



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 942 OF 2007

JOHN MUYA NDUGIRE.....APPELLANT

VERSUS

ANDERSON NJUE.....1ST RESPONDENT

MATTHEW S. SHOMPA.....2ND RESPONDENT

(Being an appeal from the Decree of Judgment by Mrs A.N. Ongeri (P M) at Chief Magistrate’s Court at Milimani Commercial Courts CMCC No 12104 of 2004 delivered on 8th day of November 2007)

JUDGMENT

INTRODUCTION

1. In her decision of 8th November 2007, A. N. Ongeri (Mrs) Principal Magistrate (as she then was) dismissed the Plaintiff’s suit and part of the Respondent’s Counter-claim and directed that the Appellant pay costs of the Counter-claim only to the extent of Kshs 343,483/=.
2. Being dissatisfied with the said decision, the Appellant filed the Memorandum of Appeal dated 16th November 2007. It was unclear when the same was filed because the stamp was illegible. He relied on eight (8) grounds of appeal. The Appellant filed a Supplementary Record of Appeal dated 20th November 2018 on even date.
3. The Appellant’s Written Submissions were dated and filed on 11th July 2018. Despite having been served with notices to attend court, neither the Respondents’ nor their advocates attended court or filed any documentation herein.
4. The Appellant therefore asked this court to render its decision based on his Written Submissions which he relied upon in their entirety. The Judgment herein is therefore based on the Appellant’s Written Submissions only.

LEGAL ANALYSIS

5. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand.
6. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd[1968] EA 123** and **Peters vs Sunday Post Limited [1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

7. Having looked at the said Written Submissions, it appeared to this court that the issues that had been placed before it for determination were:-

1. Whether or not the Learned Trial Magistrate erred when she dismissed the Appellant’s suit.

2. Whether or not the Learned Trial Magistrate erred when she allowed the Respondents' counterparts in part.

8. As all the grounds were related, this court dealt with the same together.

9. The Appellant submitted that consignments were carried and/or transported pursuant to a special relationship between him and the Respondents arising from a Clearing and Forwarding Contract.

10. After taking into account all the expenses, including the payment of duties and other charges, the parties reconciled the account. He was adamant that he was not to blame for the extra charges that were incurred.

11. He pointed out that the Respondents never demanded any monies from him and that it was only after six (6) years that they disowned the acknowledgement and demanded all the monies they had paid to him.

12. He argued that the Respondents did not prove forgery and that the Learned Trial Magistrate erred when she failed to find that the parties had reconciled the account and that the acknowledgement of the debt took into consideration all the factors and that the same was unrebutted.

13. He was emphatic that the amount he demanded was a reconciled amount in respect of extra services rendered to the Respondents otherwise not forming part of the original agreement and that it was not a renegotiation on the original agreement to warrant the same amounting to past consideration.

14. He further stated that the Learned Trial Magistrate erred when she found that the monies paid to cater for the custom duty, freight, warehousing and other expenses were paid by the Respondents. In addition, he stated that she erred in upholding a counter-claim that was not supported by a verifying affidavit. In this regard, he relied on the case of Transafrica Portways Ltd vs Postal Corporation of Kenya [2006] eKLR where the court therein struck out the counter-claim for not having been accompanied by a verifying affidavit was provided for in Order VII Rules 1(1) (e) and Order VII Rule 1(2) of the Civil Procedure Rules (now repealed).

15. He also placed reliance on the case of the Patrick Onyango Ojuang & Anor vs Henry Ojwang Nyabende [2018] eKLR where a similar holding was made.

16. He added that the Learned Trial Magistrate also erred by awarding the Respondents an amount that had not been pleaded contrary to what is envisaged in an adversarial system that parties formulate their own case in their own way and further that parties are bound by their pleadings. In this respect, he referred to several cases amongst them Marcos Munuve Kieti vs Official Receiver & Interim Liquidator Rural Urban Credit Finance & Another [2010] eKLR.

