



REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL APPEAL NO.40 OF 2015

MARCUS OTIENO OKWAYO

Chairman, suing on behalf of Payroll Self Help Group.....APPELLANT

VRS

ZEDEKIA KAKU.....RESPONDENT

(Being an appeal in Kericho CMCC No.95 of 2011 by Hon. B. Limo)

JUDGMENT

1. This appeal arises from proceedings in CMCC No. 95 of 2011. In the amended plaint dated 17th April 2013, the appellant was claiming a sum of Kshs. 17,000 from the respondent. The amount had apparently been loaned to the respondent by the appellant as a friendly loan.
2. The respondent filed a defence in which he denied having been lent or owing any money to the appellant. After some back and forth proceedings including the entry of judgment in default of appearance and defence and various applications, as well as what appears to have been an attempt to settle the matter amicably, hearing of the case commenced before Hon. B. Limo on 4th June 2014. The appellant was represented by Mr. Migiro while the respondent was represented by Mr. Meroka.
3. The plaintiff called one witness, Mr. Marcus Otieno, and then closed its case. An attempt by the plaintiff to produce a certain document, which was marked PMFI-2, was objected to by Counsel for the defence, and the objection was upheld.
4. The defence hearing commenced on 17th October 2014, with the defendant/respondent as witness. The record indicates, however, that before cross-examining the defendant, Mr. Migiro for the plaintiff/appellant applied for the proceedings to be typed, and for the witness to be stood down, which was done with the concurrence of Counsel for the defendant/respondent.
5. The defence hearing resumed on 12th November 2014. However, his Counsel objected to his being cross-examined on the document, PMFI-2, as it was his submission that the document had not been produced as an exhibit. In his ruling of 4th February 2015, Hon. Limo found that the document had only been marked for identification but had not been produced as an exhibit, and the defendant could therefore not be cross-examined on it.
6. It appears that it is this ruling that has prompted the present appeal. In the undated Memorandum of Appeal, the appellant raises the following grounds:

1. That the file having been misplaced from 26th November, 2014 and only to re-appear on 4th February, 2015 for a ruling in the presence of the respondent's counsel only without notification to the appellant's counsel, the learned trial magistrate exhibited high probability of reckless and deceit.

2. That the learned trial magistrate failed to base his ruling as he should have done upon verification of proceedings found between pages 1 to 19 of the proceedings as agreed between court and counsels for the parties herein and as a result came with a ruling which was prejudicial to the appellant's case.

3. That although the learned trial magistrate is on record as having read the aforesaid proceedings, nonetheless failed to find and hold as he should have done that counsel for the respondent did not raise any objection as regards to PEX 2 on 4th June, 2014 during the plaintiff's case.

4. The learned trial magistrate erred in law and fact by failing to appreciate that besides exhibit No.2 originating from the respondent the document was filed and served upon respondent's counsel and the same formed part of the record before hearing started and therefore he was not a stranger to it.

5. That as it may be appreciated from the record, the trial magistrate is consistence both in recording of exhibits and casual handling of the matter, has greatly contributed to a miscarriage of justice to the appellant herein.

6. That the magistrate's decision to peruse and apparently verifying the proceedings in the presence of the defendant's counsel only and decisions made without the participation of the appellant constitutes a breach of principles of natural justice.

7. The appellant therefore asks the court to grant the following orders:

a) That the appeal herein be allowed and orders given on 4th February 2015 be set aside with costs.

b) The matter in Kericho CM CC No.95 of 2011 to proceed for full hearing and determination.

8. Though the appeal was filed by Counsel for the appellant, the appeal was prosecuted by Mr. Marcus Otieno who had filed a notice to act in person dated 4th April 2016.

9. The core of the appellant's grievance as it appears from his submissions before the court is that the trial court "*verified proceedings*" in the absence of Counsel for the parties and gave a ruling dated 4th February 2015. Mr. Otieno argues that the ruling of 4th February 2015 was given *ex parte* without his input and he was condemned unheard in contravention of Article 159. He prayed that the "*ex-parte verification of the typed proceedings*" which upheld the objection by Counsel for the defendant, Mr. Meroka, that he had objected to the production of the document in dispute, be set aside and the costs of the appeal be awarded to the appellant.

10. His submission is that there was nowhere in the typed proceedings where Mr. Meroka had raised objection to cross examination in respect to document no.2.

11. In his response, Mr. Meroka for the respondent pointed out that the court is a court of record, and he referred the court to page 50 – 51 and 56 and 57 of the record, and to the ruling of the trial court at page 58 of the record of appeal.

12. It was also his view that the appellant was labouring under a misconception with regard to the "*verification of the record*" or of typed proceedings. His submission was that the record supported the

ruling of the court, and the appeal should be dismissed with costs and an order made that the matter proceed expeditiously from where it had reached.

13. I have considered the record of appeal and the proceedings before the trial court on 4th June 2014 and 12th November 2014. The record indicates that the proceedings of 4th June 2014 were as follows:

“PW1 STATES ON OATH IN KISWAHILI BY MIGIRO

I am Marcus Otieno Kowayo from Kericho County. I am Chairman of Payroll Self-Help Group. I am complainant in this case on 30th May 2011 as filed on the same day. I wish to rely on that statement in support of case. In this case, I wish to deny the defendant’s position nor the defendant took loan of kshs.17,000/=. I have an agreement to that effect. The defendant took the original. I wish to produce the same.

COURT: A copy of agreement dated 27th June 2010 produced as P. Exhibit No.1.

MEROKA: The agreement is a copy. I wish to have an original copy. The notice to produce was not issued as required.

COURT: Objection upheld. Copy of agreement hereby marked as PMFI-1.”

14. On 12th November 2014 when Counsel sought to cross-examine the defendant on the said document, the record of proceedings indicates that Mr. Meroka for the respondent objected to the cross-examination of the defendant on PMFI-1 on the basis that it had not been produced. The Court then ruled that the defendant would be stood down until the ruling on the objection is delivered on 26th November 2014. The ruling was delivered on 4th February 2015.

15. It is evident that the trial court retired to consider and render a decision on the objection by Counsel for the defendant. There was no question of the court engaging in a “*verification*” of the typed proceedings, either with Counsel for the parties or with the plaintiff/appellant. Indeed, I do not know of any proposition of law that requires or would require that a trial court, in making a determination on proceedings before it, does so in the manner suggested by the appellant.

16. In the circumstances, I find no merit in the present appeal, and it is hereby dismissed with costs.

17. This matter is remitted to the trial court to hear and determine the issues raised expeditiously.

Dated, Delivered and Signed at Kericho this 17th day of November 2016.

MUMBI NGUGI

JUDGE