



REPUBLIC OF KENYA



**Mburu v Muhoro (Commercial Appeal 2 of 2023)
[2024] KEHC 8679 (KLR) (11 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8679 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
COMMERCIAL APPEAL 2 OF 2023**

FN MUCHEMI, J

JULY 11, 2024

BETWEEN

STEPHEN MBURU APPELLANT

AND

ALICE WANJIRU MUHORO RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. V. A. Ogutu (RM/Adjudicator) delivered on 23rd February 2023 in Thika Small Claims Court Commercial Claim No. E564 of 2023)

JUDGMENT

Brief Facts

1. This appeal arises from the judgment of Thika Resident Magistrate/Adjudicator in Small Claims Court Commercial Claim No. E564 of 2023 whereas judgment was entered in favour of the respondent for a sum of Kshs. 400,000/- paid to the appellant to process for title deeds for two plots.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 9 grounds of appeal summarized as follows:-
 - a. The learned trial magistrate erred in fact and law in finding that the respondent proved her claim whilst she did not provide any evidence showing that the respondent received Kshs.400,000/-.
 - b. The learned trial magistrate erred in law and in fact in failing to appreciate that the appellant availed evidence to show that he had received Kshs. 39,000/- from the respondent and conducted his duty as was expected of him in procuring the titles of the two plots on behalf of the respondent.
3. Parties put in written submissions.



The Appellant's Submissions

4. The appellant submits that the respondent claimed that she gave him Kshs. 400,000/- for purposes of processing title deeds for her for two plots. The appellant states that he was unable to deliver on the assignment for the titles were not in the name of the respondent which position was well communicated to the respondent. The appellant states that the he informed the appellant that the land Registrar Thika required her attendance before him to confirm ownership. The appellant submits that he produced the documents supporting his contentions in court during the hearing.
5. The appellant submits that he only received Kshs. 39,000/- from the appellant through one mpesa transaction. The appellant further argues that the respondent failed to provide substantial evidence of the transaction where she paid him Kshs. 400,000/-. The appellant states that the respondent claimed that she paid him Kshs. 400,000/- in cash after withdrawal from the bank but she did not produce any proof of bank withdrawals or call a witness. The respondent claimed that her son had witnessed her withdraw the funds.
6. The appellant further submits that he provided physical evidence of performing his obligations of assisting in obtaining of title deeds on behalf of the respondent as he conducted a survey, purchased maps and visited the land registry for processing of the title deeds whereas expenses were incurred.
7. The appellant argues that the trial court failed to appreciate that he did not want to be entangled in any fraudulent registration of land and he communicated the same to the respondent causing her to claim some exaggerated amounts from him.

The Respondent's Submissions

8. The respondent submits that a party is bound by its pleadings and although the appellant disputes receiving the sum of Kshs. 400,000/- from her, the appellant in his statement of response he stated that he received the money and used it in processing the title deeds on her behalf. Furthermore, the respondent submits that all through the appellant's pleadings, he stated that he had received money from her and actually began the work and it is only during the hearing that the appellant changed the story saying that he received Kshs. 39,000/- This was after her witness and herself had already testified in court. The respondent argues that based on the foregoing, the trial court found the appellant's assertions of receiving Kshs. 39,000/- as an afterthought.
9. The respondent submits that although the appellant stated in his statement of response that he used her money to employ a team of surveyors who subdivided Plot Number SSS6/70 Makongeni that was allocated a new number being Thika Municipality/Block 1/73, the appellant did not prove his assertions. According to the respondent, it is not possible to sustain a team of surveyors for an unknown prolonged period on a job and end up paying only 39,000/-. The appellant pleaded that he already spent the respondent's money and that the claim against him is ill advised yet he later claimed that he could not process the titles for the land did not belong to the respondent but to other people whom he named as Edward Mwaura and Jane Wamaitha Njeri. The respondent argues the ownership of the parcels of land was never in dispute. The respondent states that upon scrutiny of the pleadings and evidence adduced, it is clear that the appellant's evidence was like a pendulum. On one hand, he averred that the work was already done and that the funds were disbursed to him. On the other hand, the appellant stated that the process was frustrated by the respondent.
10. The respondent argues that her evidence inconsistent in the pleadings and in her statement as well as that of her eye witness was sufficient proof of her claim. The respondent further states that she produced an acknowledgment of the funds executed by both parties.



