Kuria v Gitonga (Sued as the personal representative of the Estate of Samuel Ngambi Gitonga) (Civil Appeal 113 of 2021) [2024] KEHC 9157 (KLR) (19 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9157 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL 113 OF 2021

HM NYAGA, J

JULY 19, 2024

BETWEEN

JOHN BOSCO KURIA ..... APPELLANT

AND

MARGARET GITONGA (SUED AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF SAMUEL NGAMBI GITONGA) ..... RESPONDENT

(Being an appeal from the whole of the Judgement of Honourable Limo B. Benjamin (Senior Resident Magistrate) in CMCC No.958 of 2018 at Nakuru delivered on 30th January, 2020)

JUDGMENT

1. By a plaint dated 1[5th] August, 2018, the Appellant filed suit against Respondent in the Chief Magistrate's court at Nakuru in which he sought judgment for: -
    a. Kshs.543,000/=
    b. Cost of the suit.
2. The defendant/Respondent filed a defence dated 31[st] October 2018.
3. Upon hearing the parties, the trial court rendered its judgment on 30[th] January 2020, dismissing the Appellant's suit with costs. It is that judgment that triggered this Appeal.
4. Vide a memorandum of Appeal dated 14th October, 2021 the Appellant raises the following grounds: -
    i. That the learned trial magistrate erred in law and fact when he held that the Appellant did not prove his case on a balance of probabilities.
    ii. That the learned trial magistrate erred in law and fact when he failed to properly analyze oral and documentary evidence presented in court by the Appellant.

iii. That the learned trial magistrate erred in alw and fact in dismissing the Appellant's case on the ground that there wa no evidence of a demand letter for the money during the lifetime of the deceased when no such requirement exists in law.

iv. That the learned trial magistrate erred in law and fact when he held that the Appellant had produced unchallenged evidence that the Respondent owed him a balance of Kshs.97,000 and yet proceeded to dismiss the Appellant's suit.

v. That the learned trial magistrate's judgment contains serious errors on the amount claimed by the Appellant as well as other inconsistences that should not be allowed to stand.

vi. That the learned trial magistrate erred in law and fact when he refused to consider the Appellant' submission on record.

vii. That the learned trial magistrate's judgment is not well founded and it should not be allowed to stand.

5. The Appellant thus seeks that the judgment of the trial court/magistrate be set aside and judgment be entered in favour of the Appellant as sought in the plaint.

6. Directions were given that the Appeal be canvassed by way of written submissions which we summarized as hereunder.

7. For the Appellant, it was submitted that the trial magistrate erred in finding that the Appellant did not prove his case on a balance of probabilities thus dismissing the suit.

8. The Appellant cited Section 107 and 108 of the *Evidence Act* to set out the law on what burden lay on the Appellant to prove his case.

9. As to what amounts to proof on a balance of probalities, the Appellant cited the decision in *William Kabogo Gitau v George Thuo and 2 Others* 2010 IKLR 526 where it was held that: -

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case is more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51%, as opposed to 49% of the opposing party, is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

10. The Appellant then went on to address the evidence that was adduced before the trial court. I shall revert to it later in this judgment.

11. The Appellant further argued that the trial court erred in dismissing the suit on the basis that there was no demand notice sent to the deceased. That failure to produce such a demand notice does of make the suit frivolous. The Appellant cited the case of Patel Rameshbhai Gordhanbhai v Stanley Ajonga Kivasa and Another; Attorney General (interested party) where it was held that:

> The courts have over time wrestled with the matter of service of a notice of intention to sue. In *Stanley Kaunga Nkarichia v Meru Teachers College & another* [2016] eKLR, the court stated:
>
> > "it has never been the law that a defendant should always have notice of intention to bring suit against him before action is filed in court. There are cases which, by their very nature or due to obtaining circumstance, it is impractical to issue a notice of intention to sue or issuing such notice of intention to sue will only be

> to the detriment of the interests of the Plaintiff and justice. For instance in trade-marks and patent rights cases or where Anton Pillerorders or ex parte temporary injunctions are the subject of the suit, issuance of notice of intention to sue will militate against the very core of the litigation. So, where there is a possibility that by giving notice of intention to sue, the defendant may dissipate or destroy evidence, or blow away the substratum of the plaintiffs' cause of action, the law does not place a necessity to issue a notice` of intention to sue before an action is commenced; it will be overlooked. And in such circumstances, it will be injudicious to deny a successful suitor his costs of suit merely on the basis that Notice of Intention to sue was not given. But in all other cases, I should think that Notice of Intention to sue ought to be given unless the plaintiff's interests are likely to be harmed by prior communication with the opposite party. However, I should also state here that absence of or failure to issue notice of intention to suit is just one of the considerations that the court must take into account in awarding costs.

12. Also cited was *Mavuno Industries Ltd and Others v Keroche Industries Limited* (2012) eKLR where it was held that: -

> "With respect to the issue of demand notice, I am not aware of any provision in law that renders a suit incompetent for failure to send a letter before action. I am aware that such a letter is one of the documents to be include in the documents to be filed with the plaint. However, for obvious reasons it would unreasonable to make it mandatory that in all cases a letter before action or demand notice be sent. It is recognized the due to urgency of certain matters it may be irrational to expect that a demand letter be sent before the suit is filed. Failure to send a demand notice, where the suit would have been unnecessary had been made, nonetheless, is a factor which the court may take into account in exercising its discretion in awarding costs."

