Kinyua v Muriuki & 2 others (Suing as Joy Mothers Women Group) (Civil Appeal E039 of 2023) [2024] KEHC 9231 (KLR) (18 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9231 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E039 OF 2023

DKN MAGARE, J

JULY 18, 2024

BETWEEN

CHARITY NJOKI KINYUA .... APPELLANT

AND

ANN WAMBUI MURIUKI .... 1ST RESPONDENT

ZIPPORAH NJOKI GAKUNGU .... 2ND RESPONDENT

MARY WAMBUI MURAYA .... 3RD RESPONDENT

SUING AS JOY MOTHERS WOMEN GROUP

(Being an appeal from the Judgment of Hon. E. Kanyiri (PM) in Karatina PMCC No. 84 of 2020, delivered on 3rd May, 2023)

JUDGMENT

1. This is an appeal from the Judgment of Hon. E. Kanyiri and decree given by Hon. E. Kanyiri in Karatina PMCC 84 of 2020. The Appellant was a defendant in a claim for money had and received. The Appeal reminds me of holy writs which posit that: -

   > " I have seen all the works which have been done under the sun, and behold, all is vanity and striving after wind."

2. The matter was fully heard with a number of witnesses testifying in a simple matter of money had and received. The court entered judgment for the respondents against the Appellant for:-

   a. A sum of Kshs. 132,000/=.

   b. Costs and interest from the date of filing.

3. The Appellant, who was the defendant in the court below, raised the following grounds of appeal:-

    a. The learned trial magistrate erred in law and in fact in failing to consider the entity of the record and the evidence adduced.

    b. The learned trial magistrate erred in law and in fact in failing to consider the entirely of the facts surrounding the suit hereby misleading herself into a wrong judgment.

    c. The learned trial magistrate erred in law and in fact in failing to consider in totality the issues before her and in the evidence adduced/tendered by the parties hereby misleading herself into a wrong judgment.

    d. The entire judgment and subsequent decree is misleading and is against the weight of evidence and against the principles of a fair trial.

4. The Respondent relied on submissions filed in the lower court. The history in the lower court is replete with baseless applications that the court dealt with.

Appellant's Submissions

5. The Appellant filed submissions dated 25/4/2024. She stated that she indicated in a letter dated 14/4/2020 to have the loan set off from her savings. She also relied on the letter dated 16/12/2020 and a demand notice dated 2/11/2020. She stated that the court did not consider those documents. She stated that offsetting was a serious issue that was not dealt with. She also stated that it was hard to know how much her saving were.

6. It was her view that the court should have descended from the citadel of justice to scrutinize non existing documents. She stated that the loan was issued as per unapproved group constitution. She stated that the earliest suit should have been filed was January 2021. She stated that a member leaving is to be given 3 months' notice to be refunded. She stated that it was against the *Banking Act*. She asked me to re-open the matter and address all issues.

Respondent's Submissions

7. In the submissions the Respondent submitted that the only issue is the amount payable. They stated that after receiving the money in issue that is Kshs. 120,000/= and agreeing to pay interest of 12,000/-, the Appellant wrote a letter saying that she was withdrawing her membership. She claimed that it is the group to pay her a sum of Ksh. 41,000/-. Of course the 41,000/= was not pleaded. They stated that there are avenues for recovering of her entitlements.

Pleadings

8. The Respondent filed suit on 23/11/2020 claiming for a refund of Kshs. 132,000/=. The defendant failed to pay the same. It was their case that all dues ought to be paid before withdrawing from the group.

9. The Appellant filed defence on 16/12/2020 admitting the debt but averring that *the constitution* was a figment of imagination. She stated that the signatures are fraudulent and the records are not maintained together with the Annual General Meeting. She stated that the loan is a smoke screen. She stated that there are other members who have also defaulted but the Respondents are not following.

