REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

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Civil Appeal 4 of 2003

Arising from BSA SRM Civil Suit No. 352 of 1999

PENINA OBUYA…….APPELLANT

VS

FREDRICK O. OTISIENO……RESPONDENT

J U D G M E N T

The Respondent filed an action before the Senior Resident Magistrate's court sitting at Busia against the appellant. He successfully obtained Judgment for Ksh.740/= plus interest and costs after going through a trial. The appellant was not satisfied hence this appeal.

In a memorandum of Appeal dated 10th March 2003, Penina Obuya, the appellant herein listed 7 grounds of appeal which were argued together by Mrs Mumalasi, the appellant's advocate. Mr. Onsongo appeared for Fredrick Otsieno, the Respondent.

I will first set out the case that was before the trial court before venturing to consider the grounds of appeal. The Respondent testified and called 1 witness to support his case. He told the trial court that he was contracted by Penina Obuya, the appellant herein, to cut some trees and saw timber for her at a fee of Ksh.3,000/=. He said he was only paid a sum of Ksh500/= leaving a balance of Ksh.2,500/= unpaid. He said the appellant only agreed to settle the outstanding amount when he reported the matter to the area chief and the village elders. He claimed that he paid the area chief Ksh.740/= to enable the elders arbitrate over the dispute. This is the amount he sued the appellant to be refunded. He called one Meshack Weswa, a retired chief for Marachi Central location to testify in support of his case. This witness said he received the complaint from the Respondent but since he was feeling unwell he referred the matter to the area assistant chief Mr. Namudeche. He said the aforesaid assistant chief gave him a feed back to the effect that the appellant agreed to pay the Respondent's debt. He was also told that the Respondent paid a sum of Ksh.500/= to the elders to arbitrate the dispute. This witness further told the trial magistrate that the Respondent refused to collect the money when the appellant failed to pay a sum of Ksh. 740/= which the Respondent paid the elders. He however later collected his money leaving the amount unpaid todate.

When called upon to defend, the appellant admitted having entered into a agreement with the Respondent in which the Respondent sawed for her timber at a cost of Ksh.3,000/=. She said a dispute arose when the Respondent did not complete the job halfway. When he came back he found the logs already burnt as charcoal. She however had the dispute resolved before the area assistant chief in which she fully paid the Respondent the balance of Ksh.2,500/=. She produced an agreement dated 13th January 1999. The appellant denied owing the Respondent any money on account of costs.

After receiving the evidence tendered by both sides the trial magistrate came to the conclusion that the Respondent had proved his case on a balance of probabilities and entered Judgment in his favour for Ksh.740/=. The appellant now cries foul and accuses the trial magistrate on several fronts. The first ground argued was the trial magistrate failed to take into account that there was no credible evidence to show that there was a contract binding her to pay expenses arising from the chief's and the elder's arbitration. The appellant further argued that even if she was bound to pay, still the Respondent had failed to call for the evidence of the recipient of the money. She was of the view that the Respondent relied on hearsay evidence.

The Respondent's counsel on the other hand was of the view that there was a valid contract binding the appellant to settle the debt. I have considered these able submissions. I have also perused the record of appeal. It is not in dispute that the appellant and the Respondent entered into a verbal agreement in which the Respondent would split timber for the appellant at a consideration of Ksh.3,000/=. It is also not in dispute that each of the parties breached the verbal agreement which culminated to an arbitration before the assistant chief of Marachi Central location. The arbitration arrived at the conclusion that the appellant should settle the Respondent outstanding debt standing at Ksh.2,500/=. The appellant promptly settled this debt as ordered by the panel of elders. The question which has been thrown to this court to determine on appeal is whether the Respondent established before the trial court that he was entitled to claim for the expenses incurred on arbitration and if so whether he actually proved his claim to the required standard in civil cases. In his Judgment the learned Senior Resident Magistrate said in part:

> "The plaintiff was paid the sum of Ksh. 2,500/= after arbitration of the matter and the balance of Ksh.740/= was not paid and is unpaid todate. I find that the plaintiff has proved his case on a balance of probabilities."

