



REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CIVIL APPEAL NO. 9 OF 2014

BETWEEN

KENYA WOMEN FINANCE TRUSTAPPELLANT

AND

ISCA ADHIAMBO OKAYORESPONDENT

(Being an appeal from the Judgment and Decree of Hon. P. Mayova, Ag. SRM at Chief Magistrates Court in Homa Bay, Civil Case No. 131 of 2012 dated 30th April 2014)

JUDGMENT

1. The appellant (“ KWFT”) appeals against a judgment rendered in the magistrate’s court where it was ordered to refund the respondent Kshs 33,000.00 together with interest at court rates from the date of filing suit, return 1,700 mats to the respondent and pay Kshs 100,000.00 in general damages and costs of the suit.
2. The respondent’s case was outlined in a plaint dated 12th July 2012. She averred that on 23rd February 2012, agents, servants or employees of KWFT took away her mobile phone cover which had Kshs. 33,000.00 and her keys. They thereafter proceeded to her business premises and took away 1,700 mats purporting to recover a loan of Kshs 100,000.00 owed by one Winfred Awino Anyango which the respondent allegedly guaranteed. The respondent denied that she ever guaranteed such a loan. She therefore claimed the money, mats and damages as a result of the trespass and illegal attachment.
3. KWFT filed a defence dated 10th August 2012, in which it denied the respondents allegations. It denied that it sent its employees to take away the respondents mats or authorised the removal of her goods or take away the sum of Kshs 33,000.00.
4. The learned magistrate held that the evidence tendered by the respondent showed that she had a purse which was snatched, that the goods were taken away forcefully and that the people who took the goods were acting on behalf of KWFT. As regards the KWFT’s defence, he held that it had not proved that its officers did not go for recovery on the material day or that the persons who went to attach the respondent were fraudsters. He also noted that KWFT did not respond to the demand letter sent to it. He therefore concluded that after weighing the defence evidence against that of the respondent, the respondent’s evidence was credible and hence she was entitled to judgment.

5. KWFT appeals against the judgment and decree principally on the ground that the respondent failed to prove her case on the balance of probabilities. Its counsel, Mr Abisai, argued that the respondent failed to identify the people who came to her premises and attached her property to satisfy the debt owed by her co-wife. In the circumstances the court erred in granting her relief.
6. Mr Oyuko, counsel for the respondent, supported the judgment on the ground that the respondent had adduced sufficient evidence to show that it is KWFT agents who took the respondent's property
7. This is a first appeal from the magistrate's court and in considering this matter I am guided by the dictum of **Sir Clement De Lestang, V.P** in the case of **Selle and Another v Associated Motor Boat Company Ltd & Others [1968] EA 123, 126.**

An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusion. Though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judges findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence on the case generally.

8. The main issue in this appeal is whether the respondent had discharged its burden of proving that KWFT through its servants or agents had wrongfully attached the respondent's properties and whether she was entitled to judgment.
9. As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of **section 107(1)** of the **Evidence Act (Chapter 80 of the Laws of Kenya)**, which provides:

107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in **sections 109** and **112** of the **Act** as follows:

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

10. The two sections encapsulate the well-known aphorism, "he who asserts must prove." This point was augmented by the Court of Appeal in **Jennifer Nyambura Kamau Humphrey Mbaka Nandi [2013]eKLR** as follows

We have considered the rival submissions on this point and state that section 107 and 109 of the Evidence Act places the evidential burden upon the appellant to prove that the signature on these forms belong to the Respondent. Section 107 of the Evidence Act provides that "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." Section 109

stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side.

11. The respondent had to prove that it is KWFT agents who came to attach her property. Once she proved the primary facts upon which liability was established, the evidential burden shifted to KWFT to show that its agents were not and could not be the persons implicated in the illegal attachment.
12. I have evaluated the entire evidence and I find that the respondent's case was predicated on the fact that certain people came to her shop and attached her goods. She did not identify the people who took the mats or who attached her property. She testified that she went to the AP Camp at Sindo, the Chief and DO's Office where she was told that the people were from KWFT. PW 2 heard the people who attached the respondent tell the Chief that they were KWFT officers. He could not tell their names. PW 3, an Mpesa agent at Sindo testified that he saw the people who attached the respondent but he did not know any of them. PW 4, the area Chief, testified that he saw the people who attached the respondent and he spoke to them and told them what they did was illegal. He reported the matter to the District Officer at Magunga. Although he stated that the people stated that they were officers from KWFT, he did not take down their particulars. He testified that the items were stored at the DO's office at Magunga.
13. DW 1, the KWFT Unit Manager at Mbita denied that he authorised any person to attach the respondent. He testified that the respondent's co-wife Winfred Awino took a loan with the KWFT through Alfa Suba Women Group which had a specific number of members who were named. He provided the relevant documentation. He also explained that attachment could be carried out through the group members and that in any event the account was not default necessitating any recovery action. KWFT's position was that in light of the fact that the respondent was not a member of the group or a guarantor of a member and it was unlikely that she was attached by agents of KWFT.
14. In my view, the KWFT could only have responded to the respondent's claim once she had shown that the people who attached her were its agents. The attachment had been reported officially at the Sindo AP Post, the Chief and the District Officer yet the respondent and the Chief could not find the names of the persons recorded in any official record. On the other hand KWFT showed that it had no legal relationship with respondent and that its officers could not have attached the respondent.
15. The respondent failed to establish its case in accordance with **section 107(1)** of the ***Evidence Act***. As the respondent did not disclose the names of the person who came to attach her property where it was possible to do so, the appellant was not obliged to call all the evidence in the world to disprove or rebut such an allegation. KWFT, on its part, discharged its evidential burden by demonstrating that it was unlikely that it could have authorised the attachment of someone who was neither its customer nor guarantor to its customer. The learned magistrate therefore erred in imposing on the KWFT the burden to disprove a case which had not been established by the respondent.
16. I therefore find that the respondent failed to prove her case on a balance of probabilities. I therefore make the following orders:-
 - a. The appeal is allowed with costs to the appellant.
 - b. The judgment and decree in the subordinate court is substituted with an order dismissing the suit with costs to the appellant.

DATED and DELIVERED at HOMA BAY this 18th day of December 2014.

D.S. MAJANJA

JUDGE

Mr Abisai instructed by Abisai and Company Advocates for the appellant.

Mr Oyuko instructed by Amos O. Oyuko and Company Advocates for the respondent.