Leah Ambale Nandwa t/a Lenox General Supplies v Nderitu (Civil Appeal E866 of 2022) [2024] KEHC 9737 (KLR) (Civ) (8 August 2024) (Judgment)

Neutral citation: [2024] KEHC 9737 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E866 OF 2022

HI ONG'UDI, J

AUGUST 8, 2024

BETWEEN

LEAH AMBALE NANDWA T/A LENOX GENERAL SUPPLIES ...... APPELLANT

AND

BEATRICE WAHU NDERITU .... RESPONDENT

(Being an Appeal against the Judgment of Hon. M. N. Murage Senior Resident Magistrate delivered on 26th September, 2022 in Milimani Civil Suit No. E6309 of 2020)

JUDGMENT

1. The respondent who was the plaintiff in the lower court filed a claim for Ksh 712,400/= plus costs and interest against the appellant. This figure comprised of Ksh 562,400/= allegedly given to the appellant for investment after an oral agreement was entered into. The rest is interest on the same.
2. The appellant filed a statement of defence dated 10th November, 2020 denying the claim. The respondent filed a reply to the defence. Its dated 25th November, 2020.
3. The matter proceeded to full hearing and later both parties filed submissions through their counsel. The trial Magistrate on 26th September, 2022 entered Judgment for the respondent as prayed.
4. The appellant being dissatisfied with the Judgment filed this appeal dated 26th October, 2022 on the following grounds:
   i. That the learned trial magistrate erred in law and in fact by failing to give effect the provisions of the law of evidence under Section 107, 108 and 109 of the *Evidence Act* that speaks to the question of burden of proof hereby awarding a sum of Keh 712,400/= as special damages, which sum was not strictly proved as required by law.

ii. That the learned trial magistrate erred in law and in fact by finding that the Respondent had proved that she loaned the appellant Ksh 562,400/= in March 2019, which the appellant was to repay with interest to the tune of Ksh 712,400/= thereby occasioning a miscarriage of justice.

iii. That the learned trial magistrate erred in law and in fact by failing to appreciate that the respondent has not established the elements of a valid oral agreement.

iv. That the learned trial magistrate misdirected herself in finding that the appellant has not produced evidence to prove that the money received from the respondent was for the purposes of running errands on behalf of the respondent, despite the appellant producing documentary evidence and availing a witness to corroborate her account.

v. That the learned trial magistrate erred in law and violated the appellant's constitutional right to a fair hearing, as guaranteed by Article 50 of *the Constitution* by not granting the appellant's witness an opportunity to testify.

vi. That the learned trial magistrate erred in law and in fact by failing to appreciate the evidence before her, the appellant's written submissions, and the factual inconsistencies in the respondents written submissions.

vii. That the learned trial magistrate erred in law and in fact in making a decision that flew in the face of the provisions of the *Evidence Act* on the burden of proof and thereby arriving at an irrational and unreasonable decision and one which goes against clear provisions of the law.

5. The appeal was canvassed through written submissions.

Appellant's submissions

6. These were filed by Kiroga Kuria & Company Advocates and are dated 20th November, 2023. Counsel addressed the court on two main issues for determination. On whether the court considered sections 107, 108 and 109 of the *Evidence Act* in awarding Kshs 712,400/= as special damages he answered in the negative. Relying on the case of William Muthee Muthani V Bank of Baroda [2014] eKLR counsel submitted that the respondent had a duty to prove the existence of a contract. To do this she had to show that there was an offer, acceptance and consideration. This to him was never done, since no LPO to confirm a tender was ever produced.

7. On the burden of proof counsel argued that the respondent had not produced any evidence to prove her claims, neither had she called any witnesses to support her claim of there being an oral agreement between the two of them. To support this position he cited the cases of:

i. David Njuguna Ngotho v Family Bank Limited & Another [2018] eKLR

ii. Siriba Ontita V Albert Mongare Okemwas [2021] eKLR

8. On the Appellant's Mpesa statement counsel submitted that the statement alone could not satisfy the purpose for which the amount was deposited into the respondent's account. On this reference was made to the case of Patrick Peter Kithini V Kamau Kimanzi [2020] eKLR and section 108 of the *Evidence Act*.