It is clear from the above statement that the learned senior Resident Magistrate Misapprehended the point. The issues pleaded and raised before him related to expenses arising out of an arbitration done by the assistant chief and a panel of elders. After a careful appraisal of the evidence presented to the trial court it is clear that the Respondent did not lead evidence to show who received the money. The evidence of P.W2, Meshack Weswa needed to have been corroborated by the evidence of one Namudacha the assistant chief who heard the dispute between the combatants herein. The evidence of P.W.2 were given to him by Namudeche who was not summoned to testify. His evidence therefore was hearsay and amounted to nothing in evidence. His evidence was therefore not conclusive. Even if P.W.2's evidence were to be held to be credible still the Respondent must establish that there had been a binding contract between him and the appellant to settle the expenses incurred in arbitration. There was no evidence that an order was made by the elders directing the appellant to meet the expenses incurred in the process of arbitration. There was no iota of evidence adduced by the respondent before the trial court to prove that he was entitled to claim for a refund of Ksh.740/= from the appellant. It was therefore a misdirection on the part of the trial Senior Resident Magistrate to conclude that the Respondent had proved his case on a balance of probabilities.

The appellant attacked the Senior Resident Magistrate's Judgment on the ground that the said trial Magistrate did not comply with the provisions of order XX rule 4 of the Civil Procedure rules. Mr. Onsongo is of the view that the Judgment came within the ambit of order XX rule 4. I have perused the Judgment and I have come to the conclusion that the learned trial Senior Resident Magistrate did not comply with the provision of order XX rule 4 of the Civil Procedure rules which provides that Judgments in defended suits shall contain a concise statement of the case, points of determination, the decision thereon and reasons for such decisions.

The Respondent, raised a preliminary point touching on the validity of the appeal. The Respondent has submitted that the appellant failed to annex to the record of appeal the order for leave to appeal out of time. The Respondent said this contravened the provisions of order XLI rule 8B (4) f of the civil Procedure Rules. The appellant's counsel conceded that she inadvertently excluded the order for leave. She however submitted that the failure to do so did not cause a miscarriage of justice on either party. It is quite clear that the appellant did not comply with the provisions of order XLI rule 8 B (4) (f) of the Civil Procedure Rules which is mandatory. However the discretion is given to the court hearing the appeal to be satisfied that the documents are included in the record of appeal. The view I have is that this is a matter which should have been raised as a preliminary point before the hearing of the appeal is commenced. Or in the alternative the same should have been pointed out at the time of taking directions. Directions were taken in this appeal on 3rd may 2004 by consent. The Respondent did not raise the issue as a preliminary point or at the stage of taking directions. Mr. Onsongo waited until the final stage of submissions that he raised the matter. He however does not dispute that the appellant had obtained leave to appeal out of time. His only complaint is that it is not included in the memorandum of appeal. The position I take in this matter is that though the provision is couched in mandatory terms, the failure to include the order for leave to appeal out of time did not prejudice the Respondent. I hold so because the Respondent does not

deny the fact that leave to appeal out of time was granted to the appellant. I would have held otherwise if there was total denial of the existence of such an order. I am of the view that the court will overlook the defect for the broad interest of justice. I am also of the view that the issue was purely technical and no court of law can countenance such a practice. Its calling is to hear the substance of the disputes between the parties and at all times avoid entertaining academic and hypothetical points of law.

The upshot of this is that I will allow the appeal and proceed to set aside the Judgment of the Senior Resident Magistrate dated 18th October 2001 and substitute it with an order dismissing the suit before the trial court. The appellant shall have costs of the appeal and the suit.

DATED AND DELIVERED THIS 8th DAY OF April 2005

J.K. SERGON

JUDGE