Wangari v Mombasa Port Savings and Credit Cooperative Society Limited (Civil Appeal 209 of 2021) [2023] KEHC 2293 (KLR) (17 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2293 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 209 OF 2021

F WANGARI, J

MARCH 17, 2023

BETWEEN

CATHERINE WANGARI .... APPELLANT

AND

MOMBASA PORT SAVINGS AND CREDIT COOPERATIVE SOCIETY LIMITED .... RESPONDENT

(Appeal from the decision of the Co-operative Tribunal at Mombasa (Hon. B. Kimemia (Chairperson), Hon Mwatsama Mjeni (Deputy Chairperson), Boniface Akusala (Member) and Mr B. Gichuki (Member) dated 7th October, 2021, Mombasa Tribunal Case 171 of 2020)

JUDGMENT

1. This is an appeal against the judgement delivered by the Co-operative Tribunal on October 7, 2021. The appellant being dissatisfied with the said judgement has preferred this appeal. The appellant preferred a total of four (4) grounds of appeal in urging this court to set aside the judgement delivered on October 7, 2021. The grounds are as follows: -

    a. The tribunal members erred in law and in fact when they failed to find against the evidence adduced, that the loan repayment periods were actually extended by the respondent without prior notice to the appellant, which action was a clear breach of the law.

    b. The tribunal members erred in law in finding without providing any cogent reasons and against clear and unrebutted evidence of inaccurate accounting by the respondent, that the appellant's prayer for an audit and reconciliation of accounts was not warranted.

c. In particular, the tribunal members erred in law by failing to pay any regard at all to the expert evidence placed before them clearly showing that there were glaring inconsistencies between the loan application forms and the statements of account as well as the interest rates applied.

d. In finding that the appellant had not specified the amount as well as interest which she was claiming against the respondent, the tribunal members completely failed to appreciate that the prayers sought by the appellant were for an audit and reconciliation of her loan account and upon such reconciliation, for a refund of all amounts found to have been unlawfully deducted together with interest, and she could not therefore logically claim those amounts and interest before the audit and reconciliation was ordered.

e. The tribunal members therefore erred in law when they dismissed the appellants claim with costs and allowed the respondent's counter-claim with costs.

2. Directions were taken and the appeal was disposed of by way of written submissions where both the appellant and the respondent duly complied and relied on various decisions in support of their rival positions.

3. As the first appellate court, it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of *Selle & Ano v Associated Motor Boat Co Ltd* (1968) EA 123). This court nevertheless appreciates that an appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all or on a misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in *Mwanasokoni v Kenya Bus Service Ltd* (1982-88) 1 KAR 278 and *Kiruga v Kiruga & Another* (1988) KLR 348).

4. I have carefully perused and understood the contents of the pleadings, proceedings, grounds of appeal, submissions and the decisions referred to by the parties. To be able to ascertain whether the judgement ought to stand or otherwise I will carefully revisit the record.

5. The appellant *vide* a statement of claim dated July 1, 2020 and filed on July 2, 2020 sought for various reliefs against the respondent among them that a declaration that the extension of the loan repayment period without prior notice to the claimant was unlawful. Contemporaneously with the claim, an application for interim orders was filed. The same was considered on July 2, 2020 and the Tribunal issued various directions and amongst them an order restraining the respondent from deducting Kshs 470.443.30/= or any other amounts or attaching the claimant's deposits. On August 6, 2020, the application was compromised by the parties and they proceeded to focus on the main suit. The claim was defended and through a judgment delivered on October 7, 2021, the claim was dismissed and judgement entered in favour of the respondent on its counter-claim with costs. This is what precipitated the present appeal.

6. As earlier noted, parties agreed to dispose of the appeal by way of written submissions. Both parties duly complied and filed their respective submissions citing various authorities in support of their positions. I have duly considered the said submissions. On the part of the appellant, she holds that the tribunal erred in failing to find in her favour despite her unrebutted evidence. On the part of the respondent, it is maintained that the tribunal arrived at the correct decision in dismissing the case and entering judgement in their favour on their counter-claim.

Analysis and Determination

7. After considering the pleadings, evidence, submissions and the law, I find that the following are the issues for determination: -

   a. Whether the appellant proved her case to the required standard;

   b. Whether the tribunal was correct in dismissing the appellant's case and entering judgement in favour of the respondent in their counter-claim;

   c. What is the order as to costs?

8. On the first issue, I note that in her statement of claim, the appellant sought for specific prayers and none of those prayers sought for any liquidated sum. In her first prayer, she sought for a declaration that the extension of the loan repayment period without prior notice to her was unlawful. Having considered the evidence, I note that the appellant applied for several loans on different occasions. On November 30, 2012, the appellant took a loan of Kshs 320,000/=. The same was to be repaid in thirty-six (36) months. On January 14, 2013, she took a loan of Kshs 120,000/= and the same was to be repaid in twelve (12) months. On April 12, 2013, September 18, 2013 and September 18, 2014, the appellant took loans of Kshs 800,000/=, 1,500,000/= and Kshs 2,800,000/= respectively. The same were to be repaid in sixty (60), fifty (50) and sixty (60) months respectively. Juxtaposing the appellant's prayer (a) with the various loans taken, it is clear that each loan taken had a fixed repayment period.

