



**Ndungu v Kamande & another (Civil Appeal E047 of 2022)
[2023] KEHC 17386 (KLR) (11 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17386 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E047 OF 2022
GMA DULU, J
MAY 11, 2023**

BETWEEN

JOHN MUIRURI NDUNGU APPELLANT

AND

LAWRENCE KIOI KAMANDE 1ST RESPONDENT

SKYSOLVER LIMITED 2ND RESPONDENT

*(From the judgment of Hon. M. Obura (CM) delivered on
8th September, 2022 in CMCC No. E119 of 2021 at Voi)*

JUDGMENT

1. In a judgment delivered on September 8, 2022 in Voi CM Civil Case No E119 of 2021, the trial Magistrate concluded as follows:-

’15. I have already determined whether the Plaintiff proved his injuries in the sister file Voi CMCC No E160 of 2021 where I found that in the absence of formal production of treatment notes, either through Plaintiffs own testimony or by consent of the parties, there is no evidence placed before me to facilitate Plaintiff’s injuries or damages payable. My reasoning and finding in the said suit shall apply mutatis mutandis.

16. This claim fails in the circumstances. Consequently, I hereby dismiss the suit and direct that each party bears their own costs.’

2. Dissatisfied with the above decision, appellant who was the plaintiff in the trial court has come to this court on appeal on the following grounds through Counsel DK Wanyoike & Company: –

1. The Magistrate erred in law and in fact by failing to appreciate there was already a test suit Voi CM E79 of 2020 and the applicant and respondent had recorded a consent.



2. The Magistrate erred in law and fact by making a finding that the plaintiff had not physically produced documents while there was a suit on issue production of documents CMCC 162 of 2021.
 3. The Magistrate erred in facts and law on overlooking all open avenues in rules of natural justice, by just dismissing the suit for non-production of supporting documents while they were in the court file.
 4. The Magistrate erred in facts and law on overlooking that the parties in CM 162/2021 which had a hearing was part of the series while 119/21, 140/21, 144/21, 157/21, CM 157/21, CM 160/21 had recorded a consent during pre-trial that production of documents be dispensed with.
 5. The Magistrate erred in law and fact by failing to appreciate the appellant's pleadings, submissions and only went and further to accept defendants on back trucking of defendant's consensus on production of documents during pre-trial (sic).
 6. The Magistrate erred in law and in ignoring that the suit did not proceed to full trial hearing and only submissions were allowed on consensus during pre-trial stage.
3. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by DK Wanyoike & Company for the appellant as well as the submissions filed by Jengo Associates for the respondents. Each side relied on decided court cases.
 4. This is a first appeal. Being so, I have to be guided by the principle that has been applied consistently by appellate courts as restated in *Selle v Associated Motor Boat Company Ltd & Others* [1968] EA 123 and the case of *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR wherein the Court of Appeal stated:-

‘This being a first appeal, it is trite law that this court is not bound to necessarily accept the findings of fact of the court below and that an appeal to this court from a trial by the High Court is by way of a 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 conclusions though it should always bear in mind that it has neither seen nor heard the witnesses testify and should make due allowances in this respect.’
 5. I have perused the record of the trial court and it is brief. No party tendered witness evidence. Parties counsel merely agreed and filed written submissions upon which the court rendered its judgment.
 6. The appellants first ground of appeal is that the Magistrate did not consider that there was a recorded consent in Voi CM E79/2020. From the judgment however the Magistrate stated as follows:-
 - “6. Consent on liability.

The issue of liability was resolved amicably in the test suit Voi CMCC No E079 of 2021. The parties recorded a consent in the said suit on January 17, 2022 through their advocates on record as follows:-

‘By consent liability is hereby apportioned at 20% against the plaintiff and 80% against the defendants.’
 7. Thus it is not correct in my view for the appellant to say on appeal that the Magistrate did not consider the consent in CMCC No E079 of 2021 as only the year was mistyped. In addition,



such consent being in the nature of a contract, binds all parties, as there is no contention that it was an invalid agreement.

8. I note that the other grounds of appeal relate to the issue of production of documents as evidence in the trial. The appellant has stated that there was a suit on production of documents that is CMCC No 162 of 2021, which according to him, was heard as part of the case series herein, wherein 119/21, 140/21, 144/21, 157/21, CM 157/21 and CM 160/21 had recorded consent done during pre-trial agreeing that production of documents be dispensed with.
9. The question is, was this contention by the appellant on relying on documents produced in case No CMCC 162 of 2021 made part of the court proceedings in the case before the Magistrate herein, that is Voi CM CC 119/2021? In this regard, note that the trial record in CMCC 119 of 2021 for June 30, 2022 it was recorded as follows, with regard to submissions and documents:-

‘Ms. Julu

I have no objection to filing written submissions.

AM Obura (Mrs) CM

Court

Parties to file and exchange written submissions on quantum. Mention August 1, 2022.

AM Obura(Mrs) – CM

Ms Julu

Counsel needs to clarify whether he is producing any documents.

AM Obura (Mrs) CM

Mr Wanyoike

I will rely on documents on record.

AM Obura (Mrs) CM

Ms Julu

It is ok. An orders apply to CC E160, E144, E155, E1577 and E119 of 2021.

AM Obura(Mrs) CM

Court

Considered. Orders apply as prayed. Mention on August 1, 2022 to confirm submissions on quantum.

AM Obura (Mrs) CM.’

10. It is clear to me from the above record of the trial court that it was Ms Julu who expressed concern about documents the appellant wanted to produce and rely on, and in response Mr. Wanyoike for the appellant elected to rely on documents already on record by that day in the subject case E119 of 2021 – that is June 30, 2022. The appellant could not thus rely on documents in another case, or documents filed subsequently herein without leave of the court.
11. I also note that neither in the grounds of appeal, nor in written submissions has counsel for the appellant pointed out and particularized the documents which were on record in this case on that date, which the trial Magistrate did not take into account. Though the case authorities



he relied upon with regard to consents to admit documents are valid, the question is which documents did the appellant file in the present case, as there is no allegation that the trial courts record had an error on its face. So in my view the Magistrate cannot be faulted, in finding that no documents to prove quantum of damages had been filed or consented to by the parties.

12. Finally, the issue for decision before the trial court herein was not the issue of liability, as same had been determined by consent at 80% to 20%. The issue was proof of quantum of damages, and the appellant had the burden of proving his claim for quantum damages on the balance of probabilities, even if liability had been recorded earlier see *Josephat Muthuri Kinyua & 5 Others v Fabiano Kimanga* [2021] eKLR.
13. In this regard, as no witness evidence was tendered, the trial court could only rely on recorded consents of the parties, or documents which had been filed and agreed to by June 30, 2022. It was for the appellant to file those documents and point them out to the trial court for consideration. That was not done and the trial court cannot be faulted for coming to the conclusion that quantum of damages were not proved on the balance of probabilities.
14. In my view therefore, the trial magistrate cannot be faulted in dismissing the suit, as no documents have been identified as having been filed and admitted by parties by June 30, 2022 even in this appeal.
15. I thus find no merits in the appeal. I dismiss the appeal. Each party will bear their respective costs of appeal.

DATED, SIGNED AND DELIVERED THIS 11TH DAY OF MAY, 2023 AT VOI VIRTUALLY IN OPEN COURT.

GEORGE DULU

JUDGE

In the presence of:-

Mr. Wanyoike for appellant

Ms. Julu for respondent

Mr. Otolu court assistant

