**Watene v Super Molders Limited (Civil Appeal E700 of 2022)**
**[2024] KEHC 5418 (KLR) (Civ) (6 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5418 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E700 OF 2022**

**WM MUSYOKA, J**

**MAY 6, 2024**

**BETWEEN**

**ANNE NJERI WATENE ..... APPELLANT**

**AND**

**SUPER MOLDERS LIMITED ..... RESPONDENT**

***(Appeal from judgement and decree of Hon. VA Mochache, Resident Magistrate, RM, in Milimani SCCCC No. E499 of 2022, of 5th August 2022)***

## JUDGMENT

1. The appellant had been sued by the respondent, at the primary court, for orders for replacement of a ruptured tank with a new one, Kshs. 5,000.00 being the value of "lost" water, Kshs. 20,000.00 for rebuilding a destroyed pit latrine, and costs. The respondent was allegedly the supplier of the tank that ruptured, as it had faults, the consequence of which a pit latrine was destroyed. The respondent allegedly pledged to replace the destroyed tank with another, but that promise was never honoured. The respondent filed a reply, denying everything pleaded in the statement of claim, and putting the appellant into strict proof.

2. A trial was conducted. 2 witnesses testified for the appellant, and none testified for the respondent. Judgement was delivered on 5th August 2022. The claim was dismissed, on grounds that the appellant had failed to prove her case to the required standard.

3. The appellant was aggrieved, hence the instant appeal. The appellant faults the trial court on several grounds: for holding that the case had not been proved to the required standard; relying on unpleaded material, and ignoring that the respondent had accepted liability; ignoring that the ruptured tank had destroyed other property within her compound; ignoring that the respondent had lied to the court that

the appellant was not its customer; and ignoring that the case by the appellant was uncontroverted, for the respondent did not call witnesses. The appellant asks that the award on general damages be set aside.

4. On 20th February 2024, directions were given, for canvassing of the appeal by way of written submissions. Both sides filed their respective written submissions.

5. The appellant submits that although the respondent had denied the claim, in its reply, in the written submissions it had conceded to the claim, and sought to justify itself. The Independent Electoral and Boundaries Commission case, whose citation or case number is not disclosed, is cited, for the proposition that parties are bound by their pleadings. *David Sironga Ole Tukai v Francis Arap Muge & 2 others* [2014] eKLR (GBM Kariuki, M'Inoti & Mohammed, JJA) and *Kenya Commercial Bank Ltd v Mwa Nzau Mbaluka & anor* Civil Appeal No 274 of 1997 (unreported), with respect to the court basing its decision on the pleadings, and on the evidence adduced to support the averments in the pleadings. It is further submitted that the trial court did not take into account the fact that the respondent did not appear in court to prosecute its defence, its defence statement was never adopted, and the defence was closed without witnesses being called, which, according to the appellant, meant that her case was unchallenged, she should have been allowed to have her way, by her case being allowed as prayed. Sections 107(1) and 109 of the *Evidence Act*, Cap 80, Laws of Kenya, and *Kenneth Nyaga Mwige v Austin Kiguta* [2015] eKLR (Visram, Mwilu, & Otieno-Odek, JJA), *Janet Kaphiphe Ouma & another v Marie Stopes International (Kenya)* Kisumu HCCC No. 68 of 2007 (Ali-Aroni, J), *Karuru Munyororo v Joseph Ndumia Murage & another Nyeri* HCCC No. 95 of 1988 (Makhandia, J), *Interchemie EA Limited v Nakuru Veterinary Centre Limited* Nairobi (Milimani) HCCC No. 165B of 2000 (Mbaluto, J), *Drappery Empire v Attorney-General* Nairobi HCCC No. 2666 of 1996 (Rawal, J) are cited in support of that contention.

6. There is really only one issue for determination, burden of proof. Where did it lie? What did it entail?

7. In civil matters the burden of proof is on a balance of probability, or on a preponderance of evidence. Although there is a burden on both sides, the claimant and the respondent, to adduce evidence to support their respective stances, the burden would require the party who initiated the claim, to prove their case to the standard of balance of probability or preponderance of the evidence, and the burden would only swing, or shift, to the defending side, upon that balance being attained or achieved. Where the claimant fails to adduce adequate evidence, on a balance of probability or preponderance of evidence, to require the defence to lead counter-evidence, the case by the claimant would be lost. A case by the claimant is still capable of being lost, for failure of adequate proof, where no defence has been filed at all, or where the case is wholly undefended.

8. There is nothing like the claimant being entitled, automatically, to the orders that they seek in their claim, merely because no defence or reply is filed, or no evidence is adduced at the trial to support any defence or reply filed. The burden of proving a case exists even in those situations. It does not entitle the claimant to a walkover, to grant of the orders sought in the claim, even in the absence of evidence adduced adequate to support the allegations made in the claim. The obligation to adduce evidence to prove the case remains on the claimant. The claim stands to be dismissed where no evidence is adduced to prove it, or the evidence adduced falls short of establishing the claim. The burden of proof on the claimant does not accrue only after a defence or reply has been filed. The burden of proving the claim is not provoked by the filing of a defence or reply, so that where none is filed, the claimant would be entitled to a judgement, without having to adduce any evidence. It exists even without the defence or reply. It would be against public policy to allow claims merely because no defences or replies are filed, for that would encourage entertainment of useless claims being allowed merely because no response is filed. Such an approach would encourage speculative litigation, and unjust enrichment.