9. The appellant did not lead any evidence as to what repayment period was extended without her notice. It is trite that courts of law do not act on conjecture and speculation. The appellant was under a duty to lead evidence on what period was extended without her notice. The same having not been done, I find no reason to impeach the tribunal's finding that this prayer was not proved to the required standards. Therefore, the first ground of appeal fails and I so hold.

10. On the second ground of appeal, the appellant contended that the tribunal erred in finding that the prayer for audit and reconciliation of accounts was not warranted. When the appellant sought for the prayer, she surely must have had an expected result. It was her duty to prove to the satisfaction of the trial court her reasons for seeking the said prayer. As noted above, an interlocutory application was filed together with the suit. I have gone through the interlocutory application and none of the prayers mentions the issue of audit and reconciliation. If indeed anything turned on it, it was imperative that the said prayer be sought for before the final determination of the matter. A party ought to know what reliefs he/she is seeking.

11. This is an adversarial system and the court cannot come to aid a party to fill gaps in their case. In *Malawi Railways Limited v Nyasulu* [1998] MWSC 3, the Supreme Court of Malawi had the following to say: -

> " ... As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings... It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings... In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "any other business" in the sense that points other than those specific may be raised without notice..."

12. Based on the above, it was upon the appellant to give cogent reasons why she needed an audit and reconciliation from the respondent. I hold that her prayer was merely a fishing expedition with an intended outcome. I note that the appellant was being supplied with her statements as and when she requested for the same and thus I proceed to find that the tribunal's finding on this aspect was sound.

13. On the third ground of appeal, the appellant submitted that the tribunal disregarded expert evidence. I note that the appellant called a witness by the Eric Onyalo Nyangoma who identified himself as an accountant. On cross examination, he confirmed that he was neither a certified accountant nor registered with Institute of Certified Public Accountants of Kenya (ICPAK). Based on the foregoing, could this witness be said to be an expert? section 48 of the *Evidence Act* defines who experts are. In *Mutonyi v Republic* [1982] KLR 203, the Court of Appeal had the following to say: -

> " ...Expert evidence is evidence given by a person skilled and experienced in some professional or special sphere of knowledge of the conclusions he has reached on the basis of his knowledge, from facts reported to him or discovered by him by tests, measurements and the like..."

14. Clearly, this witness could not have passed as an expert and his evidence though on record was merely an opinion based on what he saw rather than from his expertise. I equally note that based on the respondent's evidence and which evidence was believed by the tribunal, every time the appellant took a loan, the same could be set off with any outstanding loan and the difference would be disbursed to her. This is a financial practice which this court takes judicial notice of. The appellant could not expect to apply for a loan for say Kshs 1,000,000/= when she had an outstanding loan of say Kshs 600,000/= and expect to receive Kshs 1,000,000/=. This could only have been possible if the loan was applied for in a different financial institution. For the above reasons, I hold that the appellant did not adduce any expert evidence and thus the tribunal was correct not to base its findings on evidence of someone who did not qualify to be referred to an as expert.

15. On ground four of the appeal, the same is tied with ground two. As stated elsewhere in this judgement, the Appellant never sought for any specified sums. It is trite that parties are bound by their pleadings. In *Adeotun Oladeji (Nig) Ltd v Nigeria Breweries* PLC S.C. 91/2002 cited with approval by the Court of Appeal in *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR,it was held as follows: -

> "...It is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded..."

16. There was no specific prayer for any sums and I see no reason to interfere with the tribunal's decision on this limb. Thus in resolving the first issue, I hold that the appellant did not discharge her burden to the required standards to justify entry of judgement in her favour.

17. On the second issue, the respondent upon being served with the statement of claim, counter-claimed against the appellant for a sum of Kshs 470,443.30/=. The respondent's witness, one Dedan Ondieki clearly set out how the said amount was arrived at and he produced documents to support the same. I note that there was a partial consent that was entered between the parties wherein the appellant's entitlements were released to her save for the amount claimed by the respondent. The witness clearly stated that the amount arose from the appellant's failure to pay her loans on time. From the foregoing, I have no doubt that the tribunal exercised its jurisdiction correctly in awarding the respondent the

sum of Kshs 470,443.30/= as sought for in the counter-claim. In totality of the above, I have no reason to impeach the lower court's judgement delivered on October 7, 2021.

18. On the issue of costs, it is trite that the same follows the event. That is the import of section 27 of the *Civil Procedure Act*. The appeal having failed, I see no reason to deny the respondent costs.

19. Following the foregone discourse, the upshot is that the following final orders do hereby issue: -

    a. The appeal is found to be lacking in merit and is hereby dismissed.

    b. The respondent is awarded costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 17TH DAY OF MARCH, 2023.

....

F. WANGARI

JUDGE

In the presence of;

Ongeso Adv. h/b for Mohamed Adv. for the Appellant

Omwenga Adv. for the Respondent

Guyo, Court Assistant