Mutuku (Suing as Legal Representative of Francis Mwanzia Mulwa) v Kenya Women Microfinance Bank Ltd (Civil Appeal 145 of 2017) [2024] KEHC 1474 (KLR) (14 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1474 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL 145 OF 2017

FR OLEL, J

FEBRUARY 14, 2024

BETWEEN

CAROLINE NZILANI MUTUKU ..... APPELLANT

SUING AS LEGAL REPRESENTATIVE OF FRANCIS MWANZIA MULWA

AND

KENYA WOMEN MICROFINANCE BANK LTD ..... RESPONDENT

(BEING AN APPEAL FROM THE JUDGMENT OF HON Y.A. SHIKANDA (S.R.M) DELIVERED ON 25 TH Ocotber 2017 IN MACHAKOS CMCC NO. 524 OF 2016)

JUDGMENT

Introduction

1. This appeal arises from the Judgment/Decree of Hon. Y.A. Shikanda (SRM) dated 23th October 2017 delivered in Machakos CMCC No. 524 of 2016, where he found that the Appellant had not proved his case on a balance of probability and none of the parties in the suit had a legal or equitable interest in motor vehicle KVZ 661 Mazda Pick-up (Hereinafter referred to as the suit motor vehicle) and therefore proceeded to dismiss the Appellants suit as against the respondent with costs.

B. Pleadings

2. The appellant filed an amended plaint dated 30th November 2016, where he pleaded that he was the rightful owner of motor vehicle registration number KVZ 661 Mazda pick-up having purchased it from its owner one Mwania Kiamba a.k.a London Kiamba vide an agreement entered into on 07.04.2015 after exercising due diligence to confirm that the said suit motor vehicle was not subject to any encumbrance. On or about 03.08.2016, the Auctioneer purporting to act on instructions of the 1st Defendant wrongly proclaimed the suit motor vehicle for an alleged loan advanced one Kiamba Mary Ambrose, with the suit motor vehicle being offered as security thereof.

3. The alleged debtor was one Kiamba Mary Ambrose, was not the registered owner of the suit motor vehicle and therefore the respondent's action was unlawful and highly irregular. Their acts were also high handed, grossly negligent, oppressive and depicted the plaintiff in the eyes of right minded members of the society as a person who does not pay his debts, thereby exposing him to ridicule, adverse attituded and embarrassment. The Appellant therefore prayed for a declaration that the respondent has no right to attach the suit motor vehicle, a permanent injunction to restrain the respondent and/or their agents from repossessing, selling disposing and or in any manner interfering his possession thereof and General and aggravated damage's occasioned by the respondent's unlawful acts.

4. The Respondent did file their statement of defence denying all the allegations made as against them by the Appellant and further stated that there was no proof that one Mwania Kiamba offered to sell the suit motor vehicle to the Appellant and/or that indeed the Appellant bought he said motor vehicle. To the contrary, it was the respondent's contention that they offered one Mary Ambrose Kiamba, a loan facility and that she did offer the suit motor vehicle as security/collateral for the said loan. They were therefore justified to claim possession of the same. The Appellant had no cause of action as against the respondent and they prayed that the suit be dismissed.

Evidence at Trial

5. The Appellant did testify and adopted his witness statement as his evidence in chief. He testified that this cause of action arose, when the respondent did sent auctioneers to proclaim on the suit motor vehicle alleging that it was a security for a loan advanced to a person not known to him. He was embarrassed by this action as in the eyes of his neighbor's and family, he was viewed as a person who obtains loans and fails to pay. He therefore sought for a declaration that the respondent had no right to take away the suit motor vehicle and also for an injunction restraining them from doing so. He also sought for general and aggravated damages occasioned by the respondents unlawful Acts.

6. Upon cross examination the Appellant stated that he had never taken any loan from the respondent, nor had he acted as a guarantor for any party who took a loan with the said respondent institution. Further he was not a party to the alleged loan taken by one Mary Ambrose Kiamba, a person unknown to him nor was he aware if Mwania Kiamba had acted as a guarantor to the facility advanced to Mary Ambrose Kiamba. The appellant further testified that he had seen the documents relied upon by the respondent and nowhere was it indicated that the suit motor vehicle was security for the loan advanced.

