Too v Mbaka (Civil Appeal E098 of 2023) [2025] KEHC 4484 (KLR) (8 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4484 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL E098 OF 2023

E OMINDE, J

APRIL 8, 2025

BETWEEN

DUNCAN KIPRUTO TOO ..... APPELLANT

AND

NICHOLAS MBAE MBAKA ..... RESPONDENT

JUDGMENT

1. This appeal arises from the judgment in Eldoret Small Claims Court Case No. 98 of 2023 The Respondent had instituted a suit against the appellant vide a statement of claim dated 21/02/2023 seeking a refund from the appellant of Kshs. 800,000/- which he claimed to have lent him pursuant to a mutual agreement. The claim was occasioned by the failure of the appellant to refund him despite having agreed that the same would be repaid within 6 months from 20/11/2019.

2. The trial court considered the claim, documentary evidence and testimonies of the parties and vide the judgement delivered on 22/05/2023, the trial magistrate entered judgement in favour of the respondent herein. Being aggrieved with the whole judgement, the appellant instituted the present appeal *vide* a memorandum of appeal dated 06/06/2023 premised on the following grounds;

    i. That the learned Magistrate erred in law and in fact by failure to consider that the appellant was not involved in a friendly loan agreement dated 28th November, since the same was a forgery and he does not owe any money to the claimant/respondent.

    ii. That the learned Magistrate considered irrelevant and extraneous factors in reaching his decision and judgment that was erroneous vis-a-vis the facts of the case.

    iii. That the learned Magistrate erred in law and in fact in closing the respondent case hence prejudicial to his right to be heard.

iv. That the learned Magistrate erred in law and in fact in failing to take into account the history, full facts and circumstances in which the appellant was not involved in the alleged loan agreement.

v. That the learned Magistrate erred in law and in fact in rendering a judgment that was contrary to the law, since the appellant was not accorded the right to be heard.

vi. That the learned Magistrate erred in law and in fact in applying the wrong principles applicable in the circumstances in arriving at his decision.

Claimants' evidence at the trial court

3. The claimant testified as CW1. He stated that he knew the appellant as he was a good friend and that he lent him Kshs. 800,000/- on 28/11/2019 pursuant to an agreement which he produced in court as evidence. He also produced the SMS communications between themselves and stated that the appellant received money through his advocate. That he was to pay after six months and failed to pay. Additionally, that the agreement was signed before Silas Kibii, an advocate with the firm of Terer Kibii & Company Advocates. He stated that he had lent the appellant money earlier and he had refunded the same.

4. The respondent testified that the agreement was not a forgery and that the appellant had not reported the same to the DCI. Further, that he has the original document and has not been charged for the alleged forgery. In cross examination he stated that the messages were being sent to the complainant and that the loan was due on 28/05/2022. That the appellant made several promises to pay but never repaid and further, that there was no other witness to the agreement other than the advocate.

5. The trial court granted the appellant an adjournment when the defence case was to be opened on 19/04/2023. When the matter came up for hearing on 17/05/2023, the appellant and his respondent failed to appear in court. The court then delivered the judgement on 22/05/2023, where judgement was, as aforestated, entered in favour of the respondent.

Hearing of the appeal

6. The appeal was canvassed by way of written submissions. The appellant filed submissions through the firm of Messrs Morgan Omusundi & Co advocates whereas the respondent filed submissions through the firm of Messrs Songok & Company Advocates.

Appellants' Submissions

7. Learned counsel for the appellant submitted that the Appellant's case in the lower court was closed due to his non-attendance highlighting that the Appellant filed his response to the Statement of Claim denying the allegations by the Respondent and further, that he filed his written statement and list of documents in court. Counsel urged that the appellant was intent on strongly rebutting the claim only that he was unavailable during the said hearing dates due to unavoidable circumstances.

8. Counsel urged that the judgment violated the Appellant's Constitutional right to fair hearing as articulated by Article 50 of the *Constitution*. Further, that the right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. Counsel cited the case of *Sangram Singh v Election Tribunal, Koteh*, AIR 1955 SC 664, at 711 in support of this submission. Additionally, he sought to rely in the case of *SM v HGE* [2019] eKLR.

9. Counsel urged that the Appellant's response to the Claim was merited and the trial court ought to have considered it before delivering its judgment because a court of law ought to critically examine the

evidence before it in any proceedings and apply the correct legal principles regardless of whether or not the suit is defended or not. He reiterated that there was gross miscarriage of justice in the trial court and the Appellant ought to have been duly accorded his inalienable right to be heard as provided for under the Constitution. He urged the court quash and set aside the decision of the trial court.

