



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NUMBER 162 OF 2013

ANASTACIA WANJIRU MUTITU. APPELLANT

VERSUS

FRANCIS DRUMMOND & CO. LTD. RESPONDENT

J U D G M E N T

The Appeal herein arises from a ruling and orders of the Hon. (Mrs.) T.W. C. Wamae (Chief Magistrate) delivered on the 22nd February, 2013 in Milimani CMCC No. 3468 of 2006.

The Appellant who was the Plaintiff in the lower court filed a plaint on the 13th April 2006 against the Respondent who had conducted investment business for the Appellant in the Respondent's capacity as a member of the Stock Exchange. The Respondent had pursuant to the said investment business for the Appellant, opened and operated the following accounts for her.

- i. CDS Account No. [particulars withheld] – O
- ii. Account No. [particulars withheld]
- iii. Nairobi Nominee Account No. [particulars withheld] /LC – O.

The Appellant avers that the Respondent failed to account to her for monies received by it for her account in respect of the purchase and sale of stock and shares in the aforesaid accounts mentioned above.

The Respondent filed a defence to the claim on the 2nd day of June, 2006 wherein it admits that it is a member of the stock exchange but denies that the Appellant conducted investment business with it and also denies that the three accounts as stated in paragraph 4 of the plaint were opened.

The Respondent further denied that it failed and/or refused to account for any money to the Appellant. Further in its defence and without prejudice, the Respondent states that upto 15th November, 2005, the Appellant's agent and son one Patrick Ngacha Mutitu was in the employment of the Respondent when he was summarily dismissed for having worked in cahoots with the Appellant to misappropriate monies of the Respondent using various accounts handled by the Respondent for its clients through fraud, deceit and wrongful conduct. The particulars of such fraud, deceit and wrongful conduct are set out in paragraph 5 of the defence. As a result of the above, the Respondent contended in his defence that the suit herein is an attempt by the Appellant and her said son to perpetuate the said fraud, deceit and wrongful conduct and the same ought to fail.

The Appellant filed a reply to defence on the 13th day of June, 2006 wherein she joins issues with the Respondent's defence and denies all the allegations in the defence. She generally reiterated the contents of the plaint. With regard to the particulars of fraud attributed to the Appellant, she denied the same and

averred that Patrick Ngacha Mutitu was an employee of the Respondent and what he did, was done in the course of his employment with the Respondent and with the full knowledge of the Respondent.

The matter was heard by the learned magistrate and a judgment delivered on the 22nd February, 2013.

In her evidence before the trial court, the Appellant testified as PW 1 and told the court that he engaged the services of the Respondent in the year 2000 to buy and sell shares and various accounts were opened as pleaded in the plaint. She paid to the Respondent a sum of Ksh.22,551.10 on the 3rd January, 2001 and a further sum of Ksh.934/- on the 20th January, 2003, and further sums were paid as hereunder.

On 22nd April, 2003 – Ksh.57,0143.10

On 10th November, 2003 – Kshs.31,500/-

On 1/12/2004 Kshs.50,000/-

After making these payments she received a sum of Ksh.61,363/- on the 18th February, 2003 and Ksh.20,000/- on 25th June, 2003, making a total of Ksh.81,363/- while she paid a total of Ksh.120,722/- to the Respondent. Her prayer to the court was that the court do order that she be given a statement of account to enable her know what was done with her money. She told the court she had received a statement from the Central depository CDS indicating that trading was going on in shares. She also sought to be paid her money from sale of her shares.

On cross-examination, she said she was giving his son Patrick Ngacha Mutitu money to pay on her behalf. She also confirmed that her son was at some point in time an employee of the Respondent. She admitted that the Respondent was entitled to a commission upon sale of shares but she did not know the rate of the commission. She said she did not know whether there are any taxes payable to the government after shares have been sold. She did not know how the Respondent was buying and selling the shares that it was involved in. She denied that her son was dismissed from the Respondent's employment for fraud and that while in the Respondent's employment he was the one operating her account.

The Appellant's son Patrick Ngacha Mutitu testified as PW 2. He confirmed to the court that he was an employee of the Respondent between January, 1998 and October, 2005 and that he was a dealer in stock market. He is aware that the Respondent operated some accounts on behalf of the Appellant and the Appellant has not been paid for sale and purchase of her shares from 2003 to date. He denied that he falsified the accounts in favour of the Appellant.

On its part, the Respondent called one witness namely Wellington Wabete Wepukhulu who was its employee as a financial controller in the year 2001. His duties included receiving and paying out money on behalf of the Respondent and auditing the Respondent's accounts. It was his evidence that the Respondent does not transact until a client has paid money into the account and that purchases are only made when a client's account has a credit balance. He identified the Appellant's statement of account in the Respondent's bundle of documents and summarized it for the court. It was on the basis of these documents that the learned magistrate took the accounts.

The Appellant has appealed to this court and has listed the following grounds: -

1. The learned magistrate erred in law and in fact in failing to appreciate that the Plaintiff's case was for accounts and thus failed absolutely to give proper directions.
2. The learned magistrate erred in law and in fact in finding that the Plaintiff's son operated the Plaintiff's accounts fraudulently.
3. The learned magistrate erred in law and in fact in finding that there were excess Mumias Sugar shares sold in the year 2004 valued at Ksh.456,667.15.
4. The learned magistrate erred in law and in fact in finding that 56515 Mumias shares were unfunded despite clear indication from the statement that the same were bought in small lots

cumulatively and that in the statement there are numerous purchases and sales hence creating debit and credit balances.

