Ng'ang'a v Njabani (Civil Appeal E029 of 2021)
[2024] KEHC 2290 (KLR) (6 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2290 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT CHUKA

CIVIL APPEAL E029 OF 2021

LW GITARI, J

MARCH 6, 2024

BETWEEN

PETER MUUGI NG'ANG'A ..... APPELLANT

AND

NIFA MUKWANJAGI NJABANI ..... RESPONDENT

JUDGMENT

1. This is an appeal against the judgment delivered on 11th November, 2021 in Chuka SRMC Civil Case No. 122 of 2016. In the said case, the Respondent herein instituted a suit against the Appellant claiming the payment of Kshs. 541,500/= and costs of the suit.

2. The Respondent alleged that on 9th June, 2015, she entered into a loan agreement with the Appellant in which she agreed to loan the Appellant a total sum of Kshs. 540,000/=. That on 3rd March, 2016, the Respondent through his advocate sought the recovery of the aforesaid sum from the Appellant vide a demand letter. That despite demand, the Appellant failed to repay the loaned sum. Consequently, the Respondent instituted the case against the Appellant before the trial court. The Appellant denied the claim. He denied the validity of the loan agreement and receipt of the alleged sums and put the Respondent to strict proof thereof.

3. In the impugned judgment, the learned trial magistrate found that the Respondent herein had proved her case on a balance of probabilities as against the Appellant and that the loan agreement produced before the court was a valid agreement between the parties. The trial court thus entered judgment in favour of the Respondent in the sum of Kshs. 540,000/= and also awarded her the costs and interests of the suit.

4. The Appellant, being dissatisfied with the said decision, appealed against the whole of the decision based on the following grounds:

a. The Learned Senior Magistrate erred in law and fact and seriously misdirected herself when she failed to appreciate that the Appellant was not a party of loan agreement and very wrongly shifted the burden of proof to the Appellant.

b. The Learned Senior Magistrate erred in law and fact and seriously misdirected herself when she failed to appreciate and consider the evidence of the Appellant and instead entirely relied on Respondent's evidence and submission which was weak and unacceptable of sustaining any standard of evidence thereby arrived at a slanted conclusion contrary and in contravention of the evidence on record.

c. The Learned Senior Magistrate erred in law and fact and seriously misdirected herself when she failed to abide by case law and to record reasons for her findings; further erroneously misdirected herself into extraneous matters.

d. The Learned Senior Magistrate erred in law and fact and seriously misdirected herself when she failed to appreciate that in the circumstances of any case, are vital witnesses who evidence is likely to shed more light in a case; and more importantly in this case; to improve the existence of loan agreement in which the Respondent never availed witnesses.

e. The Learned Senior Magistrate erred in law and fact and seriously misdirected herself in finding and holding that the Respondent proved her case on a balance of probabilities, and failed to appreciate, consider and/or address, capture the circumstances which were alleged on alleged loan agreement, same failed to render herself fully, on all aspect of the case; evaluate the entire evidence on record thereby abandoned her judicial mandate and/or responsibility, albeit without any lawful cause and/or basis and consequently, the judgment and resultant decree of the learned trial magistrates, is not only inconclusively erroneous, but same is omnibus and has therefore occasioned a miscarriage of justice, further the learned magistrate contravenes the mandatory provision of Order 21 Rule 4 of the *Civil Procedure Code*; and therefore, the judgment/ruling of the learned trial magistrate is a nullity ab initio and a mockery of the due process of the law and hence ought to be set aside.

5. The appeal is opposed by the Respondent and the same was canvassed by way of written submissions.

The Submissions

6. It was the Appellant's submission that the evidence adduced by the Respondent was not sufficient to the required standard of balance of probability. That the trial court erred by failing to find that the Appellant was not a party to the loan agreement and by shifting the burden of proof to the Appellant. The Appellant thus prayed that for this court to find that the present appeal is meritourious by setting aside the impugned judgment with costs including costs of the lower court.

7. On the part of the Respondent, it was put forward on the onset of her submissions that whereas the Appellant raised five (5) grounds of appeal in his Memorandum of Appeal, he appeared to have raised and addressed new grounds of appeal in his submissions that were totally different from what he had filed in his Memorandum of Appeal. That said, the Respondent indicated that they would only address and limit their submissions to the five grounds of appeal raised in the Memorandum of Appeal.

8. It was thus the submission of the Respondent that the learned magistrate was within her judicial discretion to find that the Appellant cannot offer the defence of mere denial and allude unsubstantiated claim of fraud in order to evade honoring his obligation as per the terms of the loan agreement. That the Appellant is stopped from running away from his contractual obligations by relying on the defense of fraud or forgery since the same was not specifically pleaded and proved.

