

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 152 OF 2016

PETER ITUMO.....APPELLANT

VERSUS

CHARLES NDUNGU.....RESPONDENT

(Being an appeal against the Judgment and decree of Hon. P. Muholi RM delivered on 4th March, 2016 in CMCC No. 3153 of 2011 Milimani commercial courts)

JUDGMENT

The appellant herein sued the respondent claiming a sum of Kshs. 130,000/= plus interest, being the balance of the sum due and payable paid to the respondent to carry out printing works which however was not completed. The respondent denied the appellant's claim and after the trial the appellants claim was dismissed. The appellant was aggrieved by the said order and filed this appeal.

In the Memorandum of Appeal dated 31st March and filed on 1st April, 2016, the appellant complained that the court was wrong to hold that he did not prove his case against the respondent, and used a higher standard of proof than a balance of probabilities in dismissing his case. The lower court was also faulted for failing to find that the evidence of the appellant and the 3rd party was more credible than that of the respondent.

I have a duty to consider the evidence adduced by the trial court in addressing this appeal.

Parties have filed submissions which I have considered. The lower court found as a fact that there existed an oral contract between the appellant and the respondent. That notwithstanding, he went ahead to dismiss the appellant's case because the appellant allegedly paid a deposit of Kshs.150,000/= and issued with a receipt in the name of Lopu Enterprises, while in the trial he failed to establish the nexus between him, that is the appellant, and Lopu Enterprises.

It is clear from the proceedings and the documents filed that, the appellant traded in the name of Lopu enterprises. In a witness statement dated 26th July, 2011 and filed on 9th August, 2011 as one of the documents attached to the plaint, the appellant clearly stated that he paid a deposit of Kshs. 150,000/= to the respondent through one Simon Mbithi and that the respondent acknowledged receipt in the name of the appellant's business known as Lopu enterprises.

When work had not been done the respondent, agreed to refund the sum of Kshs. 130,000/= which he defaulted and became the subject of the suit in the lower court. It is clear the lower court did not consider the witness statement of the appellant when writing the judgment now in contest.

It is true that his was a claim for special damages. Special damages must be specifically pleaded and strictly proved. The pleadings were specific as to the amount claimed. Proof was provided by the appellant himself and the corroboration offered by his witness. That in effect was proof on a balance of probability against the respondent.

The lower court in dismissing the appellant case stated as follows,

“The plaintiff has proved existence of a contract between the defendant and himself. He however has failed to discharge the onus that the amount of Kshs. 150,000/= was given to the defendant. The receipt in the name of someone else, an entity different from himself and acknowledgment agreement has not been proved to the standard as required to make it admissible and even if it were, the court is not satisfied of the consideration having passed over to the defendant.”

It is clear in view of the evidence that the court misapprehended the facts and the evidence. Further to the foregoing, the respondent said in his evidence that he did more work than expected and in fact spent Kshs. 300,000/= of his own money. It is instructive that the respondent did not raise any counter claim in his statement of defence filed on 29th December, 2019. It is also clear that, although he alleged fraud and forgery on the part of the appellant, he never made any report to the police.

On the contrary he alleged that he was coerced and threatened to admit a debt which he never owned, but he never called any police officer from KICC police station to support his case. The evidence of the appellant read against that of the respondent is more credible, and in my judgment hold that he proved his case against the respondent to the required standard to deserve judgment in his favour. Accordingly, this appeal is allowed and the judgment of the lower court set aside. There shall be judgment in favour of the appellant as prayed in the plaint. The appellant shall also have the costs of the suit both in the lower court and in this appeal.

Orders accordingly.

Dated, signed and delivered at Nairobi this 23rd day of July 2020.

A. MBOGHOLI MSAGHA

JUDGE