7. He reaffirmed that he bought the suit motor vehicle from Mwania Kiamba through a sale agreement dated 07.04.2015 and paid for it by cheque which was part of his list of documents and had been acknowledged by Mwania Kiamba. Further he had started the process of transferring the said motor vehicle to his name and had deposited the logbook and transfer papers at the registrar of motor vehicles, but the actual transfer was yet to be effected. Finally, though he was not present during proclamation, his dignity and reputation was damaged and he was therefore entitled to be compensated.

8. The Respondent did call one witness Anne Njeru, its branch manager- Machakos. She too adopted her witness statement as her evidence and also relied on all the documents filed as defence Exhibits. She testified that on 01.04.2015, they did advance Kshs.500,000/= to Mary Kiamba Ambrose and one Mwania Kiamba was the main guarantor, while one Francis Mackenzie was the 2nd guarantor. The said Mary Kiamba Ambrose defaulted in repaying this loan and fell into arrears totaling to Kshs.472,736/=. They did a demand letter and sent auctioneers to recover the securities pledged, which include the suit motor vehicle, business and household items.

9. The respondent's witness further testified that they had the original logbook of the suit motor vehicle in their custody and were not aware of any other interest in the said suit motor vehicle when they sent

the auctioneers to proclaim the same. Upon cross examination, the respondents witness admitted that they had not perfected the securities before advancing the loan and that the bank had not register its interest/ chattels mortgage on the logbook of the suit motor vehicle. Further the suit motor vehicle did not appear in the loan documents as part of the securities mortgaged and a third party would not know of the banks interest.

10. The trial magistrate did consider all the evidence adduced and did find that the Appellant had not proved his case on a balance of probability and proceeded to dismiss the said suit. The appellant being dissatisfied by the judgment filed their memorandum of appeal which raised eight (8) grounds of appeal namely that:

    a. That the learned trial magistrate erred in law and in fact in completely disregarding the documents and evidence adduced by the plaintiff thus arriving at the wrong decision.

    b. That the learned trial magistrate erred in failing to record and consider that the plaintiff had adopted his statement and documents as filed in court.

    c. That in making his decision, the learned trial magistrate failed to consider the fact that the Appellant is and has been in lawful possession of the vehicle in question since 07.05.2015 when he purchased the same without any encumbrance and thus he had equitable interest on the same.

    d. That learned trial magistrate erred in law and in fact in not appreciating that the plaintiff had discharged his evidential burden in proving that he had legal and equitable interest in the suit motor vehicle.

    e. That the material presented to the learned trial magistrate could not justify or sustain the finding of dismissal on grounds that the plaintiff and the defendant had no legal or equitable interest in the suit motor vehicle.

    f. The decision of the said Magistrate has the effect of subjecting the Appellants Motor vehicle to the risk of being proclaimed and subsequently attached leaving the Appellant with no legal recourse and the said decision thus offends the principle of audi alteram partem and therefore oppressive and unjust.

    g. The learned trial Magistrate's discretion was exercised without considering the prejudice that was likely to be occasioned against the plaintiff as she would be condemned to pay the Defendant despite having presented a claim as an innocent purchaser for value without notice of any adverse claim by the Defendant.

    h. The decision of the said Magistrate was against the weight of the material presented to him.

11. The Appellant thus prayed for the appeal to be allowed and the decision of the trial court to be reversed and she be awarded costs of the Appeal and the primary suit.

Appellant's Submissions

12. The appellants faulted the trial Magistrate for disregarding the Appellant's uncontroverted evidence that he had executed a sale agreement and bought the suit motor vehicle from Mwania Kiamba for a consideration of Ksh.170,000/= on 07.05.2015 and thereafter had been placed in possession since then as the rightful owner thereof. As at the time of the sale and subsequently the suit motor vehicle was not encumbered and he had effected the process of legal transfer of the said motor vehicle to himself but had been inconvenienced by the delay at the registrar of motor vehicle office. Reliance was placed in the case of *Lawrence P. Mukiri vs Attorney General & 4 others* (2013) eKLR, where the court cited

with approval the case of Court of Appeal Uganda *Katende vs Haridar & Company Limited* to explain who a *bona fide* purchaser doctrine.

13. It was therefore equitable for the Appellant to pray for possession of the subject suit motor vehicle. The trial Magistrate was further faulted for not applying his mind to the prima facie evidence placed before him on the issue of ownership of the said motor vehicle and had he done so, he would have found that the Appellant had discharged the burden of proof at the interlocutory stage as to how he acquired title to the suit motor vehicle as an innocent purchaser for value, without any notice of any encumbrance to its title.

