Mutua v Mbevu; Odero (Third party) (Civil Appeal 157 of 2017)
[2024] KEHC 9514 (KLR) (22 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9514 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL 157 OF 2017

SM MOHOCHI, J

JULY 22, 2024

BETWEEN

NELSON MWANZIA MUTUA ..... APPELLANT

AND

SAMMY MBEVU ..... RESPONDENT

AND

PETER GEORGE ODERO ..... THIRD PARTY

(Being an appeal from the Judgement and/or Decree of Honourable L. Gicheha in Nakuru CMCC No. 1304 of 2009 delivered on 6th November, 2017)

JUDGMENT

1. By Plaint dated 29th October, 2009 the Respondent sued the Appellant in Nakuru CMCC No. 1304 of 2009 seeking Kshs 500,000, costs of the suit as well as interests. The facts were that the Respondent and Appellant entered into an agreement dated 11th November, 2008 where the Appellant offered to sell a motor vehicle to the Respondent. The Respondent made a cheque deposit of Kshs.500,000 and the Appellant promised to deliver the vehicle within two weeks but that was not done. The Appellant through an undertaking dated 14th May, 2009 promised to refund part of the amount Kshs. 448,200 on or before July, 2009 but that was not done which prompted the institution of the suit.

2. The Appellant through his defence dated 12th July, 2010, denied entering into the agreement and in the alternative stated that the Respondent was a business associate and they had agreed to purchase a vehicle for their business from the 3rd Party. The Responded deposited the sum into the bank account of the Appellant and the Appellant transferred the amount to the 3rd Party. The vehicle was not delivered and the Third Party issued a cheque to the Respondent which was dishonored. The Appellant lodged

a complaint and the 3rd Party was arrested and charged in Mombasa Criminal Case No. 3313 of 2009. He denied there being an undertaking and accused the Respondent of intimidation and duress.

3. PW1, Sammy Mbevu testified that he met the Appellant in 2007. They became friends in 2008 and started business of selling industrial salts. In November of 2008 he wanted to purchase a pick up and he took a loan from Cooperative Bank where the Appellant worked. The Appellant said he knew someone who would do the importation. On 11th November, 2008, wrote a cheque to the Appellant's account number 01125xxxxxxxxx. He produced the deposit slip as PExh.1. The total amount was Kshs 900,000. He paid Kshs. 500,000 and the balance was to be paid upon delivery of the vehicle. It was a verbal agreement.

4. The Appellant sent an email of the vehicle specifications and that it was to arrive in 3 weeks. The Appellant was to send the acknowledgement that he made payment. The Appellant advised him that he had given money to his cousin Kioko to take to the dealer and to go to Mombasa in person. On 17th December he travelled to Mombasa and Kioko took him to the dealer. The vehicle had not yet been imported. He sought a refund from the Appellant an on 23rd December, 2008 the 3rd Party gave him a Cheque of Kshs 500,000, he deposited it on 24th December, 2008 and after a week it was dishonored. he produced the deposit slip and copy of Cheques as PExh.4 and PExh.5 respectively

5. The Appellant was arrested after the Respondent made a report with CID Nakuru. He pleaded to be released so that he could make payment arrangements. The Respondent withdrew the complaint and entered into an agreement. The Appellant agreed to refund him Kshs 448,200 between 14th May, 2009 and 14th July, 2009. He produced the same as PMFI.6. He still had not refunded the money. From the Partnership they deducted the sum of Kshs. 448,200 which was not refunded. He never instituted criminal case in Mombasa though he informed the Appellant of his intention to sue.

6. DW1 was Nelson Mutua Mwanzia stated the Respondent was a business associate. The business was doing well and required a vehicle for transport. They went to a car bazaar in Jamuhuri but wouldn't find what they wanted. They sought Nixon Kilonzo whom they used to source the salt from and he introduced the 3rd Party to them. He sent pictures a pick of going for Kshs. 900,000 which they liked and the Respondent sent Kshs. 500,000 from their business to Nixon. That the Appellant deposited the money in the Respondent's account. Nixon took the money to the 3rd Party. The pick-up was never delivered.

