Thiong'o v Tuti & another (Civil Appeal E338 & E346 of 2023 (Consolidated)) [2024] KEHC 11150 (KLR) (23 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11150 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CIVIL APPEAL E338 & E346 OF 2023 (CONSOLIDATED)

CJ KENDAGOR, J

SEPTEMBER 23, 2024

BETWEEN

SYLVIA WAMBUI THIONG'O .... APPELLANT

AND

CHARLES TUTI .... 1ST RESPONDENT

TUTI SAFARIS LIMITED .... 2ND RESPONDENT

(Being an appeal from the Judgment of Hon. M. Kinyanjui, Principal Magistrate, delivered on 14th August, 2023 at the Chief Magistrate's Court at Kiambu by Hon. Manuela Kinyanjui, Senior Principal Magistrate, in CMCC 124 of 2019)

JUDGMENT

1. This Judgment relates to the Judgment of Hon. M. Kinyanjui, Principal Magistrate, delivered on 14th August, 2023 at the Chief Magistrate's Court at Kiambu by Hon. Manuela Kinyanjui, Senior Principal Magistrate, in CMCC 124 of 2019.

2. The 1st Respondent is a director of the 2nd Respondent. In September ,2018, the Appellant sought the 1st Respondent's assistance in importing a Motor Vehicle from Japan. They agreed that the Appellant would pay the 1st Respondent some Agency fee for his services, although the parties dispute on the exact agreed figure for the Agency fees. The Appellant paid a sum of Kshs 814,000/= to the Respondents for the purchase of the Motor Vehicle. The Respondents went ahead and sourced the motor vehicle as agreed. When the Motor Vehicle arrived at the Port of Mombasa, the 1st Respondent cleared with the Customs and registered the vehicle with the National Transport and Safety Authority in Appellant's name.

3. Thereafter, the Appellant engaged the services of a driver to drive the Motor Vehicle from Mombasa to Nairobi and paid the driver Kshs 10,000/= for the services. By the time the vehicle left Mombasa, it

had no comprehensive insurance cover. However, along the way to Nairobi and before the Appellant could take possession, the vehicle was involved in a road traffic accident which left the vehicle with a cracked side mirror as well as dents on the left side and the windscreen. The Appellant declined to take possession of the motor vehicle and also refused to take the Log Book. The 1st Respondent took the vehicle to Joginder's Auto Services Centre where he secured parking space for the Motor Vehicle.

4. The Appellant sued the Respondents vide a plaint dated 22nd March, 2019 asking for judgment against the Respondents jointly and severally for Kshs 814,000/= and costs of the suit. She anchored the suit on breach of contract, specifically on a total failure of consideration. The Respondents filed a Statement of Defense and a Counter-Claim. In the counter-claim, the 1st Respondent sought 40,000/= as the Agency Fees and Reimbursement for accrued parking fees of Kshs 800/= per day from 5th November 2018 until the date of removal of the Motor Vehicle from the Parking Space.

5. The lower court, in a judgment delivered on 14th August 2023, found that both the Appellant and the Respondents share liability to the ratio of 50:50. It also dismissed the Respondents' counter-claim.

6. Both parties were dissatisfied with the lower court's judgment and appealed to this court. The Appellant was the first to file a Memorandum of Appeal on 12th September, 2023 and the appeal was registered as Civil Appeal No E338 of 2023. She listed three grounds of appeal, namely;

    1. That the learned magistrate erred in law and in fact in apportioning liability whereas the subject matter was not about a road traffic accident.

    2. That the learned magistrate erred in law and in fact in failing to appreciate the impeccable evidence that the Appellant had on the issue of refund of the monies against the Respondents.

    3. That the learned magistrate erred in law and in fact in failing to consider the Appellant's submissions and therefore arriving to an erroneous decision.

7. She asked the court to allow the Appeal, and set aside the lower court's judgment.

8. The Respondents also filed their Memorandum of Appeal on 15th September 2023 and the appeal was recorded as Civil Appeal No E346 of 2023. They listed 9 grounds of appeal, namely;

    1. The Learned Magistrate erred in fact by unilaterally quantifying the Appellant's loss at Kshs 814,000/= and apportioning the same equally between the Appellant and the Respondents when the same was not pleaded or proved as such.

