



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 575 OF 2014

DUNCAN KINYUA MUGAMBI.....APPELLANT

-VERSUS-

SALOME W. NJORA T/A MATHARE NORTH HEALTH

UNIT AND MATERNITY HOME.....RESPONDENT

(Being an appeal from the judgement of the learned Ag. Senior Principal Magistrate Mr. A. Lorot H. R. delivered in Civil Case No. 5842 of 2010 on the 11th day of December 2014)

JUDGEMENT

BACKGROUND:

1. The appellant first filed suit by way of a plaint on 13th December 2000 in Nairobi HCCC No. 2073 of 2000. It was later transferred to the lower court as Milimani CMCC No. 5842 of 2010.
2. Judgment was entered on 29th April 2002 and a decree issued accordingly. The appellant through M/s Wright Auctioneers attached all the household goods in the house where she used to reside. The respondent currently resides and works as a nurse in London the United Kingdom as stated in her evidence.
3. An objection to attachment was filed by the plaintiff's children on 1st November 2002. An order for unconditional release was given by the Hon. Justice Rimita on the 18th November 2002.
4. However, in blatant disregard of the said court order the goods were auctioned in an auction dated 14th December 2002. The appellant did not account for the sale and no account for proceeds of sale was filed in court after the auction.
5. After the said attachment and sale the appellant later fixed the suit for hearing. When the same came up for hearing on 15th April 2013, the respondent's advocate sought leave to amend defence. The appellant's advocate stated that there was no objection to the amendment.
6. The court ordered the amended defence should be filed and issued within 14 days. This was done. The matter later proceeded for hearing on 4th November 2013 at 11.00am with each party calling one (1) witness.
7. After suit was heard the respondent in her claim succeeded thus triggered the instant appeal in which the court can compress the grounds/issues set out in appeal into 3 namely:

i. Whether the respondent proved her claim was time barred?

ii. If above in negative ,was counterclaim proved on balance of probabilities? and

iii. what is the order as to costs ?

8. The parties were directed to file submissions.

APPELLANT'S SUBMISSIONS:

9. On this point it is worthy to note that this matter was filed on 13th December 2000 in High Court Case No. 2073 of 2000 and a defence was filed on 29th January 2001 and which did not have a counterclaim.

10. A further defence and counterclaim and or set off was filed on 14th August 2013 pursuant to the ruling delivered on 20th November 2013 by Justice A. Mabeya. According to amended defence, and counterclaim it indicates leave was granted on 31st August 2013 which is a strange thing. On point of law the said counterclaim was brought after a period in excess of 11 years and contravenes the provisions of section 4 of the Limitation of Action Laws of Kenya, which is mandatory to the effect that such a claim should be filed within a period of 3 years. According to the ruling of the judge it did not provide for extension of time to bring that claim out of time but only allowed amended defence to include a counterclaim.

11. On the claim and award of counterclaim, it was not supported by any evidential proof in respect of the value of the goods sold. On this aspect, this is a claim for specials and which needs to be specifically pleaded and proved by way of receipts. Appellant invite the court to scrutinize the receipt and or letters since none was issued to the respondent herein but other third parties who are not parties to proceedings in court. The parties in those receipts and or letters are all strangers to the proceedings.

12. It is not disputed that the appellant was earning 4,000/= to 12,000/= per month and which was admitted by the respondent and from the books of account it shows the balances which was not paid every month and thus making the basis of the appellant's claim in his plaint.

RESPONDENTS' SUBMISSIONS:

13. The appellant challenges the respondent's counterclaim and/or set off that the same ought not to have been allowed.

14. However, it is clear from the record that the order to amend defence was made by consent. All along the appellant never challenged the counterclaim and/or set off even at the hearing.

15. The appellant in fact filed a reply to the amend defence and merely denied the contents of the amended defence. At trial, the appellant did not challenge the respondent's counterclaim.

16. It is clear that the appellant is challenging the amended defence for the first time on appeal after judgment.

17. The appellant in levying distress against the respondent's household goods/despite a court order for unconditional release demonstrated gross contempt of the court.

18. This position has todate not been regularized. He now seeks orders from the same court that the he so holds in contempt.

19. Besides, the plaintiff has not accounted for the sale of the respondent's goods. In so far as this court is concerned, the appellant has executed a decree pronounced by the court.

20. In the circumstances, there are no issues for this court to make order in favour of the appellant. The suit in the trial court is effectively spent.

21. The appellant's conduct does not demonstrate pursuit of just cause. It is actuated by malice against the respondent.

22. In defiance to a court order for unconditional release of the respondent's household goods, he proceeded to auction them. Upon such auction the appellant did not even account for such sale. He however proceeded to fix the case in the trial court for hearing, seeking the very decree he had executed.

23. It is the trial court that listened to both parties, observed their demeanor and looked at the documents presented as evidence; before arriving at the judgment on record.

24. This honourable court is now being invited to set aside the said lawful judgment. No valid reasons have been given to warrant such setting aside, nor has it been demonstrated to what end such setting aside will serve.

25. The appeal herein is for dismissal since from the foregoing, it is clear that:

- *There is already a decree executed by the appellant in the trial court. The issues herein are spent.*
- *An order for retrial is unwarranted, uncalled for and unjustified.*
- *There was already a proper trial in the lower court in which the appellant fully participated and nothing has been adduced to prove otherwise.*

EVIDENCE ADDUCED:

26. The plaintiff testified that he is a nurse currently working with Integrated Community Development and Health Services, Huruma. He has been there since the year 2006. Prior thereto, he had been engaged the defendant and left in the year 2000. He joined the defendant in 1993

and in a salary of Kshs.12,000/= per month. He explained that his work entailed working between 8am to 5pm. However, he used to extend this time and left work daily at 8pm. He was paid allowances for the extra houses put in. this went on well until the month of September 2006.

