



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 382 OF 2010

REUBEN OMWENGA MARWANGA1ST APPELLANT

FLORENCE MWANGO NYARANGA2ND APPELLANT

VERSUS

GWARO ONWONGARESPONDENT

(Being an appeal from the judgment delivered on 19th August, 2010 by Hon. A.K. Ndung'u (Mr) PM in Milimani CMCC No. 7177 of 2008)

JUDGMENT

The genesis of this case is an agreement dated 12th February, 2007 executed between a company known as PIMA CAPITAL PARTNERS said to have been owned by appellants and the respondent on the other part. The respondent was invited to join the said company to become a part owner by raising a contribution of ownership as set out in that agreement. It would appear from the pleadings that after compliance on the part of the respondent, the appellants failed refused and or neglected to admit the respondent has a partner in the said firm, and in the process the appellants continued to ran the firm to the exclusion of the respondent.

The total sum said to have been paid by the respondent was Kshs. 1,263,826.65 made of cash and equipment. When all efforts failed for the respondent to claim his position in the said firm, this suit was filed claiming a refund of the said sum, particulars of which were set out in paragraph 7 of the plaint plus costs and interest. The appellants denied the respondents claim in their joint statement of defence. In fact, the thrust of the defence is that other than the description of the parties in the plaint, everything else was denied including the existence of the said agreement and sought the dismissal of the respondent's suit.

The case was then listed for hearing whereby the respondent testified in support of his pleadings producing, in the process, the agreement leading to the filing of the case and other exhibit showing the transactions related thereto. The appellants did not call any evidence and attempts to have the matter adjourned were not allowed by the court. In the end, the court was persuaded that the respondent had proved his case against the appellants and gave judgment in his favour. It is that judgment that aggrieved the appellants leading to the filing of this appeal.

In the Memorandum of Appeal dated 17th September, 2010 the appellants have faulted the trial court on several fronts which related to the agreement saying that the court was wrong to have relied on the same, yet it was signed by the appellants only. Further, they disputed the court's finding that they had misrepresented the soundness of the firm to the respondent as related to its viability and that the provision of a lap top to the business by the respondent was not supported by any evidence.

The signing of the agreement by the 1st appellant which was found to be on behalf of the 2nd appellant was also faulted, because the 1st appellant was not a legal representative or legal attorney of the 2nd appellant. Finally, there was no partnership deed and there was no proof that the respondent was entitled to the said award.

As the first appellate court I have a duty to consider and evaluate the evidence adduced before the trial court with a view to arriving at independent conclusions. This I have done. Even where the defence does not call any evidence, the party suing has the duty to prove his case based on the pleadings and evidence. The respondent produced the agreement dated 12th February, 2007 and it is important to note that, it opens by identifying the agreement being the ownership interest in the firm known as PIMA Capital Partners.

The respondent is identified by name and so is the 1st appellant on behalf of the firm. The said agreement also states clearly that the firm was at that time wholly owned by the appellants herein. At the end, it was signed by the 1st appellant and the respondent herein. It cannot be said that this was a draft agreement by any standards.

The respondent gave his evidence before the lower court and the record shows he was extensively cross-examined by the counsel for the appellants. In that evidence, he gave a chronology of all the payments he made to the appellants and also produced a statement of account in that regard. He also gave an account of how and when he purchased office equipment in the form of laptop and a cabinet and produced receipts in that regard. His efforts to be introduced to the firm's account eventually showed that money was transferred from the main firm account to another company owned by the appellants and in some cases money was transferred to the appellants' individual accounts and also an employee known as Karen Kamuma. The respondent concluded he could not have signed up to the business had he known the consequences and concluded, there was misrepresentation on the part of the appellants. He did so in good faith and in fact the 1st appellant was his uncle. He based his trust on family connections.

His evidence in the absence of any rejoinder from the appellants remained uncontroverted. The statement of defence filed by the appellants in the absence of any evidence to confirm the denials contained therein remained a statement of facts only. In the judgment of the lower court, the trial magistrate observed as follows,

“It emerges from the evidence on record that as at the time of signing the agreement, the representation by the defendants were not true.the plaintiff has also laid base through the bank statement produced unexplained transfers of large amounts of monies for the respective accounts to the 1st defendant, 2nd defendant and an employee and to a company owned by the two defendants.....my analysis of the evidence leads me to the conclusion that the plaintiff acting on the representation by the defendants whom the trusted as close relatives contributed monies into the business venture. It only dawned on him later the basis upon which he contributed money was not factual. The plaintiff has ably demonstrated the contribution through evidence of the agreement and initial contribution as well as the other money transfers and expenses as seen in the receipts before the court. His evidence remains uncontroverted as the defence called no evidence.”

On the evidence adduced before the trial court, and which I have considered afresh in this judgment, the lower court may not be faulted for arriving at the decision that it did. There was cogent and uncontroverted evidence which withstood extensive and searching cross-examination. That notwithstanding the respondent remained firm and unwavering. I have no doubt that what he told the court is the truth. He was invited into a business that the appellants knew had no future. There misrepresentation by close relatives and which can only be described as breach of trust. The lower court could not have arrived at a different decision.

I have come to the same conclusion and find that this appeal is devoid of merit and therefore dismissed with costs to the respondent.

Dated, signed and delivered at Nairobi this 19th Day of December, 2019.

A. MBOGHOLI MSAGHA

JUDGE