9. Further, it was the submission of the Respondent that by alleging that all the documents were forged and fraudulent, the Appellant shifted the burden of proof upon him but could not prove his allegations. That as such, the learned magistrate was within her judicial discretion to find that based on the evidence and the testimonies submitted before the court, the Respondent has proved her case beyond reasonable doubt. The Respondent thus urged this court to find that the appeal lacks merit and dismiss the same.

Issue for Determination

10. I have considered the grounds of appeal raised by the Appellant, the record of appeal, and the submissions by the parties with regard to the present appeal. In my view, the main issue that arises for determination by this Court is whether the Respondent's claim against the Appellant was proved on a balance of probabilities.

Analysis

11. This is a first appeal. I am minded of the primary role of an appellate court which is to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of *Peters v Sunday Post Limited* (1958) EA 424 wherein the court held that on a first appeal, the court is entitled to review the evidence before the trial court as follows:

> " Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial court should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decided. Watt v Thomas, (1947) 1 ALL ER 582; [1947] A.C. 484, applied."
>
> See also: *Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited* [2016], eKLR, *Williamson Diamonds Ltd. v Brown* [1970] E.A.L.R. and the oft-cited *Selle & Anor. v Automobile Associated Motor Boat Company Ltd.* [1968] EA 123.

12. During trial, the Respondent and the Appellant testified as the only witnesses in proof of their respective cases. The Respondent adopted her statement dated 9th September, 2016 as his evidence in chief and reiterated that he entered into an agreement with the Appellant on 9th June, 2015 in which the Appellant borrowed Kshs. 540,000/= from the Respondent to boost his business. In her statement, the Respondent stated that she is a business lady within old Marima market operating a bar and restaurant known as All Members. That the defendant is was well known to her for over five years as he was a distributor who used to supply her with alcohol for her business.

13. On her part, the Respondent testified that the Appellant acknowledged receipt of the said sum of Kshs. 540,000/= and that they both signed the agreement in the office of an advocate and that one Faith Wanja was the attesting witness. The Respondent testified that the Appellant has never refunded him the said sum and that he even stopped taking the Respondent's calls necessitating the institution of the case against him for the refund of the loaned sum plus interest. The Respondent produced copies of the aforementioned loan agreement and the demand letter as P. Exhibits 1 and 2 respectively.

14. On cross-examination, the Respondent stated that he did not take motor vehicle probox KBR 489H as security or receive any documents in respect of the said vehicle. That the agreement was signed before

an advocate. The Respondent denied the allegation that he was defrauding the Appellant stating that the Appellant is the one who came with Faith Wanja as a witness to the agreement.

15. For the defence case, the Appellant testified that he knew the Respondent. He denied that the Respondent gave him money stating that all the documents produced by the Respondent are forged. He stated that the signature in the produced agreement was not his signature. Further, that he neither knew the advocate who drew the agreement in question nor has he ever been to his office. According to the Appellant, the Respondent only loaned him Kshs. 54,000/= which he repaid through Mpesa.

16. On cross examination, the Appellant acknowledged that the motor vehicle registration no. KBR 489H which was indicated to be the security in the subject loan agreement belonged to him. He stated that he disposed it in 2019. He further stated that he has never sold alcohol to the Respondent directly.

17. Before delving into merits of this appeal, I find it prudent to deal with the preliminary issue raised by the Respondent in her submissions namely, that the Appellant has raised and addressed new grounds of appeal that are totally different from what he filed in his Memorandum of Appeal. I have carefully read the submissions of the Appellant bearing in mind the grounds of appeal contained in the Appellant's Memorandum of Appeal filed on 29th December, 2022. It is clear that the Appellant has in fact introduced new grounds of appeal in his submissions without seeking the leave of the court to amend his Memorandum of Appeal. Addressing the new issues raised by the Appellant in his submission will evidently be prejudicial to the Respondent as the Respondent has not addressed the same in her submissions. Order 42 Rule 4 Civil Procedure Rules provides:

> "The appellant shall not, except with leave of the court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the High Court in deciding the appeal shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the court under this rule:
>
> Provided that the High Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground."
>
> The appellant could not be permitted to go outside what is pleaded in the four corners of the Memorandum of Appeal without leave of the Court.
>
> In the circumstance, it is only just to limit this judgment to the issues that arise from the five (5) grounds of appeal contained in the Memorandum of Appeal filed on 29th December, 2022.

18. Moving to the merits of the appeal, the entire case leading to the impugned judgment rotated upon the validity of the loan agreement dated 29th June, 2015. It is trite that he who alleges must prove. This is stems from the provisions of Section 107 of the *Evidence Act* (Cap 80 of the Laws of Kenya) which provides that:

> "(1) 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.
>
> (2) When a person is bound to prove existence of any fact it is said that the burden of proof lies on that person."

