Mungai & another (Suing as the officials of Athuri A Kirigu Self Help Group) v Wambugu (Civil Appeal 188 of 2019) [2023] KEHC 2109 (KLR) (17 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2109 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CIVIL APPEAL 188 OF 2019

MM KASANGO, J

MARCH 17, 2023

BETWEEN

NGARUIYA MUNGAI ..... 1ST APPELLANT

SAMUEL KAMANDE MUNGAI ..... 2ND APPELLANT

SUING AS THE OFFICIALS OF ATHURI A KIRIGU SELF HELP GROUP

AND

ISAAC KANYARI WAMBUGU ..... RESPONDENT

(Being an appeal from the judgment of the Chief Magistrate's Court at Thika (B.J. Bartoo, RM) in Civil Case No. 147 of 2014 dated 26th April, 2018)

JUDGMENT

1. Ngaruiya Mungai and Samuel Kamande Mungai (the appellants) filed a case before the Thika Chief Magistrate's court seeking refund of Kshs 104,000 from Isaac Kanyari Wambugu (the respondent). Their case was dismissed by the trial court's judgment of April 26, 2018. The appellants being aggrieved by that dismissal filed this appeal. On November 21, 2019 this Court in Miscellaneous Application No 149 of 2018 granted the appellants leave to file this appeal out of the time provided under section 79G of the *Civil Procedure Act*.

2. This Court, being the first appellate court is required to reconsider the evidence adduced at trial, evaluate that evidence and draw its own conclusion: See the case of *Selle and another v Associated Motor Boat Company Limited & 2 others* (1968) EA 123. The Court of Appeal in the case of Peters v Sunday Post Limited (1958) EA 424 further elaborated on the jurisdiction of first appellate court thus:-

> " Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has

failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide."

3. The appellant's claim is that on July 20, 1999 they entered into an agreement whereby the respondent agreed to sell to them a plot No J located in Thika. Appellants pleaded that they paid the respondent the agreed purchase price of Kshs 250,000 but on making that payment, they learnt that the aforestated plot did not exist. Appellants pleaded that the respondent fraudulently received money from them by falsely pretending he would transfer the plot into their names.

4. Although the respondent filed a defence, he did not adduce any evidence at the trial. Evidence was adduced by the appellant Samuel Kamande Mungai. In that evidence, that appellant supported the pleadings.

5. Although the respondent did not adduce evidence, the trial court by its judgment determined that the appellants' case was time barred. The trial court based its finding that the case was time barred on the written submissions of the respondent. The trial court by its judgment stated:-

> " The defendant (the respondent) in their (sic) submission stated that the suit was time barred and the plaintiff had no intention to institute suit on behalf of the group members.
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> I have clearly perused the plaintiff's (sic) (appellants) case and defence their (sic). I find that the suit was not instituted on time, the plaintiff having entered into an agreement in the year 1999. They filed the suit in 2010. There is no evidence presented that leave of court was sought for hearing of suit out of time.
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> Further, there were no minutes produced by the plaintiffs to show the membership and their intention in the transaction that followed. The receipt produced by the plaintiff did not clearly state that the payment (sic) made were to the defendant and in respect of the land parcel in question."

6. In my humble view, the trial court erred in dismissing appellants' case.

7. The first error I note is the trial court's consideration of the respondent's submission and elevating those submissions to the level of evidence. That was an obvious error and the case of *Robert Ngande Kathathi v Francis Kivuva Kitonde* (2020) eKLR make clear of that error thus:-

> " "21. As stated by the Court of Appeal in Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR:
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> > "Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."
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> 22. The Court of Appeal in Avenue Car Hire & another v Slipha Wanjiru Muthegu Civil Appeal No 302 of 1997 held that no judgement can be based on written submissions and that such a judgement is a nullity since written

submissions is not a mode of receiving evidence set out under order 17 rule 2 of the Civil Procedure Rules [now Order 18 rule 2 of the Civil Procedure Rules]. The same Court in Muchami Mugeni v Elizabeth Wanjugu Mungara & another Civil Appeal No 141 of 1998 found the practice of making awards on the basis of the submissions rather than the evidence deplorable."

