Ongaga v Ntabo t/a Eric Ntabo & Co Advocates (Civil Appeal E032 of 2022) [2024] KEHC 8212 (KLR) (20 June 2024) (Judgment)

Neutral citation: [2024] KEHC 8212 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E032 OF 2022

JM CHIGITI, J

JUNE 20, 2024

BETWEEN

GEORGE AGWATA ONGAGA ..... APPELLANT

AND

PRIC NTABO T/A ERIC NTABO & CO ADVOCATES ..... RESPONDENT

JUDGMENT

1. The Appellant and Respondent were close friends who decided to mobilize resources to execute the contract with a view to benefit from the transaction.

2. The Respondent contributed Kshs. 900,000/= (Nine Hundred Thousand) whereas the Appellant contributed Kshs. 300,000/= (Three Hundred thousand).

3. The County government delayed the payments leading to litigation. The Appellant made part payments of:

   Kshs. 100,000/= (One hundred thousand) Acknowledged earlier

   Kshs. 50,000/= (Fifty thousand)

   Kshs. 400,000/= (Four Hundred thousand)

   The net effect is that by December 2021 the Appellant had refunded the Respondent over Kshs. 550,000/=.

4. The Appellant believes that the trial court was wrong and that it misdirected itself when it awarded the Respondent Kshs. 800,000/= knowing very well that the Appellant had already repaid Kshs. 550,000/= (Five Hundred and fifty thousand). This erroneous award had implications on the interest and costs.

5. The Respondent thereafter proceeded and attached Motor Vehicle Registration Number KBM 9xxx Toyota worth more than Kshs. 850,000/= (Eight hundred and fifty thousand) and sold it at Kshs.

487,000/= (Four Hundred and Eighty-seven thousand) but never gave a statement of account about the sale of this vehicle but Appellant had in reality paid Kshs. 1,037,000/= (One million, and thirty-seven thousand.)

6. It is the Appellant's case that the trial court showed open bias by awarding the Respondent costs of Kshs. 8,100/=. The allegation that the Respondent paid the Plaintiff Kshs. 300,000/= on 14/03/2017 which amount was given to Joshua Nyandieka who was never called as a witness and enjoined a Co Defendant is wrong since the Respondent never demonstrated the nexus between Joshua Nyandieka and the Appellant.

7. Section 107 of the *Evidence Act* is very clear that he who alleges has to prove those facts exist. No evidence was placed before court to show that there was a nexus between the Appellant and Joshua Nyandieka.

8. The Appellant objected to the production agreement allegedly dated 26/4/2020 which was obtained through duress and intimidation.

9. The trial court erred by admitting the said agreement which was an understanding on a without prejudice basis aimed at the release the Voxy car which had been attached by the Respondent.

10. Being dissatisfied with the judgment, the appellant filed a Memorandum of Appeal raising the grounds that:

    1. The subordinate court misapprehended the facts and made the wrong conclusion.

    2. The trial court misdirected itself on the issue of special damages.

    3. The court erred in Law and fact by failing to appreciate that on 21st December 2021, the Defendants paid the Plaintiff Kshs. 400,000/=

    4. The court erred in Law and fact by failing to appreciate that on 13th September 2021 Kshs: 50,000/

    5. The Subordinate court erred by failing to appreciate that a substantial amount had been paid.

    6. The Subordinate court erred in Law and fact by making a wrong decision.

    7. The court erred by failing to distinguish between the initial agreement which was invalid and the subsequent agreement which was done under duress.

    8. The trial court made a decision against the Law by creating a theory not supported by evidence or submissions.

    Reasons whereof, he urged the high court to quash and/or set aside the Judgement.

11. The appellant thereafter filed the following supplementary grounds: -

    1. The Trial Court erred in law by closing the defense case on 2-3-2022 without according the Appellant a chance to explain why he was not in court with his witnesses which violated Article 25(c) as read with Article 50 of the *Constitution* of Kenya.

    2. The Trial Court erred in law and fact by failing to analyze the fact that 100,000/= was paid to Joshua Nyantika (Nyandicka) who never testified. It follows that the allegations by the Plaintiff of Kshs. 800,000/= were never proved on preponderance of evidence.

    3. It was wrong, erroneous, and prejudicial to the Appellant for the court to admit the document dated 28-4-2020 as an agreement which it was not.

4. The Superior Court is entitled to re-evaluate the entire evidence and draw its own conclusion.

5. The Trial Court misdirected itself on issues of law and fact to the prejudice of the appellant.

6. The Trial Court erred in law and fact by misapprehending the facts, applying wrong legal principles and arriving at wrong decision to the prejudice of the appellant,

7. The Trial Court erred in law by applying wrong legal principles which resulted in an injustice.

12. The Appellant then sought the following prays: -

i. That the Judgment and decree entered on 16th May 2022 be set aside.

ii. An order remitting the matter to the lower court for a proper trial before another court.

iii. That the Honorable Court be pleased do Issue any such further orders it deems fit and convenient in the circumstances of this case.

iv. Costs of this appeal to be borne by the Respondent.

13. The Constitutional values and Principles of Justice, Democracy, Human Rights, Transparency and Accountability are captured as Principles of Fair trial. They are not just paper aspirations. It is the duty of the court to ensure that these provisions are enforced.

14. It is the Appellant's case that the court closed the defense case without according the defence a chance to explain himself on the challenges he faced.

15. This was highly prejudicial to the Appellant's case because he was deprived a chance to adduce and challenge evidence.