19. Under Section 109 of the *Evidence Act*, it is provided that:

> " The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person."

20. The evidential burden of proof of admissibility is provided for under Section 110 of the *Evidence Act* which provides as follows:

> " The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence."
>
> These provisions lay down the burden and standard of proof in the civil cases. That is the legal as well as evidential burden of proof in civil cases. The legal basis for the issue of legal burden of proof is provided under Section 107 of the *Evidence Act*. The section lays the burden on the person who asserts or alleges the existence of facts which forms this claim. It is a burden on the party who would lose if the burden is not discharged. This burden was on the respondent who alleged that he had advanced a friendly loan to the appellant and which was reduced in writing. He had the burden to adduce credible and cogent evidence to prove this fact to the satisfaction of the court. This burden remains on the party who alleges and it never shifts.

21. The second limb of the burden of proof is the evidential burden. The party who bears the legal burden of proof adduces evidence to proof certain allegations in his claim. If the party fails to adduce sufficient evidence to the required standard, allegations must fail. If on the other hand sufficient evidence is adduced the other party bears the burden to adduce evidence to rebut the allegations. The evidential burden shifts to the opposing party. Thus the legal burden remains on the party who alleges but evidential burden shifts depending on the evidence adduced.

In *Raila Amolo Ondinga & Another v IEBC & 2 Others* (2017) eKLR, Supreme Court, while dealing with the issue of legal and evidential burden of proof stated as follows:-

> " Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and "remains constant throughout a trial with the plaintiff however, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence was introduced.
>
> It follows that once the court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidential burden shifts to the respondent..... To adduce evidence rebutting that assertion....." See paragraph 132 & 133.
>
> What this analysis determines is that the legal burden of proof in all cases is always static and never shifts. However evidential burden of proof may shift to the defendant depending on the evidence laid down before the court by the plaintiff. Burden of proof is defined as – "the degree or level of proof demanded in a specific case in order for a party to succeed." See *Black's Law Dictionary* (9th Edition 2009).
>
> When it comes to civil cases, the burden of proof is on a balance of probabilities unlike in criminal cases it is beyond any reasonable doubts.

22. Applying the above provisions, it follows that before the trial court, the Respondent herein had the burden to lay the basis for her claim by proving on a balance of probabilities that she had advanced a loan to the Appellant and that the Appellant had fails and/or refused to repay the loan.

In his statement of defence the appellant denied that he had requested the respondent to advance her a loan of Ksh.540,000/- and termed the allegation as outrageous and unfounded. Thus he generally denied the allegations and put the respondent to strictly proof the allegations denied that the respondent had advanced her money. That all documents are forged, the signature on the agreement is not his and does not know the advocate. That the respondent only gave him Ksh.54,000/- which he paid through Mpesa. The trial magistrate in rejecting the defence stated that the respondent did not produce the Mpesa statement to prove his allegation. The respondent produced the agreement which was executed by the parties, and witnessed by name Edith Wanja in the presence of an advocate P.M. Mutani. On being cross-examined the appellant admitted that the name and ID number on the agreement are his. In *Lole v Butcher* (1949) All E.R 1107 Lord Dening stated as follows while considering the factors which may render a contract invalid, stated-

> " Once a contract has been mad, that is to say once parties, whatever their innermost state of mind have to all outward appearances agreed with sufficiently contains in the same terms on the same subject matter, then the contract is good unless and until it is set aside for breach of some conditions or implied in it or for fraud or on some equitable ground....."
>
> Thus for a court to reject the evidence based on a contract signed by the parties the party must prove the existence of vitiating factors like mistake misrepresentation coercion and or undue influence.
>
> In this case, the appellant alleged that his signature was forged. The respondent adduced evidence that the appellant signed the agreement. The onus of proof shifted on the appellant to proof that his purported signature on the agreement which was produced by the respondent was forged. In the case cited by the respondent Elizabeth Kamene Ndolo –v- George Matata Ndolo (1996) eKLR it was stated that where a party alleges forgery and fraud, the burden of proof is higher and must be discharged and is not enough to infer fraud. It was not enough to allege fraud and forgery. It must be specifically pleaded and proved. The respondent testified that he knew the appellant and had dealt with him in the cause of doing business. The appellant admitted that he was known to the respondent and that he (appellant was a businessman.) The respondent testified that the appellant had made promises to pay but failed to do so. I find that based on the testimony of the respondent, and the documentary exhibit, that is the agreement there was prima facie evidence that the respondent advanced money to the appellant. The appellant did not adduce evidence to rebut the contention that he signed the said agreement or that his signature was forged. Despite this the appellant has raised various grounds which I will now proceed to consider.

