



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CIVIL APPEAL NO.126 OF 2017

(FORMERLY NKR.HCCA.9/2015)

(Appeal Originating from Nyahururu CM's Court Civ.No.69 of 2014

by: Hon. P.O. Muholi- R.M.)

ALFRED NDIRITU KING'ORI.....APPELLANT

- V E R S U S -

MARY WAKARIMA GITHII.....RESPONDENT

J U D G M E N T

This is an appeal by **Alfred Ndiritu King'ori** (plaintiff in the Lower Court) which emanates from the judgment of **Hon. P. Muholi (R.M.)**, which was delivered on 16/12/2014 in favour of the respondent, **Mary Wakarima Githii** (the defendant in Lower Court).

In the Lower Court, the appellant sued the respondent for a sum of Kshs.26,200/= being the principal sum and interest thereon from 22/11/2013 till payment in full for services he rendered to the respondent of clearing of bushes; that the respondent agreed to pay the appellant the 1st installment of Kshs.10,000/= in three weeks from 22/11/2013, the date she acknowledged the debt. However, despite several demands made to the respondent, she refused/neglected to pay the said sum and that necessitated the filing of this suit.

The respondent filed a defence on 13/4/2016 in which she denied the claim or that she ever engaged the services of the appellant to clear bushes on her parcel of land; that the purported contract was not signed by her and she was not bound by it; that she never entered into an oral or formal contract with the appellant; that there being no contract between them, she had no obligation to honour the demand.

After hearing the evidence tendered by both sides, the trial magistrate dismissed the appellant's claim. That decision aggrieved the appellant as a result of which he lodged this appeal on the following grounds:

- (1) That the learned magistrate erred in law and fact in admitting oral evidence to challenge documentary evidence presented via the agreement dated 22/11/2013;***
- (2) That the learned magistrate erred in law and fact in finding that the respondent's signature on the contract differed from the one in the replying affidavit dated 10/5/2014 and the respondent did not sign it without a handwriting expert's evidence to that effect;***
- (3) That the learned trial magistrate erred in law and in fact in disregarding the appellant's overwhelming evidence on record in deciding the case;***
- (4) That the trial magistrate erred in failing to take into consideration the rules of evidence in deciding the case;***
- (5) That the trial magistrate erred in finding that the agreement dated 22/11/2013 had glaring alterations.***

The appellant's counsel Ms. Wangeci filed submissions which she highlighted. Counsel submitted that although the respondent denied that the contract was entered into, she admitted in cross-examination that the appellant did the work and payments were to be determined by the chief and elders which was then agreed at Kshs.25,200/=; that though the respondent denied signing the contract, she admitted that one Mwangi attested. Counsel urged that a valid contract was entered into because the parties had capacity, there was an offer, acceptance and

consideration was to be Kshs.25,000/= for the offer which was clearing bushes.

Counsel relied on Section 2 of Law of Contract Act which provides that a contract cannot be void just because it had no seal; that one can have several signatures and it is not enough to deny the signature on the contract. The appellant also relied on the decision of ***Marrita Peush Mahajan v Yashwat Kumari Mahajan HCC.571/2015*** where the court held that where the defendant performs their part of the contract, where there is specific performance; counsel urged that since the bushes were cleared by the appellant, the respondent had the duty to compensate him for his work. Counsel also relied on the case of ***Eldo City Limited v Corn Products (K) Ltd & another (2013)*** and the English decision of ***Stores v Manchester City Council (1974) 1 W.L.R.1403***.

The appeal was opposed and Mr. Nderitu, counsel for the respondent also filed submissions and highlighted them. He submitted that there was no contract made on 22/11/2013 and wanted the court to look at the wording of the document; that there was alteration on the document from Kshs.2,500/= to Kshs.25,200/=; that since the respondent denied the existence of the contract, the burden was placed on the appellant to prove the existence of the contract; that the appellant cleared the bushes without the respondent's consent; that the purported witness one Mwangi should have been called; that the trial court was correct in dismissing the suit because the respondent never signed the purported agreement.

This being a first appeal, this court is required to examine all the evidence tendered before the trial court afresh, analyze it and make its own conclusion. In ***Selle and another v Associated Mart Boat Co. Ltd & others (1968) 1 EA 123*** the court observed that a first appeal is like a retrial whereby the court has to reconsider the evidence, evaluate it and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect.

The appellant's case in the trial court was as follows:

The appellant (PW1) testified that the respondent gave her work to clear a bush at her home area measuring 3 acres at Silibwet; that after he finished, he was supposed to be paid Kshs.25,200/= but the respondent failed to pay; that on 22/11/2013 they later entered into an agreement with her in the presence of a brother to her husband who signed it; that in the agreement, the respondent agreed to pay Kshs.10,000/= first and later pay Kshs.15,200/= which he signed and she too signed and it was witnessed. The agreement was produced as P.Exh.1; that the respondent never paid the said money despite the demand letter (P.Exh.2) through her advocate; that to date, the respondent has never paid as a result of which the appellant filed this suit.