9. So, did the appellant herein have a case that warranted orders being granted in her favour? The appellant sought 3 orders from the trial court: replacement of the ruptured tank with a new tank; Kshs. 5,000.00, being the value of the "lost water;" and Kshs. 25,000.00, being the cost for the destroyed pit latrine.

10. The evidence that was required to prove entitlement to a replacement of the ruptured tank with a new one should have turned on the nature of the contract that the 2 parties had between them. The critical question should have been whether there was a term in that contract that provided for such replacement. The law that governed the transaction must have been the *Sale of Goods Act*, Cap 31, Laws of Kenya. I have perused the trial court record, and noted that the appellant did not attempt to anchor her case on the provisions of the *Sale of Goods Act*. I note that the trial court was alive to the nature of the contract between the parties, and particularly that it was a sale of goods one, which was governed by the *Sale of Goods Act*. The trial court properly identified section 8 thereof, as the applicable provision, for a replacement of the goods, the subject of the sale, can only be on the basis of a term in the contract. That term would be in the nature of a warranty, and the appellant did not establish that there was any such warranty in the alleged contract.

11. Secondly, I have very closely perused the trial record, and I have not come across any documentary evidence that links the respondent to the alleged transaction. The appellant allegedly transacted with an individual, who she named as Mwororo, but she led no documentary evidence that connected that individual to the respondent. No documentary evidence was placed on record to indicate that the individual was an agent of the respondent, and that he, expressly or by implication or conduct, bound the respondent. The appellant did not produce any sales receipt nor an invoice from the respondent. What was placed on record was a blurred or unclear copy of an alleged delivery note. There is no original copy of that delivery note in the record before me. One cannot tell, from it, who the parties to that delivery were, and what was being delivered. I have seen a copy of a bank statement, in the record of appeal, to evidence a payment to the respondent by the appellant, as proof of the alleged transaction. I have not seen a copy of that bank statement in the original trial record, and an original copy of that bank statement was not produced at the trial. The authenticity of it should, therefore, be doubted. So, there was inadequate proof, that the contract relating to the ruptured tank, was entered between the respondent and the appellant, or even between the appellant and the individual that she named.

12. Thirdly, even if there was a transaction or contract between the appellant and the respondent, and that there was a valid warranty, and I reiterate that I have not seen any evidence of either such transaction or contract and warranty, the appellant still had an obligation to prove that that rupture of the tank was caused by a manufacturer's defect. No evidence of that nature was tendered. A manufacturer's defect is a matter of science, and no scientific report was placed on record, from experts in the field, as testimony that they had examined or tested the ruptured tank, and established that the alleged rupture was caused by defects during the process of its manufacture. Such manufacturer's defect cannot be proved by mere oral testimony. It was the appellant who alleged such a manufacturer's defect, and the burden was upon her to prove that such a defect existed. That burden, of proving that the damage was occasioned by a manufacturer's defect, was on the appellant, and it would have shifted to the respondent only upon some evidence in that behalf being tendered.

13. On the claim for Kshs. 5,000.00, for the loss of the water that had been held in that destroyed tank prior to the rupture, again, no concrete evidence was adduced, to demonstrate that that was the loss that the appellant actually suffered, after the water it held escaped. No basis was laid on how the appellant calculated or ascertained that alleged loss. The trial court was not expected to grant the award merely because it was not resisted, the burden remained on the appellant, to demonstrate how she arrived at

that unit of loss. A figure cannot just be plucked from the air, the figure placed before the court must be justified and explained.

14. A similar argument lies with regard to the claim for Kshs. 25,000.00, for the pit latrine that was allegedly damaged by the escaping water. Just how did the appellant come to the value or figure of Kshs. 25,000.00? No valuation report was placed on record of the value of that pit latrine before it was damaged, or of the damage caused to it by the water, or even of the cost that she had incurred in the construction of the alleged pit latrine. The court could not award the sum claimed, merely on the basis of the oral testimony of the appellant.

15. The appellant cited the provisions of the *Evidence Act*, and a number of decisions based on them. I agree with the positions stated in those decisions. The burden of proof always falls on he who alleges. The first allegations came from the appellant, that she was entitled to a new tank, and to Kshs. 5,000.00 and Kshs. 25,000.00. The burden was on her, to prove her entitlement to what she claimed. As indicated above, the reply by the respondent was primarily a denial of the allegations. The burden remained on the appellant, to establish her claims, by preponderance of evidence, or to a level which would have required the respondent to present counter-evidence. No concrete evidence, other than oral testimonies, was presented to support the allegations, and, therefore, the burden of proof did not shift to the respondent. It did not matter that the respondent did not lead or adduce any evidence, it was not obliged to, for no plausible case had been presented against it.

16. On the whole, I am not persuaded that the trial court was in error, in the manner it handled the trial, analysed the evidence tendered and the conclusions it came to. In the end, I find no merit in the appeal herein, and I shall dismiss it, as I hereby do. The respondent shall have the costs. Orders accordingly.

**DELIVERED BY EMAIL, AND DATED AND SIGNED, AT BUSIA, THIS 6TH DAY OF MAY 2024.**

**W MUSYOKA**

**JUDGE**

Ms. Veronica, Court Assistant, Milimani.

Mr. Arthur Etyang, Court Assistant, Busia.

Ms. Anne Njeri Watene, the appellant, in person.

Advocates

Mr. Muthama, instructed by Robert Muthama & Company, Advocates for the respondent.