



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Owino v Ramji (Civil Appeal 69 of 2020)
[2024] KEHC 16956 (KLR) (7 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 16956 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 69 OF 2020
F WANGARI, J
FEBRUARY 7, 2024**

BETWEEN

ZABLON OTIENO OWINO APPELLANT

AND

DAYALAL RAMJI RESPONDENT

(Appeal arises from the Judgement and Decree of Trial Court delivered on 26th May 2020 by Hon. E. Muchoki, Resident Magistrate in Mombasa CMCC No. 1645 of 2018)

JUDGMENT

1. This Appeal arises from the Judgement and Decree of Trial Court delivered on 26th May 2020 by Hon. E. Muchoki, Resident Magistrate in Mombasa CMCC No. 1645 of 2018. The Trial Court dismissed the Appellant’s suit.
2. The Appellant being aggrieved by the dismissal filed this Appeal and preferred the following grounds in the Memorandum of Appeal.
 - a. The Trial Court erred in law and fact in dismissing the Plaintiff’s suit on account of failure to produce crucial payment documents.
 - b. The Trial Court erred in law and fact in finding that the Plaintiff did not prove his case on a balance of probabilities.

The Appellant’s case

3. The Appellant filed the suit *vide* the Complaint dated 17th August 2018. The Appellant sought refund of Kshs. 277,446 from the Defendant being the sum of Kshs. 274,446 and Kshs. 3,000 remitted in settlement of Land Rates and Land Rate Clearance Certificate in respect of the Defendant’s Plot



No. 24 Kilifi/Kawala A Kadzonzo. The amount was said to have been paid to the Town Council of Mariakani.

The Respondents case

4. The Respondent entered appearance and filed Defence denying that he authorized the Appellant to make the payments pleaded.

Evidence

5. During testimony, the Appellant relied on the witness statement and documents filed in Court on 30th November 2018 on his behalf and testified in support of his case. It was his testimony that he was a contractor and was managing the Defendant's properties including the suit property.
6. Further, he had been contracted by the Defendant to carry out the construction of a boundary wall but which stalled owing to a land dispute from which an injunctive order was issued. It was his further case that the Respondent gave him verbal authority to pay the rates.
7. The Respondent also testified in court and relied on his witness statement and bundle of documents. It was his case that he met the Appellant sometimes in 2014 when the Appellant produced the receipts and demanded refund. He further stated that he never asked the Appellant to pay.
8. In cross examination, the witness confirmed that the rates were paid in respect of Plot No. 24 Mariakani and he had given the Appellant a contract to build a boundary wall thereon. It was his further case that he did not request the Town Council to return the funds. He also testified that the Appellant had paid but without his authority and that the rates were paid when his agents had not paid the rates.

The Appellant's Submissions

9. It was the submission of the Appellant that the Trial Court erred in dismissing the suit despite the evidence produced in support of the case. Counsel submitted that the court failed to consider evidence by the Appellant that Kshs. 274,446 was paid in respect of land rates and Kshs. 3,000 in respect of land clearance certificate.
10. It was submitted that the Appellant had proved his case on a balance of probabilities. Counsel did not cite any authorities.

Respondent's Submissions

11. It was the submission by counsel that the Appellant had no instructions nor consent to make any payments. Counsel relied among others on the case of *Alice Wanjiru Rubiu v Messiac Assembly of Yaweh* [2021] eKLR to canvass the submission that the Appellant had not proved the case as required under Sections 107 and 108 of the *Evidence Act*.
12. It was the submission of the Respondent that the Appellant filed to prove that the Respondent instructed the Appellant to pay the land rates in respect of the premises.
13. The counsel cited a number of authorities for support the point that the Appellant had not proved his case in the lower court on a balance of probabilities. I have considered those authorities in detail and my failure to reproduce them herein is not lack of appreciation of their value.



Analysis

14. This Court has considered the pleadings, evidence, submissions and authorities relied on by the parties in support and opposition to the Appeal. The issue that fall for this Court's determination is whether the Trial Court erred in law and fact in dismissing the Appellant's case.
15. This being a first Appeal, the Court should with judicious alertness re-evaluate the evidence, and consider arguments by parties and apply the law thereto, and, make its own determination of the issues in controversy. Except however, that it should give allowance to the fact that it neither saw nor heard the witnesses' testimonies.
16. In the case of *Selle & Another v Associated Motor Board Company Ltd.* [1968] EA 123, the Court stated as follows:

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect, in particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
17. I note that in the Lower Court, the Plaintiff sought special damages. With special damages, the rule is strict and somewhat mathematical. The court has to discern pleaded damages and proceed to find their proof. It is not based on estimates.
18. The Court of Appeal in *Jogoo Kimakia Bus Services Ltd v Electrocom International Ltd* [1992] KLR 177 stated that:

“... Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded.”