16. In Civil Appeal No. 52 of 1968 *Archie Fernandes v A.E.A Noronha*, the court of Appeal held that a first Appeal, it is the duty of the court to evaluate the entire evidence and reconsider it by itself and draw its own conclusions bearing in mind that that it has neither seen nor heard the witnesses.

> " This 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 demeanor of a witness is inconsistent with the evidence in the case generally."

The Respondent's Case;

17. It is The Respondent's case that the issues for determination in this matter are as follows: -

a. Did the Respondent lend money to the Appellant as a soft loan as claimed in the plaint?

b. Did the Appellant acknowledge having received the money in his examination in chief, cross examination and his submissions in the subordinate court?

c. Did the Appellant refund the money as agreed vide the repayment agreement dated 28/4/2020?

d. Were the parties given equal or reasonable chance/opportunity to be heard in the subordinate court?

18. It is submitted that in order to prove that the Respondent lent money the to the Appellant, the Respondent produced as Ex. No. 1, a repayment agreement dated 28/4/2020 signed by both parties

together with one Joshua Nyandieka and Mr. Evans Ondieki Advocate who witnessed the repayment agreement dated 28/4/2020 as the Appellant's witness.

19. He argues that The Respondent further produced as Ex. No. 2 a demand letter demanding Kshs. 900,000/= which was duly received by the appellant who then paid Kshs. 100,000/= leaving a balance of Kshs. 800,000/= which gave rise to the suit in the subordinate court.

20. Further it is its case that the Appellant in his undated submissions filed in court on 6/5/2022 acknowledges having received Kshs. 900,000/= from the Respondent.

21. He alleges to have paid back the money leaving a balance of Kshs. 350,000/= which he promised to pay on or before 30th September 2022.

22. There is a deposit slip of part of the money clearly indicating under the purpose of transfer as a "soft loan".

23. As at the time of filing the suit in the subordinate court on 27/08/2020, the Appellant had refunded Kshs. 100,000/= only leaving a balance of Kshs. 800,000/= which reflects in the plaint dated 25/08/2020.

24. The Appellant was given a chance to be heard as opposed to his submissions. From the proceeding on record in page 69 of the record of appeal, after the close of the Appellant's testimony on 8/10/2021 as DW1, he sought an adjournment to call his witness and the matter was fixed for further defence hearing on 8/12/2021. When the matter came up for further defence hearing on 8/12/2021, the court was not sitting. The Appellant never appeared in court though. The Respondent took a date being 2/3/2022 and was ordered to serve a hearing notice which he duly served. Come the hearing date, the trial court found that service of hearing notice was properly done and closed the defence case and ordered parties to file submissions by 20/04/2022. The court further ordered the Respondent herein to serve a mention notice which he duly did. The Appellant attended court on 20/04/2022 and sought for more time to file his submissions which time was granted. He filed his submissions and judgement was subsequently delivered on 16/05/2022.

25. Had the Appellant felt aggrieved by the closure of his defence case on 2/3/2022 despite being duly served, he would have moved the court by filing an application to open the defence case. He instead proceeded to file submissions. Even in the submissions, he did not mention anything to do with being afforded an opportunity to call his witnesses.

26. The respondent urges the court to find that it is now too late in the day to raise the issue. No constitutional right under Article 259(c) as read with Article 50(1) have been violated.

27. The trial court properly delivered its judgment based on the evidence at hand and the testimony of the parties.

Analysis and determination;

28.

Issues for determination:

i. Whether the supplementary Appeal should be admitted

ii. Whether the reliefs sought can be allowed

iii. Who should bear the costs.

29. Order 42 (4) if the *Civil Procedure Rules* provides that 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.

30. It is my finding that indeed the respondent herein was served with the supplementary record of appeal and responded to the supplementary record of appeal. The upshot of the foregoing is that it hard sufficient opportunity to contest, the contents there in the manner it elected to.

31. Article 159 (2) (d) of the *Constitution* states that;

    " justice shall be administered without undue regard to technicalities".

32. Article 50(1) of the *Constitution* of Kenya, 2010 provides as follows:

    " Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."

33. In exercise of my discretion I have invoked Article 159 of the *Constitution* in ensuring that the hearing and determination of the appeal is not impeded by technicalities.

34. I have gone through and analyzed the proceedings for 10.12.21,2.3.22 and 20.4.22.From the record, it is clear that the Appellant did not attend court on these days. I did not see an affidavit of service which would have ordinarily been the most basic legal way to prove that the Appellant had been notified of Defense these hearing dates.

35. I am satisfied that the Appellants' witnesses were not given an ample opportunity to testify. A decision that is made against a backdrop of a violation of Article 50 and 25 of the *Constitution* is null and void. It is never too late to raise issues of violation of the Bill of Rights.It is my finding and I so hold that the impugned judgment has no legally binding effect and the same is set aside. The matter has to be heard afresh before a different court, which I hereby direct.

36. Having so determined it is this courts' finding that a rehearing, reevaluation and an analysis of the rest of the grounds of appeal will prejudice and compromise the cases that the parties will present at the rehearing at the trial court.

37. Allowing the appeal as set out above accords with the right to hearing as guaranteed under Article 50 of the *Constitution*.

Disposition:

38. Their appeal has merit and the same is allowed.

Order:

.

1. The appeal succeeds on ground 1 of the supplementary Record of appeal.
2. The Judgment and decree entered on 16th May 2022 is set aside.

3. An order remitting the matter to the lower court for a proper trial before another court is hereby issued.

4. The appeal shall be heard and determined within 60 days.

5. The costs the appellant.

DATED, SIGNED, AND DELIVERED AT VIRTUALLY THIS 20TH JUNE, 2024

.....

CHIGITI. J (SC)

JUDGE