



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CIVIL APPEAL NO.1 OF 2018

FKT..... PLAINTIFF

VERSUS

GI..... DEFENDANT

(An Appeal arising from Order, Decree, and Judgment of Hon. B. Omwasa (PM), delivered on 29th December, 2017)

JUDGMENT

1. This is an appeal originating from the judgment made by the Hon. B. Omwasa (PM) in Civil Suit No.108 of 2017. FKT who is now the Appellant before this court lodged the suit in Magistrate's Court through plaint dated 16th November, 2010 in which he sued GI who is now the Respondent claiming Kshs.234,000/= plus interests being money lent to the Defendant/Respondent to start a business.

2. The Respondent having been duly served with summons entered appearance and filed her Defence denying the Appellant's claim. On 29th December, 2017 the trial court entered judgment dismissing the claim.

3. In his Judgment, the trial magistrate ruled that having considered all evidence adduced in court, he found that the said money was held to be money advanced to Appellant's girlfriend; Defendant, during the good times and/or that "lucid internals" when they were to hold themselves as couple. Additionally, there was no oral agreement subsisting upon which the Appellant/Plaintiff's claim was grounded. It is this decision that triggered the current appeal to this court.

4. The instant appeal is premised upon the twenty (20) grounds on the body of the Memorandum of Appeal filed on 16th January, 2018 contesting the entire judgment as delivered.

5. Subsequently, Respondent's costs were assessed at Kshs.43,389/= and the process of execution commenced.

6. The Respondent filed her reply to the memorandum of appeal and stated denied every allegation stated by the Appellant and states that the two are married and have five issues. Secondly, she did not at any time borrow money from the Appellant as they lived as husband and wife or they did not enter into any money lending agreement. However, the money borrowed by her and the Appellant as the guarantor was to purchase building materials as indicate by the Appellant.

7. The matter was canvassed by way or written submissions.

APPELLANT'S WRITTEN SUBMISSION

8. The Appellant on 25th June, 2018 filed his written submissions dated 25th June, 2018.

9. The Appellant submits that in April 2002 the Respondent asked him for business money and promised to guard the money and return it with some interest. However, the Respondent diverted the given sum for her personal gains with intent to steal from the Appellant.

10. The Appellant submits he has four children with the Respondent but they are not married. He further submits that he is married to Mrs. SJY whom they have five (5) children together.

11. The Appellant argues that the Respondent before April 2002 was not a member of Women Group. It was his submission that the Respondent took eight (8) loans with Women Group tallying to Kshs.490,000/= inclusive of interest accrued without having ability of repaying them. It is further stated that the Respondent topped up those loans and transferred the net balance to her other personal developments and not replacing the money removed from her shop with intent of barring the Appellant access to his money in her shop. The Appellant submits that the Respondent was purely stealing from him by diverting the money to her other projects.

12. The Appellant submits that she advanced Kshs.23,000/= as starting capital for the Respondent's business and not Kshs.10,000/= as claimed by the Respondent. The Appellant submits that the Respondent knew she was to guard, protect and handle the money given to her by the Appellant and return the same as she had promised.

13. The Appellant submits that he is also claiming from the Respondent Kshs.63,000/= as balance in the Respondent's shop which he is claiming as from April 2002. In 2003, the Appellant claims Kshs.32,400/= balance after giving the Respondent Kshs.38,000/= for stock in her shop.

14. In 2004, the Appellant claims Kshs.64,500/= being balance from the advanced money of Kshs.81,550/=. The Appellant claims a further Kshs.15,450/= from the Respondent. The Appellant submits that up to the year 2004 he claims a total of Kshs.175,350/= from the Respondent.

15. The Appellant submits that he gave the Respondent Kshs.58,650/= to go service her loan of Kshs.120,000/= with Kenya Women Finance Trust.

16. The Appellant submits that he has suffered huge financial loss and psychological trauma for not using his retirement money from April 2002 to date. He therefore prays for adequate compensation since the Respondent intentionally diverted his money to her personal use and the Respondent's parents have continued to conceal stealing by their daughter hence enjoying money fraudulently acquired.

17. The Appellant urges the court to recover the hidden money from the Respondent as the Respondent had the capacity to make and keep promise to the Appellant.

18. On 26th September, 2018 the Appellant filed his reply to the Respondent's filed submissions. In the reply he still emphasized and repeated what he had articulated in his initial submissions.

RESPONDENT'S WRITTEN SUBMISSIONS

19. The Respondent on 14th September, 2018, filed her written submissions dated 14th September, 2018.

20. The Respondent submits that herself with the Appellant got married under Kipsigis Customary Law in Bomet County, Kiprerer Ward at the home of the Appellant in the presence of Appellant's relatives.

21. It is her submissions that after high school education at Loreto High School she stayed with the Appellant, and in the years 1994 and 1997 they were blessed with two issues a boy and a girl subsequently. It was in 1997 that the Respondent discovered that the Appellant had another wife. Again in 1999 they got another child. And in 2005 got their last born.

22. The Respondent submits that in 2002 she took a loan of Kshs.50,000/= with Kenya Women Finance Trust to expand her groceries business which she was operating since 2001. It is the same time that the Appellant took early retirement from KCB Kisii with reason that he was going back to school.

23. Respondent submits that she took another Kshs.80,000/= as loan money spent at the time her first born son was unwell. Again the respondent took another Kshs.120,000/= as requested by the Appellant.

24. The Respondent submits that they only paid the loan with KWFT once and defaulted and that is when the Respondent's family jumped in to help in repaying the loan.