9. While relying on section 109 of the *Evidence Act* counsel submitted that special damages must be pleaded and proved. In support he relied on the cases of:

i. Kenya Breweries Limited Kiambu V General Transport Agency Limited [2000] eKLR

ii. Douglas Kalafa Ombera V David Ngama [2013] eKLR.

He argued that the respondent did not produce any written agreement signed between herself and the appellant showing that the appellant agreed to a refund of the amount purportedly lent with Kshs 150,000/= as interest. He further referred to Kanji Jadva Valji V Trinity Prime Investment Limited & 2 others [2014] eKLR where it was held:

> " Contracts for the loan of money are legal under common law, and such loans can be secured by way of personal security consisting of guarantees or indemnities, or by real security consisting in rights in order or over property belonging to the borrower. Interest, including compound interest, is at common law as a general rule not payable unless there is express agreement to that effect."

10. The next issue counsel submitted on, is whether the respondent proved that she lent the appellant Kshs 562,400/= in March 2019 which attracted interest bringing the amount Kshs 712,400/=. It's his contention that the email from the respondent to the appellant dated 11th April, 2019 with a tender advert for the supply of Desktop computers and laptops to KRA did not in itself show that the appellant's business held any tenders with either KRA or any other entity in or around March, 2019. With this lack of evidence he referred to Garvey V Richards [2011] JMCA 16 which held that for a contract to be valid, essential terms governing the relationship of the parties must be incorporated therein, and the subject matter be certain. There must also be positive evidence that a contractual obligation born out of an oral or written agreement is in existence.

11. Additionally, he submitted that there is no evidence to show that the respondent sent the appellant Ksh 562,400/= through Mpesa. However, from the Mpesa statements produced, the money sent to the appellant amounts to Ksh 128,770/= (receipts on pages 46-48 of the record of appeal). Referring to the case of Carol construction Engineers Limited & Another v National Bank of Kenya [2020] eKLR, he submitted that the elements of promissory estopped are representation, reasonableness, reliance, detriment and unconscionability none of which was proved.

Respondent's submissions

12. These were filed by Karwanda & Associates and are dated 14th February, 2023. It is counsel's submission that the respondent proved that indeed the appellant owed her Kshs 712,400/=. Further that what the respondent claimed was not special damages. That the appellant had not objected to the production of the WhatsApp conversation between her and the respondent. Counsel submits that the conversation demonstrated that the appellant received money from the respondent. She could not therefore turn around and deny it. For this, reliance was placed on the case of Ahmed Mohammed Noor V abdi Aziz Osman [2019] eKLR. Counsel contented that the appellant's evidence was full of lies, since she admitted receiving money but misled the court on what the money was for.

13. On whether the advanced amount was proved, counsel answered in the affirmative. This he said was through the Mpesa statements and WhatsApp conversations which proved that the appellant had received the entire sum which is payable with interest.

14. Counsel further submitted that the only evidence the appellant produced in court were her Bank and Mpesa statements whose purpose she did not explain. That what was detected was that she had sufficient funds in the account to make the repayment but was not willing to honour it.

15. Finally, counsel submitted that the respondent's claim and pleadings are very clear and were well expounded during trial. Further that the appellant was unable to prove that the money she received was meant to run errands. He thus asked the court to disallow the Appeal.

Analysis and determination

16. This being a first appeal, the court has a duty to re-evaluate and re-consider the evidence on record and arrive at its own conclusion. This was re-stated in the case of Abok James Odera t/a A. J. Odera & Associates [2013] eKLR as follows:

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and gave reasons either way"

17. Upon careful consideration of the record of appeal, grounds of appeal, submissions and cited authorities by both parties I find the issue for determination to be whether the respondent proved her claim on a balance of probabilities.

18. From the evidence on record, there is no dispute that the appellant and respondent knew each other very well, and they were in constant communication. It was the respondent's evidence that the two of them got into an arrangement in 2019, for the respondent to fund the appellant with money (Kshs 562, 400/=) to enable her pay for a tender with Kenya Revenue Authority (KRA). Further that the funds lent would attract an interest of Kshs 150,000/=. The respondent confirmed that the agreement to fund the appellant was oral and not in writing. The only evidence she had were her Mpesa statements plus their WhatsApp conversations (pages 14 – 15 of the record of appeal).