7. The Cheque Exh.8 from the 3rd Party to the Appellant was dishonoured. The Respondent followed up with the 3rd Party but was not successful prompting him to report to the police station in Mombasa. The 3rd Party was arrested for the offence of issuing a bad cheque and charged. He was a witness together with Nixon, the certified copied of the criminal case proceedings marked DMFI.1

8. On 13th May, 2009 he was arrested in Nakuru, he recorded his statement produced as D. Exh.5, was locked up and told would be released on cash bail of Kshs. 50,000. He was also told to sign the acknowledgement of Kshs. 500,000 to the Respondent dated 14th May, 2009. He signed it under duress. That the Respondent misled the Court in saying he did not know the 3rd Party.

9. DW2 Nickson Kioko Kilonzo stated that he received Kshs. 500,000 from Co-operative Bank, he took the money and handed it to the 3rd Party for the importation of a motor vehicle. He never received the vehicle or the money.

10. The Trial Court entered judgement on 6th November, 2017 in favour of the Respondent for the sum of Kshs. 500,000 together with costs and interests.

11. Aggrieved with the said judgement, the Appellant filed the instant appeal vide Memorandum of Appeal dated 27th November, 2017 on the following grounds: -

    a. That the Learned Trial Magistrate erred in law and in fact in failing to consider the Appellant's submissions.

    b. That the Learned Trial Magistrate erred in law and in fact in failing to find that the Respondent's evidence and his sworn Affidavits were full of contradictions and incredible.

    c. That the Trial Magistrate erred in law and in fact in failing to find that the 3rd Party, owed the Respondent the sum of Kshs. 500,000.

    d. That the Learned Trial Magistrate erred in law and in fact in failing to consider the Appellant's evidence in totality.

    e. That the Learned Trial Magistrate erred in law and in fact in holding that the Appellant was under an obligation to refund the Respondent when there was overwhelming evidence on record to the contrary.

12. The Appellant sought that the appeal be allowed and the judgement of the Trial Court be set aside with costs to the Appellant.

13. The Appeal was argued by way of written submissions pursuant to the direction of the Court of 30th January, 2024. The Appellant's submissions were not on record.

14. The Respondent in his submissions dated and filed on 9th February, 2024 submitted on four issues. As regards the first issue, counsel argued that the trial magistrate did consider the Appellant's submissions as the Appellant's case was enumerated in the judgement and argued further that the ground is misleading and evasive. He relied on *Mkube v Nymuro* [1983] KLR, 403-415 where the Court of Appeal held that the Court would normally not interfere with finding of fact unless it is based on no evidence.

15. On the credibility of the Respondent's evidence, the Respondent contended that he proved that he sent money to the Appellant and the Appellant confirmed receipt therefore the argument from the Appellant that he was under duress to refund the money was an afterthought. He relied on the pronouncement in *Miller v Minister of Pensions* [1942] 2 ALL ER 372.

16. Thirdly on the issue of whether the 3rd Party owes the Respondent, it was submitted that Order 1, Rule 19 of the *Civil Procedure Rules* and the decision in *Solomon J Muriungi & Another v Carren Atieno Auma & 2 Others* [2015] eKLR placed an obligation to the Appellant to either satisfy the decree or apply from judgement against the 3rd Party. That the Court cannot act suo moto.

17. Finally, it was submitted that Section 109 of the *Evidence Act* placed an obligation on the Appellant to prove that he was under duress. He also relied on the decision in *Hellen Wangari Wangechi v Carumera Muthini Gathiua* [2005] eKLR where the Court held that an assertion of fact has to be proved. That it was the onus of the Appellant to demonstrate that he was under duress.

Analysis and Determination

18. I have considered the documents on record; the testimony of the witnesses in the subordinate court and the Appellant's submission and the Court finds that the following issues are for determination is:

> Whether or not there was an oral between the Appellant and Respondent warranting the judgment?

19. Section 119 of the *Evidence Act* provides that: -

> " The Court may presume the existence of any fact which it thinks likely to have happened, regard being to the common course of natural events, human conduct and private and public business, in relation to the facts of the particular case"

20. On the issue of the whether the Plaintiff and the Defendant entered into a valid oral contract, the court of Appeal in *Ali Abid Mohammed v Kenya Shell & Company Limited* (2017) eKLR, stated that a contract between parties can exist where no words have been used but where it can be inferred from the conduct of the Parties.

