



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL SUIT NO. 117 OF 2010

ELIZABETH G. MACHANGA..... APPELLANT

VERSUS

ESTHER WANGWE..... RESPONDENT

[Being an appeal from the judgment of Webuye CMCC No. 27 of 2006 by E.C. Cherono PM]

JUDGMENT

This appeal arises from the judgment of P.M. Hon. E.C. Cherono in PMCC No. 27 of 2007 Webuye that was delivered on 8th September 2010. The appellant being aggrieved and dissatisfied by the same preferred this appeal on several grounds which in brief state as follows;

The trial court awarded special damages that were not proved, there was no contract between the appellant and the respondent, the agreement dated 29.10.2005 was not produced as exhibit; there was no proof of how PW11 weighed the alleged tonnage of trees; the trial court failed to consider the 2nd agreement dated 22nd December 2005 and; and the trial court shifted the burden of proof.

The appellant therefore sought for the lower courts judgment to be set aside together with all consequential order.

At the hearing of the appeal both parties relied on written submissions to the effect that;

The appellant – the respondent did not prove the claim of Kshs. 15,000/= she did not call the witnesses who allegedly weighed the timber at Nzoia Sugar Company Ltd, PW11 failed to state how he measured the tonnage as he had no machine or equipment to do so, any tonage he gave was imaginary; the trial court shifted the burden of proof as the appellant had no duty to assist the respondent, the parties signed an agreement that was witnessed by the respondent's husband which agreement gave the sum due and owing as Kshs. 42,000/= and lastly the court failed to consider the appellant's side of the case and attempted to re-write a contract between the two.

The respondent -the respondent argued that she proved the claim vide exhibit 1 & 2 and that the respondent gave no reasons as to why exhibit 2 would not be relied upon, there was an admission of sum due and payable to the respondent, and that although the weighbridge receipts were not produced there was sufficient evidence to support the claim.

This being the first appellate court it has the duty to reconsider the evidence afresh, evaluate and analyze

the same in order to arrive at an independent opinion.

In her plaint dated 4th January, 2006, the respondent claimed for the sum of Kshs. 151,000/= being the balance due and owing to her for 151 tons of trees having been paid Kshs. 49,000/=. In her evidence she produced exhibit 1, 2 & 4. Exhibit 1 was an agreement dated 29th October, 2005 allegedly signed between the parties. In the agreement the price per ton was Kshs. 1,000/=. In the 2nd agreement allegedly signed by the parties and witnessed by the respondents husband there was an acknowledgment of Kshs. 49,000/= and a balance of Kshs. 42,000/-. The agreement was signed on 22nd December, 2006. Exhibit 4 on the other hand was a record by PW11 of the date the timber was ferried from the farm, registration number of the vehicle, tear weight.

In a defence dated 3rd February, 2006 the appellant denied owing the amount claimed. Disowned exhibit 1, admitting that the parties signed exhibit 2 and stated that the respondent declined to accept the balance of Kshs. 42,000/=. In her evidence she stated that they had agreed that she would pay Kshs. 7,000/= per trip as they had no means of weighing the timber and that the respondent could not rely on the records at Nzoia Sugar Company as the timber delivered also included timber from other source.

It is trite law that he who alleges must prove. The onus of proving that the sum of Kshs. 151,000/= was owing was upon the (respondent)- In the 1st agreement and indeed in her evidence price per ton was Kshs. 1,000/= however it is not clear how the amount of tonnage that left the farm in any one of the trips as PW11 admitted not having the means to measure the tonnage.

Indeed a close look at exhibit 4 it is a record of the lorry, the registration number and its carrying capacity. Did the lorry carry to its capacity, more or even less. This did not come out in evidence.

Having made the above observations, both parties do acknowledge exhibit 2. Although the respondent stated in evidence that the record at Nzoia showed ticket number of each vehicle and the tonnage – the said tickets were simply marked and not produced as part of evidence thus denying the court details of the alleged tonnage that was received at Nzoia.

It is therefore the opinion of this court that failure to produce evidence of the tonnage that was received was fatal to the respondent's case and the only evidence available to support the claim in the absence of the actual tonnage is the second agreement signed by the parties. The said read agreement was signed in a bid to reconcile the parties at a police station and witnessed by the respondent's husband.

Consequently I set aside the judgment of the trial court and enter judgment for the sum of Kshs. 42,000/= in favour of the respondent.

Each party to meet its own costs.

DATED at BUNGOMA this 28th day of January 2016.

ALI-ARONI

JUDGE