Kibaara v Kiama (Commercial Appeal E158 of 2023) [2024] KEHC 12521 (KLR) (Commercial and Tax) (17 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12521 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL APPEAL E158 OF 2023

PM MULWA, J

OCTOBER 17, 2024

BETWEEN

JANEROSE KAITHI MUTEGI KIBAARA ..... APPELLANT

AND

TERESA N KIAMA ..... RESPONDENT

JUDGMENT

1. This is an appeal from the judgment and decree of the Honourable B J. Ofisi (Senior Resident Magistrate/Adjudicator) delivered on the 23rd June 2023 in SCCCOMM No. E1013 of 2023. In the suit, the respondent (the claimant) claimed that on 22nd March 2018, she and the appellant agreed to trade in forex through the appellant's I & M Bank account jointly; that she contributed USD. 7,000 and the appellant USD. 1,226; that the appellant withdrew USD 2,000 from the account and gave the respondent; that she later sent an additional Kshs. 15,700.00 required for the trading to the appellant via M-pesa and thereafter the appellant was unresponsive.

2. The appellant denied the claim. Her case was that she granted the respondent full access and control to her multicurrency account with the PIN and everything required for its operation after the respondent mentioned that she was interested in forex trading but did not have a dollar account; that through the account it was possible to load Dollars, from a cash deposit made in Kenyan Shillings, and disburse the money to a forex broker; that the money deposited by the respondent was immediately sent to the forex broker, Pastor Clement Enzomo and that the account statements provided by the respondent were for I & M Bank's collection account through which money was held pending distribution to different credit cards.

3. After hearing the matter, the trial court found that on the basis of the action by the parties, they had entered into an implied agreement and that the appellant had a duty to spend the money for the

intended venture. It also found that the appellant had not provided evidence to show how the monies deposited by the respondent were used for the trading business and that she failed to avail a witness from the bank to corroborate her statement. In the end, the trial court found that the respondent proved her case to the required standard. The trial court stated that it could not make out how the appellant had shared her credit card credentials which are confidential.

4. Aggrieved by the decision, the appellant instituted this appeal through a memorandum of appeal dated 19th July 2023, on the following grounds:-

    1. The learned magistrate misdirected herself in Law by disregarding and failing to consider the Appellant's evidence, testimony and submissions thus arriving at an erroneous decision.

    2. The learned magistrate erred in law by delivering judgment despite there being a pending application with a hearing date making the entire judgment irregular and against the legally sound principles of a fair hearing.

    3. The learned magistrate erred in law by delivering judgment without jurisdiction in light of a binding judgment delivered by Hon. Lady Justice Patricia Gichohi on 23rd March 2023 in *Kartar Singh Dhupar & Company Limited v ARM Cement PLC (In Liquidation) (Civil Appeal 129 of 2022*) [2023] KEHC 2417 (KLR) (Commercial and Tax) (23 March 2023) (Judgment).

    4. The learned magistrate erred in law by acting without jurisdiction by conducting a trial of a case the subject of which was Sub-judice in light of a case at Milimani MCCC/E6513/2022 Dr Janerose Kaithi Mutegi VS Dr. Teresa Nungari Kiama.

    5. The learned magistrate erred in law by denying the Appellant's application to summon a material witness by the name Clement Enzomo while basing the judgment on failure by the Appellant to call witnesses.

    6. The learned magistrate erred in law by abdicating its power under section 19 of the *Small Claims Court Act*, 2016 by failing to summon an expert witness to shed light on technicalities of operating a Multi-currency card thus arriving at a wholly wrongly premised judgment.

    7. The learned magistrate erred in law by conducting the trial in utter disregard of principles fair hearing by manifestly expressing actual bias and prejudice against the Appellant.

    8. The learned magistrate misdirected herself in Law by purporting to shift the burden of proof to the Appellant, the resultant effect that the Judgment was wholly erroneous in Law.

    9. The learned magistrate erred in law by holding that there was an agreement between the Appellant and the Respondent against the weight of evidence on record.

    10. The learned magistrate erred in law by purely relying on hearsay evidence against the rules of evidence.

    11. The learned magistrate erred in law while writing a judgment by departing from the legally recognized principles of the content of judgment thus making the whole judgment entirely unlawful.

    12. The learned magistrate erred in law in arriving at a judgment insupportable in Law, in fact or on the basis of the Pleadings and Evidence filed the resultant effect being that the Judgment was wholly erroneous.

5. The appellant prays that the judgment delivered on 23rd June 2023 and the decree thereof be wholly set aside; that the Court makes any other orders that it deems fit in the circumstances and that the costs of the appeal be awarded to it.

6. The appeal was canvassed through written submissions. The appellant and the respondent filed written submissions dated 2nd December 2023 and 18th April 2024 respectively.

Analysis and determination

7. I have considered the memorandum of appeal, the record of appeal and the parties' respective submissions. This is a first appeal from a decision of the Small Claims Court. Section 38 of the *Small Claims Court Act* provides that:

> "(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."

8. It therefore follows that in an appeal from the SCC, this Court's mandate is circumscribed to handling matters of law only. Matters of fact are only interfered with if they were based on no evidence or wrong principles (See Bashir Haji Abdullahi v Adan Mohammed Nooru & 3 others [2014] eKLR).

9. In my view, the twelve grounds of appeal may be condensed and rephrased into the following three issues for determination:

   a. Whether the trial court erred by delivering the judgment without jurisdiction while an application dated 9th June 2023 challenging its jurisdiction was pending.

   b. Whether the trial court showed actual bias and prejudice against the appellant in conducting the hearing of the suit.

   c. Whether the respondent proved its case on a balance of probabilities and was entitled to the amount awarded.

10. The first issue flowed from grounds 2, 3 and 4 of the Memorandum of Appeal. The appellant submitted that the impugned judgment was delivered while its application dated 9th June 2023 challenging the trial court's jurisdiction was pending. And that this was against its right to a fair hearing under Article 50 of *the Constitution*.

11. I note from the record that indeed the appellant filed an application dated 8th June 2023 seeking a declaration by the trial court that it lacked the jurisdiction to deliver judgment in the matter as pronounced by a binding decision of this Court. However, I also note that on 19th July 2023, the appellant's advocate withdrew the said application as it had been overtaken by events. Therefore, ground 2 fails.

12. Section 34(2) of the Small Claims Court (SCC) Act provides that proceedings should be concluded within 60 days of filing of the claim and the judgment delivered within 3 days of the hearing. The appellant relied on this provision to argue that the trial court had no jurisdiction to deliver the impugned judgment outside the 60 days' statutory timeline. In support of its position, the appellant relied on the decision in *Kartar Singh Dhupar & Company Limited v ARM Cement PLC (In Liquidation) (Civil Appeal 129 of 2022*) [2023] KEHC 2417 (KLR) (Commercial and Tax) (23rd

March 2023) (Judgment) in which the Court held that the judgment of the trial court was made without jurisdiction as it was given outside the statutory timelines set under Section 34 of the SCCA.

13. On its part, the respondent submitted that the Court has since departed from the position adopted in the aforementioned case.

14. Certainly, Courts have since held that the said provision is directory and not meant to oust the Court's jurisdiction. In this respect, the Court in *Crown Beverages Limited v MFI Document Solutions Limited (Civil Appeal E833 of 2021)* [2023] KEHC 58 (KLR) (Civ) (17 January 2023) (Judgment) held that Section 34(2) of the SCCA which requires the proceedings be concluded within 60 days of filing of the claim and the judgment delivered within 3 days of the hearing, is directory and not mandatory as it is not the intention of the SCCA to invalidate any proceedings that violate the statutory timelines. See also *Biosystems Consultants v Nyali Links Arcade (Civil Appeal E185 of 2023)* [2023] KEHC 21068 (KLR) (31 July 2023) (Ruling) and Javier Rumili Munzala T/A Javier & Associates v Kingdom Bank Limited (HCCA NO. E065 OF 2023). And therefore, ground 3 fails as well.

