



REPUBLIC OF KENYA



**Kibaru v Ithaara & another (Civil Appeal E839 of 2021)  
[2024] KEHC 9431 (KLR) (Civ) (22 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9431 (KLR)

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

**CIVIL**

**CIVIL APPEAL E839 OF 2021**

**AM MUTETI, J**

**JULY 22, 2024**

**BETWEEN**

**JOSEPHINE G KIBARU ..... APPELLANT**

**AND**

**GRACE GACHERI ITHAARA ..... 1<sup>ST</sup> RESPONDENT**

**BRIAN MURIUKI ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal against the whole of the judgment of Hon. P Muholi (MR) in Milimani CMCC No. 6944 of 2014 Josephine G. Kibaru Vs Grace Gacheri Ithaara and Brian Muriuki being sued on behalf of the estate of Nicholas Ndege Mutwiri T/A Generation Motor Mart)*

**JUDGMENT**

1. The appeal arises out of a Judgment delivered on the 26<sup>th</sup> November 2021 by the learned Hon. P. Muloli P.M dismissing the plaintiff's suit for failing to meet the threshold for a liquidated claim. the appellant aggrieved by the said decision approached this court vide a memorandum of appeal dated 20<sup>th</sup> December 2021. In the memorandum of Appeal the appellant raises five grounds:-
  - i. that the learned Honourable magistrate erred in law by applying a higher standard of proof than required in civil claims..
  - ii. that the learned Honourable magistrate failed to consider the totality of the plaintiff's evidence.
  - iii. that the learned Honourable magistrate erred in law and fact by failing to take into account the defendants admission of the substituted defendant's indebtedness to the plaintiff over the outstanding amount of Ksh. 3,000,000/=.



- iv. that the learned Honourable Magistrate erred in law and fact by shifting the burden of proof to the plaintiff to prove that the motor vehicles offered by the substituted defendant in settlement of the outstanding amount of Ksh. 3,000,000/= are in the actual possession of the plaintiff and registered in her name.
- v. that the learned Honourable Magistrate erred in law by failing to appreciate that the endorsed request for RTGs transfer form held by the plaintiff was conclusive proof that the amount of Ksh. 3,700,000 indeed moved from the plaintiffs account to the substituted defendants account.

The appellant through the grounds set out above is simply telling this court that she adduced sufficient evidence to support her claim and that the trial court applied a much higher standard in evaluating the sufficiency of the evidence.

The Respondent has filed submissions opposing the appeal and largely supporting the learned Honourable magistrate's decision.

The standard of proof in all civil cases is on a balance of probabilities. This court as the first appellate court has the duty to re-evaluate and analyse the evidence in order to draw its own conclusions as to the sufficiency of that evidence or otherwise. The duty of the appellant was to present evidence in a liquidated to claim to establish that the claim existed and that the defendant was under a legal obligation to settle the claim.

The duty of the court is to examine the pleadings filed by the plaintiff/Appellant and analyse the evidence presented in support thereof.

The plaintiff in his plaint dated 25<sup>th</sup> November 2024 sought the following;-

- a. a refund of Ksh. 3,000,000.
  - b. Interest on (i) above at commercial rates until the determination of the suit and until payment in full.
  - c. Any other relief that the court would deem fit and just to grant.
2. It was therefore incumbent upon the plaintiff to prove that the late Nicholas Ndege Mutwiri T/A Generation Motor Mart was indebted to him to the tune of Ksh. 3,000,000/= at the time of filing the suit.
  3. The record reflects that on the 30<sup>th</sup> January 2019, at the instance of the defendants, a third party Notice was issued to one Stephen Mburu by the court when the learned Honourable magistrate granted the application dated 21<sup>st</sup> May 2018. The defendants, sought the Notice to issue to Stephen Mburu whom they maintained was the one making payments to the plaintiffs.
  4. The plaintiff testified on the 9<sup>th</sup> November 2020 and told the court that she had asked the late Nicholas Ndege to procure a lorry for them. She stated that she deposited Ksh. 3.6 million via a bank transfer. According to her when she realized that the lorry was not being delivered she went to an advocate to demand repayment. The plaintiff went further to state that in 2014 she received a refund of Ksh. 700,000 through the deceased's company in small amounts.
  5. Upon cross examination the plaintiff stated that she was receiving money from one Martha and that she did not know Stephen Mburu. She admitted that she had not produced evidence to prove that Nicholas Ndege owned the company Motor Mart. She was emphatic that she did not know who the owner of the motor vehicle yard was. The witness further stated that they had an oral agreement since the deceased was known to her.



6. It is important to point out at this stage the plaintiff in her examination in chief adopted her statement that she had filed in court. In re-examination the appellant states that she paid money to General Motor Mart. According to her the business was owned by Nicholas Ndege. the deposit slips the witness produced indicated the name of Martha Kariuki.
7. The plaintiff's statement dated 4<sup>th</sup> April 2018 indicated that she paid money to Generations Motor mart amounting to Ksh. 3,700,000 upon delivery of the motor vehicle. The statement further states that the substituted defendant made payment totaling to Ksh. 700,000/=.
8. The court notes however that the statement sharply contradicts the evidence in court where the plaintiff is recorded as having received refund from one Martha. I shall soon revert to this bit of evidence.
9. The defendant on her part through the firm of Kinyanjui Kirimi Advocates issued a third party Notice to one Stephen Mburu and in the said Notice stated;-
 

