Murithi v Musyoki & 6 others (Civil Appeal E358 of 2022)
[2023] KEHC 781 (KLR) (Civ) (10 February 2023) (Judgment)

Neutral citation: [2023] KEHC 781 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E358 OF 2022

AA VISRAM, J

FEBRUARY 10, 2023

BETWEEN

JOEL WANGAI MURITHI ..... APPELLANT

AND

MARY MWENDE MUSYOKI ..... 1ST RESPONDENT

MWIHOKO HOUSING COMPANY LIMITED ..... 2ND RESPONDENT

PAUL KARENJU WAMBUGU ..... 3RD RESPONDENT

FRANCIS NDUNGU MARARO ..... 4TH RESPONDENT

STANLEY KIRIMA BAGINE ..... 5TH RESPONDENT

KAGEMA GATORO ..... 6TH RESPONDENT

NJERI IRUNGU ..... 7TH RESPONDENT

(Being an appeal from the judgement of the Hon. G. Sogomo Principle Magistrate at the Chief Magistrates' Court at Nairobi in Milimani Commercial Courts Civil Case No. 5029 of 2019 delivered on 6th May 2022)

JUDGMENT

Introduction

1. The appellant filed a suit in the lower court vide a plaint dated 11th July, 2019. In it he alleged that on 20th July, 2018, he entered into a sale agreement with the 1st respondent for the sale of plot no. 007 MCH1, ("the Property") for a consideration of Kshs. 2,500,000. The appellant paid full consideration to the 1st respondent and later discovered that the Property was owned by the 2nd respondent. He further

discovered that the 1st respondent had won the Property in a raffle, having received a residential plot certificate on the 14th January, 2000.

2. The appellant stated that he accordingly visited the 2nd respondent's office and it confirmed that the 1st respondent had been allotted the Property. Only after receiving confirmation, did he proceed to pay the purchase price for the Property. The appellant paid a further sum of Kshs. 45,000 to the 2nd respondent for a title deed, and Kshs. 40,000 as a fee for transfer of the Property. He then proceeded with his plans to develop the Property and incurred site excavation fees, and architectural fees of Kshs. 70,000 and Kshs. 140,000 respectively for the same.

3. Having paid the above sums, the appellant stated that he was shocked to find a different person in possession of the property by the name of Mercy Muthoni Murima, who held title to the Property, having been issued with the same on 18th May, 1999. On investigation, he found that the said Mercy acquired the said property with the help of the 2nd respondent. The appellant thus filed the suit and prayed for judgment against the respondents jointly and severally, in the amount of Kshs. 2,795,000, and interest on the same.

4. The suit was opposed by the 2nd defendant's statement of defence dated 30th August, 2019. The 2nd defendant denied owning the Property, and stated that as far as it was aware, the Property was allocated to the 1st respondent. It claimed that it was equally shocked to learn that a third party was claiming ownership of the Property and that it's record reflected the 1st respondent as the owner. It subsequently denied the allegations of the appellant and put him to strict proof thereof.

5. The matter went for a full trial, and judgment was rendered on 6th May, 2022, in which the lower court allowed the appellant's claim against the 1st respondent and ordered it to pay the appellant a full refund of the purchase price. In particular, the court ordered the 1st respondent to pay the appellant the sum of Kshs. 2,500,000, and a further sum of Kshs. 295,000 for pecuniary losses incurred together with costs. The court dismissed the appellant's claims against the 2nd -7th Respondents collectively with costs to the 2nd respondent.

The appeal

6. Aggrieved by the judgment of the lower court, the appellant filed this appeal dated 27th May, 2022 on the grounds that:

    1. The learned magistrate erred in fact and law by entering judgment in favour of the 3rd – 7th respondents, yet a judgment in default had already been entered against the said respondents and the same had not been vacated at any point.

    2. The learned magistrate erred in fact and law by failing to render a determination on whether the 2nd respondent was liable for double allocation of the suit property or not, despite the weight of the evidence that had been adduced by the appellant.

