



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 15 OF 2010

Hellen Wangari Wangechi.....Appellant

Versus

Carumera Muthoni Gathua.....Respondent

JUDGEMENT

This appeal arises from the judgement and decree passed by the Senior Resident Magistrate in Civil Case number **153** of **2009** whereby the appellant had sued the Respondent for recovery of **Ksh. 316,000/=** plus costs and interests.

The Appellants case against the defendant was enumerated in her plaint dated 20<sup>th</sup> March 2009 whereby the appellants pleaded *inter alia* that 'at all material time the plaintiff and the defendant were business partners involved in supply of foodstuffs to various institutions' and that it was their *common usage* that the Respondent would obtain the orders while the Appellant would provide the required finance and that after every transaction the Appellant would be refunded whatever amount she would have spent thereupon the two would share the profit earned equally.

The Respondent tendered her written statement of defence on 5.5.2009 in which she denied the contents of the plaint and added that the two had agreed to deposit the said sum in **Deci Financial Institution** which collapsed, hence between them no one owed the other any money.

Pursuant to the said arrangement, the appellant had financed several transactions as at June 2005 and that as at November 2005, the parties had agreed that the sum due and payable to the Appellant was **Ksh. 316,000/=**. Further, the appellant averred in the plaint that the Respondent undertook to repay the said sum and that this was reduced into writing on 3.6.2008.

The appellants' evidence in the lower court was that after supplying the goods, the Respondent received the cash but failed to inform her, that after a long wait she went and inquired from all those institutions they had supplied the goods and they all confirmed to her that the Respondent was paid in 2005. Upon confronting her in the presence of her son, she admitted she had received the cash and promised to repay the same after she had sold her shamba. She never repaid as promised and they went to an advocate who wrote an acknowledgement on 3<sup>rd</sup> June 2008 undertaking to pay the amount by August 2008 but she never paid. On 26.9.08 she wrote again this time in Kikuyu language undertaking to pay. She later opted to sue.

The Respondents evidence was that her contribution was **Ksh. 100,000/=** while the Appellant contributed **Ksh. 150,000/=**. It was her testimony that after they supplied the food staff, they were paid and after the cheque went through they shared the profit. They carried on the said business and continued sharing the profits, and in 2004, the payment was delayed and was only paid in 2005 after which she transmitted the appellants share to her and informed her that they would not continue with the business. It was the Respondents evidence that the at the Appellants suggestion, they deposited the cash at a pyramid Bank which collapsed, and after its collapse the Appellant demanded the money from her. They met later; they fought, and went to the police station were they were locked in. The police asked them to reach a compromise. At that point the appellant called an advocate who prepared the acknowledgement that was produced in court. Her evidence was that the said document was prepared and signed at the police station. The Respondent called two witnesses whose evidence I think was not of great value because none of them

directly testified of the nature of business the parties herein were doing or was present when the money exchanged hands.

After analysing the evidence by both parties, the trial magistrate believed the testimony of the Respondent and concluded that the appellant had not proved his case to the required standard and added another dimension in his judgement when he held that the matter before the court related to a partnership and that by virtue of the provisions of the Partnership Act<sup>[1]</sup> the Magistrate held that he had no jurisdiction to entertain the matter and on proceeded to dismiss the case with costs.

Dissatisfied with the said judgement, the appellant appealed to this court citing 4 grounds of appeal:-

- i. *The learned Trial Magistrate erred in law and in fact in misdirecting himself on the issues for trial in this case.*
- ii. *The learned trial Magistrate erred in law and in fact in holding that the court lacked jurisdiction in the matter when the plaintiffs claim had already been admitted.*
- iii. *The learned trial magistrate erred in holding that the plaintiff had failed to prove her case when all evidence pointed to a civil debt.*
- iv. *The learned trial Magistrate erred in failing to analyse all the evidence on record and hence arrived at a wrong conclusion.*

Both parties filed written submissions. The appellants counsel in his submissions faulted the Magistrates findings that the court had no jurisdiction to entertain the case citing the provisions of the partnership Act which counsel felt were wrongfully applied in this case and further submitted that the learned Magistrate had misapprehended the issues, facts and evidence laid before him, hence he arrived at the wrong decision. Counsel for the appellant basically submitted on the facts and never cited any authorities.