19. On the other hand, the respondent denied ever entering into any such agreement with the appellant. She too referred to her Mpesa – statements (pages 101 -105) of the record of appeal.

20. From the evidence herein, the bone of contention at this juncture is whether there existed a contract between the appellant and respondent. In the case of National Bank of Kenya Ltd V Pipeplastic Samkolit (K) Ltd & Another (2001) the court held that:

> "A court of law cannot re-write a contract between the parties whereas its role is limited to interpretation of the same. This is because contracting parties are free to specify the terms and conditions of their agreement, and that when parties do contract, the court does not have the right or ability to substitute its judgment for that of the parties."

21. In Eldo City Limited v Corn Products Kenya Ltd & another [2013] eKLR which applied the English Supreme Court decision in RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG [2010] UKSC 14, it was held as follows;

> "whether or not there was a binding contract in place could be established by considering the communication, by words and by conduct, between the parties and assessing whether it led to the objective conclusion that the parties intended to create legal relations and whether the parties had agreed on all terms essential to form a contract."

22. Further, in Storer v Manchester City Council [1974] 1 W.L.R. 1403, the court held as follows: -

> "In contracts you do not look into the actual intent in a man's mind. You look at what he said and did. A contract is formed when there is, to all outward appearances, a contract. A man cannot get out of a contract by saying: "I did not intend to contract" if by his words he

has done so. His intention is to be found only in the outward expression which his letters convey. If they show a concluded contract that is enough."

23. With the above decisions and the law in mind, I will now re-evaluate the evidence on record. The respondent was specific that the funding she made was for purposes of investing Kshs 562,400/= in the tender awarded to the appellant's business known as Lenox General Suppliers. The tender had been issued by KRA among other entities.

24. From all aspects this was a huge sum of money calling for specific evidence to confirm the same and what was happening between the appellant and respondent. The respondent was not part of the entity that was awarded the tender, and in her pleadings, she said the borrowing was in or about March 2019. A perusal of the Mpesa statements she produced shows Mpesa transactions ranging from 3rd April, 2019 – 2nd April, 2020. Was the appellant executing the contract for a whole year? Secondly the total of the sums shown vide the Mpesa transactions is Kshs 163,987/00. The respondent claims to have loaned the appellant Kshs 562,400/=. Where is the evidence?

25. On the other hand, the appellant's Mpesa transactions bearing the respondent's names as having sent cash to the respondent totals Kshs 50,000/=. The appellant's claim of having given the respondent Ksh 320,000/= from the Makueni County tender is not supported by any evidence.

26. The burden of proof in this matter lay on the respondent who claimed Kshs 712,400/= from the appellant. Sections 107, 108 and 109 of the *Evidence Act* place such burden of the respondent. The said law provides thus:

    Section 107 Burden of proof:

    1. 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.

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

    Section 108 Incidence of burden:

    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.

    Section 109 Proof of particular fact:

    The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

27. The question now is whether this burden was proved by the respondent.

28. It is true that during cross examination the appellant admitted receiving money from the respondent for running errands. The issue here, is how much money she received from the respondent despite the purpose. All that has been shown from the Mpesa statements is that the appellant received Kshs 163,987/= from the respondent which she has not accounted for.

29. As for what is in the appellant's Mpesa as having been sent to the respondent has not been claimed for in the pleadings and so it will not be considered herein. The trial Magistrate besides setting out the evidence adduced did not show how he arrived at the conclusion that the respondent had disbursed Ksh 562,400/= to the appellant.

30. My finding is that the only amount proved to have been disbursed to the appellant is Kshs 163,987/=.

31. The upshot is that the appeal has merit and is allowed. The Judgment by the subordinate court is set aside and substituted with one for Kshs 163,987/= plus costs and interest at court rates from the date of the Judgment in the lower court, in favour of the respondent. Each party to bear its own costs for the Appeal.

32. Orders accordingly

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 8TH DAY OF AUGUST, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE