



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Appeal 59 of 1998

NGANGA KIANGAIAPPELLANT

V E R S U S

KIMANI GICHORESPONDENT

(From the judgment dated 23/4/96 in Githunguri in RMCC NO.n 58 of 1995 – Miss Rungare)

J U D G M E N T

The Appellant herein was the plaintiff in the lower court while the Respondent was the defendant. The appeal is against the decree of that court by which the plaintiff's suit was dismissed with costs. In paragraph 3 in his plaint dated 30th March, 1995 the plaintiff pleaded his claim as follows:-

“The plaintiff’s claim against the defendant is for KShs. 80,000/= being a debt for the agreed value of the plaintiff’s shop materials and sewing machine sold and delivered by the defendant (sic) at Kagwe in Kiambu District in 1993 and which the defendant and his wife undertook to pay to the plaintiff in 1993 but he failed to do so.”

The defendant’s defence as set out in paragraph 3, 4, and 5 of his statement of defence dated 5th May, 1995 was as follows:-

“3. The defendant denies the content of paragraphs 3 and 4 of the plaint and puts the plaintiff to strict proof thereof. The defendant further avers that no sum of KShs. 80,000/00 or at all was ever advanced to him at his request and instance and that the plaintiff’s stock given to the defendant’s wife was over-valued in any event. Further that the said stock mentioned in paragraph 3 of the plaint was returned to the plaintiff by the defendant’s wife when the latter deserted the defendant, a son-in-law of the plaintiff.

4. The defendant further avers that KShs. 20,000/00 of the amount claimed was paid as a salary to the defendant’s wife and that the rest of the sum was a grant.

5. The defendant further avers that the suit is brought in bad faith only because the defendant and the plaintiff’s daughter have separated and is thus an abuse of court process.”

The memorandum of appeal dated 11th March, 1998 contains three grounds of appeal. They are:-

1. The judgment is against the weight of evidence.
2. Having held that the plaintiff is entitled to claim from both his daughter and the defendant KShs. 60,000/00 the learned trial magistrate erred in not entering judgment for the plaintiff against the defendant for KShs. 30,000/00 with costs.
3. The learned trial magistrate erred in holding that the Appellant had the burden of proving that his daughter did not take away the stock from the defendant.

I have perused the record of the lower court. I have also considered the submissions of the learned counsels appearing. The plaintiff testified and called one witness, JACINTA NYAMBURA NG'ANG'A (PW2). She was the daughter of the plaintiff. The defendant alone testified for the defence. The plaintiff's testimony was that he had a shop at Kagwe trading centre where he conducted the business of general shop while his daughter (PW2) conducted a tailoring business. She was subsequently married to the defendant. On 31st January, 1993, the plaintiff sold to the defendant and PW2 the stock in the shop and the tailoring machine which was being used by his daughter in the tailoring business for the consideration of KShs. 80,000/00. But he waived KShs. 20,000/00 as a gift to his daughter

“for the good work she has done for me in the shop”.

The balance due was therefore KShs.60,000/00 to be paid within one year. The agreement was reduced into writing and signed by all three parties. It was produced in evidence. In the event the defendant and his wife never paid the plaintiff the KShs. 60,000/=. The defendant and PW2 subsequently separated.

In his testimony the defendant said that his wife, PW2, left him on 21st June, 1994 and that she took away with her all the stock in the shop plus the sewing machine. He reported the matter to the police. For that reason therefore, he argued, the plaintiff was not entitled to anything from him.

The defendant did not deny the written agreement executed between himself and his wife on one part and the plaintiff on the other part. Under that agreement the defendant and his wife were liable to pay the plaintiff KShs. 60,000/00. They did not. The defence put forward that his wife, who happened to be the plaintiff's daughter, took away the goods when she left him, and that therefore he was not entitled to payment from the defendant is not tenable at all. The defendant is liable under the written agreement to the plaintiff in the sum of KShs. 30,000/00. PW2 would have been liable to the plaintiff for the balance of sum of KShs. 30,000/00. The plaintiff should have sued both the defendant and PW2, jointly and severally, for the money if he wanted to recover the entire sum from one or the other. He chose to sue only the defendant, obviously because PW2 was his daughter. He cannot expect the defendant to pay what his daughter should have paid him.

The learned trial Magistrate therefore erred. His judgment was against the weight of evidence. The fact that the defendant's wife (PW2) took away the goods is not relevant to the plaintiff's claim at all. That fact could not be used to defeat the plaintiff's claim; it would have been relevant only in a claim lodged by the defendant against his wife. There was no such claim.

I will therefore allow the appeal. The judgment of the lower court is hereby set aside. There will be substituted therefor judgment for the plaintiff for the sum of KShs. 30,000/00 plus costs and interests at court rates. The Appellant shall have the costs of the appeal. It is so ordered.

DATED, PRONOUNCED AND DELIVERED AT NAIROBI

THIS 11TH DAY OF APRIL, 2008

H. P. G. WAWERU

J U D G E