The Respondent also filed written submissions and supported the courts finding on the existence of a partnership and maintained that the court had no jurisdiction to entertain the matter. The Respondent also maintained that the alleged admission was procured under duress hence inadmissible and sought to have this appeal dismissed with costs.

To determine this appeal it is necessary to address the following issues, namely:-

- i. *Whether the dispute in question involved a partnership, and hence outside the jurisdiction of the trial court.*
- ii. *Whether the Appellant proved his case to the required standard.*
- iii. *Whether the Respondent executed the alleged admission under duress.*

Before I address the above issues, I find it necessary to recall the provisions of Order 21 Rule 4 of the Civil Procedure Rules 2010 which provides that:-

*“Judgements in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision”*

I note that the judgement does not strictly conform to the above requirements and emphasise that in my view it is important that judgements ought as much as possible to comply with the above requirement. Parties are entitled to be satisfied that their case was given due consideration, hence the need to clearly give a statement of the case. Parties are entitled to appreciate that the issues at variance were addressed, hence reason why the points for determination need to be included in the judgement. Parties are entitled to know the court’s decision and more important the reasons why the court arrived at a particular decision. To me this is not only good practice, but is a requirement of the law which should be embraced at all times.

The learned Magistrate citing paragraph three of the plaint held that the parties were partners in a business and by virtue of the provisions of the Partnership Act the Magistrates court had no jurisdiction to entertain the case. I find it disturbing that the issue of jurisdiction only came up in the judgement, thus at the

eleventh hour and no one deemed it fit to raise it earlier. Issues of jurisdiction ought to be raised and determined at the earliest opportunity possible. I however note that the Respondent was unrepresented both in the lower court and in this appeal, and that possibly explains why she never raised it in her defence or evidence.

The *locus classicus* on jurisdiction is the celebrated case of **Owners of Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Ltd**<sup>[2]</sup> where **Justice Nyarangi** of the Court of Appeal held as follows:-

*“I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”*

Commenting of the above holding **Justice Nzioki Wa Makau** in **Seven Seas Technologies Ltd vs Eric Chege**<sup>[3]</sup> stated that the authority by **Nyarangi J** cited above is to be found in the writings of **John Beecroft** in a treatise headed **“Words and Phrases Legally Defined”**<sup>[4]</sup> which states the following about jurisdiction:-

*“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the fact exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given”*

It is at this stage it is important to examine the relevant provisions of the Partnership Act so as to appreciate their applicability or otherwise to this case. I note that counsel for the Appellant did not address the provisions of the said Act in his submissions, yet this is a crucial fact considering that the Magistrate cited the said Act in dismissing the appellants’ case. I would have appreciated counsels in put on the said sections to expound on why the appellant faults the Magistrate in so holding.

Section 3 of the Partnership Act provides as follows:-

**3 (1)** *Partnership is the relation which subsists between persons carrying on a business in common with a view of profit.*

Section 2 of the said Act on interpretation states as follows:-

In this Act, except where inconsistent with the context-

**“court”** means the High Court or, where the gross assets of a partnership do not exceed fifty thousand shillings, the Resident Magistrates Court.

Section 4 of the Act stipulates rules to be considered in determining whether or not a partnership exists;

**Sub-section 4 (a)** *Provides that a joint tenancy, tenancy in common, joint property, common property or part ownership does not of itself create a partnership as anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof.*

Sub-section (b) provides that the sharing of gross returns does not of itself create a partnership, whether the persons sharing those returns have or have not a joint or common right or interest in any property from which, or from the use of which, the returns are divided.

Sub-section (c) provides that the receipt by any person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with profits of a business, does not of itself make him a partner in the business

The Business Dictionary defines partnership as ‘a type of business organization in which two or more individuals’ pool money, skills, and other resources, and share profit and loss in accordance with terms of the partnership agreement. In absence of such agreement, a partnership is assumed to exist where the participants in an enterprise agree to share the associated risks and rewards proportionately.’ [5] Persons can form a partnership either orally or in writing.

