REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 122 OF 2018

JOHN KATUA MWALULA KIVULA.....APPELLANT

VERSUS

DANIEL IBULU MUKETI.....RESPONDENT

(Being an appeal from the Judgment and Decree of the Senior Principal Magistrate's Court at Kangundo by the Honourable Martha Opanga (SRM) dated 11th Day of September 2018 in Civil Case No. 2 of 2011, John Katua Mwalula Kivula versus Daniel Ibulu Muketi)

JUDGEMENT

1. The Appellant herein who was the Plaintiff before the trial court by way of a plaint dated 12th January, 2011, sought from the Court the following reliefs against the Respondent herein who was the Defendant:

> **(a) A perpetual order of injunction restraining the Defendant by himself or his agents from interfering in any manner with Barclays Bank of Kenya share Account No.xxxxx.**
>
> **(b) An order directing the Registrar Barclays Bank of Kenya to unblock share Account No.xxxxx, rectify the Register and cause the names of the Defendant to be deleted from such register and retain the names of the Plaintiff as the sole owner of the said Account.**
>
> **(c) Cost of this suit.**
>
> **(d) Any other or further relief this Honourable Court may deem just for ends of justice.**

2. The Appellant's claim was that in or about 1986, the two parties agreed to contribute and did contribute Kshs 800/= each and jointly applied for shares from Barclays Bank of Kenya Limited (hereinafter referred to as "the Bank"). However, as the approval of the said application took some time, the Respondent, for lack of forbearance demanded a refund of his contribution and the Appellant refunded him the same on 21st June, 1986, receipt of which the Respondent acknowledged in writing and the Respondent withdrew from the said transaction.

3. However, the said application was subsequently approved and a shares Account No.xxxxx was allocated jointly to the Appellant and the Respondent as the Appellant had not moved the Bank's Registrar to delete the Respondent's name after the said refund was made. However, unlike the Appellant, the Respondent did not make any further payments after his withdrawal. Instead, on 15th September, 2010 the Respondent wrote to the Plaintiff and to Bank and blocked the said Account and the payment of dividends and threatened to move the Bank for the sale of the said shares purporting to be a joint owner.

4. The Appellant contended that the Respondent had no right or interest over the said shares and that his continued interference and/or blockage of the said Account and payment of dividends is illegal and unlawful.

5. The Respondent in response filed a statement of defence and counterclaim. In the said documents he admitted that they jointly applied for shares but averred that the approval was done almost immediately thereafter and a joint share account no.xxxxx opened in their joint names. However, the Appellant cunningly lied and misrepresented the facts to him stating that their share application had been rejected upon learning that the said application had been approved. The action of the Appellant, it was pleaded was intended to defraud the Respondent and that the Appellant cheated him that he had misplaced the forms when the Respondent demanded proof of the said rejection.

6. According to the Respondent, 10 years later, in 1995 he confirmed the existence of the said account and when he confronted the Appellant, the Appellant admitted that the said application had been approved, shares allocated and that he had been receiving dividends alone since 1986 and that henceforth he would be sharing the same equally with the Respondent. However, the Appellant did not honour his undertaking

and a family meeting was convened to resolve the dispute where both families agreed that the shares were jointly held and that the proceeds ought to be shared equally.

7. According to the Respondent, the Appellant never made any additional purchases and that the additional shares in the joint account were as a result of bonus shares issued by the Bank. It was upon the failure to reach an amicable solution that the Respondent approached the Bank seeking to know the status of the said account and proceeded to block the said account when the Appellant failed to respond to his letters. In his view the said Account was blocked by the Bank to stop further illegalities by the Appellant.

8. The Respondent therefore prayed for the dismissal of the Appellant's suit and prayed for a declaration that the said account is jointly owned by both parties, an order directing the Bank to sell the said shares and share the proceeds equally between the parties and an order directing the Appellant to pay to the Respondent an equal sum of the value of dividends already paid by the Bank to the joint account and collected by the Appellant since 1986. He also sought costs and interests.

9. In his reply to the counterclaim the Appellant reiterated the contents of his plaint and sought for the dismissal of the counterclaim.

10. The manner in which the proceedings were undertaken before the trial court is with respect, rather unusual. According to the record, on 3rd May, 2012, the parties agreed to call one neutral witness who was however referred to as "DW-1", **Sandro Hans Otieno**, from Custody and Registrars Services, Nairobi. After his examination in Chief, which seems to have been conducted by counsel for the Defendant, he was re-examined by Counsel for the Plaintiff. After his evidence was taken, the matter was adjourned sine die. Thereafter, it would seem that the matter could not proceed due to failure to comply with Order 11 of the ***Civil Procedure Rules*** till 27th November, 2013 when the court was informed that the Plaintiff had complied. On 22nd January, 2014, counsel for the Defendant informed the Court that though he was ready to proceed with one witness, counsel for the Plaintiff was absent. Accordingly, the hearing was stood over to 2nd April, 2014. For one reason or the other, the hearing was not able to proceed till 19th September, 2019 when the Plaintiff informed the Court that because his advocate had delayed in finalising the suit, he had filed a notice to act in person and sought for a hearing date. The court then directed that since the matter was partly heard before another magistrate, the proceedings be typed and a mention date was given for 17th October, 2017. On the said date, it was noted that the proceedings had not yet been typed and a further mention for 28th November, 2017 was given. No further proceedings, took place, going by the certified proceedings. Instead, a judgement was delivered on 11th September, 2018 in which the plaintiff's claim was dismissed while the Defendant's counterclaim was allowed.

11. In arriving at the said decision, the learned trial magistrate who took over the matter formed the view that the Plaintiff and the Defendant each "testified" as per their pleadings and thereafter each filed submissions.

Determination

12. I have considered the material placed before me in this matter.

13. Order 18 rules 1 and 2 of the ***Civil Procedure Rules*** provide as hereunder:

> ***1.The plaintiff shall have the right to begin unless the court otherwise orders.***
>
> ***2. Unless the court otherwise orders—***
>
> > ***(1) On the day fixed for the hearing of the suit, or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.***
> >
> > ***(2) The other party shall then state his case and produce his evidence, and may then address the court generally on the case. The party beginning may then reply.***
> >
> > ***(3) After the party beginning has produced his evidence then, if the other party has not produced and announces that he does not propose to produce evidence, the party beginning shall have the right to address the court generally on the case; the other party shall then have the right to address the court in reply, but if in the course of his address***

14. In this case the above provisions were not strictly adhered to. The hearing commenced with the hearing of a defence witness though the court was informed that he was a neutral witness. While there is nothing wrong with calling a common witness to testify in a case, where parties have intimated their desire, as was in this case, to call other witnesses, the court ought to afford them a reasonable opportunity of doing so. In this case, there was no agreement that only the evidence of DW1 was to be relied upon by the parties and there was no evidence that the parties closed their cases after DW1 testified.

15. It would seem that the Court deemed the pleadings on record as the evidence of the parties. With due respect that was unprocedural. That averments in pleadings are not evidence was appreciated in **Francis Otile vs. Uganda Motors Kampala HCCS No. 210 of 1989** where it was held that the court cannot be guided by pleading since pleadings are not evidence and nor can they be a substitute therefor. Before that the then East African Court of Appeal held in **Mohammed & Another vs. Haidara [1972] E.A 166** where that the contents of a plaint are only allegations, not evidence. According to **Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997,** where a defendant does not adduce evidence the plaintiff's evidence is to be believed as allegations by the defence is not evidence. In **CMC Aviation Ltd. vs. Cruisair Ltd. (No. 1) [1978] KLR 103; [1976-80] 1 KLR 835**, **Madan, J** (as he then was) expressed himself as hereunder:

> **"Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of**

them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of "evidence" as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth."

