



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 146 OF 2018

(Being an appeal from the judgement and decree of the Hon TA Odera, Senior Principal Magistrate, in Mumias SPMCCC No.1113 of 2006, delivered on 12th October 2018)

WYCLIFFE LUBANGA KEFA.....APPELLANT

VERSUS

DENNIS OCHOLA.....1ST RESPONDENT

ATTORNEY GENERAL..... 2ND RESPONDENT

JUDGEMENT

1. In his memorandum of appeal, dated 7th November 2018, the appellant argued that the trial court erred in not referring to the recorded statement of the arrested officers who admitted recovering stolen items from the 2nd accused in the Mumias SPMCCRC No. 752 of 2001 and failed to release the same to the appellant as claimed in the plaint in Mumias SPMCCC No. 1113 of 2006, erred in not appreciating that the appellant had proved his case on a balance of probability as required by law, and that the impugned judgment was against the evidence on record.

2. The suit at the primary court, in Mumias SPMCCC No. 1113 of 2006, was initially commenced as Eldoret CMCCC No. 447 of 2004, before it was transferred to the Kakamega law courts. It was brought at the behest of the appellant, who was the complainant in Mumias SPMCCRC No. 752 of 2001, which arose out of a burglary that had happened at his shop where he lost the items listed in the plaint. Two suspects were arrested and several of the stolen items were allegedly recovered by the police. His complaint in Mumias SPMCCC No. 1113 of 2006 was that after the completion of the trial in Mumias SPMCCRC No. 752 of 2001, where one of the suspects was acquitted and the other convicted, the police did not return to him the items recovered, save for a weighing machine that the trial court had found belonged to him. His further complaint was that only the weighing machine was presented as an exhibit. He sued the Attorney-General and the investigation officer in Mumias SPMCCRC No. 752 of 2001, the respondents herein. He sought that Kshs. 50, 000.00, being the value of the goods retained, or for the return of the goods in the alternative. There was a second prayer for general damages for trespass to the goods and for loss of user, and for loss of income and profit.

3. The respondents filed a defence, where they conceded Mumias SPMCCRC No. 752 of 2001 and the acquittal of one of the suspects, but denied that the criminal court had found that the weighing machine belonged to the appellant. They further denied that notice had been given prior to filing suit.

4. At the hearing in Mumias SPMCCC No. 1113 of 2006, only the appellant testified. He did not call a witness. The matter proceeded on 6th March 2018, in the absence of the respondents. The appellant told the court that thieves broke into his house in 2001, and were later arrested and arraigned in court in Mumias SPMCCRC No. 752 of 2001. He asserted that the exhibits got lost upon being produced in court. He mentioned to the court the items the subject of the suit, he said that he had no receipts for some of them, while he produced receipts for others, mostly the electronics. He stated that he did not get the items back from the police after the case ended, and that was why he sued. He stated that his business suffered as a result. After taking evidence, the trial court dismissed the suit, on grounds that the appellant had not proved that the court in Mumias SPMCCRC No. 752 of 2001 had held that the weighing machine belonged to him, nor that he had provided proof that the other items ever belonged to him. It is that finding and holding that prompted the instant appeal.

5. Directions were given on 24th September 2019, that the appeal would be disposed of by way of written submissions. Only the appellant filed written submissions, dated 9th October 2019.

6. The appellant submitted that the judgment delivered on 12th October 2018, failed to appreciate that the 1st respondent herein, who testified as PW VI in Mumias SPMCCRC No. 752 of 2001, listed all the items that were recovered from the suspects in the aforesaid criminal case, and in particular that the said exhibits belonged to him. He also submitted that the trial court in its judgment failed also to appreciate that the 1st respondent, while testifying in Mumias SPMCCRC No. 752 of 2001, stated that “only the weighting machine was brought to court as

exhibits and the rest of exhibits recovered there to were left at the police station.” He also submitted that the trial court erred in bringing in extraneous matters that were not relevant to the case at hand by invoking section 19 of the Stamp Duty Act, Cap 480, Laws of Kenya, when that ought to have applied in Mumias SPMCCRC No. 752 of 2001. He also submitted that the trial court never took into account the evidence that was used in the criminal case, which evidence showed that the exhibits were indeed recovered by the 1st respondent, who was duty bound to produce them in court as exhibits and not to convert them to his personal property.