Learned author **E.R. Hardy Ivamy** in his work “**Principles of the Law of Partnership**” [6] at page 1 defines partnership as:-

*“the relation which subsists between persons carrying on a business in common with a view of profit. This definition is neat and epigrammatic, and, no doubt, puts the matter in a nutshell; but it is easier to concoct an epigram than to interpret it, and, as a witty and learned Lord of Appeal has remarked, it is one thing to put a case in a nutshell and another to keep it there”*

At page 3 of the same book, the learned author continues as follows:-

*“Let us examine the definition a little more closely. There are three essential facts without which no partnership can exist. There must be: (i) a business; (ii) carried on in common; (iii) with a view of profit.”*

From the rules stipulated in Section 4 of the Act and from the above definitions, only persons who are in receipt of a share of profits of a business are taken, *prima facie*, to be partners in that business. The Act does not provide that a partnership should be in writing.

Section 49 of the Act provides that rules of equity and common law applicable to partnerships in England shall apply to partnerships in Kenya, except in so far as they are inconsistent with the provisions of the Act. In my view, the matters of law not covered under the Act or other written law in Kenya will be governed by the rules of equity and the common law applicable to partnerships in England.

I find useful guidance in the following passage from **Halsbury’s Laws of England**[7]:-

*“Partnerships involve a contract between the partners to engage in a business with a view to profit. As a rule each partner contributes property, skill or labour but this is not essential. A person who contributes property without labour, and has the rights of a partner, is usually termed a sleeping partner or dormant partner. A sleeping partner may, however, contribute nothing. The question whether or not there is a partnership is one of mixed law and fact”*

At paragraph 4 on the same page it defines business as follows:-

*“The existence of a business is essential to a partnership, and for this purpose business includes every trade, occupation or profession the idea involved is that of a joint operation for the sake of gain”*

In my view, the conduct of the parties will be a relevant factor in determining whether or not there was a partnership.[8] According to **Lindley on Partnerships**[9] at common law, partnerships need not be in writing. In find no legal requirement in Kenya that provides that partnerships must be in writing. In **Mworia & Another vs Kiambati**, [10] the court of appeal had this to say:-

*‘In some cases, partners establish their business by entering into a deed. In many cases, the agreement is*

oral. In a verbal contract of partnership, a person has to prove the existence of it by proving material items. These can be proved by their conduct, the mode they have dealt with each other and with other people’.

It is trite law that parties are bound by their pleadings. This position was correctly captured by the Malawi Supreme Court in the case of **Malawi Railways Ltd vs Nyasulu**<sup>[11]</sup> where the learned judges quoted with approval from an article by **Sir Jack Jacob** entitled “**The Present Importance of Pleadings**” which was published in {1960} **Current Legal Problems** at Page 174 where the author stated:-

*“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party by is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice.....”*

*In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “any other business” in the sense that points other than those specific may be raised without notice.”*

Also relevant is the Ugandan case of **Libyan Arab Uganda Bank for Foreign Trade and Development & Another vs Adam Vassiliads**<sup>[12]</sup> where the Court of Appeal of Uganda cited with approval the dictum of **Lord Denning** in **Jones vs National Coal Board**<sup>[13]</sup> that:-

*‘In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries’*

The Supreme Court of Nigeria put it more authoritatively in the case of **Adetoun Olade (NIG) Ltd vs Nigerian Breweries PLC**<sup>[14]</sup> where **Judge Pius Aderremi** expressed himself as follows:-

*“...it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of pleadings goes to no issue and must be disregarded.”*

In the said case, **Judge Christopher Mitchel J.S.C** rendered himself as follows:-

*“In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation”*

Paragraph 3 of the plaint clearly states that “at all material times relevant to this suit the plaintiff and the defendant were business partners involved in a supply of foodstuffs to various institutions.” Paragraph 4 refers to the parties “common trade usage”. The fact that the parties were doing business jointly together and shared profits is also well captured in the evidence of both parties in the lower court. Having looked at the definition of a partnership under the Act and also under the common law, and considering the pleadings filed before the court and the evidence tendered by the parties, I find no difficulty in finding that indeed a partnership did exist between the parties, hence the learned Magistrate was properly guided

under the law in his finding to that effect.

The next point to consider is whether the court had jurisdiction to hear the matter. It's necessary to again examine the definition of court under the Act.

