Mogusu v Maingi (Civil Appeal 40 of 2023) [2025] KEHC 4274 (KLR) (4 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4274 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL 40 OF 2023

AC BETT, J

APRIL 4, 2025

BETWEEN

SAMUEL MOGUSU ..... APPELLANT

AND

NICHOLAS MAINGI ..... RESPONDENT

(Being an appeal from the judgement of the Honourable R. Otieno (Mr.), Resident Magistrate/ Adjudicator in Thika SCCCOMM No. E402 of 2022 delivered on 24{{^th}} January 2023)

JUDGMENT

Background

1. By a statement of claim filed on 16th June 2022, the Respondent sued the Appellant for a sum of Ksh. 250,000/= plus costs. The cause of action was stated to be goods sold and delivered to the Appellant by the Respondent. According to the Respondent, he had delivered quarry stones valued at Ksh. 160,000/ = by lorry to the Appellant. The Respondent stated that upon delivery of the stones, the Appellant issued him with two cheques which both bounced. One cheque was for Ksh. 80,000/= while the other one was for Ksh. 60,000/=.

2. The Respondent averred that his attempts to recover the sum due from the Appellant was futile and he reported the matter to the DCI whereupon the Respondent paid Ksh. 20,000/= only which covered one trip leaving a balance of Ksh. 140,000/=.

3. The Appellant denied the claim and after hearing both parties, the learned trial Adjudicator delivered judgement in favour of the Respondent in which he awarded him the sum of Ksh. 140,000/= plus costs and interest.

4. Aggrieved by the decision of the learned Adjudicator, the Appellant lodged an appeal and set out the following grounds of appeal:-

1. That the learned trial Magistrate erred in law and misdirected himself on the law and principles on the law relating to the burden of proof.

2. That the learned trial Magistrate erred in law and fact by holding that the Respondent herein had proved his case.

3. That the learned trial magistrate erred in law and fact by relying on the evidence of the Respondent herein and his witness which testimonies were tainted with in discrepancies and inconsistencies.

4. That the learned trial Magistrate erred in law by disregarding and misconstruing the evidence laid out by the Appellant and his submissions.

5. The appeal was canvassed through written submissions.

6. The Appellant submitted that he and his witness adduced unshaken and uncorroborated evidence that the purchase price had been paid in full and the cheques issued were to act as security for payment.

7. The Appellant further submitted that the finding of the Adjudicator was erroneous since there was overwhelming evidence in the documents availed in the trial court that showed how the Respondent's agent had received the money and signed off on each payment that was made upon delivery of the goods.

8. Additionally, the Appellant submitted that the fact that the Respondent banked the cheques on 23rd April 2020 whereas his lorry had supplied the stones in February 2020 showed that the Respondent was trying to defraud him.

9. It was the Appellant's submissions that since he had paid the full purchase price and having had the stones delivered, the learned Adjudicator ought to have applied the doctrine of equitable estoppel to find that the Appellant did not owe the Respondent any money.

10. The Appellant also submitted that an appellate court will not normally interfere with a trial court's finding of fact unless it is based on no evidence or on a misapprehension of the evidence or the Judge is demonstrably shown to have acted on a wrong principle in reaching the findings he had. He relied on the cases of Ephantus Mwangi & Another v. Duncan Mwangi Wambugu [1982-88] 1 KAR 278 in which it was stated that the appellate court would only reverse a finding of fact of a trial court if (a) it appeared that he had failed to take account of particular circumstances or probabilities material to an estimate of the evidence or (b) that his impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.

11. The Appellant contended that the appellate court has a duty to review the record of the evidence in order to determine whether the conclusion originally reached upon the evidence should stand but that the jurisdiction to be exercised with caution.

Respondent's Submissions

12. In opposing the appeal, the Respondent submitted that the Appellant failed to submit on Ground 1 of the appeal which is that the learned Adjudicator misdirected herself on the law and principles relating to the burden of proof and failed to demonstrate the existence of such misdirection.

13. On Ground 2, the Respondent submitted that contrary to the contention that he had failed to prove his case, his evidence was consistent and not rebutted. The Respondent submitted that he was able to prove that the money in issue was owed to him and the Appellant's case was full of lies.

14. In regard to Ground 3, the Respondent maintained that the Appellant failed to demonstrate that his evidence was tainted by discrepancies and inconsistencies and therefore the ground must fail.