5. The learned magistrate erred in finding that there were no purchases of EABL shares by the Plaintiff in 2005.
6. The learned magistrate erred in law and in fact in finding that all the Plaintiff's accounts were run and opened by her son in light of clear and self explanatory letter dated 10th August, 2006 from the CDSC.
7. The learned magistrate erred in law and in fact in finding that the Plaintiff's Mumias Sugar Company shares were unfunded.
8. The learned magistrate erred in law and in fact in finding that the Plaintiff's Mumias Sugar Company had cumulatively been bought since the year 2004.
9. The learned magistrate erred in law and in fact in failing to appreciate that the Nominee Account which was also buying and selling shares on behalf of the Plaintiff was responsible for various purchases and sales of Plaintiff's shares.
10. The learned magistrate erred in law and in fact in finding that the proceeds of sale of EABL shares bought in 2005 and sold in 2005 was fraudulently posted on Plaintiff's account.
11. The learned magistrate erred in law and in fact in finding that the Plaintiff had received Ksh.2,348,953.05 from the defendant without any evidence whatsoever to confirm the contention.
12. The learned magistrate erred in law and in fact in disregarding the Plaintiff's evidence on record in totality, submissions by Plaintiff's counsel and thereby dismissing with costs wholly the Plaintiff's case and finding that the Plaintiff owes the Defendant Ksh.48,345.65.

In his submissions, counsel for the Appellant condensed all the grounds of Appeal into 1:, that the provisions of Order 21 Rules 16 and 19 were flouted, the reason being that the order sought by the Appellant was for taking of accounts pursuant to a relationship between the Appellant and the Respondent which was one between a principal and an agent. He further submitted that the learned magistrate went ahead and took accounts on her own volition and found that the Respondent is entitled to Ksh.48,435/- and since the same was not counter-claimed, she did not award it. It was further contended that the learned magistrate went ahead and made a final decree before passing a preliminary decree and in doing so, she erred. He further submitted that the provisions of Order 21 Rule 16 is mandatory and the purpose of the said rule is to assist the court to take accounts. He relied on several authorities being Civil Appeal No. 95 of 1999 **National Bank of Kenya Ltd Vs Pipeplastic Samkolit (K) and Professor Samson K. Ongeri (2001) eKLR**, Civil Suit No. 414 of 2004, **Francis Joseph Kamau Khatha Vs Housing Finance Company of Kenya Ltd (2014) eKLR** and Civil Suit No. 2496 of 1997 (**First National Finance Bank Limited Vs Universal Apparels (EPZ) Limited & 2 Others (2014) eKLR**).

In addition, he relied on an extract from a practical approach to Civil Procedure Stuart Sime, Sixth Edition, Oxford University Press Pages 265 and 266.

On her part, counsel for the Respondent submitted that the Appeal has no merits and that the same is contradictory in the sense that when the Appellant asserts that a judge or a magistrate is not competent to take accounts in what is being referred to, as a complex matter, the Appellant is asking the court to order payment of Ksh.2,987,045.30 cents without showing the court the basis for such an order. She further submitted that while the Appellant is not asking the court to order that accounts be taken, on what basis would the court order payment of that amount? That the Appellant and her son who was an employee of the Respondent caused fraudulent entries into the accounts held by the appellants with the respondent.

It was her further submission that some transactions were fraudulent and it is common knowledge that one can only reap profits from an investment and that the profits must be commensurate to the investment made and that an investment of Kshs.80,000/- could not have possibly made a profit of Kshs.3million. According to her, the only explanation for it was that the Respondent was inviting shares from other people, purport to sell them and credit the money into the Appellant's account. The trial court found as a matter of fact that there were fraudulent transactions on that account. That Order 21 Rules 16 and 17 is very clear that if it becomes necessary to ascertain any accounts and that there has to be a situation that necessitates taking of accounts. If the accounts are fraudulent there was no need to take accounts.

I have considered the provision of Order 21 Rules 16 and 17.

Rule 16 provides:-

“In a suit for an account of pecuniary transactions between a principal and an agent, and in any other suit not herein before provided for, where it is necessary, in order to ascertain the amount of money due to or from any party, that an account should be taken, the court shall, before passing its final decree pass a preliminary decree directing such accounts to be taken as it thinks fit.”

My understanding of the said rule is that the court will order for accounts to be taken “where it is necessary” and if it is, the court shall before passing its final decree

In the case herein, there is no doubt that it was necessary to take accounts and that is why the learned magistrate proceeded to do so. In my view, the magistrate ought to have directed such accounts to be taken and give directions on how the same was to be done. In taking the accounts herself, she erred. This position is fortified by the Court of Appeal in **Civil Appeal No. 95/1995 (National Bank of Kenya Limited Vs Pipeplastic Samkolit (K) Ltd & Prof. Samson K. Onger** where the Court of Appeal held:-

“We reiterate that it is not a judge to take accounts. The reason is clear. It is not the job of a judge to be accountant.”

The court went further to say:-

“That is why Order XX rule 16 (then) of the Civil Procedure Rules gives special directions as to taking of accounts. Elaborate provisions have been made therein. The ad hoc method in which the learned Judge proceeded to take and settle accounts was not only unprocedural but erroneous and without jurisdiction.”

I have no reason to deviate from the finding by the Court of Appeal. In fact I am bound by it.

In the upshot, I partly allow the Appellant’s Appeal and make the following orders.

1. The judgment dated 22nd February 2013 and decree therein be set aside.
2. The matter be remitted back to the Chief Magistrate’s court to be heard fresh.
3. Each party shall bear their own costs of the Appeal.

DATED, SIGNED and delivered at Nairobi this 24th day of March, 2016

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L NJUGUNA

JUDGE

In the presence of:-

.....for the appellant

.....for the respondent