13. The Appeal was opposed by the Respondent. The Respondent submitted that the trial court did not err when it found that the plaintiff had not proved his case on a balance of probabilities. That the duty of proving the averments in the plaintiff lay squarely on the Appellant as was set out in *Karugi & Another v Kabiya and 3 Others* (1987) KLR 347 where the court held that: -

> "[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof?. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim."

14. On the standard of proof that were required, the Respondent cited *Mumbi M'Nabea v David M. Wachira* (2016) eKLR where the Court of Appeal held that:

> "In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not."

15. On the point that the trial court erred in dismissing the suit on the ground that there was no evidence of a demand letter to the deceased during his lifetime, it was submitted that the court made the right decision given the circumstances of the case.

16. The Respondent thus prayed that the appeal be dismissed with costs.

17. This being a first appeal, the Court's duty is as was set out in *Sele and Anotherv Associated Motor Boat Company Ltd and Others* (1968) E.A. 123. These principles were reiterated in *Gitobu Imanyara and 2 Others v Attorney General* (2018) where it was held as follows: -

> " This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the Court below and that an appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect."

18. With the above in mind, it is thus the duty of this Court to look at the evidence adduced before the trial court.

19. The Plaintiff/Appellant claim was founded upon a claim for goods supplied to Samuel Ngambi Gitonga (deceased at the deceased request for the period ending December 2012.

20. In his evidence the plaintiff stated on 19th August 2012 he had supplied the defendant (sic) with 100 jerrican of bactrl mc worth Kshs.99,000 and that on 20th August 2012, he also supplied the defendant (sic) with the following items: -

    a. 160 bags of barley (sabini) worth Kshs.2,500 each

    b. 220 jerricans of cyclone worth Kshs.1,080 each

    c. 10 jerricans of artea worth Kshs.2,240 each.

21. The total amount for the good supplied according to the Appellant was Kshs.543,00/=. To support his case, he produced the document marked as Exhbit 1 to 5. He stated that he delivered the invoices to the deceased before he died.

22. DW1 was the Respondent who is the administrator of the estate of Samuel Ngambi Gitonga (now deceased). She stated that she and her late husband were barley farmers and they used to get all their inputs from Kenya Breweries Limited. That the 3rd parties were involved. That she became aware of the claim in 2016 when the Appellant took the invoices. She stated that she was not aware of any business dealings between her late husband and the Appellant. She pointed out that the invoice in question did not have the deceased's signature.

23. After hearing the parties, the trial magistrate found that the Appellant had not discharged his burden of proof as provided for under Section 107 (1) of the *Evidence Act*. The trial magistrate found that the deceased died in 2013, while the claim arose in 2015 and that the Appellant failed to avail any documents to show any demand calling for the payment of the money during the lifetime of the deceased. It was on those grounds that the suit was dismissed with costs.

24. The issue for determination before this court is whether the Appellant was able to prove his case as required.

25. From the pleadings filed in the trial court, the Appellant stated that the goods were supplied to the deceased in August 2012. He produced 3 delivery notes dated 19th August, 2012 and 20th August 2012 and an invoice dated 20th June 2017.

26. The delivery notes indicated that the goods were collected by one David Kungu Kamau whose ID card number was indicated therein.

27. In her evidence, the respondent denied any knowledge of the said David Kungu Kamau.

28. Looking at the documents produced, it is clear that the delivery notes were signed by the said David Kungu Kamau and not the deceased. The Appellant has not established the connection between the deceased and the said David Kungu Kamau.

29. In addition, the invoice adduced as evidence was raised in 2017, long after the deceased had died. It is thus difficult to make a reasonable connection between the delivery notes and the invoice. Ordinarily, an invoice would be issued as soon as delivery is made, if not at the same time.

30. In my view, and in agreement with the trial magistrate, the Appellant did not satisfactorily prove that deliveries were made to the deceased.

31. The Appellant has also stated that the trial court erred when it held that there was no proof of demand prior to the death of the deceased.

32. If I understood the trial magistrate correctly, the demand referred to is not a demand letter that proceeds filing of a suit and serve as a notice of intention to sue.

33. I think that what the trial magistrate meant was that there was nothing to show that the Appellant requested the payment from the deceased during his lifetime so as to validate his claim that he had supplied the goods to the deceased. This is in view of the fact that the invoice which ought to have been raised at the time, was only raised after the deceased had passed on.

34. Therefore, the argument on this point was misplaced. Even if this was the case, a finding to the contrary would not change the finding that there was no proof of delivery to the Respondent's husband (now deceased).

35. From the foregoing reasons, I find that this appeal lacks merit and it is dismissed with costs to the Respondent.

DATED AND DELIVERED AT NAKURU THIS 19TH DAY OF JULY, 2024.

H. M. NYAGA,

JUDGE.

In the presence of;

C/A Jeniffer

Ms. Wangari for Appellant

Ms. Karoki for Respondent