**“court” means the High Court or, where the gross assets of a partnership do not exceed fifty thousand shillings, the Resident Magistrates Court.**

What are gross assets of a partnership? Did the partnership have any *gross assets* of a value *not exceeding Ksh. 50,000/=* to fall within the jurisdiction of the said court. The **Black's Law Dictionary**<sup>[15]</sup> defines asset as *‘an item that is owned and has value, the entries o a balance sheet showing the items of property owned, including cash, inventory, equipment, real estate, accounts receivable and good will...’*. The concise Oxford English Dictionary defines gross as *“without deductions.”*

Partnership assets are used to describe assets which are owned by the partnership, but each case depends on its own facts, intention of the parties or documentary evidence if any. In the present case, the parties never reduced their partnership in writing nor did they document how much each partner contributed. It is not even clear how much each one of them contributed nor is it clear how the amount claimed in the plaint was arrived at. No evidence was tendered as to what were the gross assets of the partnership or whether the amount claimed was pure profits due to the appellant. In the appellants evidence, the amount was at one time said to be **Ksh. 320,000/=**, **Ksh. 309,500/=** and then the amount of **Ksh. 316,000/=** claimed in the plaint while the respondent insisted in the plaint that the Appellant contributed **Ksh. 150,000/=** and herself raised **Ksh. 100,000/=**.

It's not clear whether the amount claimed was gross of net profit. The appellant was economical in her evidence in providing key details as to how the said sum was arrived at possibly because there was an assumption that the amount had been admitted even though a look at the defence filed in court shows that the plaintiffs' averments in the plaint were denied.

What is clear is that the amount claimed arises from what the plaintiff described as *partnership business*. No matter how we look at it, the said sum qualifies to be described as assets of the partnership. Having found that the parties were partners as admitted by both of them, I find no difficulty in concluding that the said sum formed part of the assets of the partnership, and far exceeded the amount prescribed under the definition of *‘court’* in the Act. Thus, the dispute was outside the jurisdiction of the Magistrates court and ought to have been filed in the High Court.

I must point out that the amount set out in the above definition is extremely low and does not make economic sense in the present day world and considering the enhanced pecuniary jurisdiction of Magistrates courts in monetary claims, the said sealing does not make sense and has been overtaken by time and time has come for Parliament to reconsider the said sealing and increase it to align it with modern economic realities.

In view of my above conclusion, issue number one is answered in the affirmative.

The next issue to determine is whether the learned Magistrate was right in arriving at the conclusion that the Respondents evidence was more credible than the Appellants and that the Appellant had not proved his case. The parties never reduced their transactions in writing nor did they have direct witnesses to support their opposing positions and the court is left with the unenviable task of choosing who among them is more credible. In this connection I am aware that the learned Magistrate had the advantage of seeing and hearing the witnesses testify and was in a position of examining their demeanour, hence I will bear this in mind as I review his conclusions that the Respondent was more credible.

In my view, the issue that emerges for determination is, whether or not the appellant discharged her burden of proof to the required standard in civil cases. To my mind the burden of establishing all the allegations rested on the appellant who was under an obligation to discharge the burden of proof.

All cases are decided on the legal burden of proof being discharged (or not). **Lord Brandon** in **Rhesa Shipping Co SA vs Edmunds**<sup>[16]</sup> remarked:-

*“No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take.”*

Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by **Rajah JA** in **Britstone Pte Ltd vs Smith & Associates Far East Ltd**<sup>[17]</sup> :-

*“The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him”*

With the above observation in mind, the starting point is that *whoever desires* any court to give *judgement* as to any legal right or liability, dependant on the existence of fact which he asserts, *must prove* that those facts exist. The *burden of proof* in a suit or proceeding *lies* on that person *who would fail if no evidence at all were given on either side*. The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall be on any particular person.

It is a well-established rule of evidence that whoever asserts a fact is under an obligation to prove it in order to succeed.<sup>[18]</sup> As observed above, the appellant made allegations in the plaint, hence she was under an obligation to support of the allegations. For example, since there was a denial in the defence, it was necessary to adduce evidence to show how the amount of **Ksh. 316,000/=** was arrived at, Further, in view of the fact that the alleged admission had been denied in paragraph 7 of the defence, it could have helped a lot if the lawyer who prepared the document in question had been called as a witness to shed light on the alleged admission. Further, no evidence was tendered to rebut the allegations of paragraph 8 of the defence even though the appellant was aware about it.