8. There being no evidence that appellants' case was time barred, the trial court should not have ventured in that direction. Even if the respondent had pleaded the claim was time barred which in this case he did not, the trial court could not proceed to consider the pleading as evidence. This is clearly stated in the case *CMC Aviation Ltd v Crusair Ltd (No 1)* (1987) KLR 103:-

> " The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents." (Emphasis mine)

9. The error is even more so because the appellants produced in evidence a document dated February 7, 2005 whereby the respondent agreed in writing to refund the appellants the purchase price of the plot by May 9, 2005. That acknowledgment of the debt by the respondent revived the appellants' claim as provided under Section 23(3) and 24 of the *Limitation of Actions Act*. In this regard, I place reliance on the case of *Telkom Kenya Limited v Kenya Railways Corporation* (2018) eKLR viz:-

> " 74. According to KRC, the contents and terms of the documents did not amount to an acknowledgment in terms of ss. 23(3) and 24 of the *Limitation of Actions Act*. This according to both DW1 as well as Mr Nyaanga was evident from the subsequent demands for bills and invoices by KRC some of which were supplied by Telkom.
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> 75. My reading of the relevant provisions of the statute (ss23 & 24) does not reveal that acknowledgments must be confined to admissions of debts in terms of quantum. A recognition and acceptance of liability will suffice. In my view, an acknowledgment in terms of statute does not have to say
>
> "I acknowledge that X amount is due and owing to you".
>
> It simply needs to get as far as being an admission of liability and that something is due. That something, as was held in the English case of Dungate v Dungate [1965] 1 WLR 1477 at 1483, may be ascertained extrinsically outside the acknowledgment.
>
> 76. In sum, the debtor must be viewed simply to have acknowledged his indebtedness in terms of liability and not necessarily in quantum form."

10. The trial court wrongly faulted the acknowledgment by the respondent on the basis that it did not specifically state how much the respondent acknowledge as owing the appellants. The foretasted case, which I am fully persuaded by its finding clearly shows the error of the trial court.

11. The respondent having acknowledged his indebtedness to the appellants in May, 2005, that acknowledgment validated the filing by the appellants of their case in November, 2010. The suit was filed within the period provided under Section 4 of the *Limitation of Actions Act*, that is before expiry of 6 years since the respondent's said acknowledgment of the debt.

12. The trial court in my view also erred to find that the appellants had failed to prove their case on the required standard. The appellants produced receipts for total amount of Kshs 254,000. One of those receipts for Kshs 4,000 is indicated as fee for the advocate. The appellants' evidence was that the purchase price amount was paid to an advocate for onward transmission to the respondent. It follows the appellant proved payment of that amount because their evidence was not countermanded by the respondent, that is, that they paid total of Kshs 250,000 was the purchase price. Their further evidence was that following the respondent's written acknowledgment of the debt, the respondent paid appellants part of the debt but failed to pay them Kshs 104,000 which was the amount they claimed before the trial court. In my view, the appellants met the civil standard of proof, that is, on a balance of probability. In the case *Miller v Minister of Pension* (1947) ALL ER 373 the court stated on that standard of proof thus:-

> "Thus, proof on a balance of probabilities means a win, however narrow; a draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un) convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

13. Appellants by their evidence proved fraud. They proved they paid the purchase price for the plot but the said plot was not in existence. Having so testified, the evidential burden to prove the plot did indeed exist shifted to the respondent. The respondent did not rebut that evidence.

14. There was also no basis for the trial court to find the suits should have been supported by minutes of the self-help group.

15. From the above discussion, it is clear that there is basis of disturbing the determination of the trial court. The appeal has merit.

16. In the end, the judgment of this court is that:-

    a. The appeal succeeds and the judgment of the trial court is hereby set aside and in its place judgment is entered for the appellants as prayed in the plaint;

    b. The appellants are awarded costs of this appeal assed at Kshs 89,000/=.

JUDGMENT DATED AND DELIVERED AT KIAMBU THIS 17TH DAY OF MARCH, 2023.

MARY KASANGO

JUDGE

Coram:

Court Assistant : Mourice/Julie

Instructed by Kang'iri &. Co. Advocates for appellants:- Ms. Mugo H/B Kang'iri

Instructed by Ishmael & Co. Advocates for the Respondent:- Ms. Wairimu H/B Koringa

JUDGMENT *delivered virtually.*

MARY KASANGO

JUDGE