10. Counsel submitted that it is now settled law that the duty of the first appellate court is to re-evaluate the evidence which was adduced in the subordinate court both on points of law' and facts and come up with its own findings and conclusions, citing the case of *Abok James Odera t/a A.J Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates* (2013) eKLR in this regard. Counsel highlighted the cause of action raised by the respondent in his Statement of Claim and recounted the testimony of the respondent in court and urged that from the evidence on record and testimony, the trial court erred in law and fact in finding that the Respondent herein had proved his case against the Appellant to the required standards. He cited the provisions of Section 107 (1) of the *Evidence Act* on the burden of proof, urging that the same was on the shoulders of the respondent. He additionally cited the case of *Evans Nyakwana vs. Cleophas Bwana Ongaro* (2015) eKLR in support of his submissions.

11. Counsel faulted the findings of the trial court as there was no evidence challenging that of the Respondent and that the Appellant did not adduce any evidence that he paid the loan or any part thereof. He stated that the Respondent produced a loan agreement CExh 1 which had purportedly been executed by him and the Appellant on 28th November, 2019, which said agreement was drawn by and in the presence of Advocate Silas Kibii which agreement was not signed by the witness included therein Agnes Cherotich and no explanation was offered by the Respondent as to why the said witness did not sign the agreement. Additionally, he stated that the Respondent himself produced the said agreement and stated that the maker of it, Advocate Silas Kibii, did not object to its production and when asked whether the advocate would testify as a witness, he said the advocate could not be available. This is contrary to the rules of evidence regarding the production of documentary evidence in that the maker of a document has to be the one to produce said document in court. in this regard, counsel sought to rely on the case of *Mugo Mungai & 4 others v Official Receiver & Provisional Liquidator (Capital Finance Limited and Pioneer) & 2 others* [2019] eKLR.

12. Counsel urged that the impugned loan agreement ought not have been admitted into the court record as evidence for the reason that its maker, Advocate Silas Kibii did not personally produce it and testify in court to confirm its veracity failure to which it had no probative value in the case.

13. Counsel faulted the respondents' reliance on the SMS conversation which he produced as evidence and stated that the conversations did not at any point make refence to the said loan agreement or the loan amount as per the said loan agreement. Further, that the Respondent testified that he had lent the Appellant money of previous occasions, which in itself means that the alleged conversations could be in relation to any of those instances in which the Appellant owed him money and not necessarily the present instance as alleged. He additionally submitted that the Respondent produced a copy of the Appellant's national ID claiming it had been attached to the said loan agreement, which is irrelevant because the Respondent testified that he had advanced money to the Appellant before and such a copy of ID could have easily been gotten from the said agreements between the two parties.

14. Counsel urged that the Respondent's testimony and evidence were of little to no probative value even without the Appellant's testimony and evidence in the first place, the Respondent failed to prove his case to the required standard as was incumbent upon him and therefore the learned trial magistrate erred in deciding the case in his favour. He relied on the case of Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR in support of this submission. He urged the court to allow the appeal and award costs to the appellant in both the trial court and this appeal.

Respondents Submissions

15. Learned counsel for the respondent submitted that this being a first appeal, parties are entitled to and expect a rehearing, re-evaluation and reconsideration of the evidence afresh and a determination of this court with reasons for such determination. In other words, a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that. Counsel cited the case of *Peters v Sunday Post Ltd* [195S] EA 424 and the case of *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR in this regard.

16. On whether this court should interfere with the findings of the trial court, counsel cited the case of *Mbogo & Another vs Shah*, [1968] EA and the Supreme Court of Kenya in the case of *Apungu Arthur Kibira v Independent Electoral and Commission Boundaries & 3 Others* [2019] eKLR.

17. Counsel submitted that the appellant has not adduced any evidence to show why the judgement ought to be set aside or varied and therefore it ought to be upheld. He urged that the judgement was founded on the strength of the sworn evidence adduced by the respondent and the proper application of the provisions of the law. He cited Section 107 of the *Evidence Act* and buttressed the same with citing the case of *Evans Otieno Nyakwana v Cleophas Bwana Ongaro* which enunciated the principle of the burden of proof. He reiterated that the respondent adduced evidence in support of his Claim as evidenced by the said Loan Agreement dated 20.11.2019 and his oral testimony, which was coherent, cogent, convincing and firm on cross-examination and urged the court to dismiss the appeal with costs.