21. This therefore shows that a contract need not be in writing but can be inferred from the conduct of the parties. The Court of Appeal in *William Muthee Muthami v Bank of Baroda* (2014) eKLR, stated that for a contract to be valid under the law of contract, it must be proved that there was offer, acceptance and consideration.

> " In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach."

22. Further, in *Charles Mwirigi Miriti v Thananga Tea Growers Sacco Limited and Another* (2014) eKLR the Court of Appeal stated that it is trite that there are three essential elements for a valid contract. That is an offer, acceptance and consideration.

23. I therefore find that the Respondent testified in support of his case before the Trial Court that he met the Appellant in 2007. They became friends in 2008 and started business of selling industrial salts. In November of 2008 he the Respondent wanted to purchase a pick up and he took a loan from Cooperative Bank where the Appellant worked. The Appellant said he knew someone who would do the importation. On 11th November, 2008, wrote a cheque to the Appellant's account number 01125xxxxxxxx. He produced the deposit slip as PExh.1. The total amount was Kshs 900,000. He paid Kshs. 500,000 and the balance was to be paid upon delivery of the vehicle. It was a verbal agreement.

24. That the Appellant further sent an email of the vehicle specifications and that it was to arrive in 3 weeks. The Appellant was to send the acknowledgement that he made payment. The Appellant advised him that he had given money to his cousin Kioko to take to the dealer and to go to Mombasa in person. On 17th December he travelled to Mombasa and Kioko took him to the dealer. The vehicle had not yet been imported. He sought a refund from the Appellant an on 23rd December, 2008 the 3rd Party gave him a Cheque of Kshs 500,000, he deposited it on 24th December, 2008 and after a week it was dishonored. He produced the deposit slip and copy of Cheques as PExh.4 and PExh.5 respectively.

25. This Court finds that, the oral agreement contains all the elements of a valid contract such as offer and accepted consideration and consent of the parties. The terms of the contract were also clear.

26. This Court confirms the finding that, the Respondent proved his case on a balance of probabilities and I accordingly confirm that, the Appellant is liable to pay for the Kshs. 500,000 by the Respondent.

27. The finding of fact that informed the judgment by the learned Magistrate in finding the case for the Respondent which I deem as sound interpretation that needs not to be disturbed.

28. As to whether in strict sense disregard of submissions without explicitly show casing what exactly was disregarded and the effect thereof. In the case of *Ali Ngumbao Baya & 2 others v Director of Public Prosecution* [2016] eKLR 'Reliance has been placed on the Court of Appeal decision in the case of Robert Fanali Akhuya case'. Held that,

> "With the provision in the *Constitution* at Article 159 that courts should not dwell on technicalities but focus on doing substantive justice, written submissions serve the purpose of expedience. Therefore, submissions can now be oral or written. Written submissions give parties latitude to explain their respective cases with ease as opposed to oral submissions which can be limited inform of time. Submissions simply put means an evaluation of the evidence by each party and analysis of the law".

29. I would hasten to add that, where a party makes submissions he or she summarizes the case, highlighting the strong points to be considered and attack the counterpart case with legal interpretation.

30. The fact that the learned magistrate made her evaluation of evidence and analyzed the law arriving at a finding of fact that there existed an agreement between the Appellant and the Respondent and that the 3rd Party.

31. As to whether the 3rd Party owes the Respondent, this Court is persuaded by the Respondent that Order 1, Rule 19 of the Ci*vil Procedure Rules* placed an obligation to the Appellant to either satisfy the decree or apply from judgement against the 3rd Party upon satisfaction and that the Court cannot move suo motu.

32. This Court thus finds that the Appeal lacks merit and the same is accordingly dismissed with costs of the Appeal to the Respondent.

It is So Ordered

DATED, SIGNED AND DELIVERED AT NAKURU ON THIS 22ND DAY OF JULY, 2024.

MOHOCHI S.M.

JUDGE