



REPUBLIC OF KENYA



Kithungururu Farmers Co-operative Ltd v Njage t/a HK Enterprises (K) (Civil Appeal E040 of 2022) [2023] KEHC 2018 (KLR) (8 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2018 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E040 OF 2022
LM NJUGUNA, J
MARCH 8, 2023**

BETWEEN

KITHUNGURURU FARMERS CO-OPERATIVE LTD APPELLANT

AND

HARRISON K NJAGE T/A HK ENTERPRISES (K) RESPONDENT

JUDGMENT

1. The appeal herein arose from the judgment of Hon Nyakweba which was delivered on July 12, 2022 in CMCC No 184 of 2014 at Embu. Being dissatisfied with the said judgment, the appellant filed the appeal herein in which he listed nine (9) grounds of appeal in the memorandum of appeal dated July 20, 2022 that:
 - i. The learned magistrate erred in law and fact in entering judgment in favour of the respondent in the sum of Kes 1, 464, 850.00 plus interest and costs in spite of the fact that the respondent did not tender sufficient evidence to discharge the burden of proof and in particular he inter alia did not prove any contract document between the parties, or evidence of work allegedly done.
 - ii. The learned magistrate erred in law and fact in failing to consider the defendant's evidence and the document tendered as evidence before the honourable court and thereby occasioning great injustice to the defendant.
 - iii. The learned magistrate erred in law and fact by making a finding in this case in favour of the plaintiff when the evidence tendered by the plaintiff was in contradiction of the very documents he produced.
 - iv. The trial magistrate erred in both law and fact in decreeing and making a finding that the plaintiff was granted leave to institute this suit whereas the documents in support of the evidence are contradictory.



- v. The learned magistrate erred in both law and facts by ignoring and failing to consider weighty facts and evidence against the plaintiff's entire suit.
 - vi. The learned magistrate erred both in law and facts by ignoring and failing to consider several fundamental issues raised before the court as the nature of the claim failed by acts of fraud and material concealment in the plaintiff's entire claim including payment of court fees.
 - vii. The learned magistrate erred in law and fact in failing to consider that the respondent did not call any witness to corroborate his account and/or evidence which included his principal document which the court rejected.
 - viii. The learned magistrate erred in law and fact in failing to consider the appellant's pleadings and evidence in the trial court and in particular the defects in procurement and service of summons.
 - ix. The learned magistrate erred in law and fact in failing to recognize that the suit had abated.
2. Reasons wherefore, the appellant herein prayed for orders that:
 - i. The appeal herein be allowed and the suit against the appellant in the trial court be dismissed with costs.
 - ii. The costs of this appeal and the trial court be awarded to the appellant.
 3. The plaintiff's/respondent's cause of action was premised on the fact that the appellant had contracted the respondent to carry out repair works at its factory which upon completion to the satisfaction of the appellant, the same costed Kes 1, 464, 850.00. That the appellant executed an undertaking to pay the aforesaid amount on June 16, 2000 but failed to honour the same. The respondent thus sued the appellant claiming damages and payment of Kes 1, 464, 850 with interest at bank rate of 21% from June 16, 2000 till payment in full; and any other relief that the Honourable court may deem fit and just to grant. Upon considering the facts of the matter and law, the trial court entered judgment against the appellant in the sum of Kes 1, 464, 850.00 with interest at court rates from June 16, 2000 till payment in full; costs of the suit to the plaintiff. It is this judgment that precipitated the appeal by the appellant herein.
 4. The appeal proceeded by way of written submissions and wherein the appellant submitted that the trial court's judgment was extremely prejudicial to it in that, it did not consider the appellant's evidence, more so the inquiry report by Monicah Kang'ethe wherein, inter alia fraud, illegalities and irregularities of the respondent were aptly particularized. Reliance was placed on the cases of *PIL Kenya Limited Vs Joseph Oppong [2009] eKLR* and *James Kariuki vs James Muthee Gakuu & 2 Others [2022] eKLR*. It was its contention that the report being a government document, and the same having been fully adopted by the members of the appellant and given that the same has never been challenged by any party in any judicial/administrative forum, the court ought to have considered the same. It was contended that the judgment by the trial court was premised on errors and the court wrongly determined that the appellant had not responded to the respondent's claim when it stated that upon amendment of the plaint a specific sum that he was pursuing being set out, the suit took the tangent of a liquidated claim. That the above notwithstanding, the trial court's position was unfounded and that denial of a claim by a party was generally sufficient. It was submitted that the respondent had not paid the court filing fees from the word go and the payments allegedly made were less the filing fee under the rules which made the claim fraudulent. Further, this court was urged to find that the respondent did not discharge the burden of proof as is required by the law to make the court reach a determination in his favour. Reliance was placed on sections 107,108 and 109 and further, inter alia on the cases of



