Waithaka v Wanyoike (Civil Appeal E098 of 2023)
[2024] KEHC 14060 (KLR) (17 September 2024) (Judgment)

Neutral citation: [2024] KEHC 14060 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CIVIL APPEAL E098 OF 2023

GL NZIOKA, J

SEPTEMBER 17, 2024

BETWEEN

MERCY WAITHAKA ..... APPELLANT

AND

TIMOTHY NJUGUNA WANYOIKE ..... RESPONDENT

(Being an appeal from the decision of Hon. E. Cherop, Adjudicator delivered on 24{{^th}} October 2023 vide Naivasha Small Claims Court Claim No. E170 of 2023)

JUDGMENT

1. By a statement of claim dated 23rd August 2023, the cliamant (herein "the respondent") sued the respondent (herein "the appellant") seeking for the following orders: -
    a. Refund of the principal amount of Kshs. 381,000
    b. Interest accrued of Kshs. 69,000 as at 31st January 2023
    c. Compensation of interest at court rates on the Kshs. 450,000 since 31st January 2023.
    d. Costs of the suit.
2. The respondent claimed that on or about September 2022, he advanced the appellant a loan of Kshs. 381,000 on the understanding that the same would be refunded together with interest of Kshs. 119,000 by 31st January 2023. That, the appellant refunded a sum of Kshs. 50,000 leaving a balance of Kshs. 450,000, hence the claim herein.
3. However, the appellant vide a statement of response dated 8th September 2023, denied the claim and/ or receiving any loan from the respondent. She averred that the parties herein are long-time friends who have engaged in several businesses, without any "hitches".

4. That as a result of the aforesaid, in the month of August 2022, the parties discussed the subject of Crypto market and trading. That the appellant was well versed with the business and once persuaded, the respondent invested Kshs 7,000 into the local bitcon account. Further, that the appellant disclosed that she was trading through a company and the respondent opted to deal in the business through that company and get returns in six (6) months.

5. That as the investment was heavy the respondent agreed to enter into a joint venture agreement with the appellant to invest his money through the appellant's company Nova Tech, a company trading in bitcoin trade since 2019.

6. It is averred that the respondent sent the appellant a sum of Kshs 300, 000 which she deposited into her account and shared details including the charges paid by the respondent. That the respondent also deposited Kshs 200, 000 into the account.

7. That it was the term of joint venture agreement that the respondent would earn interest of Kshs. 200,000 at the end of six (6) months giving rise to a total of Kshs. 500,000 inclusive of the initial deposit.

8. The appellant denied guarantying a refund of the respondent's money and argued that the refund was dependent on the performance of the investing company and in any event both parties were investors.

9. The appellant averred that, the delay in transmitting the money to the respondent was occasioned by a law suit instituted against the company by the U.S. Securities Exchange Commission (SEC) in which temporary orders were issued preventing trading and acquisition of all securities by or of the company and orders extended on 2nd March 2023 for a period of six (6) months.

10. That as a result of the lawsuit, the withdrawals of the sum invested and interest took longer than usual to be approved. That she updated the respondent regularly on all the issues relating to the delay in refund of his money. That nevertheless, she would transmit to the respondent his rightful claim once the withdrawals are approved.

11. The appellant denied that, the Kshs. 50,000 to the respondent was part of the investment and stated that it was a gratuitous payment from a previous investment in the company but separate from the joint venture.

12. The case proceeded to full hearing where the parties adopted their statements and the documents filed in support thereof and at the close of the case parties filed their submissions.

13. At the conclusion of the case, the trial court delivered its judgment on 24th October 2023, wherein it found that, there was no contest that the appellant received Kshs. 381,000 from the respondent, but there was no evidence of a joint venture agreement and/or lending agreement. Further, that the appellant had refunded the respondent a sum of Kshs. 50,000.

14. The trial court then held that the claimant's claim was partially successful and entered judgment in favour of the respondent as follows: -

    a. Judgment in the sum of Kshs. 331,000

    b. Costs of the claim with interest from the date of filing.

15. However, the appellant is aggrieved by the decision of the trial court on the following grounds: -

    a. That the Honourable Learned Magistrate Adjudicator erred in law and fact by failing to appreciate that the appellant and the respondent had entered into a joint venture agreement.

b. That the Honourable Learned Magistrate/Adjudicator erred in law and fact in arriving at the finding that the appellant owed the respondent a debt.

c. That the Honourable Learned Magistrate /Adjudicator erred in law and fact in ignoring or not considering the appellant's evidence and submissions on record thus arriving at a wrong decision.

d. That the Honourable Learned Magistrate/Adjudicator erred in law and fact in failing to take into consideration the totality of the evidence tendered and consequently arriving at the decision not supported by the facts and evidence on record.

16. As a result, the appellant seeks for the following orders: -

a. The appeal be allowed.

b. The judgment of the Honourable court delivered on 24th October 2023 and consequential orders be set aside.

c. That the appellant be granted costs of this appeal.

17. The appeal was disposed of vide filing of submissions. The appellant in submissions dated 11th June, 2024 argued that, there was a valid joint venture agreement based on the conduct and intention of the parties of pooling resource together with the aim of investing the same.

18. She relied on the case of; Omar Gorhan vs Municipal Council of Malindi (Council Government of Kilifi) and Overlook Management Kenya Ltd [2020] eKLR where the High Court cited with approval the case of; Garvey v Richards (2011) JMCA 16 where Harris JA stated that: -

> "It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into contractual relationships and consideration. For a contract to be valid and enforceable an essential terms governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement is in existence."

19. On whether the respondent was entitled to compensation, the appellant invoked the doctrine of frustration as outlined by the Court of Appeal in Kenya Airways Limited v Satwant Singh Flora [2013] eKLR and restated by the Court of Appeal in Five Forty Aviation Limited v Erwan Lanoe [2019] eKLR, where the court stated that: -

> "....the doctrine of frustration operates to excuse further performance where it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist, or that some particular person will continue to be available, or that some future event which forms the foundation of the contract will take place, and before breach performance becomes impossible or only possible in a very different way to that contemplated without default of either party and owing to a fundamental change of circumstances beyond the control and original contemplation of the parties. The mere fact that a contract has been rendered more onerous does not of itself give rise to frustration."

20. The appellant further submitted that, she was unable to withdraw the matured investment after six (6) months due to a major crackdown against major cryptocurrencies in the United States of America and aggravated by the order against NovaTech barring from dealings with cryptocurrencies. That, the crackdown was unforeseeable and barred the parties from further performing their contractual obligations.

21. That, the joint venture agreement did not provide that the appellant would guarantee or indemnify the respondent against any loss and therefore it would be prejudicial for the court to compel her to indemnify and/or compensate the respondent.

22. That in the circumstances, the respondent cannot seek the intervention of the court to re-write the contract. She placed reliance on the case of County Government of Migori v Hope Self Help Group [2020] eKLR where the High Court cited the case of Civil Appeal No. 330 of 2003, Hussamudin Gulamhussein Pothiwalla administrator, Trustee and Executor of the Estate of Gulamhussein Ebraihim Pothiwalla -vs- Kidogo Basi Housing Cooperative Society Limited and 31 Others where the Court of Appeal stated that a court cannot rewrite a contract between parties, that ordinarily equity does not allow a party to escape from a bad bargain save for special case.

23. The Appellant reiterated that she kept the respondent updated on their investment even after NovaTech was barred from dealings, and undertook to transfer the respondent's share once she could make the withdrawal.

24. Lastly, the appellant cited section 27 of the Civil Procedure Code (Cap 21) Laws of Kenya which provide that costs follow the event and submitted that she had proved her case and prayed that the court awards her costs of the suit.

25. However, the respondent in submissions dated 16th June 2024 urged the court to dismiss the appeal as it raises both issues of law and fact contrary to the provisions of section 38 of the *Small Claims Court Act* that provides an appeal to the High Court shall be only on matters of law.

26. The appellant submitted that the Adjudicator did not err in holding that the parties had not entered into a joint venture agreement, as she Adjudicator acknowledged that the agreement produced by the parties was neither signed nor dated.

27. Further, the appellant failed to prove other essential elements to the joint venture being; the description of the business, statement declaring the parties to the joint venture, the contribution of each party, the bank accounts holding the contribution, how the profits will be distributed, management of the joint venture, costs and compensation, and termination.

28. The respondent submitted that, the appellant admitted to have received Kshs. 381,000 from him and there being no evidence that the funds were sent elsewhere, the trial court correctly held that the appellant ought to refund the money to the respondent.

29. That in the case of; Samuel Kamau Macharia vs Kenya Commercial Bank Limited, Kenya Commercial Finance Company Limited [2003] eKLR the High Court set out the principles of unjust enrichment and held that that, it is intended to prevent a person from retaining money or some benefit obtained from another and is against conscience that he should keep it and therefore should be restored to the plaintiff.

30. The respondent further submitted that, the appellant failed to identify evidence the trial court had ignored to assist the court on appeal to interrogate whether an error of law had been committed. Furthermore, the findings of the trial court were based on the evidence produced and the witness

statements by both parties. That in the circumstances, the appeal should be dismissed and the respondent awarded costs.

31. Having considered the appeal in light of the materials placed before the court, I note that the role of the 1st appellate court is to re-evaluate the evidence adduced in the trial court afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses as held by the Court of Appeal in the case of; Selle & Another vs Associated Motor Boat Co. Ltd. & Others (1968) EA 123.

32. The Court of Appeal thus observed: -

> "I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. 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. 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 or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

33. However, this matter arose from the Small Claims Court established under *Small Claims Court Act*, cap 10A of the Laws of Kenya. Section 38 thereof states as follows:

    (1) A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.