The standard of proof in civil and criminal cases is the legal standard to which a party is required to prove his/her case. The standard determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases the standard of proof is the balance of probabilities. In the case of **Miller vs Minister of Pensions**,<sup>[19]</sup> **Lord Denning** said the following about the standard of proof in civil cases:-

*‘The ...{standard of proof}...is well settled. It must carry a reasonable degree of probability.....if the evidence is such that the tribunal can say: ‘We think it more probable than not’ the burden is discharged, but, if the probabilities are equal, it is not.’*

In my view the reason for this standard is that in some cases, the question of the probability or improbability of an action occurring is an important consideration to be taken into account in deciding whether that particular event had actually taken place or not. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. The standard of proof, in essence can loosely be defined as the quantum of evidence that must be presented before a court before a fact can be said to exist or not exist.

As mentioned above, the trial magistrate had the benefit of seeing the parties testify, and the opportunity to assess the witnesses ability to recall the events accurately, assess whether the testimony was plausible and likely to be true, assess whether the testimony was consistent or inconsistent, assess whether the manner the witnesses testified reflected upon the truthfulness of the witnesses testimony, assess whether the witnesses had bias, hostility or some other attitude that affected the truthfulness of their testimony, assess whether the witnesses had a motive to lie and if so to what extent such a motive could have affected the truthfulness of the testimony only to mention but some. Bearing the above in mind, I am totally reluctant to fault the magistrates finding on this issue and in particular his conclusion that the Respondent was more truthful or credible in her evidence. My finding could have been different if there

were credible allegations of biasness's on the part of the court or failure to consider the appellants evidence in his findings. Thus my answer to issue number two is in the affirmative.

Counsel for the Appellant maintained that since the amount in question had been admitted in writing, it was a civil debt recoverable is a suit and it was wrong for the court to dismiss the case. However, the alleged admission had been denied in the defence and it was incumbent upon the appellant to offer clear evidence that indeed the admission was arrived at freely. Matters were complicated by the testimony of the Respondent who claimed that she signed the alleged document in a police station where both parties had been detained after fighting over the same money, and while at the station the police gave them the chance to negotiate and the Appellant summoned her lawyer. The document was alleged to have been prepared at the police station by the appellants' lawyer hence she signed under duress.

Duress is defined as unlawful pressure exerted upon a person to coerce that person to perform an act that he or she ordinarily would not perform. Duress also exists where a person is coerced by the wrongful conduct or threat of another to enter into a contract under circumstances that deprive the individual of his or her volition. If duress is used to get someone to sign a document, then the court may find such a document to be null and void. The Respondents testimony that she signed the document at a police station was in my view not rebutted, hence the alleged admission cannot be safely assumed to have been freely. Thus my answer to issue number three is in the affirmative.

I find that the learned Magistrate properly directed his mind to the law and the evidence and properly dismissed the case before him. The upshot is that the appellants appeal is dismissed. The Appellant shall bear the Respondents costs both in the lower court and for this appeal.

Right of appeal 28 days

Dated at Nyeri this 26<sup>th</sup> day of October 2015

**John M. Mativo**

**Judge**

---

[1] Cap 29, Laws of Kenya

[2] {1989} KLR 1

[3] Industrial Court, Nairobi, Misc App No 29 of 2013

[4] Volume 3:1-N, at Page 113

[5] [www.businessdictionary.com](http://www.businessdictionary.com)

[6] Tenth Edition, London, Butter Worths, 1975

[7] 4<sup>th</sup> Edition, Volume 35 at Page 5,mParagraph 2

[8] See J. K. Kinoti vs G. J. Kibanga Civil Appeal No. 343 of 2010

[9] 11<sup>th</sup> Edition, Chapter 5, page 107

[10] {1988}KLR 665

[11] {1998}MWSC 3

[12] {1986} UG CA 6

[13] {1957} 2 QB 55

c.c 91/2002[14]

[15] Eight Edition

[16] {1955} 1 WLR 948 at 955

[17] {2007} 4 SLR (R) 855 at 59

[18] Koinange and 13 others vs Koinange {1968} KLR 23

[19] {1947} 2ALL ER 372