Mikiki Farmers Co-operative Society Limited v Njagi & 2 others (Civil Appeal 68 of 2016) [2023] KEHC 1457 (KLR) (1 March 2023) (Judgment)

Neutral citation: [2023] KEHC 1457 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL 68 OF 2016

LM NJUGUNA, J

MARCH 1, 2023

BETWEEN

MIKIKI FARMERS CO-OPERATIVE SOCIETY LIMITED ..... APPELLANT

AND

PENINA WEVETI NJAGI ..... 1ST RESPONDENT

NJAGI KAGUNDU ..... 2ND RESPONDENT

JOSEPH GICOVI ..... 3RD RESPONDENT

JUDGMENT

1. The appeal herein arose from the judgment of Hon. R.O. Oigara delivered on October 19, 2016 in CMCC No 178 of 2007 at Embu. Being dissatisfied with the said judgment, the appellant filed the appeal herein in which it listed two (2) grounds of appeal in the memorandum of appeal dated November 21, 2016 to wit:
    i. The Learned Magistrate erred in law and fact in awarding the respondents damages for illegal arrest, detention and malicious prosecution when the respondents did not prove the same to the standards required.
    ii. The decision to hold any liability against the 3rd defendant was against the law and the weight of the evidence.
2. Reasons wherefore the appellant sought for orders that:
    i. The appeal be allowed.
    ii. The decision and decree of the learned magistrate dated October 19, 2016 be set aside.
    iii. The costs of this appeal and the lower court be awarded to the appellant.

3. Directions were given that the appeal be canvassed by way of written submissions which directions all parties complied with.

4. It was submitted that the appellant is a legal person created under *Co-operative Societies Act* and that it could only act through its agents. That the evidence before the trial court did not provide any basis for the learned magistrate to hold that malice was proved on a balance of probability. This court was therefore urged to subject the proceedings and the judgment by the trial court to a re-hearing, re-evaluation and come up with fresh determination to wit that the learned magistrate erred/misdirected himself and as a result, allow the appeal herein.

5. On the other hand, the respondents submitted that the appeal herein lacks merit and that the same ought to be dismissed. It was submitted that the trial court did not err in either fact or law in awarding the respondents damages for illegal arrest, detention and malicious prosecution. That the respondents proved all the elements on a balance of probability in that, the court found that the arrest and prosecution of the respondents arose from a complaint by the appellant; that the respondents were thereafter acquitted in the criminal case on March 09, 2007 as there was no evidence; that the court further held that there was no evidence that could be adduced against the respondents even in future. According to them, the same proved that their arrest and thereafter prosecution was without a probable cause and was malicious. In regards to costs, it was their case that having established a case of malicious prosecution against the appellant, the court was bound to award damages. That the decision to hold the appellant liable was a sound decision supported by evidence. In the end, the respondents urged this court to dismiss the appeal herein with costs to them.

6. 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.'

7. 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 revaluate 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 Vs Nicholas Patrice Tabuche* [2019] eKLR).

8. I have read through and considered the memorandum of appeal and the submissions filed by counsel for the parties. Further I have also read and evaluated the record and evidence adduced therein by the appellant before the trial court but most importantly, the procedure that was adopted by the trial court, in "hearing" the matter.

9. This court has perused the record and the same shows that, the plaint the subject matter of this appeal, was amended on 22.02.2008. Upon service of the summons and the amended plaint, the 3rd appellant filed it's statement of defence. When the matter came up before the court for hearing, the parties resolved to canvass the matter by way of written submissions. The court thus proceeded to consider the statements and submissions of the parties and therefrom, delivered a judgment.

10. The procedure of hearing of suits and examination of witnesses is provided for in Order 18 of the *Civil Procedure Rules (2010)*, Cap 21 Laws of Kenya. The said order is very comprehensive on how a trial should proceed in court including the recording and production of evidence. Of importance to this court is Order 18 Rules 1 and 2 which provide as follows:

> 1. The plaintiff shall have the right to begin unless the court otherwise orders.
>
> 2. Unless the court otherwise orders—
>
> (1) On the day fixed for the hearing of the suit, or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.
>
> (2) The other party shall then state his case and produce his evidence, and may then address the court generally on the case. The party beginning may then reply.
>
> (3) After the party beginning has produced his evidence, then if the other party has not produced and announces that he does not propose to produce evidence, the party beginning shall have the right to address the court generally on the case; the other party shall then have the right to address the court in reply, but if in the course of his address he cites a case or cases the party beginning shall have the right to address the court at the conclusion of the address of the other party for the purpose of observing on the case or cases cited.

11. In view of the above provisions, can the procedure that was adopted by the parties, and the trial court be said to have complied with the procedure as laid down in the *Civil Procedure Act*?

12. Before the trial court, the counsel consented to have the parties adopt the evidence without having to testify; they further agreed to adopt the witness statements as evidence. It is of importance to note that the law provides for the mode of hearing and even if the parties were to agree between themselves on how they wish to proceed with the hearing, the same is a nullity since the law and practice is elaborate on how the same should be done.

13. The court of appeal in the case of *Kenneth Nyaga Mwige Vs Austin Kiguta and 2 others* [2015] eKLR had this to say on production of documents;

> The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the documents are filed, the documents though on the court file does not become part of the judicial record.
>
> Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document.

> Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the reference and veracity of the contents. This is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the documents when called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the court would look not at the document alone, but would take into consideration all facts and evidence on record.

14. The Court of Appeal further stated: -

> Once a document has been marked for identification it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for is authenticity and relevance to the facts of the case. Once the foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit; it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an authenticated account.

15. In the case of *Des Raj Sharma Vs Reginan* [1953] EACA 210, the court held that there is a distinction between exhibits and articles marked for identification and that the term exhibit should be confined to articles which have been formally proved and admitted in evidence.

16. As earlier stated, Order 18 of the Civil Procedure Rules is clear on how a hearing should proceed and how evidence should be recorded and produced. In this case, parties substantially deviated from the laid down procedure. This court is alive to the provisions of Order 11 and in particular Rule (7) which gives the court the discretion to order admission of statements without calling the makers as witnesses, where appropriate. The challenge this court has is; when a court exercises such discretion "how does it interrogate the veracity of the evidence contained in such statements which are produced without calling the makers?"

17. It is my considered view that, such substantial deviation from a well laid down procedure is not acceptable.[See *James Njoro Kibutiri Vs Eliud Njau Kibutiri* 1 KAR 60 [1983] KLR 62; [1975-1985] EA 220 and *Lehmann's (East Africa) Limited Vs R Lehmann & Co. Limited* [1973] EA 167]

18. In view of the foregoing and given that the documents referred to in the list of documents were not formally produced and their veracity tested in support of the suit, coupled with the fact that the correct procedure for recording and production of evidence as laid down in Order 18 Rules 1 and 2 was not complied with, the same rendered the whole trial a nullity.

19. As a consequence of the above, I hereby order that:

    i. The judgment in Embu CMCC No 178 of 2007 is hereby set aside.

    ii. The matter is remitted to the trial court for hearing and determination in the manner stated hereinabove.

    iii. Each party should bear its own costs of the appeal.

20. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 1ST DAY OF MARCH, 2023.

L. NJUGUNA

JUDGE

.....Appellant

.....Respondents