17. It was his further argument that the Learned Trial Magistrate erred when she took into consideration the date of the second agreement which was not the date when their cause of action arose. It was his submission that the amount claimed was paid more than six (6) years ago and it was thus statute barred as Section 4(1) of the Limitations of Actions Act Cap 22 (Laws of Kenya) provides that the limitation period for actions founded on contract is six (6) years.

18. In his evidence, the Appellant testified that he was a Transporter and that he used to do Clearing & Forwarding (**sic**). He stated that he used to clear goods for the 1st Respondent and that they had worked together for three (3) years before this incident brought them to court. According to him, the Respondents paid him a sum of Kshs 600,000/= for the clearing of a container at Mombasa MCLU-280309-4. He cleared the container. This was pursuant to a contract entered on 20th August 1998.

19. He stated that after doing his calculations, he realised that there had been an increase of Kshs 212,600/= which he was now claiming. He averred that he entered into a written agreement with the Defendants on 6th January 1999. His evidence was that this amount was to be paid to him on 11th February 1999 but the Respondents had refused to pay him. He was emphatic that the Counter-claim was not genuine and was emphatic that the Respondents did not incur any expenses as a result of his delay (**sic**).

20. During his cross-examination, he stated that the extra charges were for the delay and that there was no dispute of port charges because of the port rate payment. It was also indicated that he incurred the sum of Kshs 212,600/= for transport.

21. Joseph Ngugi Kogi (hereinafter referred to as "DW1") confirmed receiving Kshs 200,000/= and \$666 on behalf of the Appellant. He confirmed that the container was cleared by the Appellant.

22. The 1st Respondent testified that he signed the Agreement with DW1, who was the Appellant's agent. He stated that they paid the Appellant through DW1 Kshs 200,000/=, \$666, Kshs 469,000/= and Kshs 73,100/=. Their agreement was for Ksh 600,000/=.

23. He denied ever having signed the acknowledgment for Kshs 212,600/= or owing the Appellant any money. He therefore claimed a sum of Kshs 749,000/= and \$666 which the Appellant failed to refund him. He did not dispute that the container was brought by the Appellant's lorry. He admitted that the work was not done for free.

24. From the documents that were annexed to the Record of Appeal, DW1 received Ksh 469,000/= on behalf of the Appellant. Receipts bearing the 1st Respondent's name were in the sum of Kshs 304,150/= and Kshs 73,100/=. It was not clear in which party's name was the receipt from Goldfield Forex Bureau Ltd for Kshs 60,500/=.

25. There was no document from the Appellant indicating that he had incurred the sum of Kshs 212,600/= on behalf of the Respondents herein. It was irrelevant that the Respondents had signed an acknowledgement for Kshs 212,600/= without the Appellant showing any

demand and/or official receipt confirming payment of the said amount. This was particularly pertinent because the Respondents had denied ever having signed the acknowledgment. The Appellant ought to have demonstrated the basis of his claim of Kshs 212,600/= against the Respondents herein.

26. This court therefore agreed with the Learned Trial Magistrate's conclusion that the Appellant's claim had to fail due to lack of evidence.

27. Turning to the Respondents' Counter-claim, this court agreed with the Appellant's submissions and those of the Learned Trial Magistrate that the time for the Respondents' claim started from the date of breach. The Learned Trial Magistrate did not, however, determine the date from when the breach accrued.

28. This court agreed with the Appellant's submissions and those of the Learned Trial Magistrate that the time for the Respondents' claim started from the date of breach. The only payment this court noted that was supported by evidence was the payment of Kshs 469,000/= that was paid on 28th December 1998. There was no evidence of the payment of Kshs 80,000/= by the Respondents to the Appellant.

29. Their claim was to become statute barred on 27th December 2004. Bearing in mind that they filed suit on 3rd December 2004, their claim was within the statutory period.