15. I now move to the contention that the learned magistrate erred in law by acting without jurisdiction by conducting a trial of a case the subject of which was sub-judice in light of a case at Milimani MCCC/E6513/2022 Dr. Janerose Kaithi Mutegi v Dr. Teresa Nungari Kiama. I note from the record that the appellant filed a preliminary objection (PO) dated 25th February 2023 raising this issue before the trial court. I further note that the PO was dismissed by the trial court through a ruling delivered on 17th March 2023. There was no appeal against that ruling and therefore, I am inclined to agree with the respondent's submission that an appeal on this ground at this juncture cannot stand.

16. The next issue is whether the trial court showed actual bias and prejudice against the appellant in conducting the hearing of the suit. The appellant faulted the trial court for declining her request to adjourn the matter when one of her witnesses, Florence Wambui Mwangi, had internet issues and was not able to join the hearing; declining to adjourn the matter on 4th May 2023 to allow summons to be issued against one Clement Enzomo; failing to record its denial and for holding that the appellant failed to call a witness who would have shed light on the transactions; failing to invoke Section 19 of the SCCA to summon an expert witness to shed light on the technicalities of operating a multi-currency card.

17. The respondent submitted that the trial court could not be faulted for her decisions and instead blamed the appellant for seeking leave to put in a supplementary list of witnesses but failing to include Mr. Enzomo contrary to the legal requirement of disclosure of all witnesses before the hearing to prevent litigation by ambush. She argued that the introduction of Mr. Enzomo after the commencement of the hearing and in the middle of the appellant's cross-examination would have highly prejudiced her.

18. The record shows that Mr. Enzomo was a party known to the appellant and not an independent expert witness. Therefore, I concur with the respondent that the trial court did not err in declining to summon Mr. Enzomo after commencement of the hearing and after the close of its case.

19. On the contention that the trial court failed to invoke Section 19 of the SCCA to summon an expert witness, I note that there is no summons of the witness on the record. The appellant ought to have extracted the witness summons, and then serve the same. If the witness was served with the summons and he failed to attend court, in compliance with the said summons, the appellant could then have moved the court by an application to impose a fine upon the defaulting witness (See *Christopher Rusana v Royal Media Services Ltd t/a Citizen TV Kisumu (Civil Appeal NO. 9 of 2019)* [2021] eKLR).

20. On allegations of bias, while the appellant complained of failure to by the trial court to record its denial of summons, I must restate that there is nothing on the record to show that it earlier filed the summons and that the witness failed to attend. Facts constituting bias must be specifically alleged and established. Accordingly, grounds 5, 6 and 7 cannot stand.

21. The last issue is whether the respondent proved its case on a balance of probabilities and was entitled to the amount awarded. On this issue, touching on facts, as earlier stated this Court cannot interfere unless the findings were based on no evidence or wrong principles.

22. Section 109 of the *Evidence Act* provides that:-

> " 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."

23. Section 112 of the *Evidence Act* provides that:

> " In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

24. In William Kabogo Gitau v George Thuo & 2 Others [2010] 1 KLR 526, the Court elaborated on what balance of proof on a balance of probabilities entails, thus:-

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

25. The learned adjudicator's findings were that: "...based on the actions taken, the parties had entered into an implied agreement; the appellant had a duty to spend the money for the intended venture; the appellant had not provided evidence to show how the monies deposited by the respondent were used with regard to the trading business; the appellant failed to avail a witness from the bank to corroborate her statement and the respondent proved her case to the required standard on a balance of probabilities."

26. My considered view is that the appellant failed to prove its claim that the respondent merely deposited the sums into her multicurrency account to have it changed to dollars and transferred to Mr. Enzomo for forex trading. I agree with the reasoning of the trial court to the effect that the appellant's explanation that she had given full credentials to the respondent was unsatisfactory.

27. Accordingly, I find that the trial court's findings were based on evidence and on sound legal principles and they do not warrant this Court's interference.

28. In conclusion, therefore, the appeal herein is found to be without merit and it is dismissed with costs, which I assess at Kshs. 30,000.00.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 17TH DAY OF OCTOBER 2024.

P. MULWA

JUDGE

In the presence of:

Mr. Wanyingi for appellant

Mr. Lionnel Odhiambo for respondent

Court Assistant: Carlos