14. The Appellant further faulted the trial magistrate for filing to appreciate the provisions of Section 67 of the *Evidence Act*, Cap 80, and the fact that its import was done away with since none of the parties challenged the authenticity of the documents relied upon by the Appellant and therefore his right to property as provided for under Article 40 ought to have been protected. The appellant thus prayed for this appeal to be allowed with costs.

15. The Respondent did not file any submissions in this appeal.

Analysis and Determination

1. A first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for rehearing both on the question of fact and law. The judgment of the appellate court must therefore reflect its conscious application of mind and record the findings supported by reasons, on all issues arising along with the contentions put forth and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the appellate court had discharged the duty expected of it. See *Santosh Hazari vs Purushottam Tiwari (Deceased)* by L.Rs (2001) 3 SCC 179.

17. A first appellate court is also the final court of fact and litigants are entitled to full fair independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the *civil procedure Act* a court of first appeal can appreciate the entire evidence and come to a different conclusion. See *Kurian Chacko vs Varkey Joseph* AIR 1969 Keral 316.

18. I have considered the entire record of appeal, the pleadings that were filed, evidence adduced, the Judgement of the trial magistrate and submissions filed herein and condense the issue for determination as to whether the Appellant discharged the evidential burden and proved his case on a balance of probability.

19. Section 107(1) of the *Evidence Act*, Cap 80 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 108 of the *Evidence Act* further provides that;

> " The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given by the other side."

20. I also refer to the *Halsbury's laws of England*, 4th Edition, Volume 17 at para 13 and 14 where it states that;

> ". The legal burden is the burden of proof which remains constant through a trial; it is the burden of establishing the facts and contentions which will support the parties case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied in respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is essential to his case. There may therefore be separate burdens in a case with separate issues.
>
> 16 The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutions evidential burden. Therefore, while both legal and evidential burden initially rests upon the appellant, the evidential burden may shift in the course of trial depending on the evidence adduced. As to weight of evidence given, by either side during the trial varies; so will the evidential burden shift to the party who would fail without further evidence."

21. In the case of *Evans Nyakwana vs Cleophas Rwana ongaro* (2015) eKLR it was held that

> "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 purpose of section 107(i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore the evidential burden..... is cast upon any party, the burden of proving any particular fact which he desired the court to believe in its existence. That is captured in section 109 and 112 of the law that proof of that fact shall lie on any particular person..... The appellant discharged that burden and as section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

22. I also refer to *Palace Investments Ltd vs Geofrey Kariuki Mwnedwa & Another* (2015) eKLR , Where the Judges of Appeal referred to "Denning J in *Miller vs Minister of Pensions* (1947) 2 ALL ER 372 discussing the burden of proof had this to say;

> "That degree is well settled, it must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it is more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where the parties.....are equally (un)convincing, the party bearing the burden of proof will lose because the requisite standard will not have been obtained."

23. The sad fact in this case is that the Appellant (who was a senior advocate) inadvertently made a mistake and did not produced his set of documents to support his case. He only stated that he would wish to rely on his witness statement. Section 62 of the *Evidence Act*, Cap 80 provides that;

> " All facts, except the contents of documents, maybe proved by oral evidence".

24. The appellant case was that he bought the suit motor vehicle from Mwania Kiamba on 07.05.2015, paid for the consideration by cheque, being Kshs 170,000/= and took possession. The said suit motor vehicle did not have any encumbrance to its title and therefore the respondent had not right to seek to repossess the same. All these facts had to be proved by documentary evidence, which were in the list of documents filed but inadvertently not admitted into evidence. The same could not be proved by oral evidence and the trial court cannot be faulted for finding as he did that the Appellant did not discharge the burden of proof.

C. Disposition

25. The upshot is that this Appeal lacks merit and the same is dismissed with no orders as to costs.

26. It is so ordered.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 14TH DAY OF FEBRUARY 2024.

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 14TH DAY OF FEBRUARY, 2024.

FRANCIS RAYOLA OLEL

.....

JUDGE

In the presence of;

Ms Mutua for Appellant

Mr. Kabugu for Respondent

Sam - Court Assistant