30. Indeed, Section 4(1) of the Limitations of Actions Act Cap 22 (Laws of Kenya) stipulates:-

“The following actions may not be brought after the end of six years from the date on which the cause of action accrued—

(a) actions founded on contract;

(b) actions to enforce a recognizance;

(c) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture; actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.”

31. Having said so, this court noted that the Respondents' claim against the Appellant was for Ksh 749,000/=. The Trial Magistrate found and held that the Respondents were entitled to a sum of Ksh 342,483/= being Ksh 303,190/= paid to Customer & Excise Department by Bankers Cheque and Ksh 40,293/= being equivalent to \$666.

32. It was evident from the testimony that was adduced that it was one party's against the other. The Appellant stated that he paid the monies for clearance of the container on behalf of the Respondents but that the receipts were in the name of the Respondents while DW2 stated that the receipts from Kenya Revenue Authority were in his name because he paid the monies, the Appellant having failed to pay the same after being given monies.

33. Although the 2nd Respondent stated that the Bankers cheque was from their account, there was no evidence to prove the same. This court found difficulties in establishing with certainty where the sum of Kshs 303,190/= came from. Nothing would have been easier than for the Respondents to have adduced in evidence bank statements to prove that the said sum had come from their account and not from the Kshs 600,000/= they had paid to the Appellant herein.

34. In view of the unexplained gaps, this court was thus hesitant to find that the Respondents had proved their Counter-claim as the Trial Magistrate had found.

35. Turning to the lack of verifying Affidavit attached to the Counter-claim, this court had due regard to the provisions of Order 7 Rule 5 of Civil Procedure Rules. The same states as follows:-

“The defence and counterclaim filed under rule 1 and 2 shall be accompanied by—

(a) an affidavit under Order 4 rule 1(2) where there is a counterclaim;

(b) a list of witnesses to be called at the trial;

(c) written statements signed by the witnesses except expert witnesses; and

(d) copies of documents to be relied on at the trial.

Provided that statements under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under Order 11.

36. The provision is couched in mandatory terms. However, it does not mean that an omission cannot be regularised. Having said so, where a matter proceeds to conclusion without a pleading being accompanied by a verifying Affidavit, it only lends to such matter being stuck out.

37. A perusal of the Respondent's Defence and Counter-claim showed that it was not accompanied by a Verifying Affidavit. This court therefore agreed with the Appellant's submissions that the Respondent's Counter-claim could not be sustained for lack of a mandatory

document and that the Trial Magistrate therefore erred in allowing the said Counter-claim.

38. In addition, it was difficult to understand the Learned Trial Magistrate's calculations regarding the Counter-claim as there were other payments that were alluded to but she did not address the same and other receipts that she did not include in her calculation.

39. In view of the fact that the contract sum was agreed at Kshs 600,000/= and the Appellant eventually delivered the container to the Respondents, it was not clear to this court what amount the Learned Trial Magistrate found to have been the Appellants fees. It was also not clear how she determined that the sum of Kshs 343,483/= was what the Respondent was entitled to considering that the Respondents were claiming Kshs 749,000/=.

40. Having considered the Appellant's Written Submissions and the case law he relied upon, this court found and held that the Respondents did not prove their Counter-claim on a balance of probability as the Learned Trial Magistrate concluded.

DISPOSITION

41. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was dated and filed on 16th November 2007 was partially successful. The effect of this decision was that the judgment that was entered in favour of the Respondents in the sum of Kshs 343,483/= together with costs be and is hereby set aside and/or vacated. In its place, it is hereby ordered that the Respondents' Defence and Counter-claim dated and filed on 3rd December 2004 be and is hereby dismissed but with no order as to costs as the Appellant's suit was also dismissed. There will also not be any order of costs in respect of the Appeal herein.

42. Orders accordingly.

DATED and DELIVERED at NAIROBI this 30th day of July 2019

J.KAMAU

JUDGE