    2. The Learned Magistrate erred in fact by finding the Respondents liable for a half of the Appellant's loss when the Respondents proved that the service for which Kshs 814,000/= had been paid to them; that is purchase of a Motor Vehicle for the Appellant, the shipping to Mombasa of that Motor Vehicle and clearance with customs; was rendered to completion.

    3. The Learned Magistrate erred in fact by finding the Respondents liable for a half of the Appellant's loss when the Respondent's proved that the Appellant's Motor Vehicle was delivered to her and she rejected it, and when the Respondents led testimony that the Motor Vehicle was now in storage at Joginder's garage.

    4. The Learned Magistrate erred in fact and law by finding that the 1st Respondent failed to recommend a competent driver to the Appellant when the same was neither pleaded nor proved.

5. The Learned Magistrate erred in fact by finding that the 1st Respondent failed to discharge his obligations as an expert when neither his field of expertise nor his failure to discharge his obligations as would be expected of such expert was either pleaded or proved.

6. The Learned Magistrate erred in fact and law by imputing liability for the accident to the Appellant's Motor Vehicle upon the driver recommended to the Appellant by the 1st Respondent, and by extension to the Respondents, when no allegation of negligence was pleaded or proved against any of them.

7. The Learned Magistrate erred in fact and law by finding the Respondents liable for events that occurred after the Appellant's Motor Vehicle had left the port of Mombasa when she had already found that the agency relationship between the Appellants and the Respondent terminated when the Appellant's Motor Vehicle arrives at the Port of Mombasa.

8. The Learned Magistrate erred in fact by denying the Respondent's counterclaim in its entirety when the Appellant admitted in her testimony that she did not pay the agreed fee of Kshs 20,000/= to the Respondents.

9. Altogether, the Learned Magistrate erred in fact and law by determining the suit in the Trial Court on grounds of negligence that were neither pleaded nor proved, thereby finding the Respondents liable on grounds they had no opportunity to defend themselves against.

9. They requested this court to allow the appeal with costs, set aside the lower court's judgment, and substitute it with an order dismissing the Appellant's suit before the Trial Court. They also asked the court, in the interest of justice, to give directions on what should happen to Motor Vehicle Registration Number KCS 553L, currently registered in Sylvia Wambui Thiongo's name and stored at Joginder's Garage, and to pay the accrued storage charges for the Motor Vehicle.

10. Later, by consent of parties dated 1st March 2024, the two appeals, E346 of 2023 and E338 of 2023, were consolidated, and the Lead file was E338 of 2023. For the purposes of this Appeal, the Appellant refers to Sylvia Wambui Thiong'o. The 1st Respondent refers to Charles Tuti, while the 2nd refers to Tuti Safaris Limited. The matter was canvassed by way of written submissions.

The Appellant's Submissions

11. The Appellant submitted that the honorable Magistrate did not understand her case and therefore proceeded to misdirect herself and apportion liability for the accident whereas the Appellant's case was about breach of contract and the available award was for refund of the purchase price of the motor vehicle and the same was pleaded at Kshs 814,000/=. Her argument was that the cause of action arose out of breach of contract for sale of a motor vehicle.

12. She submitted that the Respondents allegation that their obligation was just to facilitate importation of the subject motor vehicle are baseless as it is so apparent that the purchase price was paid directly to them and was not paid to the sellers of the motor vehicle in Japan. She argues that she did not have any link with the sellers of the motor vehicle in Japan because she did not have any agreement with them.

13. In addition, she submitted that the Respondents' obligation was to import and sell the subject motor vehicle to her. She argued that the 1st Respondent's obligation under the agreement would end upon him delivering the motor vehicle to her in Nairobi with the motor vehicle in the same condition as it was when he first sent its photographs to her.

14. She also argued that the Respondents are not entitled to the claimed Kshs 40,000/= because they failed to deliver the subject motor vehicle to her in good state. Lastly, she argued that the 1st Respondent is not entitled to the claim of Kshs 800/= per day for the storage charges because he did not have any invoices to enable him make the claim. She relied on the case of *Equator Distributors v Joel Muriu & 3 others* [2018] eKLR.