“the defendant disputes the plaintiff's claim on the ground set out in the amended defence but in the event of its being held liable to the plaintiff, the defendant claims that it is entitled to indemnity on the grounds, inter alia, that you were at all material times relevant to this suit the actual person who owed the plaintiff money”.
10. in the defendants supporting affidavit to the Notice of Motion for issuance of the third party Notice stated that the payment to the plaintiffs were being made by one STEPHEN MBURU.
11. The defendant in her testimony recorded on the 9<sup>th</sup> November 2020 states that that she was not involved in the business of her deceased husband but Martha was the secretary. The cheque deposits shown to her showed that Mburu was the owner of the cheques.
12. Martha Kariuki gave evidence as DW 1 and relied on her statement. In cross examination Martha stated that the cheques presented were drawn in Stephen Mburu's account. None from Nicholas Ndege's account.
13. It is this evidence that the learned Honourable magistrate was left to consider and make a determination. This court having analysed the evidence tendered by the parties arrived at the conclusion that there was indeed an arrangement entered into by the Appellant with Nicholas Ndege trading as Generations Motor Mart.
14. The plaintiff was under duty to prove that the money she paid amounting into Ksh. 3,700,000 went into the Account of Nicholas Ndege so that she could then make a valid claim against his estate. The plaintiff in her statement filed in court and her testimony was unable to prove that it is true that she actually received refunds but the said refunds was from the third party. The evidence tendered by her did not link the substituted defendant to the refunds.
15. The third Party in whose name DW 1 Martha states the cheques were drawn did not turn up to defend the suit despite the third party Notice. The evidence against him leaves many unanswered questions which the parties in my view ought to have sought clarification from Martha during her testimony.
16. For instance, who was the proprietor of Generations Motor Mart. Is it possible that Mburu was the owner of the yard which the plaintiff talked of in her evidence? Is it also possible that Mburu was the recipient of the money deposited by the plaintiff through his bank account? The plaintiff did not do justice to her case by failing to uncover the faces behind the business name Generations Motor Mart as well as the signatories to the account to which she paid money to. it is not a case that in my view



would have been very difficult to prove had the party done some due diligence before the institution of the suit and during its pendency.

17. The failure to link the money directly to the substituted defendant was in my view a fatal omission. It is on this basis that I agree with the learned Honourable magistrate that the fact of how money changed hands considering that there was no written agreement between the plaintiff and the defendant was critical.
18. The appellant did not discharge that burden. In Stanley Maira Kaguongo Vs. Isaac Kibiru Kahuthia [2022] eKLR the court held:-

“..... the trial court was justified in finding that, it was unable to make any Liquidated award herein the in absence of proof...”
19. The plaintiff cannot expect an award in a liquidated claim that is not proved to the satisfaction of the court. The evidence by the Appellant in the court below left many gaps that the court could not ignore.
20. I do not agree with the Appellants claim that the learned Honourable magistrate applied a higher standard than that of a balance of probabilities.
21. It is also clear from the judgment of the trial court that the learned Honourable magistrate analysed the evidence thus the second ground of appeal must fail.
22. On the third ground of admission of the debt, the Appellant was not able to demonstrate this in evidence. The testimony of Martha DW 1 and the Respondent did not help matters in that the 3<sup>rd</sup> party who issued the cheques appears by conduct to have been the party that was attempting to settle the debt and not the substituted defendant. No evidence was tendered to show that the deceased made any refund.
23. The appellant needed to lay a firm basis of the alleged admissions by the substituted defendant. The issue of admission of the debt could not be lightly admitted by the court as being the correct position in the absence of any other independent evidence to corroborate the Appellants evidence. It would have been a great travesty of justice for the magistrate to condemn the substituted defendant who could not wake up from his grave to defend himself.
24. The appellant in ground four of the appeal contends that the magistrate shifted the burden of proof to him. It is trite law that he who alleges must prove. The plaintiff was the most suited person to explain to the court her dealings with the deceased on vehicles. The Respondent in this matter was categorical that she was not involved in her husband's business. It cannot therefore be presumed that she was privy to all his business dealings. The plaintiff had special knowledge of the circumstances of entry into any arrangement with the substituted defendant and under Section 107 (1) of the *Evidence Act* the plaintiff being desirous of a favourable judgment was under a legal duty to prove with certainty her liquidated claim to the satisfaction of the court.
25. In Mumbi MWabea Vs David M Wachira (2016) eKLR the court of Appeal guided the courts that courts should assess oral, documentary and real evidence advanced by each party and decide which is more probable.
26. This court having analysed the Evidence presented before the learned trial magistrate comes to the conclusion that the Appellant did not discharge the legal burden placed upon him in a case of this nature. It is not enough for a party to swamp the court with documents and hope that the court will somehow establish from the documents who was responsible for what. Litigants must tell their story



concisely and with clarity. The court cannot be left to construe documents and draw inferences that are not backed by evidence.

27. The appellant in the last ground of appeal accused the learned Honourable Magistrate of failing to appreciate that the endorsed RTGs transfer form held by the plaintiff was conclusive proof that the sum of Ksh. 3,700,000 moved from the account of the plaintiff to the substituted defendant. The ground cannot in my view succeed because an endorsed RTGs alone is not sufficient. The appellant did not tell the court what difficulties, if any, she had with getting her own bank statement to prove the movement of the funds. The plaintiff did not also tell the court into whose account the money was credited. That was key if the court was to believe the plaintiff's case. I have considered the submissions by counsel for the appellant and I do not agree with them that the learned Honourable magistrate applied a test higher than that of balance of probabilities.

28. The upshot of the analysis above is that the appeal is not merited and is hereby dismissed with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22<sup>ND</sup> DAY OF JULY, 2024.**

**A. M. MUTETI**

**JUDGE**

In the presence of:

Court Assistant: Kinyua

No appearance for the Appellant

Kirimi Advocate for the Respondent

Appellant-Absent