Raila Amolo Odinga & another Vs IEBC & 2 others [2017] eKLR and *Mbuthia Macharia vs Annah Mutua Ndwiga & Another [2017] eKLR*.

5. The appellant stated that the suit is defective for want of extension of validity of summons as the respondent had not complied with provisions of Order 5 and more specifically Rule 2 of the *Civil Procedure Rules*. That the respondent obtained other summons which he attempted to serve upon the appellant; that the said summons were defective and a nullity, as the suit had abated and therefore, there was no basis for their issuance. It was submitted that the respondent further filed suspicious affidavits of service in respect of the 2006 and 2013 summons; while the same had glaring alterations hence an outright forgery. That, be that as it may, even if the summons had been duly served on the appellant, no request for judgment was lodged with the court for a period of seven (7) years. That this clearly shows that the respondent was indolent and as such, it was not tenable that he benefits from the reliefs he sought before the trial court. The appellant relied on the case of *Zakaria Somi Nganga Vs Kenya Commercial Bank Limited & 3 Others [2008] eKLR*. Additionally, it was contended that the suit herein is res judicata for the reason that the respondent previously filed Civil Case Number 124 of 2004 in Embu which was eventually transferred to Meru High Court and which he later withdrew and costs were awarded to the respondent at Kes 200,000.00. That the respondent further filed a matter before the Co-operative Tribunal Cause Number 142 of 2002 which was dismissed with costs. He further lodged an appeal at the High Court of Kenya at Nyeri being Civil Appeal Number 514 of 2002. In the end, it was stated that the suit as filed signified an abuse of court process together with the summons which were never brought to the attention of the trial court. This court was therefore urged to allow the appeal herein.
6. The respondent submitted that there is an appeal pending determination at the Court of Appeal (Nairobi) being Civil Appeal No 250 of 2021. That notwithstanding, the respondent submitted that the appeal herein does not raise pure points of fact and law given that some of the factual matters were already dealt with by Muchemi J in Civil Appeal No 30 of 2016. The respondent contended that to that end, her Ladyship appreciated and addressed herself to the factual matters which the appellant was aggrieved at. That the appellant cannot, therefore, premise the appeal herein on factual matters either expressly or impliedly. It was his case that the issues brought out by the appellant to wit summons and underpayment of the filing fees were accordingly dealt with by her Ladyship.
7. On summons to enter appearance, it was reiterated that Muchemi J at paragraph 15 of her ruling properly addressed the issues raised and as such, the same ought to rest. That the only procedural lapse in respect to the aforesaid summons was the filing of the affidavit of service in that, it was belatedly filed on May 13, 2013, a period of seven years after service of the summons. That, however, the superior court rightly observed that the procedural lapse was curable and amendable under the provisions of article 159 (2) (d) of the *constitution*. The respondent relied on the case of *Nicholas Kiptoo arap Korir Vs IEBC and 6 others [2013]*. It was his submission that her Ladyship relying on the above case dealt with the issue exhaustively and therefore, the same could not be brought before this court again.
8. On whether the suit herein is res judicata, it was submitted that the respondent had previously been granted leave to institute the suit against the appellant vide Miscellaneous Application No 1067 of 2000. Therefore, the appellant's contention that the respondent's suit is defective on account of misjoinder is not tenable. The respondent conceded that in as much as the respondent's case has had a long checkered history, at no particular time were the substantive issues determined so as to render the same res judicata. On whether there was sufficient evidence to warrant judgment in the respondent's favour; it was the respondent's case that it was a term of the LPO that the respondent was contracted to perform various works and that funds were to be paid once an assessment by a government officer was done. That the appellant did not challenge the contents of the LPO. Additionally, it was the