    3. The learned magistrate erred in law and fact by entering judgment in favour of the 2nd respondent, yet the 2nd respondent did not adduce any evidence to support their statement of defence.

    4. The learned magistrate erred in law and fact by entering a second judgment against the 1st respondent, yet there was another judgment against the 1st respondent, and the same had not been vacated at any time.

5. The learned trial magistrate erred by holding that the appellant did not provide evidence to support their case on the culpability of the 2nd respondent.

6. The learned magistrate erred on law and fact by failing to determine the list of issues submitted by the appellant.

7. The learned magistrate erred in law by awarding costs to the 3rd -7th respondent, yet a judgment in default had already been issued against the said respondents with costs being awarded to the appellant.

8. The learned magistrate erred in fact by failing to understand the nature of the claim against the 2nd respondent which did not involve any road accident as evidenced by the introduction framed by the learned trial magistrate.

Appellant's Submissions

7. This appeal was disposed by way of written submission. Only the appellant filed submissions.

8. The appellant submitted that this court has jurisdiction to hear this appeal as the first appellate court. That the court has a duty to examine matters of both law and fact and subject the whole of the evidence to a fresh and exhaustive scrutiny, drawing a conclusion from that analysis bearing in mind that it did not have an opportunity to hear the witnesses first hand and test the veracity of their evidence and demeanour.

9. The appellant submitted that his claim before the trial court was one for compensation of liquidated sums, interests accruing thereto, and cost of the suit resulting from fraudulent sale of land by the 1st defendant in cohorts with the 2nd defendant and its directors and the 3rd-7th respondents. He added that his claim was not based on a raffle ticket that the 1st respondent won, but rather, was based on the fact that he paid the raffle ticket winner a sum of Kshs. 2,5000,000 in consideration for the piece of land, and that the 2nd respondent gave him an assurance that indeed the property belonged to the 1st respondent.

10. The appellant indicated that he made an application under Order 10 Rule 6 &7 of the *Civil Procedure Rules* for an interlocutory judgment against the 1st-7th defendants. On 14th October, 2019 the learned Magistrate entered ex parte judgment against the 1st- 7th respondents and a decree was issued on 11th December, 2019 holding the respondents jointly and severely liable for a sum of Kshs. 2,795,000 plus costs of the suit, and interest on both. Accordingly, the Honourable Magistrate ought to have limited himself to the dispute between the appellant and the 2nd respondent only because the said judgment had not been set aside.

Analysis and determination.

11. The duty of the 1st appellate court was explained in the case of *Selle and Another v Associated Motor Boat Company Ltd & Others* [1968] EA 123, thus:-

> " 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 conclusion. 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 in 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 on the case generally."

12. This being a first appeal, the court is required to evaluate the evidence afresh before drawing its own conclusion.

13. I have carefully examined the appeal, written submissions, and the record in its entirety. The following are the issues that arise for determination:

    a. Whether the judgement dated 6th May, 2022 was res judicata?

    b. Whether the appellant was entitled to the reliefs sought?

14. On examination of the record, the matter that was before the lower court related to the liability and damages for breach of contract. The appellant filed his suit in the lower court and sought compensation for his loss arising out of a botched sale together with interest for the same, and costs. His position was that the 1st defendant had defrauded him in cahoots with 2nd to 7th respondents collectively.

15. Based on the 1st, 4th and 7th grounds of the memorandum of appeal, the appellant urged this court to find that the judgment dated 6th May, 2022 ("the Judgment") made determinations on matters that were res judicata. In particular, he submitted that judgment in default of appearance had already been entered against the 1st defendant and the 3rd – 7th defendants, yet the lower court went on to make its own determination in relation to the liability of those defendants.

16. The Black's law Dictionary defines res Judicata as:

    " An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties..." (emphasis mine)

17. In the case of *Christopher Kenyariri v Salama Beach* [2017] eKLR, The court clearly stated

    " ... the following elements must be satisfied...in conjunctive terms;

    a) The suit or issue was directly and substantially in issue in the former suit;

    b) Former suit between same parties or parties under whom they or any of them claim;

    c) Those parties are litigating under the same title;

    d) The issue was heard and finally determined; and

    e) The court was competent to try the subsequent suit in which the suit is raised."

