



**Gatugi v Muchugu (Civil Appeal E63 of 2023)
[2024] KEHC 9819 (KLR) (24 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9819 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E63 OF 2023
BM MUSYOKI, J
JULY 24, 2024
[FORMERLY KIAMBU HCCA NUMBER E267 OF 2022]**

BETWEEN

CHARITY NJANGO GATUGI APPELLANT

AND

SAMUEL MURAGURI MUCHUGU RESPONDENT

(Being an appeal from judgement and decree of Honourable J.A Agonda PM dated 5-10-2022 in Ruiru Principal Magistrate's Court civil case number E051 of 2021)

JUDGMENT

1. The respondent sued the appellant in Ruiru Principal Magistrate's Court vide the court's civil suit number E051 of 2021 praying for the following;
 - a. Daily profits from 28th December 2020 up to 1-02-2021 Kshs 500,000/=
 - b. Loss of investments Kshs 800,000/=
 - c. Special damages.
 - d. General damages for breach of contract.
 - e. Costs of the suit; and
 - f. Interest in (a), (b), (c), (d) and (e) above at the prevailing courts rates until payment in full.
2. The basis of the suit was an agreement entered between the two parties on 7-08-2021. The agreement was a short one whose simple terms were as follows;
 1. The partnership shall be that of selling new clothes at Nairobi Mart in Githurai market.



2. That the partnership shall commence immediately on execution of this agreement and shall continue until 28th December 2020.
 3. The 1st Party (the respondent) lends to the 2nd Party (appellant) a sum of Kshs Eight Hundred Thousand (Kshs 800,000/=) i.e Kshs 110,000/= in cash and Kshs 690,000/= by way of bank funds transfer to A/C No. [particulars withheld] - Co-operative Bank to take off, which will be refunded to the 1st Party on 28th December 2020.
 4. That failure to refund the said money on 28th December 2020, the partners herein shall extend the period of this partnership until the said money is paid to the 1st Party.
 5. That all business profits shall be shared equally between the partners herein commencing on this date.
 6. Each party shall upon every reasonable request, inform the other partner of all accounts and other things which shall come to their knowledge concerning the partnership.
 7. This partnership shall be dissolved as and when the partners herein agree i.e. 28th December 2020.
 8. That the parties herein agree that their joint Advocates are Wakahu Mbugua & Co. Advocates.
3. I have taken the trouble of reproducing the above terms because they are very important as they will be at the center of my re-evaluation of the evidence produced before the trial court. At the end of the trial the court entered judgment for the respondent as follows;
- a. The defendant is to refund Kshs 800,000/= pursuant to the agreement entered into by the parties herein on 7-08-2020.
 - b. The defendant is condemned to pay nominal damages of Kshs. 100,000/=.
 - c. The plaintiff is awarded the costs of this suit together with the interest thereon at court rates from the date of the judgment and until payment in full.
4. In many judicial authorities it has been retasted that a first appeal should be conducted in a manner of a retrial where the appellate court re-evaluates and re-examines the evidence produced before the trial court and comes to its own conclusion always bearing in mind that it did not have the advantage of taking the proceedings first hand and observing the demeanour of the witnesses.
5. The respondent testified before the lower court by adopting his one paragraph witness statement dated 9-02-2021. The statement read;
- “I am the plaintiff herein and duly authorized to make this statement. That I am well versed with the matter herein and therefore reiterate the contents of the plaint and the verifying affidavit and adopt the same as my witness statement.”
- I find this to be strange and against the rules of pleadings because in my view, it should be the other way round. A plaint cannot be adopted as a witness statement. A plaint is a pleading which should contain facts only and not evidence. It is the witness statement which gives the evidence that should be in support of facts pleaded in the plaint.
6. Be that as it may, when the respondent took the witness stand, he gave equally short oral evidence. He stated that he had a business partnership with the appellant for four (4) months. He gave Kshs 800,000/= to the appellant which was for payment of rent and employees and on 28th December 2020



the appellant was to pay him Kshs 800,000.00. The respondent was clear that he received profits for the period and on 9th February 2021, he went to his advocates and recorded his statement. He completed his evidence in chief by saying that he wanted to recover his profits for period of August 2020 and that the appellant did not return the monies for the clothes he purchased and the cost of the suit.