The Respondents' Submissions:

15. The Respondents argued that they were not the sellers of the Motor Vehicle and that they should not be held liable for the purchase price and the costs attendant to shipping it to Kenya. They submitted that, in receiving the money and paying it to various parties along the way, the money did not at any point become their money and that they were only agents of the Appellant. They argued that the Appellant did not accuse them of breaching the agency relationship. In addition, they submitted that they did not breach the agency relationship between them and the Appellant because by the time the Motor Vehicle left Mombasa, it was in the condition in which it was imported and the Kshs 814,000/= being claimed by the Appellant had been put to its full and proper purpose.

16. They submitted that they should not be held responsible for the damage sustained by the Motor Vehicle because it was the Appellant who bore the risk at the time of the accident. They support this argument by pointing out that the ownership of the motor vehicle was the Appellant's from the outset, it was shipped in her name, it was imported by her, and it was accordingly registered in her name. They also argue that they should not be held liable for the damage because the driver who was in possession of the Motor Vehicle when the accident occurred was the Appellant's agent and not Respondents.'

17. With regards to what should happen to the Appellant's Motor Vehicle, the Respondents argued that the Appellant was, from the outset, the owner of Motor Vehicle KCS 533L and that it was hers to repair. They submitted that the Appellant has the right to pursue compensation for the damage to it from the negligent parties, but that was not the subject of her suit before the Trial Court. They also submitted that the Appellant's Motor Vehicle is her responsibility now as it was when it was cleared at the Port in 2018 and that all charges attendant to the storage of that Motor Vehicle are therefore payable by her.

Issues for Determination:

a. Whether there was a Seller-Buyer agreement between the Appellant and the Respondents

b. Whether there was an agency relationship between the Appellant and the Respondents, and if there was any, when did it end?

c. Whether the Respondents were entitled to the relief sought under the Counter-Claim

Whether there was a Seller-Buyer agreement between the Appellant and the Respondents

18. The Appellant claimed that their engagement with the Respondents was that of a seller and buyer because she paid the purchase price to them and they were to import and sell the subject motor vehicle to her. On the other hand, the Respondents argued that they were only agents of the Appellant, and that they were not sellers of the Motor Vehicle. The lower court did not directly address this issue.

19. Being a first appeal, the duty of this court is to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. This principle was set out in *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123 where the Court held:

> “ …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 account of particular circumstances or probabilities materially to estimate the evidence …”

20. Upon perusal of the evidence before the lower court, there is every indication that the engagement between the two parties was not that of a seller and a buyer. Documentary evidence before the court showed that the Appellant was the Buyer of the Motor Vehicle from the outset, and the Respondents did not acquire ownership of the Motor Vehicle at any time

21. The Motor Vehicle was shipped in her name as per the Bill of Lading, it was imported by her as per the Motor Vehicle Radiation Inspection Report and the Import Declaration Form and it was registered in her name as per the logbook and the NTSA Search.

22. In addition, during cross-examination, the Appellant admitted that there was no sale agreement between her and the Respondents, and that she was not buying anything from them. In her own words, she said, “There was no agreement of sale. I was not buying anything from him. I was not buying motor vehicle from him.”

23. In my view, this statement by the Appellant ultimately settles this issue and rules out the possibility of a seller-buyer relationship between the Appellants and the Respondents. Having found so, the upshot is that, the Appellant’s claim that her cause of action arose out of breach of contract for sale of a motor vehicle is rendered baseless, because there was never a contract for sale between the two parties in the first place. In addition, the issue of when risk passed to the Appellant does not arise because there was no transfer of ownership between the Appellant and the 1st Respondent.

Whether there was an agency relationship between the Appellant and the Respondents, and if there was any, when did it end?

24. The next question is whether there was an agency relationship between the Appellant and the Respondents. The Respondents argued that they were only agents of the Appellant and that their obligation under the agency relationship was to assist the Appellant in importing the Motor Vehicle from Japan.

25. The starting point is to define an agent-principal relationship. I am guided by the case of *Lucy Nungari Ngigi & 4 others v National Bank of Kenya Limited & another* [2015] eKLR, where the High Court states as follows;

> “ Ample judicial authorities were cited by both sides on agent-principal relation arising from the addendum herein. I am content to rely on the literary work in Bowstead and Reynolds on Agency Seventeen Edition, Sweets Maxwell Page 1-001, which defines such a relationship to be:-
>
> > “… a relationship which exists between two persons, one whom expressly or impliedly consents that the other should act on his behalf so as to affect his

relations with third parties, and the other of whom similarly consents so to act or so acts."