18. The Civil Procedure Rules at Order 10 Rule 7 provides as follows;

    'Where the plaint is drawn as mentioned in rule 6 and there are several defendants of whom one or more appear and any other fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against the defendant failing to appear, and the damages or the value of the goods and the damages, as the case may be, shall be assessed at the same time as the hearing of the suit against the other defendants, unless the court otherwise orders.' (Emphasis mine)

19. On examination of the record, the judgment in default of appearance was entered against the 1st and 3rd – 7th respondents, and the matter thereafter proceeded to trial against the 2nd respondent. The trial against the 2nd respondent was therefore the only hearing of the suit on its merits.

20. A reading of Order 10 rule 7, clearly required the appellant to prove his damages, or the value of damages at the hearing of suit against the 2nd defendant, unless ordered otherwise by the court. From the record, there is no order of the court directing otherwise.

21. The judgment in default of appearance was not a final judgment on its merits. The appellant, who obtained interlocutory judgment, ought to have known that further steps were required of him.

22. The Court of Appeal decision in *Coast Bus Services Ltd v Sisco E Murunga Ndangi & 2 others* Court of Appeal 192 of 1992, makes it clear that special damages must be pleaded and proved, and that a court cannot waive this requirement. Accordingly, the appellant could not take for granted that he was entitled to the sum of damages based on his pleadings alone. Further action was required of him in compliance with Order 10 rule 7.

23. To my mind, further action was especially important in this case, because the appellant had made serious allegations relating to fraud and misrepresentation on the part of all the other respondents. These claims should have also been specifically pleaded and proved to the requisite standard of proof applicable in fraud matters, which for the avoidance of doubt, is on a standard below beyond reasonable doubt, but above a balance of probabilities.

24. In *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR, Tunoi JA (as he then was) stated as follows:

> " It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts." (Emphasis mine.)

25. The onus lay on the appellant to provide cogent evidence of fraud in the lower court against the respondents to the applicable standard as stated in the authority above. He could not rely on the interlocutory judgment to prove allegations of fraud and claim res judicata. This is not the purpose of Order 10 rule 7.

26. Based on the record before me, the appellant had every opportunity at the hearing of the suit against the 2nd defendant to prove his claims of fraud and damages against the remaining respondents, but simply did not seize the moment.

27. A court has a duty to hear evidence against a party before making a finding that is quasi criminal in nature. I do not think the Magistrate went astray by considering the evidence in relation to the allegations of fraud, and arriving at a conclusion based on the evidence before the court.

28. I am satisfied that the Magistrate arrived at a reasonable conclusion. In particular, the Magistrate considered the fact that assurances had been made to the appellant, which were relied on, and having considered the same, arrived at a determination. I do not see any good reason to interfere with the lower court's decision. Accordingly, I find this ground has no merit.

29. Based on my reasoning above, I also find that the 2nd, 3rd and 5th grounds fail. I am satisfied that the lower court considered the relevant evidence and arrived at a reasonable conclusion which was based on the doctrine of privity of contract, which it said existed only between the appellant and the 1st respondent.

30. On the doctrine of privity of contract, the Court of Appeal decision of *Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & Another* [2015] eKLR is instructive, the Court rendered itself as under: -

> " In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party. In *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847, Lord Haldane, LC rendered the principles thus:
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> "My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it."

31. On 6th and 8th grounds, I am satisfied that the lower court did consider all relevant issues before it. To my mind, the paragraph in the Judgment relating to a motor vehicle accident, while out of place, appears to have been included in error, and in any case, it did not affect the outcome of the case.

32. Based on the foregoing, I find that the appeal dated 27th May, 2022 is without merit and is consequently dismissed.

33. I make no order as to costs because the respondents did not participate in this appeal.

DATED AND DELIVERED VIRTUALLY THIS 10TH DAY OF FEBRUARY, 2023

ALEEM VISRAM

JUDGE