7. In cross examination, the respondent stated that he was refunded Kshs 800,000/= as per clause 7 of their agreement. He claimed that the appellant had not contributed any money. He alleged that they were sharing profit and the respondent was to return sum for the stock as she was enjoying profits. He added that, that was an oral agreement between him, the appellant and her advocate. He referred to clause 4 of the agreement and stated that failure to refund the Kshs 800,000/= shall extend the period of the partnership until payment was done. He also confirmed that the agreement did not indicate anything about the stocks. He added that he was praying for daily profits from December 2020 and according to him, he had Mpesa statements to proof the profits loss of Kshs 800,000/=. He also stated that he was asking for special damages of Kshsh 200,000/= and that he did not have receipts. In re-examination, he restated that he gave the appellant seed capital and he was not refunded his monies for stock.
8. On his part, the appellant referred to his recorded statement dated 30-11-2021 and sought to adopt the same. He also produced bundle of documents in his list dated 30-11-2021. In the statement, the respondent confirmed that she had entered into the agreement referred to by the respondent. She took the stand that the partnership was to come to an end on 28-12-2020 and that they were to share profits for that period and on 28-12-2020, she refunded the Kshs 800,000/= to the respondent. She also told the court that she took a loan from cooperative bank to boost the business and she would plough back her share of profits to the business. She denied breaching the agreement.
9. When she was cross examined, the appellant stated that she did not buy anything in her shop and that her business had been affected by corona virus. She maintained that she used to pay workers and rent and share the profits with the respondent.
10. The appellant's memorandum of appeal raised five grounds. The appellant accuses the trial court for;
 1. Failing to consider the appellant's pleadings, material evidence on record and the appellant's submissions therein and therefore proceeding to re-write the contract between the parties;
 2. Finding that the appellant was to refund Kshs 800,000/= yet the same had been duly been paid back as at 28-12-2021;
 3. Condemning the appellant to pay the respondent nominal damages of Kshs 100,000/= yet neither was there breach of contract nor was there any legal wrong occasioned upon the respondent in the first place;
 4. Condemning the appellant to pay costs of the suit yet events of the suit clearly were not in the favour of the respondent; and lastly
 5. Failing to consider the material circumstances of the case therefore arriving at the wrong decision.
11. The above grounds revolve around the question whether there was evidence that the appellant had breached the contract between her and the respondent and if so, what damages did the respondent suffer. On 5-06-2024 when the parties appeared before me, there were no submissions in the court file. I directed the advocates for the parties to file their submissions by 13-06-2024. As I was writing this judgment, I on 11-07-2024 discovered that the none of the parties had filed their submissions. I directed my court assistant to conduct the advocates for the parties and find out whether they had filed



their submissions but her calls went unanswered. She under my direction proceeded to write and send emails to the advocates and informed them to file their submissions by 9.00 am of 12-07-2024.

12. The parties had not by the time ordered filed their submissions and I proceed to write the judgement based on what is on record including their submissions filed in the lower court.
13. The first and fifth grounds of appeal ride on the other grounds. So, my answer to the said grounds will be incorporated in my decision on issues raised in 2nd, 3rd and 4th grounds.
14. The appellant complains that the magistrate was wrong in finding that the appellant was to refund Kshs 800,000.00. In order to answer this ground one need not go further than the agreement between the parties dated 7-08-2020 whose terms I have reproduced above and the short and clear testimony of the parties.
15. The basis for the magistrate in making the orders of refund was that the respondent did not refund the money to the respondent as per the contract. At paragraph three of page 8 of her judgment, the honourable magistrate held and I believe rightly so that;

“As for the restoration of the plaintiff to his pre-contractual position, the amount of money loaned to the defendant was Kshs 800,000/=. The only damages would be reasonably expected as arising from the defendant’s breach in the circumstances of this suit is the refund of loan amount. The defendant admitted that he received the said loan from the plaintiff.”

16. In the preceding paragraph, the honourable magistrate had also stated that;

“The legal rescission of an agreement is that the parties are restored to their former position. In the present case, the pre-contractual position of the parties is that the plaintiff loaned the defendant Kshs 800,000/=:, and that the plaintiff is to be put back to the financial position he was at the time of entering into the agreement.”

17. Up to that point, this court agrees entirely with the magistrate as that is the position in law in cases of this nature. I have gone through the entire judgement of the court and I do not see any clear statement from the court that the appellant did not refund the loaned amount, again rightly so because the respondent stated in several instances that the said sum was refunded to him. What comes close to that is the last paragraph of page 6 which spills over to page 7 where she stated that;

“The defendant cannot be heard to say that she paid the plaintiff the capital of Kshs 800,000/= and shared profits proceeds when no records have been availed to prove that the parties shared equals profits and expences.”