26. Similarly, the Court of Appeal in *Industrial & Commercial Development Corporation (ICDC) v Patheon Limited* [2015] eKLR, states as follows;

> "So who was to reimburse the respondent? We concur with the trial court that the relationship between the receiver and the appellant in this case was that of principal and agent. Why do we say so? The receiver was appointed by the appellant who was both majority shareholder and a debenture holder in PVP. In addition the receiver was an employee of the appellant. Further, Mr. Majani testified that he reported all activities to the appellant and all proceeds from the sale of PVP went to the appellant. The *Concise Dictionary of Law*, 2nd Edition, page 17 defines an "agent" as,
>
> > "A person appointed by another (the principal) to act on his behalf, often to negotiate a contract between the principal and a third party."
> >
> > In *Garnac Grain Co. Inc. v H.M. Faure & Fair Dough Ltd and Bunge Corporation* (1967] 2 All E.R. 353 Lord Pearson with the concurrence of the House used the words-
> >
> > > "The relationship of the Principal Agent can only be established by the consent of the Principal and Agent. They will be held to have consented if they have agreed to what amounts in law to such a relationship, even if they do not recognize it themselves and even if they have professed to disclaim it... the consent must, however, have been given by each of them, either expressly or by implication from their words and conduct."

27. Based on the above authorities, I agree with the Respondents that they were agents of the Appellant. The totality of the evidence placed before the trial court reveals that the Appellant wanted the Respondent to act on her behalf and be the link between her and the Sellers of the Vehicle in Japan. The evidence shows she was the main party in the transaction and that the 1st Respondent was merely facilitating or assisting her in importing the vehicle.

28. This was apparent during cross-examination, where the Appellant described the role of the 1st Respondent in the transaction. She said "I engaged the [1st Respondent] to source for me a motor vehicle. I needed him to assist me in importing a motor vehicle. I contacted him to import for me. I paid Kshs 815,000/=. This money was to be paid to the seller of the motor vehicle. He was not to keep it. I was to pay him Kshs 20,000/= for his service." Similarly, in her witness statement dated 22nd March 2019, she stated that, "I called [the 1st Respondent] and indicated to him that I needed him to assist me to import a car."

29. The Lower Court analyzed this evidence and held that the 1st Respondent was the Appellant's agent in the importation of the vehicle from Japan. The Court observed as follows; "The Communications between the [Appellant] and the [1st Respondent] confirms that the 1st Respondent was an agent of the Appellant. The Appellant engaged the 1st Respondent to act as her agent in the importation of the vehicle from Japan. By doing so, the Appellant appointed the Defendant to handle the transaction on her behalf. As a principal, the Appellant paid for the vehicle's purchase price..... There was therefore an agency relationship created when the Appellant engaged the Respondents to import the vehicle on her behalf." I find no reasons to fault the lower court's finding on this issue.

30. Having found that there was an agency relationship between the Appellant and the 1st Respondent, at what point then did the agency relationship terminate? The question of when an Agency relationship ends is to be determined primarily by the express terms of the agency agreement between the Principal and the agent. In the absence of such express terms, the question is to be determined by the conduct of the parties.

31. It is not disputed that the parties in this case did not have a written contractual agreement expressing the agency relationship. Instead, the terms of the agreement are scattered between text messages and oral conversations, the authenticity of which the parties could agree. For example, the 1st Respondent stated in her witness statement that his role was 'limited to facilitating the importation, clearance, and registration.' On the other hand, in both her witness statement and testimony in court, the Appellant does not elaborate on the terms of the agency relationship. She only stated that the 1st Respondent was to assist her in importing the car. She did not indicate when his role would come to an end.

32. Nonetheless, the lower court held that the agency relationship terminated when the vehicle arrived in Mombasa. The Court held, "the [1st Respondent] clearly informed the [Appellant] that the vehicle had arrived and he had registered it in her name. In my view, he had completed his job and the agency therefore ceased to exist."

33. I disagree with the lower court's observation on this issue because the conduct of the 1st Respondent suggests otherwise. For instance, when the motor vehicle was involved in a road traffic accident, the 1st Respondent immediately called the Appellant and informed her that it had happened. In addition, the 1st Respondent also accompanied the driver in delivering the motor vehicle to the Appellant. In my view, the conduct of the 1st Respondent shows that the agency relationship between him and the Appellant did not terminate upon the registration of the Vehicle but extended up to the time of the delivery of the vehicle.