23. I will start by addressing the ground of appeal arguing that Respondent failed to call vital witnesses in support of her case. It is a fact that the Respondent testified as the sole witness in proof of her case and did not call any other witness. According to the Appellant, the Respondent ought to have called one P. M. Mutani, the advocate in whose presence the impugned loan agreement was signed by the parties as well as Faith Wanja who was the witness of the agreement. The law is trite that no particular number of witnesses shall be required for the proof of any fact.

Section 143 of the *Evidence Act* provides:-

> "No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

In this case, the trial magistrate held that the loan agreement dated 29/6/2015 was valid and enforceable. She had the opportunity to see the respondent and was satisfied that she proved her case on a balance of probabilities. In *Mkube v Nyamuro* (1983) eKLR Kneller & Hancox Ag JJA, (cited by the respondent) it was stated;

> "A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence or on a mis-apprehension of the evidence, or a Judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."

24. In my view, a party has the discretion to call the number of witnesses they wish and produced their evidence in support of the issues which they are bound to prove. The number of witnesses called by a party is not relevant. What matters is whether a fact that ought to be proved has been proved by the adduced evidence, whether the evidence is documentary evidence or testimonial evidence. In this case, the Respondent had the burden of proving that there was a valid loan agreement entered into between herself and the Appellant; that the Appellant received the loan amount claimed but refused to pay it upon demand. The respondent discharged the burden of proof with the evidence tendered and the failure to call the said witnesses was not fatal to her case.

25. `I now turn to grounds of appeal no. 1, 2, 3, and 5 which collectively fault the trial court for finding that the Respondent had proved her case against the Appellant to the required standard. In her submissions before the trial court, the Respondent submitted that she had proved her case on a balance of probabilities stating that she had produced the loan agreement and demand letter as evidence. She further submitted that she had produced a bank statement as P.Exhibit 3 showing proof of withdrawal of the amount of money advanced to the Appellant herein. The Respondent further submitted that the Appellant was in breach of the loan agreement for failing to repay the loan on the dates stipulated in the agreement. This submission was extraneous as it was not borne out by the record of proceedings before the trial court.

26. I have carefully perused the record of proceedings before the trial court. There is no such bank statement that was produced before the learned magistrate. In any event, a bank statement evidencing that money was withdrawn is not proof that the money was subsequently given to the Appellant. The trial magistrate ignored the submission and rightly relied on the evidence.

27. On the issue of fraud raised by the Appellant, it is notable that indeed the Appellant in his defence gave blanket denial of all the averments raised by the Respondent. He however stated at trial that the loan agreement produced in evidence was a fraud and forgery and further, that the Respondent had only loaned him Kshs. 54,000/= which he had repaid.

28. I agree with the submission of the Respondent that once the Appellant raised the defense of fraud and forgery, the burden of proof shifted to him as he who alleges must prove. The Appellant, however, did not substantiate this claim with evidence. In addition, the claim of fraud was not specifically and particularly pleaded in the Respondent's statement of defence. Furthermore the appellant did not attempt to adduce any evidence as to why the respondent would wake up one morning and decide to claim a huge sum of money from him without any basis. This is not normal and in my view the mere denial is insufficient to rebut the respondent's case.

29. Finally, I do not agree with the Appellant's submission that the trial magistrate labored to consider extraneous matters in her judgment by considering whether the Respondent was entitled to double the principal amount for breach of the loan agreement. The law is very clear that parties are bound by their pleadings. While there was a clause in the impugned loan agreement to the effect that a breach of the agreement would attract a remedy of double the principal amount, the same was not pleaded by the Respondent. The trial court was enjoined to consider that clause as it was in the agreement produced as exhibit -1. The record shows that the respondent voluntarily abandoned that claim and it was in her discretion to do so.

    Having considered the evidence adduced before the trial court, I find that the respondent discharged the burden to proof her claim on a balance of probabilities. The appellant's defence was a mere denial which was insufficient to rebut the respondent's case.

30. I have considered the submissions by the appellant on the proceedings. The proceedings of 2/6/2021 do not support that the suit was dismissed. Cause was shown why the suit should not be dismissed for want of prosecution. On the other hand on 16/9/2021 the matter was listed for hearing. The appellant was served with a hearing notice and hence his appearance in court. The learned trial magistrate exercised discretion and ordered the matter to proceed. The appellant proceeded. No prejudice was suffered. The authorities cited by the appellant are therefore not relevant. Article 50(1) of *the Constitution* was complied with.

Conclusion:

For the reasons stated in this Judgment, I find that the appeal lacks merits. I order that :-

1. This appeal is dismissed with costs.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 6TH DAY OF MARCH, 2024.

L.W. GITARI

JUDGE