7. The appellant in his submissions raises a few pertinent questions, regarding the exhibits in the criminal case, and he invites the court to address them. Some of these are:

- a) where were the other exhibits claimed by the appellant which were recovered from the suspects alongside the weighing machine?
- b) why were they not produced in court alongside the weighing machine?
- c) who was charged with the responsibility of producing items in court as exhibits?
- d) are the two respondents liable for the loss of the exhibit herein?

8. The appellant asserts that the evidence, in Mumias SPMCCRC No. 752 of 2001, was conclusive that all the items or goods recovered from the suspects belonged to him, and ought to have been subsequently produced in court as exhibits, and upon completion of the criminal case, the same items were bound to be returned to him.

9. The trial court, in Mumias SPMCCC No. 1113 of 2006, found for a fact that only the weighing machine was presented to court, and produced as an exhibit in Mumias SPMCCRC No. 752 of 2001, the rest of the items were not presented in court, and were not produced in evidence. Secondly, the trial court noted that the trial court in Mumias SPMCCRC No. 752 of 2001, did not make a finding that the said weighing machine belonged to the appellant, instead, the said court identified the owner of the weighing machine as one Francis. The appellant did not provide any evidence to demonstrate that he was the person referred to in that judgement as Francis, nor that Francis was his other name. Since the appellant failed to prove ownership of the weighing machine, and it is a trite law that special damages must be strictly proved and specifically pleaded, I, therefore, agree with the trial court that there was failure of proof of ownership of the weighing machine by the appellant.

10. Regarding the other items, the appellant had no receipts at all for some of them. In respect of such items, obviously there was no proof of ownership. For some, he had receipts, but the trial court ruled that stamp duty had not been paid in respect of them, and, therefore, they were not admissible. I have noted that the appellant did not produce any document to show that the goods were indeed recovered, neither did he issue notice to the respondents to produce an inventory of the recovered goods or an investigation diary to confirm the alleged recoveries. There was, therefore, no sufficient evidence from the appellant to prove that the goods were indeed recovered.

11. On the matter of stamp duty, specifically on the question of admissibility of receipts, where the revenue or duty stamp has not been affixed, the courts have addressed the same severally. In *Joseph Kimani & another vs. James Kangera Kahanya* [2017] eKLR, the court stated:

“The matter of unstamped payment receipts has been put to rest in numerous court decisions.

Under the Stamp Duty Act, Cap 48 Laws of Kenya it is a mandatory requirement that any receipts produced in evidence must have a revenue stamp for them to be admissible except in criminal proceedings by a collector to recover stamp duty, unless it is duly stamped.

- Sections 19(1) (a) (b) of the Act.

See HCCA No. 71 of 2015 Eunice Auma Onyango –vs- Salin Akinyi Oluoch [2015] eKLR & Leonard Nyongesa –vs- Derrick Ngula Right – Civil Appeal No. 168 of 2008 at Mombasa (unreported)

It is also trite that a receipt ought to be stamped by the Receiver of the payment, and not the giver or the payee.

Section 88 of the Act places that duty upon the receiver, not the payee to affix revenue stamps on the receipt.”

12. In *Maxam Limited vs. Heineken East Africa Import Company Limited & another* [2019] eKLR, the court said:

“46. For the court to consider the effect of failure to have the document in question stamp duty stamped as required under section 19(1) of the Stamp Duty Act, has to consider the purpose of having a document stamped. The section provides that:-

“No instrument chargeable with stamp duty shall be received as evidence in any proceedings whatsoever except ...”

My understanding of the section is to ensure any document for which stamp duty is required to be paid for, should have stamp duty paid first before it can be received. Failure to pay stamp duty does not in my mind mean that the document is invalid or fatally defective but stamp duty that is required to be paid had not been paid; first before admission of the document as there is no bar in paying the stamp duty due thereafter or upon an order of the court to that effect.”

13. I note that the appellant has argued that the issue of stamp duty was extraneous, and the trial court ought not to have considered it. I do not think it was extraneous. Payment of stamp duty on sales is a requirement of the law, and there is an obligation that for every sales receipt issued duty should be paid and a revenue stamp affixed to the receipt. Under the Stamp Duty Act, a receipt ought not to be received in evidence if duty on it has not been paid. It is not something that a court can wish away. The trial court, therefore, did not go astray when it considered it.

14. The only matter for me to consider is whether the trial court was justified to hold that the said receipts were not admissible as evidence in view of the provisions of section 19(1) of the Stamp Duty Act, Cap 480, Laws of Kenya. That provision is about receiving the documents in evidence where stamp duty was not paid. The courts have consistently said that where a party seeks to rely on unstamped receipts, the trial court should give time to that party to correct the anomaly. See *Bagahat Ram vs. Rattan Chand (2)* [1930] AIR Lah 854, *Sunderji Nanji Limited vs. Mohamedali Kassam Bhaloo* [1958] EA 762 and *Mwanahamisi Omar Mzee also known as Fatuma Mohamed Ali vs. Chengo Kahindi Birya & another* [2018] eKLR. Should the stamp duty be paid thereafter, the court ought to receive the document as evidence, but in default it should decline to admit the document.

15. In Mumias SPMCC No. 1113 of 2006, the trial court, when confronted with the receipts sought to be produced before stamp duty was paid, did not inform the appellant that he ought to pay the stamp duty nor give him time to pay, as suggested in *Bagahat Ram vs. Rattan Chand* (supra), *Sunderji Nanji Limited vs. Mohamedali Kassam Bhaloo* (supra) and *Mwanahamisi Omar Mzee also known as Fatuma Mohamed Ali vs. Chengo Kahindi Birya & another* (supra). Instead, the trial court received and admitted the documents in evidence, despite the lack of revenue or stamp duty stamps, and marked the same as exhibits, numbers 2 to 7. The question then is whether, having received the said receipts as evidence and marked them as exhibits, the trial court could later on, in its judgment, say that they were not admissible. The holding in the judgment, that the receipts were not admissible, was a contradiction, for the court had already admitted them in evidence and marked them as exhibits. Having accepted the documents at the oral hearing, the court was not justified in rejecting them at the judgment. It has been suggested in a number of other cases that such evidence could be accepted so long as no one was complaining, and further that, in any event, it should be the issuer of the receipt who ought to affix the stamp and not the buyer.

16. Let me now consider the ground that the trial court did not refer to the statements of the arresting officers, who had admitted recovering stolen items from one of the suspects in Mumias SPMCCRC No. 752 of 2001, and failed to release the same to the appellant, as claimed in the plaint in Mumias SPMCC No. 1113 of 2006.

17. Section 109 of the Evidence Act, Cap 80, Laws of Kenya, provides for proof of particular facts, and it states as follows:

“The burden of proof as to any particular fact lies in the person who wishes the court to believe in its existence, unless provided by any law that the proof of fact shall lie on any particular person.”

18. It is the appellant who alleges that the items stolen from him had been recovered. It was incumbent on him to prove the recovery, and further that the recovered items belonged to him. It was not enough for him to just rely on the criminal proceedings in Mumias SPMCCRC No. 752 of 2001, since in those proceedings those items were not produced as exhibits, and there was no proof, in that trial, that the same belonged to him. He needed to do more, to provide proof of the recovery, which he could, if indeed there was such recovery, since such evidence must have been with the police officers who did the recovery. Upon establishing the recovery, he could thereafter prove ownership.

19. On whether the trial court erred in not appreciating that the appellant had proved his case on a balance of probability as required by law, it must be stated that it is trite law that it is he who asserts who must prove his case. The burden of proof lies with whoever would want the court to find in his favour in support of what he claims. Section 107 of the Evidence Act succinctly states it 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.”

20. In *Susan Mumbi vs. Kefala Grebedhin* Nairobi HCCC No. 3321 of 1993 (unreported), the court stated that:

“The question of the court presuming adverse evidence does not arise in civil cases. The position in civil cases is that whoever alleges has to prove. It is the plaintiff to prove his case on a balance of probability and the fact that the defendant does not adduce any evidence is immaterial.”

21. My finding on stamp duty does not change the overall picture, so long as no evidence was led on exactly which items were recovered by the police, and whether the recovered items matched those reflected in the receipts that the appellant put in evidence. Production of the proceedings in Mumias SPMCCRC No. 752 of 2001 did not provide adequate evidence of the items that had been recovered by the police, and the appellant ought to have done more.

22. In the end, I am not persuaded that the final conclusion by the trial court, that the appellant had not proved his case to the required standard, has been impeached on appeal. The appeal, therefore, lacks merit to that extent, and I hereby dismiss the same. There shall be no order as to costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 30TH DAY OF APRIL, 2020

W. MUSYOKA

JUDGE