34. The Appellant argued that the 1st Respondent, being her agent, had various obligations arising thereunder. She claimed that the 1st Respondent was obligated to ensure that the Motor Vehicle was insured correctly (with a comprehensive cover) from Mombasa until the point she would take its possession. She also argued that the 1st Respondent was obligated to ensure that the Motor Vehicle was being driven safely so as to reach her in a good state. Lastly, she submitted that the 1st Respondent was obligated to ensure that the Motor Vehicle reached her in the same state as it was in the photographs that the 1st Respondent sent her before the purchase of the said vehicle.

35. However, these claims are not supported by any evidence and I dismiss them as unproved. The Appellant did not state these in her pleadings, and witness statement, and it did not come out during her testimony in court. It is a well appreciated principle of law that parties cannot plead their case through submissions.

36. As stated by the Court of Appeal in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR:

> "Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."

37. I am inclined to find that, alongside her agency relationship with the 1st Respondent, the Appellant also entered into another separate agency relationship with the driver who drove the vehicle from Mombasa to Nairobi. This is rightly so because she allowed her to drive the vehicle to Nairobi and paid him Kshs 10,000/= upon the delivery of the vehicle.

Whether the Respondents were entitled to the relief sought under the Counter-Claim

38. The Appellant and the 1st Respondent agree that the Appellant was to pay the 1st Respondent a sum of money for his services, but the two do not agree on the figure. An extract of their WhatsApp chats does not help solve this issue either because it shows that while the 1st Respondent was asking for Kshs 40,000/=, the Appellant was on the other hand only willing to pay Kshs 20,000/=.

39. The Appellant does not state the figure in her witness statement. However, during cross-examination, she stated that she was supposed to pay 20,000/= for the agency fee but admitted that she did not pay that money. On the other hand, the 1st Respondent stated, in his witness statement, that they agreed the agency fee to be Kshs 40,000/=. The Appellant did not produce evidence to prove the claim for the additional Kshs 20,000/= denied by the Appellant. Therefore, I hold that it is more probable than not that the agency fee was settled at Kshs 20,000/= as claimed by the Appellant.

40. The standard and burden of proof provided by the *Evidence Act* ought to be discharged; he who alleges must prove. Section 107 of the *Evidence Act* places the burden of proof on the party that alleges.

41. I am also guided by the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 others* (2014) eKLR, where the Supreme Court held inter alia:

> "The person who makes such allegations must lead evidence to prove the fact. She or he bears the initial legal burden of proof, which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence of a fact in issue."

42. The 1st Respondent is however not entitled to a reimbursement for accrued Parking Fees of Kshs 800/= per day from 5th November 2018 until the date of removal of the Motor Vehicle from the Parking Space. During cross-examination, the 1st Respondent admitted that he did not have documentary evidence to prove the claim. He stated; 'I didn't sign any document with the garage. I've not produced any invoice.'

What recourse is available to the Appellant and what is to happen to the Appellant's Motor Vehicle?

43. Having found earlier that there was no Seller-Buyer relationship between the Appellant and the Respondents, it is my holding that the Appellant did not have the right to decline to take possession. This is because the 1st Respondent was her agent and not the seller. If she had reasons to believe that the Respondents and the Driver who drove the vehicle were negligent, her recourse laid in suing them for damages for the breach (if any) of their respective obligations to her as her agents.

Conclusion:

a. The Appellant's appeal Civil Appeal No E338 of 2023 is hereby dismissed.

b. The Respondents' appeal Civil Appeal No E346 of 2023 is partially allowed.

c. The Judgment of the Trial Court is hereby set aside and substituted with an order dismissing the Appellant's Suit before the Trial Court.

d. The Respondents' counterclaim at the lower court is partially allowed, and the Appellant is ordered to pay the 1st Respondent Kshs 20,000/= as Agency Fees.

e. The Respondents' claim for Reimbursement for accrued parking fees is declined.

f. Each party to bear its costs.

44. It is so ordered.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT 23RD SEPTEMBER, 2024.

TEAMS ONLINE PLATFORM ON

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C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Hellen

Mr. Kagura for Appellant in E338/2023

Ms Njoroge for Respondent in E338/2023