10. The court heard the parties and delivered its judgment. The court found that contents of paragraph 4 of the plaint were admitted. The admitted paragraph read as follows:-

> " On or about 11/4/2020, the defendant received from the group, Kshs. 120,000 which was refundable with an interest of 10% being Kshs. 12,000 hence the total amount to be paid back to the women group by the defendant was Kshs. 132, 000 and the same was to be paid at Kshs. 13,200 per month."

11. Paragraph *5* related to default in repayment. The Appellant did not deny owing the money or not repaying.

Analysis

12. This is an appeal that should never have been filed. The Appellant admitted Kshs. 132,000/=. Her next defence should be how she paid. This was not done. There was no counter claim related to *the constitution*. *The constitution* of group was not subject of the matter herein.

13. Only one question was in issue, and the same was, whether the admitted sum of Kshs. 132,000/= was paid. It was not open for the court to deal with savings, for one simple reason – there was no counter claim. Secondly, it is not the business of the court to re-write contracts between parties. In the case of National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR as follows: -

> " A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.
>
> As was stated by Shah JA in the case of *Fina Bank Limited vs Spares & Industries Limited (Civil Appeal No 51 of 2000)* (unreported):
>
> "It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain".

14. The defence raised was a sham. It was not even worthy going into a full hearing. The defence must specifically raise issues related to payment and set off. A party cannot throw to the court set off and expect the court to fish for evidence.

    1. -Therefore, parties are bound to plead their cases fully. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, Justice A C Mrima stated as doth: -

        "

        " 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3

others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

".....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded......

...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

In the case of Malawi Railways Ltd vs Nyasulu [1998] MWSC 3, Malawi Supreme Court of Appeal stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled "The Present Importance of Pleadings" published in [1960] Current Legal Problems at p 174 whereof the learned author posited that: -

As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings ....for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

12. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in an election petition: -

> " In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up

by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings......'"

15. The court is thus not involved in evidence gathering. This is in line with the court of appeal case of Raghbir Singh Chatte v National Bank of Kenya Limited [1996] eKLR, where the court of appeal stated as doth: -

> "The main object of this rule and Rule 14 is to bring the parties by their pleadings to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing (per Jessel M. R. in Thorp v Holdworth (1876) 3 Ch. D. 637). This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him. Thus, in an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible",
>
> I will also add that the crucial deficiency of a general denial which I have already described, also applies to the evasive, inconsistent and contradictory alternative general traverse in the appellant's defence. This was that if the respondent had extended any overdraft facilities without stating the amount involved, to the appellant which was moreover, denied, then the same and here again, without stating how and when, had been paid. Such a spurious pleading in the alternative cannot give any merit to the defence and so also makes it one which discloses no reasonable defence for all purposes including that of 0 6 r 13(1)(a)."

16. Money had and received has to have documents/repayment. None was there. Order 2 Rule 4(1) provides:-

Matters which must be specifically pleaded.

4. (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality —

a. which he alleges makes any claim or defence of the opposite party not maintainable;

(b) which, if not specifically pleaded, might take the opposite party by surprise; or

(c) which raises issues of fact not arising out of the preceding pleading

17. The duty to show that the debt has been paid is on the debtor. In Mariano Dinacci v Angelo Lattineli [2015] eKLR, the court of Appeal stated as follows: -

> "(31) With respect we must depart from the finding of the learned Judge that the appellant failed to show his entitlement to the money demanded as this finding was based on a misapprehension of the law and the evidence. We come to the conclusion that there was clear and uncontroverted evidence that the appellant extended two loans to the respondent which were €41,322 and US $50,000

and that the respondent failed in his attempt to demonstrate his defence that he had repaid the loans."

18. The appeal is baseless. It is accordingly dismissed with costs of Ksh. 55,000/= to the Respondent.

Determination

19. The net effect is that I make the following orders:-

    a. The Appeal lacks merit and is dismissed with costs of Kshs. 55,000/=.

    b. 30 days stay of execution.

    c. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 18TH DAY OF JULY, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

No appearance for Appellant

Ms. Wambui for Respondents

Court Assistant – Jedidah