Analysis and Determination

18. Section 38 of the *Small Claims Court* provides:

    38.

        (1) A person aggrieved by the decision or an order Appeals. 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.

19. In considering the grounds of appeal filed, it is my finding that the issue for consideration is

whether this appeal raises points of law

20. In the case of *Peter Gichuki King'ara v IEBC & 2 Others*, Nyeri Civil Appeal No. 31 Of 2013, (Court of Appeal) (Visram, Koome & Odek, JJA), the Court of Appeal stated as follows: -

> "It was held that it is trite law that the exercise of judicial discretion is a point of law and that the trial court in denying a prayer of scrutiny is exercising judicial discretion. The Court concluded that it would not be feasible for the Court of Appeal to order for a recount and scrutiny as this would involve matters of fact that were within the jurisdiction of the trial court. The court further held that the question of whether the trial judge properly considered and evaluated the evidence and arrived at a correct determination that is supported by law and evidence – with the caveat that the appeal court did not see the witness demeanour – is an issue of law."

21. Further, in the case of *Mwangi v Kihiu* (Civil Appeal 16 of 2023) [2023] KEHC 18643 (KLR) (28 April 2023) (Judgment) when handling an Appeal emanating from the Small Claims Court, Kizito Magare Jstated as follows:

> " Even on the normal legal lingua, a point of law must clearly arise out of the pleadings. In case of appeal, it should arise out of the memorandum of appeal vis-à-vis the pleadings in the court below ..."

22. Regarding evidence, the trial court is bound by section 32 of the *Small Claims Court Act,* which provides: -

> 32. Exclusion of strict Rules of evidence
>
> (1) The Court shall not be bound wholly by the Rules of evidence.
>
> (2) Without prejudice to the generality of subsection (1), the Court may admit as evidence in any proceedings before it, any oral or written testimony, record or other material that the Court considers credible or trustworthy even though the testimony, record or other material is not admissible as evidence in any other Court under the law of evidence.
>
> (3) Evidence tendered to the Court by or on behalf of a party to any proceedings may not be given on oath but that Court may, at any stage of the proceedings, require that such evidence or any part thereof be given on oath whether orally or in writing.
>
> (4) The Court may, on its own initiative, seek and receive such other evidence and make such other investigations and inquiries as it may require.
>
> (5) All evidence and information received and ascertained by the Court under subsection (3) shall be disclosed to every party.
>
> (6) For the purposes of subsection (2), an Adjudicator is empowered to administer an oath.
>
> (7) An Adjudicator may require any written evidence given in the proceedings before the Court to be verified by statutory declaration.

23. I have read the impugned judgement. I have also discerned from the Record of Appeal all the pleadings that were filed in the lower court. I note from that record that the appellant did file a Response to the Statement of Claim dated 29th March 2023 on 31st March 2023. The appellant also filed a Written Statement dated the same day. From the record of proceedings, it is indeed correct that the appellant through his Counsel participated in the trial when the respondent put forth his case and an adjournment was granted due to his physical non-attendance to another date so that he may come at another date to present his case. He did not appear on the given date and the trial court proceeded to close his case and render its judgement.

24. All the above notwithstanding, in its judgement the Hon Magistrate stated that there was no evidence challenging that of the claimant, and proceeded to consider the evidence of the appellant only and entered judgement in favour of the respondent. Even as the appellant had failed to turn up in court on the date of the hearing of his case, there were pleadings filed by him that the court ought to have considered vis-a-vis the evidence adduced by the claimant. It is clear from the judgement that the Hon Magistrate did not at all in the address herself to the appellant's response to the claim that was on record or even to the issues raised by Counsel for the appellant in the cross examination of the claimant before reaching her determination.

25. In this regard and in light of the finding of the Court of Appeal in the case of *Peter Gichuki King'ara v IEBC & 2 Others,* Nyeri Civil Appeal No. 31 Of 2013 (*Supra*) where the court held that the question of whether the trial judge properly considered and evaluated the evidence and arrived at a correct determination that is supported by law and evidence is an issue of law, then I am satisfied that there was indeed a miscarriage of justice and the appellant was prejudiced. This in my considered opinion amounts to a mistrial and I now hereby so find. In this regard, I am satisfied that the Appeal has merit and I allow the same in its entirety with costs to the applicant. The entire proceedings of the lower court and including the judgement delivered on 22nd May 2023 in now hereby set aside and the file is referred back to the small claims court for a re-trial.

READ DATED AND SIGNED AT ELDORET ON 8TH APRIL 2025

E. OMINDE

JUDGE