respondent's case that the appellant placed heavy premium on the fact that the plaintiff's principal document was the letter dated June 16, 2000 and thus the author of the document ought to have been called to produce the same. As regards the letter which was prepared by an officer from the Ministry of Agriculture, it was submitted that, the maker of the same ought to have been called; according to him, the question was whether the failure to have the same admitted into evidence adversely affected the respondent's case. In regard to that, it was reiterated that owing to the fact that the appellant vide a letter dated June 16, 2000 admitted owing the plaintiff a sum of Kes 1, 464, 850.00; further that, the letter dated June 16, 2000 being the basis upon which the initial plaint dated June 2, 2006 was amended so as to capture the cause of action as June 16, 2000 being the date on which an undertaking was issued to the respondent, the same legitimized the respondent's case.

9. On whether there were errors in the judgment, it was submitted that the same is neither here nor there for the reason that the appellant's main gravamen is in regard to the court's observation that no particulars of fraud were particularized in appellant's defence. This court was therefore urged to dismiss the appeal herein with costs to the respondent.
10. The court has considered the grounds of appeal and the submissions by both parties and the court forms the view that the main issue it has been called upon to determine is whether the appeal has merits.
11. As a first appellate court, this court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing a conclusion from that analysis. The court has, however, to bear in mind the fact that it did not have an opportunity to see and hear the witnesses first hand. This duty is captured by Section 78 of the Civil Procedure Act which espouses the role of a first appellate court which is to:

'..... re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions.'
12. This was buttressed by the Court of Appeal in the case of Peter M Kariuki Vs Attorney General [2014] eKLR where it was held that:

' We have also, as we are duty bound to do as a first appellate court, to reconsider the evidence adduced before the trial court and reevaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence...' (See Ansazi Gambo Tinga & another v Nicholas Patrice Tabuche [2019] eKLR).
13. Having read and understood the case herein, I note that the Respondent has raised an issue in his submissions to the effect that there is a pending appeal before the Court of Appeal being Civil Appeal Number 250/2021.
14. This court has independently established that there exist proof that the appellant herein filed an appeal at the Court of Appeal against the judgment of Muchemi J which was delivered on October 17, 2019. Further, the registry supplied the appellant with a copy of the proceedings and a certificate of delay as provided for under Rule 82 (1) of the Court of Appeal Rules.
15. Of importance to note is the fact that the appeal in HCCA 30 of 2016 which is the subject of the appeal now pending before the Court of Appeal was in relation to the preliminary objection to the effect that the trial court had failed to consider all the facts and issues raised by the appellant in relation to the payment of fees as required by Order 3 Rule 2; and on the issue whether the suit was defective for want of extension of summons and further; whether the suit had already abated. Prior to the delivery of the judgment dated October 17, 2019 by Muchemi J, the appellant via an application dated December 5,



2016 had sought for amongst other prayers, stay of proceedings in Civil Suit No 184 of 2014 before the trial court and the same was allowed via a ruling delivered on January 4, 2017 by Bwonong'a J.

16. After considering the appeal against the ruling of the trial court on the preliminary objection, the same was dismissed via a judgment delivered on October 17, 2019; and as a result, the proceedings before the lower court proceeded and via a judgment delivered on July 12, 2022 the learned trial magistrate entered judgment for the plaintiff/respondent against the defendant/appellant.
17. The said judgment by the trial court precipitated the appeal currently before this court and of importance to note is the fact that the appeal before the Court of Appeal being Civil appeal number 250/2021 is still pending. The said appeal has a bearing on the appeal before this court and on the judgment of the trial court, which is the subject of this appeal. I say so for the reason that the appellant challenged the respondent's suit for being defective for want of extension of summons and/or that the suit was filed out of time. It therefore turns out that the issues before the Court of Appeal are so crucial that the appellant ought to have stayed the proceedings before the trial court post the judgment of Muchemi J in Civil Appeal number 30/2016 which was not done, yet the issues that were pending determination before that court are the same issues that were determined by the trial court and are still the subject of this appeal. This court therefore, finds itself in an awkward position in that regard.
18. In view of the above, it would be prejudicial for this court to attempt to determine the matter herein for the reasons given above. In the premises, the only order that commends itself to me is to strike out this appeal, which I hereby do, with costs to the respondent.
19. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 8TH DAY OF* MARCH, 2023.

L. NJUGUNA

JUDGE