16. In this case, the Learned Trial Magistrate relied on pleadings and documents attached to the pleadings when the statements in the pleadings were not on oath and when the attached documents were not produced as exhibits. The law is however clear on how exhibits are to be produced. Even in a full-fledged trial, if documents are simply referred to by witnesses but not formally produced they do not acquire the status of exhibits in the case. This was the position in **Kenneth Nyaga Mwige vs. Austin Kiguta & 2 Others (2015) eKLR** where the court held;-

"16. The fundamental issue for our determination is the evidential effect of a document marked for identification that is neither formally produced in evidence nor marked as an exhibit. Is a document marked for identification part of evidence" What weight should be placed on a document not marked as an exhibit"

17. The respondents' contention is that the appellant by failing to object to the three documents marked as "MFI 1", "MFI 2" and MFI 3" must be taken to have accepted their admissibility; that at no time did the appellant contest the documents or allege that they were forgeries.

18. The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not became part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents- this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the court would look not at the document alone but it would take into consideration all facts and evidence on record.

19. The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which document was before the witness. The marking of the document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification.

20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation or it authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the documents produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would be hearsay, untested and unauthenticated account.

21. In Des Raj Sharma –vs- Reginam (1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification; and that the term "exhibit" should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of Michael Hausa –vs- The state (1994) 7-8 SCNJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence.

22. Guided by the decision cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production o the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.

23. In the instant case, we are of the view that the failure or omission by the respondent to formally produce the documents marked for identification being MFI 1, MFI 2 and MFI 3 is fatal to the respondent's case. The documents did not become exhibits before the trial court; they were simply been marked for identification and they have no evidential weight. The record shows that the trial court relied on the document "MFI 2" that was marked for identification in its analysis of the evidence and determination of the dispute before the court. We are persuaded by the dicta in the Nigerian case of Michael Hausa –vs- The state (1994) 7-8-SCNJ 144 that a document marked for identification is not part of the evidence that a trial court can use in making its decision.

24. In our view, the trial judge erred in evaluating the evidence on record and basing his decision on 'MFI 2' which was a document not formally produced as an exhibit. It was a fatal error on the part of the respondents not to call any witness to produce the documents marked for identification……."

17. In this case the court seemed to have also relied on the submissions made by the partiesSubmissions, with due respect, do not amount to evidence unless expressly adopted as such. Consequently, in legal proceedings, evidence ought not to be introduced by way of submissions. As was held by **Mwera, J** (as he then was) in **Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007**:

"Submissions simply concretise and focus on each side's case with a view to win the court's decision that way. Submissions are not evidence on which a case is decided."

18. The same Judge in **Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993** expressed himself as follows:

"Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case."

19. Similarly, in **Ngang'a & Another vs. Owiti & Another [2008] 1KLR (EP) 749**, the Court held that:

"As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."

20. As stated by the Court of Appeal in **Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR**:

"Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "*marketing language*", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."

21. The Court of Appeal in **Avenue Car Hire & Another vs. Slipha Wanjiru Muthegu Civil Appeal No. 302 of 1997** held that no judgement can be based on written submissions and that such a judgement is a nullity since written submissions is not a mode of receiving evidence set out under Order 17 Rule 2 of the ***Civil Procedure Rules*** [now Order 18 rule 2 of the ***Civil Procedure Rules***]. The same Court in **Muchami Mugeni vs. Elizabeth Wanjugu Mungara & Another Civil Appeal No. 141 of 1998** found the practice of making awards on the basis of the submissions rather than the evidence deplorable.

22. It is clear that the manner in which the proceedings before the Learned Trial Magistrate were conducted rendered the whole trial a nullity. There was in fact no trial at all as contemplated by the law.

23. What then is the consequence of that? In **Mumias Agricultural Transport vs. Sony Agricultural Ltd. Civil Appeal No. 201 of 1997**, the Court of Appeal held that where no trial is carried out as known to law the matter is to be remitted back for hearing.

24. In the premises the order that commends itself to me and which I hereby grant is that this appeal succeeds, the judgement in Kangundo SPM's Court Civil Suit No. 2 of 2011 is hereby set aside. The matter is hereby remitted to the said court for hearing and determination of the case in the manner stated hereinabove.

25. Each party will bear own costs of this appeal.

26. It is so ordered.

Read, signed and delivered in open Court at Machakos this

25th day of February, 2021

G V ODUNGA

JUDGE

Delivered the presence of:

Mr Ayieko for the Respondent

Mr Hassan for Mr Kelly for the Appellant

CA Geoffrey