18. With all due respect to the magistrate, she digressed from the case before her. The respondent did not claim in his plaint or even in his oral testimony that he was dissatisfied with calculations or determination of profits paid to him for the period between 7-08-2020 and 28th December 2020. In his plaint, the respondent claimed what he called loss of investment between 28th December 2020 and 1-02-2021. In his testimony before the court, he repeated the same claim. It is only the magistrate who can tell why she decided to interrogate the issues of sharing of profits before 28-12-2020. Even if that were the case, it is incompressible that a court properly directing its mind would take the route the honourable magistrate took. What was before the court was simple claims. That is loss of investments and profits for the period between 28-12-2020 and 1-02-2021. No one in both the pleadings and the proceedings asked the court to determine any issue on disclosure of accounts and manner of sharing the profits earned before 28-12-2020. Even if the respondent would have testified on the issue the



magistrate ventured into, that would not be allowable in law as parties are bound by their pleadings. In *David Sironga Ole Tukai v Francis Arap Muge & 2 Others* (2014) eKLR;

“In an adversarial system such as ours, parties to litigation are the ones who set the agenda and subject to rules of pleadings each party is left to formulate its own case in its own way. And it is for the purposes of certainty and finality that each party is bound by its pleadings. For this reason, a party cannot be allowed to raise different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other’s case as pleaded. The purpose of the rules of pleadings is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expence.”

19. Again, I find the magistrate to have erred by holding that the appellant breached the contract by terminating the partnership when pertinent issues regarding finances had not been resolved. The agreement between the parties were that the partnership would end on 28-12-2020. There is no ambiguity in this term of the contract which is actually repeated twice at clauses 2 and 7 of the partnership agreement. The respondent or even the court could not introduce terms into the contract which would contradict or vary the written contract. That is the basic meaning of the parole evidence rule which makes inadmissible any evidence that seeks to contradict, vary or add to a written contract. The following passage from *Halsbury’s Laws of England* 4th Edition Vol. 12 is relevant to this position;

“Where the intention of the parties has been reduced to writing it is, in general not permissible to adduce extrinsic evidence, whether oral or contained in writing such as instructions, drafts, articles, conditions of sale or preliminary agreements either to show that intention or to contradict, vary or add to the terms of the document.”

20. The only thing the appellant was supposed to do to bring the partnership to an automatic end was to pay the Kshs 800,000.00 by 28-12-2020 which payment is confirmed by both parties. There were no pertinent financial issues pending for resolution. And even if there were, it was the onus of the respondent to prove them which he did not even make an attempt to do.

21. The respondent was the one alleging that he lost investments and the burden of proving the same was on him. It is trite law that he who alleges must prove. I find and hold that the trial court considered extraneous matters by going outside the respondent’s pleadings which obviously led her to arrive at the wrong decision. The respondent is on record stating that he was refunded his investment of Kshs 800,000/= and the magistrate in her judgement acknowledged this admission. So, the magistrate had no basis of awarding him another similar amount.

22. In view of the above, I find that the magistrate was wrong in accusing the appellant of having terminated the partnership when the agreement clearly indicated that the same would come to an end on a specific date and upon payment for a specified amount. The date came and the appellant paid the specified amount. Without saying more, I have no alternative other than setting aside the award of Kshs 800,000/=.

23. The 3rd ground faults the trial court for awarding Kshs 100,000.00 as nominal damages. In what instances are nominal damages awarded? Nominal damages are awarded as a sign of acknowledging that a party’s identifiable right had been violated but the damages are not quantifiable or he did not suffer any damages. It is a recognition of a breach of a legal right. The magistrate appreciated this in her judgment. She rightly observed that the respondent had failed to prove that he suffered loss but proceed to state that he was nevertheless entitled to an award of nominal damages. I have already held that the appellant was not in breach of any term of the contract and consequently the respondent cannot be



said to have had any of his legal rights whether contractual or otherwise breached or violated. In the circumstances, I similarly find that the award of Kshs 100,000.00 as nominal damages was unwarranted and lacked basis in law. The same is hereby set aside.

24. The last ground for my consideration is whether the magistrate erred in awarding costs to the respondent. It is trite law that costs follow the events which is however at the discretion of the court. I have found that the appellant is successful in this appeal and she should have been successful in the lower court. In the circumstances, the order which commends to me is that the appellant is entitled to costs both in this court and in the lower court.
25. The totality of the above is that this appeal is allowed in its entirety and I consequently make the following orders;
 - i. The judgment in Ruiru Senior Principal Magistrate's Court civil case number E051 of 2021 is hereby set aside in its entirety and substituted for an order dismissing the said suit with costs to the appellant (the defendant in the suit).
 - ii. The appellant shall have the costs of this appeal.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JULY 2024.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT

