



**Nguku v Jamjos Enterprises Limited (Civil Appeal E126 of 2023)
[2024] KEHC 13165 (KLR) (Civ) (9 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13165 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E126 OF 2023

AM MUTETI, J

OCTOBER 9, 2024

BETWEEN

ERICK MBIU NGUKU APPELLANT

AND

JAMJOS ENTERPRISES LIMITED RESPONDENT

(Being an appeal from the judgment of Honourable Kagoni E.M, Principal Magistrate, delivered on 24th November, 2022 in Chief Magistrate’s Court Milimani CMCC No. E10650 OF 2021)

JUDGMENT

Introduction

1. The appeal arises from the judgment of Honourable E. Kagoni PM in CMCC No. E10650 of 2021 rendered out of a dispute arising from an alleged contractual relationship between the parties.

Summary Of The Dispute

2. According to the plaint filed by the respondent the two parties had been engaged in business dealings for a period of five years.
3. The respondent claim was that the year 2017 the parties entered into a verbal contract wherein the respondent would supply the appellant with goods on credit.
4. Further, the respondent claimed that the respondent would settle the appellant would settle the accruing debt within 60 days, however the respondent agreed to a restructuring of the debt and the parties entered into an agreement on 2nd June 2021 for the settlement of Kshs. 2,181,490 the sum owing and due to the respondent.



5. The respondent maintained that the appellant committed to paying the sum of Kshs. 100,000 weekly beginning 2nd June 2021 bill payment in full.
6. It is the alleged failure by the appellant to honour the agreement that gave rise to the suit.
7. The appellant denied the contentions by the respondent maintaining that there was no such an agreement as alleged by the respondent.
8. According to him he ensured that all his purchases were in cash and where he did not make cash payment he would draw a cheque.
9. The appellant alleged that sometime in September 2019 he took some goods from the respondent but since the respondent did not have all the consignment he wanted he paid in advance the sum of Kshs. 990,000 by way of a cheque with an undertaking by the respondent that he would deliver the tiles in question within a week.
10. The appellant further contended that the respondent did not deliver the tiles within the week as agreed.
11. It was after the two weeks that the respondent delivered the consignment of tiles to the appellant which consignment he declined to accept owing to what he claimed to be a substandard supply.
12. The appellant went on to claim in his defence that he informed the respondent to change the consignment or else review the price downwards to accommodate his concerns about quality.
13. The appellants case was that the respondent ignored that demand by the appellant and went ahead to deposit the cheque without his authority prompting him to direct his bank not to honor the cheque.
14. The appellant denied that he owed the respondent any money other than the figure in issue which the respondent failed to act on his demands.
15. The facts stated above basically sum up the case of the parties. It was the dispute before the learned Honourable magistrate who found the appellant liable to pay the respondent the sum of Kshs. 2,081,490 plus costs and interests.
16. It is this finding that has given rise to the appeal.

Duty Of The First Appellate

17. As a first appellate Court this Court is expected to review , reevaluate and appreciate the evidence tendered before the trial Court and there from draw its own independent conclusions.
18. The Court is of course expected to make due allowance to the conclusions reached by Magistrate on account of this Court not having had the opportunity to hear the witnesses.
19. The Court is however not bound by the trial Courts findings of facts based on the analysis of evidence . See *Selle Vs. Associated Motor Boat Co. Ltd.*

“ 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.



20. The appellant file a witness statement dated 20th January 2022 which he adopted and relied on at the hearing. In the statement he maintained that he was engaged in business with the respondent largely on cash basis, and he would at other times draw cheques.
21. He only acknowledged the transaction involving Kshs. 990,000 cheque which he issued to the respondent and later stopped.
22. He denied entering into a contract agreement as alleged by the respondent.
23. The respondent on his part filed a statement too in which he claimed owed him the sum of Kshs. 2,181,490 and that the appellant had declined to settle the sum.
24. The respondent relied on an agreement dated the 2nd June 2021 in which the appellant undertook to pay the sum in installments but breached the agreement.
25. I have thoroughly scrutinized the written statement filed by the appellant as his defence and noted that the appellant did not make reference to the alleged agreement entered into between him and the respondent on 2nd June 2021.
26. In my view that omission was deliberate but not a mere oversight. It was intentional.
27. I hold that it was intentional because the respondents witness statement dated 30th July 2021 must have been within the knowledge of the appellant as at 30th January 2022 when he responded by way of his statement.
28. The respondent in support of his claim called PW1 Hilda Waithera who adopted her statement which succinctly set out the respondents case against the appellant. She stated that that statement was served upon the appellant in person in the presence of the respondent's accountant.
29. The witness was emphatic that there was an agreement dated 2nd June 2021 executed between the parties and in execution of the same the appellant paid the first instalment of Kshs. 100,000 in cash.
30. The witness maintained that the appellant did not ask them not to bank the cheque nor demand that there be a reconciliation.
31. The appellant testified on 27th July 2022 and adopted his statement in defence. He indicated that he paid the plaintiff in cash and cheque on delivery. He however sought time to pay Kshs. 600,000 as they reconcile accounts.
32. Upon cross-examination he admitted owing the sum of Kshs. 600,000 and that he drew up a cheque of Kshs. 990,000. According to him there were no delivery notes because we have been in business with the plaintiff for 9 years. We have dealing without documents. I did not sign the agreements and I do not agree with the computer generated statement.
33. The respondent produced and relied on the computer printout as his proof of the debt as well as agreement of 2nd June 2021.

Analysis

34. I have taken time to peruse the respective statements in support of each parties' case.
35. I have also looked at the documents tendered in support of the respondent's case before the learned Honourable magistrate.



36. Undeniably these two parties had business dealings for a considerable period of time hence I have no hesitation in drawing a conclusion that trust between them had developed.
37. The appellant put the period of business dealing to about 9 years almost a decade.
38. The appellant when called to testify did not deny the claim by the respondent in its entirety. But nevertheless he was dissatisfied with the learned magistrates decision and has appealed on the following grounds:-
 1. That the Honourable magistrate erred in law and in fact in failing to appreciate that the respondent's suit lacked merit and ought to have been dismissed. The trial Magistrate failed to evaluate both the documentary evidence and oral that was adduced before him.
 2. That the Honourable magistrate erred in law and in fact in preferring the testimony and submissions of the respondent against that of the appellant and misapprehended the evidence and issued raised. The trial court failed to analyze and consider all the material facts, and was openly biased against the appellant.
 3. That the Honourable Magistrate erred in law and fact in finding that the Appellant was bound by an agreement which he did not execute and he does not know about its existence and by so doing arrived at a wrong conclusion.
 4. That the Honourable Magistrate erred in law and in fact by failing to find the agreement produced by the Respondent was inadmissible for it was NOT executed by the Appellant as required under section 3 of law of contract act.
 5. That the Honourable Magistrate erred in law and fact in finding that the Appellant had no real defense and finding the appellant had no bonafides.
 6. That the Learned Magistrate erred in law and in fact in failing to acknowledge that the Respondent did not discharge its burden of proof. The trial court determined the matter in favour of the Respondent herein when the evidence tendered by the Respondent did not prove the case. The Judgement is against the weight of the evidence.
39. It is from a reading of the grounds set forth by the appellant that I draw the following issues for determination: -
 - i. Whether the Learned Honourable magistrate's decision was supported by the evidence.
 - ii. Whether the agreement dated 2nd June 2021 was executed by the parties and therefore binding.
 - iii. Whether the respondent discharged the burden of proof in support of his claim as against the appellant.
40. On the first issue the evidence tendered by the appellant and the respondent left no doubt that there was a contractual relationship between the two parties.
41. It was admitted by the appellant that he would take goods from the respondent even without documents owing to their longstanding business relationship.
42. No doubt therefore that the document produced by the respondent detailing the transactions between them and the handwritten agreement thereon were true records of their dealings.
43. I say so because other than simply denying the figure of Kshs. 2,181,480 the appellant sought time to pay the sum of Kshs. 600,000 as they went about reconciliation.