27. He claimed in evidence that salaries from 1996 September to the year 2000 became erratic. He worked for the clinic and received money on behalf of the defendant. He would submit all monies each evening but would occasionally retain some of the money for his upkeep. He maintained a record of all the monies he took. This was in the form of a book. He insists that the defendant knew of this book and its contents and had acceded to it. He eventually resigned due to non-payment of what he claims to be his dues.

28. He admits that prior to his resignation his father fell ill and eventually passed away. His employer, the defendant, did not take a keen interest or contribute to the burial. He resigned in protest. He had given her notice and pleaded with her mother and sister to be paid his dues. She declined. He later learned that she was travelling abroad and promptly moved to file the suit in the year 1999, first as a pauper since he had no money then to file case. His total claim is for a sum of Kshs.652,087/=.

29. In cross examination, he confirmed that he was engaged at an initial salary of Kshs.4000/= which was later increased to Kshs.12,000/=. He had no contract of employment, and claimed that the employment was verbal. He confirmed that the defendant used to work for the University of Nairobi. She managed to get him placement at the University of Nairobi at the sickbay. He insisted that he was still in full employment of the defendant whilst working at the University of Nairobi.

30. He further confirmed in cross examination that patients paid money in cash to him and he would issue no receipts. He recorded all monies received on the patients' record cards. He advanced himself money in what he described as "*survival*" and expected that these monies will be deducted from his salary.

31. It transpired that this claim had been argued before and pursuant to a court order, the defendant's household goods were attached and later auctioned to recover what is now being claimed. This is not disclosed in the plaintiff's claim before this court but on questioning by court, the plaintiff confirmed that a sale conducted yielded Kshs.54,000/= or thereabouts. He was not even sure.

32. The defendant is Mrs Salome Wambui Njora who lives in London. She is a registered nurse and proprietor of the business in whose name this suit is subject. She considered having employed the plaintiff at a salary of Kshs.4000/= monthly. This was the net pay and no further dues were expected or paid. She was surprised at this suit. She was quick to point out to court that it will be difficult for any worker to stay for five years working without pay.

33. The plaintiff collected the proceeds and was solely responsible for the running of the clinic. She would pay him monthly after the calculations and deductions of the advances he paid himself. The plaintiff was the one in control of the money and the proceeds, and she had trusted him solely. The agreement was that he will run the clinic. This was the maternity until running between 8am to 8pm. There was therefore no question of overtime. She confirmed that all the agreements were verbal.

34. His salary gradually increased as the maternity grew. His growth in salary depended wholly on the growth of the business. She had other nurses in the clinic although she considered him the main nurse. When he lost his father, he took a month's leave but did not come back to work. He had absconded. No one had sacked him. He had left with all the cash registers. On the other hand she was preparing to go to London. When she summoned him, he came with a cash register that only reflected what he wanted reflected. They did not sit down to agree on the contents of the book.

35. She insisted that she owes the plaintiff no money. The clinic was a small clinic that performed poorly. They were having problems with water, the owners of the premises were wrangling over where she was to pay rent and she had to file suit to establish who to pay rent to.

36. She was bitter that her household goods were sold, especially because she was out of the country and her mother who had been ailing had just died. She could not even attend the funeral. Auctioneers were sent to her house and attached and sold her household goods valued at Kshs.265,093/=. This was in November 2002. She produced a list of the goods attached. No one furnished her with a report of the proceeds of the sale. It was never mentioned in court until the matter was raised in cross examination. She has asked the court to take cognizance of this fact in making decision.

37. She claimed that this case is about harassment and is buttressed by the conduct of the plaintiff in failing to make material disclosure of the attachment and sale of her goods and his employment of what she termed as "*funny methods*". She asked that suit against be dismissed and judgment be entered in the counterclaim.

38. In cross examination, she confirmed that plaintiff kept all the clinic records. He left with all of them. She used to countersign on the books when making payments to the plaintiff and other nurses but the books introduced in evidence did not bear her signature. There was no overtime due to the plaintiff. The verbal agreement they had was that he would work between the hours of 8am to 8pm, Labour Laws notwithstanding. He had worked perfectly until he brought this suit. The resignation letter of the plaintiff came long after he had absconded from the clinic. It was of no effect.

39. Analysis and determination.

40. On the first issue/ground a further defence and counterclaim and or set off was filed on 14th August 2013 pursuant to the ruling delivered on 20th November 2013 by Justice A. Mabeya. According to amended defence, and counterclaim it indicated leave was granted on 31st August 2013.

41. On point of law the said counterclaim was brought after a period in excess of 11 years and which on the face of it contravenes the provisions of section 4 of the Limitation of Action Laws of Kenya, which is mandatory to the effect that such a claim should be filed within a

period of 3 years.

42. According to the ruling of the judge it did not provide for extension of time to bring that claim out of time but only allowed amended defence to include a counterclaim.

43. Provisions of cap 22 on Limitations of Actions of contract and tort and certain other actions (1) state;

“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 enforce an award; (d) 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; (e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law. (2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued.”

44. The amendment agreed by parties did not validate nor extend time to claim out of time for goods sold unlawfully. It was a claim for tort which ought to have been lodged within 3 years from the date the cause action arose. That did not happen thus the claim was time barred and on that ground alone the appeal succeeds.

45. Thus court makes the following orders ;

i. The appeal is allowed with effect that the counter claim is struck out with no orders as to costs.

ii. Parties to bear their costs in the appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29th DAY OF NOVEMBER, 2019.

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C. KARIUKI

JUDGE