On her part, the respondent (DW1) testified that the appellant is her uncle. She denied giving him any work; that the appellant asked for land to plant potatoes and did not wait but went ahead and cleared the land; DW1 denied giving him permission to clear the land; that he cleared half an acre and she stopped him from proceeding with clearing; that the village elder told them to agree on how much to pay and she denied agreeing to pay Kshs.25,200/=. DW1 also denied having signed the piece of paper produced in evidence as an agreement. She admitted that Mwangi, her brother in law signed something that he did not know what the case was all about.

He who alleges has the duty to prove. This is the purpose of Sections 107 and 108 of the Evidence Act. The sections provide as follows:

“Section 107:

- (1) 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;***
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”***

“Section 108:

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

The burden lies with the appellant to prove the existence of a valid and enforceable contract between him and the respondent.

For a contract to be enforced, the prerequisites are as follows:

- (1) The parties must have capacity to enter into a legal relationship;***
- (2) There must be an offer, an acceptance and consideration;***
- (3) The contract should be entirely into mutually entered into.***

Both the appellant and respondents are adults and there is no evidence that any of them was not fit to enter into a contract by virtue of age or mental incapacity. The court will find that both parties had the capacity to enter into a legal relationship.

The appellant told the court that he was contracted to clear bushes through an oral agreement which was later reduced into writing on 22/11/2014 where the respondent acknowledged that she owed the appellant for work done. However, the respondent denied entering into any agreement with the appellant.

In their defence, the respondent admitted that indeed the appellant cleared some bushes without the respondent's consent but went on to state

that the chief of the area was involved and told them to agree on how to pay. I believe that on the advice of the chief, that may be what resulted in the written document dated 22/11/2014. DW1 admitted that some bushes were cleared but it was very small area of ½ acre.

In cross examination, the respondent said that it was the chief to determine how much she was to pay. It therefore means that the respondent was in fact admitting being indebted to the appellant. The respondent also denied having known of the existence of the written contract which was produced in court. She stated:

“I never signed the piece of paper, I do not know the acknowledgement.”

However, in cross examination, the respondent admitted that, ***“Mwangi signed something he did not know what that case was all about”***. It means that the acknowledgement was signed by Mwangi in the respondent’s presence. The respondent was aware of it. It is my finding that the respondent was aware of the acknowledgement of the debt which is the agreement (P.Ex.No.1). If it were true that the chief was to determine how much was payable by the respondent, the question is why the respondent did not pursue the chief to make the determination so that she could pay whatever was due to the appellant. Despite the demand, the respondent did not bother to ascertain how much she was supposed to pay.

The respondent also denied signing the agreement. The law in regard to signing of contracts is set under Section 2(1) of the Laws of Contract Act Cap.23 ***“...no contract in writing shall be void or unenforceable by reason that it is not under seal.”***

The fact that the signature did not look like what was on the respondent’s affidavit dated 27/7/2014, does not mean that signature was not hers. One can have many signatures.

It was the submission of Ms. Wamithi, counsel for the appellant that apart from looking at the intention of the parties to the alleged contract, the court should look at their conduct.

In the case of ***Marrita Peush Mahajan v Yashwat Kumari Mahajan HCC.571/2015*** J. Onguto, held that where the defendant performs part of the contract there is specific performance.

In ***Eldo City Limited v Corn Products (K) Ltd & another (2013)*** Justice Mabeya adopted the decision of LORD DENNING M.R. in ***Storer v Manchester City Council (1974) 1 W.L.R. 1403*** when he said ***“In contracts, you do not look into the actual intent in a man’s mind, you look at what he said and did. A contract is formed when there is, to all outward appearance, a contract. A man cannot get out of a contract by saying, “I did not intend to contract,” if by his words he has done so. His intention is to be found only in the outward expression which his letters convey. If they show a concluded contract that is enough.”***

In this case, there is no doubt that the appellant cleared some bushes for the respondent. The respondent confirmed that they were to agree upon the mode of payment. I believe the mode of payment was reduced into writing as per the agreement filed in court (P.Ex.no.1) on 22/11/2013.

On the question of the cancellations, on the agreement, it is clear that the figure Kshs.2,500/= was cancelled before Kshs.25,200/= was written. As regards the year 2013 there is really no alteration and even the respondent did not deny that, Mwangi signed something, while at her home.

In the end, I do find that there was a valid contract created between the appellant and the respondent.

The appellant performed his part of the contract by clearing the bush and it was the duty of the respondent to compensate the appellant by paying for the services. I find that the trial court erred in finding that there was no contract. I hereby set aside the judgment of the trial court and instead enter judgment for the appellant as prayed in the plaint for Kshs.25,200/= being the principle sum and Kshs.1,000/= the cost of the demand letter.

The appellant will have costs of the Lower Court and of this appeal with interest payable from the date of filing this suit.

Dated, Signed and Delivered at NYAHURURU this 30th day of April, 2019.

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R.P.V. Wendoh

JUDGE

PRESENT:

M/S. Ngethe holding brief for Waichungo for the applicant

Mr. Nderitu for respondent

Soi – Court Assistant