44. The question that arises is what was there to be reconciled if indeed the debt was Kshs. 600,000 as per the appellant?
45. That statement by the appellant was a confirmation that indeed there was a debt owed by the appellant to the respondent but the appellant did not know exactly the amount of the debt.
46. The mere fact that the appellant denied knowledge of the contents of the computer printout could not suffice to render the document worthless.
47. It was the responsibility of the appellant to present evidence to challenge the correctness of the document. In the absence of such evidence, the Court would only be left with the respondent's evidence.
48. The matter being civil in nature and proof being on a balance of probabilities, I find and hold that the evidence tendered by the respondent adequately proved the claim.
49. It is the Courts view therefore that the challenge by appellant that the Learned Honourable Magistrate's decision was not backed by evidence is unsustainable and is hereby rejected.
50. On the second issue as to whether the appellant executed the agreement of 2nd June 2021, this Court finds in the affirmative the appellant did not dispute the agreement in his statement in defence which he adopted and relied on at the hearing.
51. That in my view amounted to what would pass for behavioral silence of a party unwilling to confront the truth.
52. If the appellant desired that the Court believes that he did not execute the document, nothing would have been easier than for him to seek to adduce evidence of forensic examination to challenge the documents authenticity.
53. In fact during his testimony he did not even dispute his signature appearing on the document.
54. He similarly did not deny that consequent upon the signing of the agreement he paid the sum of Kshs. 100,000.
55. The appellant had an opportunity to dispute that agreement when he first did his statement in defence. He did not do so.
56. To seek to deny the document later at the hearing was in my view an afterthought.
57. The two parties were generally operating on the basis of good faith in their business dealings as is evident from the testimonies in Court and in the written statements.
58. The respondent could therefore not reasonably anticipate a denial of the agreement in order for him to venture into calling expert evidence to prove the same. It is in my view enough for a party to place before a court a document and the party disputing the authenticity of the same would have the duty to lead evidence to that effect.
59. The document having been admitted in evidence, the trial Court was under duty to look at the contents of the same and to act on it.
60. The appellant was at liberty to object to its admission in evidence but did not do so. It is not legally not permissible therefore for the appellant to seek to have that evidence disregarded on appeal.



61. The law as set out in Ratanlal & Dhirajlal; The Law Of Evidence 26th Edition at Pg 1075 is that :-
“regarding proof of a document , the objection has to be raised at the time when the document was tendered in evidence. It cannot be allowed to be raised at any subsequent stage or appellate stage.”
62. The appellant ought to have sought the exclusion of the document from evidence at the time it was filed and tendered in Court. The record does not show any protestation to its admission in evidence thus the appellant is estopped from raising the same at this stage.
63. The appellant in his detailed submissions sought to persuade this Court that the trial Courts decision was not supported by evidence. However, of importance is their limb of submission that 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.
64. The appellant sought to have the court believe that it did not execute the agreement of 2nd June 2021. That burden was not discharged by the appellant thus the Court could not ignore the solid evidence presented by the respondent as proof of the debt.
65. In the end the finding of this Court is that the appellant executed the agreement and the learned Honourable Magistrate was correct in his finding.
66. The last issue is whether the respondent discharged the burden of proving the claim. in my view the evidence against the appellant regarding the debt was overwhelming and his partial admission of the debt put the question of liability for the debt beyond doubt.
67. The Court observed that the appellant was only disturbed by the fact of the debt being over and above what he believed he owed the respondent.
68. He did not however table any evidence to discount the evidence presented by the respondent. The totality of his defence was what I would classify a calculated denial to buy more time.

Determination

69. In the circumstances I find no merit in the appeal. The same is hereby dismissed with costs to the respondent.
70. It is so ordered.

DATED, SIGNED AND DELIVERED IN VIRTUAL COURT AT NAIROBI THIS 9TH DAY OF OCTOBER 2024.

A. M. MUTETI

JUDGE

In the presence of:

Kiptoo: Court Assistant

Ms Achayo holding brief Mbuvi for the Appellant

Nga'ng'a for the Respondent