    (2) An appeal from any decision or order referred to in subsection (1) shall be final. (emphasis added)

34. A perusal of the grounds of appeal herein reveals that they relate to matters of fact save for ground (1) which contests partially the validity of the joint venture agreement. The appellant was duty bound to adhere strictly to the provisions of section 38 and lay out explicitly matters of law relied on and explain how the Adjudicator erred in relation to the same. That has not been done.

35. Be that as it may, as to whether there was a valid contract and/or joint venture agreement between the parties, I note that, the appellant argues that the parties had entered into a valid joint venture agreement for purposes of investing money in bitcoin trade through NovaTech company.

36. That, although the contracted was never signed, the intention of the parties can be seen from their conduct of drafting the agreement and the respondent sending the money.

37. On the other part, the respondent argues that the trial court was right in holding that there was no valid contract as the same had not been signed by the parties. Further, the appellant failed to prove the elements of the contract.

38. In considering the rival arguments, I note that in the case of; William Muthee Muthami vs. Bank of Baroda (2014) eKLR the Court of Appeal laid out the elements required to be proved before bringing a claim for breach of contract. The court thus stated: -

> " 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."

39. In the case of; Rhoda Kibunja t/a Docuquest Enterprises v Next Technologies Limited [2020] eKLR the High Court considering whether there was a valid contract where a draft agreement had been sent by the plaintiff to the defendant, the court stated that as follows: -

> 36. Having considered the totality of the evidence against the express pleadings, I find that the terms of engagement by the parties were neither evident nor agreed upon. I would venture to say that the correspondence between PW 1 and DW 1 prior to submission of the Tender documents was mostly one sided and do not make reference to the oral agreement or the terms thereof between the parties. Although the correspondence shows that PW 1 forwarded several documents including CV's of proposed experts and supplier related documents, there was no indication in the emails about the terms of engagement as pleaded in the plaint including the terms of payment.
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> 37. The undisputed evidence it that it is PW 1 who sought out DW 1. What were the terms of her offer to the defendant for the collaboration? On what basis was she submitting the information and documentation to DW 1. Nothing in the emails prior to the close of the Tender disclosed the nature of the offer to the defendant and neither is there any indication of acceptance of such an offer by the defendant from the totality of the evidence. There is also no evidence that the plaintiff offered and the defendant accepted the terms set out in paragraph 4 of the plaint.
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> 38. Even if accept what is stated at paragraph 5 of the Plaint, that the plaintiff proceeded to undertake her duties, it was, as she states, "pending the signing of and negotiations on the joint venture agreement". From the emails exchanged between PW 1 and DW 1, the draft joint venture agreement forwarded by PW 1 to DW 1 constituted an offer. The offer contained in the draft agreement was not accepted as the agreement was never signed.
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> 39. The fact that the plaintiff forwarded a draft agreement for consideration to the defendant implies that the parties intended that following negotiations, any understanding would be concluded by a signed agreement. As the plaintiff stated in the plaint, she proceeded to engage with the defendant, "on the understanding that the agreement was to be signed by the parties." Since no agreement was not signed, the court cannot imply an agreement in the circumstances.
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> 40. Counsel for the plaintiff submitted that the draft agreement forwarded by email to DW 1 established the intention of the parties to establish legal relations...
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> 41. While it is true that it must be established that the parties intended to enter into legal relations, the contract is only implied or established when there is a meeting of minds or where the parties are ad idem. An intention to establish legal relations is an essential ingredient in the formation of a contract. An intention alone does not constitute a contract as such intention must ultimately be consummated. In this case, PW 1 forwarded to DW 1 an agreement for consideration but the totality of the evidence is clear that no agreement was reached between the parties on the terms pleaded at paragraph 4(i), (ii), (iii) and (iv) of the plaint. Since no agreement was reached, I findthat the plaintiff's case for breach of contract has failed."

40. In the instant matter the parties did not sign and or execute the agreement relied on by the appellant. A party to a document is bound to perform the contractual obligation under it by virtue of endorsing it.

41. Thus it is trite law that an unsigned contracts and agreements are not legally binding. This means that parties may not be able to enforce the terms and conditions stated in the contract. This also is an indication that there was no agreement between the parties.

42. The document relied on herein is blank hence it is as good as the plain paper on which it was made. Thus the trial court was well guided and did not err when it held that since the joint venture business was denied by the respondent could not rely on the alleged agreement not executed by the parties.

43. The rest of grounds are on matters of facts but even when considered I find that the appellant was ordered to refund sums acknowledged received and held to which she lays no proprietary interest

44. In the given circumstances I find no merit in the appeal herein and dismiss it with costs to the respondent.

DATED, DELIVERED AND SIGNED ON THIS 17TH DAY OF SEPTEMBER, 2024

GRACE L NZIOKA

JUDGE

In the presence of;

Appellant in person

Mr. Njoroge for the Respondent

Mr. Komen: Court Assistant