



Muriithi v Wakaba t/a Tim-Trade Converters Limited (Civil Appeal E075 of 2022) [2024] KEHC 5748 (KLR) (9 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5748 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL E075 OF 2022**

DKN MAGARE, J

MAY 9, 2024

BETWEEN

JOSEPH WAMBUGU MURIITHI APPELLANT

AND

JOHN WAKABA T/A TIM-TRADE CONVERTERS LIMITED RESPONDENT

JUDGMENT

1. This is an appeal from Hon. E Angima SRM given on 5/12/2022 in Nyeri CMCC E316 of 2021. The Appellant was the Plaintiff in the lower court. It was a simple case of money had and received which metamorphosed into a life of its own.
2. The Appellant filed 4 grounds of Appeal as doth: -
 - a. The learned trial magistrate erred in law and in fact in finding the appellant's case as premature.
 - b. The learned magistrate erred in failing to find that there was a failure to mitigate on the part of the respondent
 - c. The learned trial magistrate erred in fact and in law in failing to play the principles of contract applicable to the matter before the court.
 - d. The learned trial magistrate erred in wholly apprehending the suit before the court hence arrived at the wrong conclusion.

Duty of the first Appellate court

3. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.



4. In the case of *Mbogo and Another v Shah* [1968] EA 93 where the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
5. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of *Selle and another v Associated Motor Board Company and Others* [1968] EA 123, where the law looks in their usual gusto, held by as follows; -

“.. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”
6. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.
7. In the case of *Peters v Sunday Post Limited* [1958] EA 424, court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”
8. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in *Pandya v Republic* [1957] EA 336 is as follows: -

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”
9. The foregoing statement had been ably elucidated by Sir Kenneth O’Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Council, that is, *Nance vs British*



Columbia Electric Co Ltd, in the decision of *Henry Hilanga v Manyoka* 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages: -

“The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance...”

10. For the appellate court, to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure.

Pleadings and Evidence

11. Vide a plaint dated 10/9/21 the Appellant sought for a sum of Kshs 190,000/= being money paid in the year 2018 for supply of firewood valued Kshs 190,000/=.
12. In his evidence the appellant stated that they agreed that the Respondent was to supply firewood worthy Kshs 190,000/=. The said amount was acknowledged on 11/3/2020. The said money was due and owing as money had and received. The acknowledgment was made on 11/3/2020 by John Wakaba. He indicated, rather erroneously that he was trading as Tim Trade Co. Ltd.
13. Faced with this case, the Respondent initially stated that there was an agreement and later Amended the defence to state that there was no agreement, he stated that the said money was paid on behalf of the plaintiff by Tim Trade converters Ltd to Kenya Forest Service.
14. Some of the facts which had earlier been admitted were changed after amendment. The change was to the effect that some of the facts were partially admitted. What a partial admission means is unknown.
15. How partial the admission, no one can tell. The description that is in paragraph 2 of the defence is that the Defendant is a male adult of sound mind. Of course no effort was made to produce any evidence to show that the trade names is actually a limited liability company. Upon admission it was clear on the fact that the dispute was between two adult males. Indeed, the acknowledge was in “my office”.
16. Parties testified in support of their claims. The Defence produced a document showing that there was a moratorium in government forests. The relevance of the moratorium was not explained in the pleadings. There was an attempt to explain non delivery though the moratorium but none to explain lack of a refund.
17. The parties made cannon fodder of the said fact. I shall not fall into the trap. Order 2 Rule 4 posits as doth: -

“(1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—

- a. which he alleges makes any claim or defence of the opposite party not maintainable;
- b. which, if not specifically pleaded, might take the opposite party by surprise; or which raises issues of fact not arising out of the preceding pleading.”

18. The defendant did not set forth any defence related to the money. The defence related to the failure to delivered firewood. It may be true that the forests closed. It does not means, that central bank of



Kenya was equally closed for purpose of tender of legal tender. The excuse for failure to deliver is wholly understandable. The Defendant could easily have obtained an alternative source of firewood or informed of their inability to carry out part of their bargain.