15. In respect to Ground 4, the Respondent submitted that the learned Adjudicator's analysis was clear and that he did not disregard or misconstrue the Appellant's evidence. According to him, the Adjudicator did not misdirect himself in fact or in law and therefore the appeal lacked substance and should be dismissed.

Analysis and Determination

16. From the parties submissions, this court identifies the issues for determination:-

    a. Whether the appeal raises points of law or fact.

    b. Whether the learned Adjudicator misdirected himself on the law and principles of the law relating to the burden of proof.

17. Section 38 of the *Small Claims Court Act* 2016 provides as follows:-

> " (1) A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.
>
> (2) An appeal from any decision or order referred to in subsection (1) shall be final."

18. Base on the law as it is, for a party seeking to appeal against a decision from the Small Claims Court to successfully invoke the jurisdiction of this court, he must demonstrate that his appeal raises points of law.

19. In the case of J. N. & 5 others v. Board of Management, St. G. School Nairobi & Another [2017] eKLR, the court in distinguishing between a point of law and a point of fact stated as follows:-

> " 14. In law, a question of law, also known as a point of law, is a question that must be answered by applying relevant legal principles to interpretation of the law. Such a question is distinct from a question of fact, which must be answered by reference to facts and evidence as well as inferences arising from those facts.
>
> 15. In law, a question of fact, also known as a point of fact, is a question that must be answered by reference to facts and evidence as well as inferences arising from those facts. Such a question is distinct from a question of law, which must be answered by applying relevant legal principles. The answer to a question of fact (a "finding of fact") usually depends on particular circumstances or factual situations."

20. The duty of an appellate court that is mandated to consider an appeal that purely raises points of law was considered by the Court of Appeal in the case of Kenya Breweries Ltd v. Godfrey Odoyo [2010] KECA 498 (KLR) where the court held thus:-

> " I have anxiously considered the pleadings, the evidence on record, the judgment of the learned Senior Resident Magistrate and the judgment of the superior court, the grounds of appeal, the submissions of the learned counsel as well as the authorities to which we were referred. First, this is a second appeal. In a first appeal the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyse it, evaluate it and come

> to its own independent conclusion. In other words a first appeal is by way of a retrial and facts must be revisited and analysed a fresh, - see Selle and Another vs. Associated Motor Boat Company Ltd and Others (1968) EA 123. In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse."

21. In his grounds of appeal, the Appellant faulted the Adjudicator for misdirecting himself in law and principles of law relating to proof in his first ground of appeal. However, there is nowhere in his submissions where the Appellant has argued this ground. Instead, the Appellant has attacked the judgement on the basis of the finding of fact by the Adjudicator.

22. I have perused the judgment. The Adjudicator heard all the witnesses and considered all the documents tendered. In the end, he chose to believe the Respondent's case and discredited the Appellant's case. The learned Adjudicator had the benefit of hearing and seeing the witnesses testify. Even if it was open for the appellate court to re-consider the finding by the Learned Adjudicator, it would only do so in exceptional circumstances which the Appellant acknowledged in his submissions, that is, that the trial court clearly failed to take account of particular circumstances or probabilities material to an estimate of the evidence or that his impression on the demeanor of the witness was inconsistent with the evidence in the case generally.

23. Having considered the judgement, I find that the trial court properly analyzed the evidence and factual material before it and arrived at a decision based on that evidence.

24. It is clear from the Appellant's submissions that there is no point of law in his appeal. The Appellant has disguised a point of fact by clothing it in legalese in a bid to persuade the court to allow his appeal. However, in his submissions, there are no legal points raised at all. The Appellant simply invites this court to revisit the evidence and re-evaluate the same.

25. In the case of Bashir Haji Abdullahi v. Adan Mohammed Nooru & 3 others [2014] KECA 621 (KLR), the Court of Appeal held that when an appellate court is faced with a situation where a memorandum of appeal raises factual issues when it is supposed to only raise points of law, then the appellate court is at liberty to strike out the offending grounds while retaining those that are compliant.

26. Having considered the first ground of appeal and rejected it, it is my finding that the remaining grounds of appeal solely raise points of fact and are therefore not tenable. I therefore proceed to strike out the said three grounds of appeal.

27. The upshot is that the appeal lacks merit and is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 4TH DAY OF APRIL 2025.

A. C. BETT

JUDGE

In the presence of:-

Mr. Njoroge for the Appellant

Mr. Muoki for the Respondent

Court Assistant: Polycap