Appellant proved its case on a balance of probabilities. The evidence on record speaks for itself, and the indemnity and deed of the guarantee are valid. Thus, the appeal succeeds and maKshs the orders as follows;

    i. Judgment of the trial court entered on July 27, 2020 is hereby set aside, and the judgment is hereby entered in favour of the Appellant as prayed in the plaint. The Appeal is merited and thus allowed with costs in the trial court and this appeal.

DATED, SIGNED, AND DELIVERED AT NYAHURURU THIS 30TH DAY OF NOVEMBER 2022.

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CHARLES KARIUKI

JUDGE