19. However, failure to refund is not. The allegations that the money was paid on behalf of the plaintiff to Kenya Forest Service is a serious one. It is however, in the special knowledge of the Defendant. Under section 112 of the *Evidence Act*, the burden of such special knowledge is on the party with special knowledge. This was the defendant. Failure to produce such Evidence a negative inference ought to be made. In the case of *Nesco Services Limited v CM Construction [EA] Limited* [2021] eKLR, justice G V Odunga as then he was stated as doth:

“In my view, the fact that the document in question was authored by the Appellant’s agent and was produced by consent of the parties themselves entitled the learned trial magistrate to rely on it. The Court of Appeal in *Ephantus Mwangi and Another v Duncan Mwangi* Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278 had this to say on the issue:

“Where documents are put in by consent, as for example an agreed bundle of correspondence, the usual agreement is that they are admitted to be what they purport to be (so as to save the necessity for formal proof of each document).”

41. Since the said author was for reasons unknown to the Court not called to testify and dispute its authenticity, adverse inference could be made thereon. In *Kenya Akiba Micro Financing Limited v Ezekiel Chebii & 14 others* [2012] eKLR the court stated as follows:

“Section 112 of the *Evidence Act* Chapter 80 of the laws of Kenya provides:

‘In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.’

Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of *Kimotho v KCB* [2003] 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession.”

20. Further, the court erroneously equated the closure of government forest to failure to supply firewood. The source of firewood is the business of the Respondent. If he was unable to get material, he needed to refund. The only defence for a claim of money had and received, is the evidence of refund or specific performance. In The case of *Ragbir Singh Chatte v National Bank of Kenya Limited* [1996] eKLR, where the court of Appeal stated as doth: -

“The main object of this rule and r.14 is to bring the parties by their pleadings to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing (per Jessel M. R. in *Thorp v Holdworth* [1876] 3 Ch. D. 637). This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him. Thus, in an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible”, (underling supplied).



I will also add that the crucial deficiency of a general denial which I have already described, also applies to the evasive, inconsistent and contradictory alternative general traverse in the appellant's defence. This was that if the respondent had extended any overdraft facilities without stating the amount involved, to the appellant which was moreover, denied, then the same and here again, without stating how and when, had been paid. Such a spurious pleading in the alternative cannot give any merit to the defence ...”

21. Thus the court was plainly wrong in holding that the case was pre mature. How mature should a case be. The rule of the thumb is you supply or refund. Neither was done.
22. There has to a cogent explanation for failure of either. He cannot have the money and the produce. Consequently, I find that the court fell into a deep error, by dismissing the Appellant's case as premature.
23. Consequently, I set aside the order dismissing the suit and in lieu thereof I enter judgment for Kshs 190,000/= costs of the lower court with interest from 28/9/2021, the date of filing.
24. The appellant shall have cost of 55,000/= for this Appeal. This is informed by The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -
 - “(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.
25. The event in this case is dismissal of the suit. The Appellant is entitled to costs

Determination

26. The upshot of the foregoing I make the following orders: -
 - a. The Appeal is merited.
 - b. Accordingly, I allow the Appeal, set aside the judgment and decree given in Nyeri CMCC E316 of 2021 by the Hon. E. Angima SRM on 5/12/2022. In lieu thereof, I enter Judgment for Kshs 190,000/= in favour of the Appellant against the respondent John Wakaba, with interest from 27/9/2021, the date of filing.
 - c. The Appellant to have courts in the court below.
 - d. The Appellant to have costs of 55,000/= for the Appeal.



- e. Stay 30 days.
- f. In default execution do issue.
- g. This judgment be served on the Honourable E. Angina, SRM
- h. This file is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 9TH DAY OF MAY, 2024.

RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

M/s & Kiingati advocates for the Appellant

M/s Goko Gichuhi & Company Advocates for the Respondent

Court Assistant-Brian/Winnie