11. The respondent relies on the case of *Alfred Anekeya Mangu'la t/a Alfabetty Enterprises vs Paul Indimuli & Another HCCA No. 41 of 2020* Kakamega and submits that lending agreements need not be in writing for them to be enforceable. As such the respondent argues that although their agreement was oral, it does not exclude the appellant from responsibility. Furthermore, the respondent submits that the mpesa statement produced by the appellant indicating the receipt of Kshs. 39,000/- does not in any way disprove that he received Kshs. 400,000/- from her.

Issue for determination

12. The main issue for Determination is whether the appeal has merit.

The Law

13. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

“.....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 allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

14. In *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR the Court of Appeal stated 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 allowance in this respect.

15. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-
- a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
 - c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

Whether the Appeal Has Merit.

16. It is a principle of law that whoever lays a claim before the court against another has the burden to prove it. Sections 107 and 108 of the *Evidence Act* provide as follows:-

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.



When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

(108) the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

17. The burden of proof was discussed in the case of *Muriungi Kanoru Jeremiah vs Stephen Ungu M'mwarabua* [2015] eKLR where the court held as follows:-

As I have already stated, in law, the burden of proving the claim was the appellant's including the allegation that the respondent did not pay the sum claimed as agreed; i.e. into the account as provided....The trial magistrate was absolutely correct in so holding and did not shift any legal burden to the appellant...The appellant was obliged in law to prove that allegation; after the legal adage that he who asserts or alleges must prove.....In the circumstances of this case, the respondent bore no burden of proof whatsoever in relation to the debt claimed. By way of speaking, the shifting of burden of proof would have arisen had the trial court magistrate held that the respondent bore burden to prove that he deposited the sum of Kshs. 98,200/- the debt being claimed herein.

18. Similarly, in the *Halsbury's Laws of England, 4th edition*, Volume 17 at paras 13 and 14:-

The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he had failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.

The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence.

19. From the record, the respondent testified that she gave the appellant Kshs. 400,000/- to process for her two title deeds in respect for Plot No. 556/70 Makongeni and Plot No. Phase 10 Makongeni. The respondent further testified that although she paid the appellant, he did not process the titles and despite asking for a refund, he refused to give her back the funds claiming that he had already spent it in the initial process. In support of her evidence the respondent produced an acknowledgement of receipt executed by both parties on 26th October 2022 in which the appellant acknowledged that he was in the process of procuring the lease documents and further he committed to refund all of the moies in the event that he failed to complete the process within 60 days.
20. The respondent also called an eye witness, CW2, who testified that he accompanied her to the bank on 20/01/2020 and witnessed withdraw of Kshs. 400,000/- for the purposes of processing title deeds. The witness said he saw the respondent handing over the money to the appellant the same day at Fululia hotel in Thika.



21. The appellant said that he spent the respondent's money in the initial process and blames the respondent for frustrating the process. In his Statement of Response dated 9th May 2023, the appellant stated that he employed a team of surveyors who sub divided Plot No. SS6/70 Makongeni and Plot N. phase 10- Makongeni into two titles LR. No. Thika Municipality/Block 1/73 and Thika Municipality Block 1/214 respectively. The appellant further pleaded that the said properties belonged to one Jane Wamaitha Njiri and Edward Mwaura Ndegwa respectively and the lands officer required the respondent to present the said persons for approval and transfer the title to her name.
22. The appellant during his testimony presented a different version testifying that the respondent gave him Kshs. 39,000/- through mpesa and produced the mpesa extract statement as an exhibit.
23. The evidential burden shifted to the appellant when the respondent and her witness testified that he was given Kshs. 400,000/- to process the two titles and produced the acknowledgment executed by both parties. The appellant however did not controvert the respondent's evidence that he received the money and failed to deliver. All he said was that he spent the money by procuring some title deeds not in the name of the respondent but did not adduce any evidence to that effect. The appellant raised the issue of only Kshs. 39,000/- having been given to him during the hearing and not in his pleadings. A party is bound by their pleadings. He did not deny executing the acknowledgement of the entire amount. He only claimed that the document had a mistake for no such money had been paid to him.
24. The appellant has failed to satisfy this court on his grounds of appeal in my considered view.
25. Accordingly, it is my view that the respondent proved her case before the Magistrate/Adjudicator on a balance of probability as against the appellant.
26. In view of the foregoing, I find that the appeal lacks merit and it is hereby dismissed with costs.
27. It is hereby so ordered.

JUDGMENT DELIVERED, DATED AND SIGNED AT THIKA THIS 11TH DAY OF JULY 2024.

F. MUCHEMI

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JUDGE