 19. Special damages are thus very specific and constitute liquidated claim which must be pleaded and proved. This court's task thus entails whether the Trial Court failed to award special damages that were pleaded and proved.
20. In *Joseph Kipkorir Rono v Kenya Breweries Limited & Another* Kericho HCCA No. 45 of 2003, Kimaru, J held that:

“In current usage, special damage or special damages relate to part pecuniary loss calculable at the date of the trial, whilst general damages relate to all other items of damage whether pecuniary or non-pecuniary. If damages are special damages they must be specifically pleaded and proved as required by law. For a loss to be calculable at the date of trial it must be a sum that has actually been spent or loss that has already been incurred...”
21. Proceeding along this line, I note from the pleadings, proceedings and evidence in the Trial Court that the dispute is not entirely about whether the payment was done. Instead it is about whether the Respondent authorised the Appellant to make the payment.



22. In as much as the Respondent denied ever giving instructions to the Appellant to pay the rates, still the Respondent, in law, has an obligation to account for the monies that were utilised to settle the land rates. In the case of *Macharia Mwangi Maina & 87 others v David son Mwangi Kagiri* [2014] eKLR the Court of Appeal held as follows: -

“This court is a court of equity; equity shall suffer no wrong without remedy. No man shall benefit from his own wrong doing, and equity detests unjust enrichments. This court is bound to deliver substantive rather than technical and procedural justice.”

23. Further, there was no counterclaim and set off pleaded by the Respondent. I note from his recorded testimony that the Respondent indeed admitted that the land rates were cleared and it was the Appellant who paid. The Respondent’s only point of digression is that since he did not authorise the Appellant to pay, then he is not accountable for the loss to be incurred by the Appellant who acted without authority. I tend to disagree with this opinion because there was a relationship between the parties herein and the Respondent was or ought to have been aware of the actions or potential actions of the Appellant.

24. I consequently find that this case does not raise any issue requiring the establishment of agency or principal relationship. The Respondent’s case was clear that he had instructed the Appellant to construct a boundary wall that however stalled following an injunction of Court. This was a service delivery engagement and so these were people who had dealings. It is not even a case of the Appellant remitting the claimed amount of money by mistake. It was a deliberate payment and the documentary evidence proved that it was paid towards the settlement of the Respondent’s rates in respect of Plot No. 24. Mariakani.

25. The Trial Court in its Judgement questioned the date when the payment demand was generated and the payment cheque issued. However, the fact remained that the payment was done and in my view that was more important than how the payment was made more so because this was undisputed fact. There was no dispute that the Town Council of Mariakani had received the payment just as there was no dispute that the Demand for Rates Payment and the Rates Clearance Certificate were documents issued by Town Council of Mariakani.

26. The law cannot permit the Appellant to keep the Appellant’s money without basis. The payment was done on the account of the Town Council of Mariakani in order to settle the Respondent’s liability and which it settled. The Respondent did not call for the refund of the amount from the Town Council. The Appellant could not call for refund because he was paying on behalf of the Respondent. Therefore, the Appellant did equity to the Respondent and could only expect equity. His intention is clear in the circumstance of this case. I am also fortified by the maxims stipulating thus, and which I abound:

Equity imputes an intention to fulfil an obligation

Equity looks at intent rather than the form.

27. As the Respondent confirmed during trial that the payments for the land rates was done and himself did not subsequently pay, he is, in my view estopped from refusing to give the Appellant’s money back. I say so because the Respondent has no claim against the Appellant.

28. In *Nurdin Bandali v Lombank Tanganyika Ltd* [1963] EA 304, the former Court of Appeal for Eastern Africa set out the conditions under which equitable estoppel arises as follows:

“The precise limits of an equitable estoppel are, however, by no means clear. It is clear, however, that before it can arise one party must have made to another party a clear and



unequivocal representation, which may relate to the enforcement of legal rights, with the intention that it should be acted upon and the other party, in belief of the truth of the representation, acted upon it.”

29. Further estoppel is a shield and not a sword and as held in *Serah Njeri Mwobi v John Kimani Njoroge* [2013] eKLR:
‘The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person.’
30. Therefore, as there were admittedly previous dealings between the Appellant and the Respondent, the Trial Court appears to have focused on whether there was authority for the Appellant to settle the Land rates on behalf of the Respondent. This was in error because the issue was clearly whether the Appellant had remitted the amount in settlement of the Respondent’s liability.
31. Authority was in my view immaterial. As the Appellant proved the payment of Kshs. 277,446 to the Town Council of Mariakani in respect of the land rates for the Respondent’s Plot No. 24 Mariakani, the Appellant was entitled to the refund of the monies so proved.
32. I have said enough to show that this Appeal succeeds. Whereas the Appellant prayed for interest on the award in the Lower Court to accrue from 1st January 2014, I find no basis and award interest on the claimed special damages from the date of filing the suit.

Determination

33. In the upshot, I make the following Orders:
- i. The Judgement and Decree of the Trial Court is set aside and substituted with an Order allowing the Plaintiff’s suit.
 - ii. The Appellant shall have the costs in the Lower Court and this Appeal.
 - iii. For the Avoidance of Doubt, interest on the Award in the Trial Court shall accrue from the date of filing the suit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 7TH DAY OF FEBRUARY 2024.

.....

F. WANGARI

JUDGE

In the presence of: -

M/S Layoo Advocate h/b for Kariuki Advocate for the Respondent

N/A by the Appellant

Court Assistant - Barile