25. The Respondent submits that in the year 2006 the Appellant requested the Respondent to take up another loan which she refused and that is when their problems started. Additionally, Respondent submits that she did not take 8 loans as stated by the Appellant because it is not possible to take that number of loans as stated by the Appellant because it is not possible to take that number of loans in two years as envisaged by the Appellant.

26. The Respondent submits that her parents' house was built by her siblings' way before their disputes with the Appellant started and that bricks were brought long ago in 1997.

27. Finally, the Respondent submits that the two are not officially divorced from their Kipsigis Customary marriage and secondly, there was no agreement between the Appellant and herself as they lived as husband and wife and there was no money lending that took place between them.

ISSUES FOR DETERMINATION

28. Having perused the Memorandum of Appeal, Reply to Memorandum of Appeal with the submissions filed, what is deemed for determination is as follows:-

a) Whether there exists a marriage between the Appellant and the Respondent?

b) Whether there exists a money lending agreement between the Appellant and the Respondent?

ANALYSIS

29. As in the case of **SELLE VS. ASSOCIATED MOTOR BOAT CO. LTD (1963)EA 123**, It is settled law that the first appellate court its responsibility is to analyze, evaluate, assess, weigh, interrogate and scrutinize all the evidence produced and arrive at its own independent conclusion, bearing in mind that it has no advantage to see and hear witnesses as they testified.

LAW

APPELLATE JURISDICTION ACT

30. Section 64(2) provides as follows;

“The Memorandum of appeal shall set forth concisely and under distinct heads numbered consecutively, without argument or narrative, the grounds of objection to the decision appealed against, specifying, in the case of a first appeal, the points of law or fact and, in the case of any other appeal, the points of law, which are alleged to have been wrongly decided.”

CIVIL PROCEDURE RULES, 2010

31. Order 42 rule 1(2) provides as follows;

“The Memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.”

FINDINGS

32. From the start the Memorandum of Appeal filed by the Appellant is not well construed in the sense that is not well drafted as per the rules. However, the overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice.

33. In **Gethere Vs. Kimunyu (1976-1985)EA, 101** it was held that; “...the relation of rules of practice to the administration of justice is intended to be that of a handmaiden rather than a mistress and that the court should not be too far bound and tied by the rules, which are, intended as general rules of practice, as to be compelled to do that which cause injustice in a particular case.”

34. In **Joseph Kianooi Vs. Waruru Wachira & 2 Other Civil Appeal (Application) No.130/2008** Court of Appeal held that;

“The cure would come about because in the circumstances justice is to be found in sustaining of the appeal for it to be heard on merit instead of striking it out on a technicality. Indeed, in our view, there cannot be a better case for the invocation of the overriding objective than this case. Court should, in our view, lean more towards sustaining appeals rather than striking them out as far as it practicable and fair... the substantive aspect of sustain the appeal must in the interest of justice override the procedural rule requiring the striking out of the notice of appeal and the record...”

35. In **Nocholas Kiptoo Arap Korir Salat Vs. Independent Electoral and Boundaries Commission & 6 Others (2013)eKLR** it was held that; “essentially the rules remain subservient to the Constitution and Statutes. Article 159(2) (d) of the Constitution, Section 14 (6) of the Supreme Court Act, Section 3A and 3B of the Appellate Jurisdiction Act, Section 1A and 1Bb of the Civil Procedure Act and Section 80(1) (d) of the Election Act places heavy premium on substantive justice as opposed to undue regard to procedural technicalities. A look at recent judicial pronouncements from all the three level of court structure leaves no doubt that the court today abhors technicalities in the dispensation of justice.”

36. Guided by the above mentioned authorities, it is my opinion that the court tries and salvage this appeal looking at the substantive issues rather than technicalities that befalls it.

37. On issue I, the Appellants stated that he knows the Respondent since 1992 and together they have four children. The Appellant also stated that the Respondent in 2004 was chased away from her parents’ home because his children and that he agreed to look and to set a home for them in Narok South. It was his evidence that he used to provide for them. PW2 Samuel Kirui Kiprotich testified that the Appellant and the Respondent lived together in one house and carried themselves as husband and wife.

38. On the other hand, the Respondent testifies and argued that she met with the Appellant in 1992 and later on after finishing her form four education got married under the Kipsigis Customary Law in Bomet County, Kipkeres Ward. Additionally, they have four (4) children together. Respondent further testified that they lived with Appellant up and until when she discovered that he had another wife and the Respondent returned to her parents’ home. Later, the Appellant took them back and rented them a house in Narok where he used to pay rent for her and the children and would also provide for them.

39. From the interference drawn by the conduct of the Appellant and the Respondent, it is my opinion that the parties have in every way held themselves as couples and the Appellant cannot be heard to detach himself from that set up.

40. On issue 2, the Appellant claims for Kshs.234,000/= from the Respondent being monies lent to the Respondent with the intention of starting a business and that it would be repaid with interest. On the other hand, the Respondent denies any such loan was given to her. It was

the Appellants claim and submission that there was an oral agreement entered between the two parties. I will agree with the trial Magistrate that no evidence was adduced to prove the existence of such agreement upon which the Appellant's claim is pinned and no witness came to court to attest that he was present during the making of the said oral agreement. Therefore, being no such evidence before the court, it is my opinion that the finding of the trial court was well founded.

41. I find that the Trial Magistrate did not err in law and facts in reaching his decision.

42. I find that the appeal herein lacks in merit and I accordingly dismiss it with costs to the Respondent.

43. Any party aggrieved by this judgment has a right of Appeal to the Court of Appeal within 28 days of this date.

Delivered, signed and dated at Bomet this 6th day of August 2020.

A. N. ONGERI

JUDGE