Kariuki v Mwangi (Civil Appeal E051 of 2022)
[2023] KEHC 23957 (KLR) (5 June 2023) (Judgment)

Neutral citation: [2023] KEHC 23957 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CIVIL APPEAL E051 OF 2022

GL NZIOKA, J

JUNE 5, 2023

BETWEEN

JOHN KIONGO KARIUKI ..... APPELLANT

AND

PATRICK MBURU MWANGI ..... RESPONDENT

(Being an appeal against the judgment of Hon. R. L. Musiega (SRM) dated 16th June 2022 in the Senior Principal Magistrate's Court at Engineer vide Civil Case No. E079 of 2021)

JUDGMENT

1. By a plaint dated 9th June 2021, the appellant instituted a civil suit against the respondent seeking judgment for the following orders: -
    a. Kshs 136,336.87
    b. Costs of the suit
    c. Interest on (a) and (b) above at court rates.
    d. Any other remedy the court may deem fit.
2. However, the respondent filed a statement of defence dated 23rd December 2021 in response and denied owing the appellant the stated amount of money.
3. The case proceeded for full hearing. The appellant's case in brief is that he utilized his shares in Tower Savings and Credit Co-operative Society Limited (herein the "Sacco") to act as a guarantor for the respondent for a loan of Kshs 75,324. That on 20th September 2016, he received a letter from the Sacco informing him that the respondent had defaulted on repayment of the loan and as a consequence the Sacco realized the shares to recover the outstanding loan amount.

4. That from the year 2016 to 2020, he tried to claim the money from the respondent in vain. Further over the said period, he incurred loss in form of dividends in the sum of Kshs 61,012.87. That despite demand and intention to sue the respondent refused and/or neglected to reimburse him the sum claimed.

5. The respondent admitted that the appellant was his guarantor for the loan amount of Kshs, 75,324 from the Sacco. That, due to a financial crisis, he defaulted on the loan and the sum was deducted from the appellant's shares. However, he entered into an oral agreement with the appellant, and paid a 1st instalment of Kshs 40,000 to the appellant's wife. Subsequently, his wife paid the appellant's wife the balance in two instalments of Kshs 10,000, and the final balance of Kshs 15,000 was offset through shopping undertaken by the appellant's wife at the respondent's shop. Consequently, the entire guaranteed amount was fully repaid.

6. The respondent case was further supported by the evidence of Obadiah Mwangi (DW2) who stated that the appellant was his neighbour while the respondent was his son. That he arranged a mediation between the parties where the respondent agreed to repay the guaranteed amount in instalments.

7. That to the best of his knowledge, the respondent sold his car and paid the appellant Kshs 40,000 in cash. However, sometime later the respondent showed him papers that indicated he had been sued. That he immediately convened a meeting with both parties and learnt that the respondent repaid the appellant's wife Kshs 40,000 while the sum of Kshs 20,000 was repaid by the respondent's wife to the appellant's wife in two instalments. That the balance of Kshs 15,000 was repaid through goods picked by the appellant's wife and children from the respondent's wife shop.

8. The respondent further called his wife Shelmith Wangeci (DW3) who reiterated the evidence by the respondent that an amount of Kshs 60,000 was paid in instalment to the appellant's wife while the balance of Kshs 15,000 was paid periodically through shopping at her shop.

9. At the conclusion of the case, the parties filed their respective submissions and on 16th June 2022, the trial court entered judgment to the effect that the appellant failed to discharge his burden of proof and dismissed his case. It is against the subject judgment, that the appeal herein arises on the grounds stated in the memorandum of appeal, filed 8th July 2022 as follows:

    a. The learned magistrate erred in law and in fact in holding that the appellant had not proved that a sum of Kshs 75,324/- was deducted from his shares with Tower SACCO whereas it was a fact admitted by the respondent in his oral testimony and witness statement dated 21st December 2021.

    b. The learned magistrate erred in law and in fact in disregarding the evidence of the appellant to the effect that he did not authorize his wife to receive any payments from the respondent on his behalf.

    c. The learned magistrate erred in law and in fact in holding that it was the appellant's word against the Respondent's whereas it was clear from the respondent's evidence that no money was paid to the appellant.

    d. The learned magistrate erred in law and in fact in holding that the appellant had not proved his case on a balance of probabilities whereas it is evident that he did not receive any payment of the deducted money and the respondent did not provide any documentary prove to show that the appellant's wife received any payments on his behalf.

e. The learned magistrate erred in law and in fact in failing to consider the submissions of the appellant's counsel.

f. The learned magistrate erred in law and in fact by arriving at a decision that was not weighed against the evidence adduced by the appellant and conceded by the respondent.

10. The appeal was disposed of by filing of submission. The appellant filed submissions dated 25th January 2023 arguing that he had proved his case on a balance of probabilities as the respondent admitted he owed the appellant money.

11. That, the respondent's defence that the money had been repaid to the appellant's wife was not supported by any evidence. He cited section 107 of the *Evidence Act* (Cap 80), Laws of Kenya which provides that the burden of proof lies on the person bound to prove the existence of any fact.

12. He further relied on the case of *Mbuthia Macharia v Annah Mutua & another* [2017] eKLR where the Court of Appeal stated that the burden of proof is discharged by way of evidence and that the legal and evidential burden may shift in the course of trial depending on the evidence adduced. That Court of Appeal went on to hold that, the defendant therein who had supplied documents to the plaintiff bore the evidential burden of proof.

13. The appellant further submitted that the argument that the respondent made payments to the wife yet he was still in the picture does not make sense. That, if indeed the respondent made payments to his wife he did not inform him of the same. That the respondent's defence that he paid his wife was fabricated on the knowledge that his wife was deceased and could not be called as a witness.

14. However, the respondent filed submissions dated 6th February 2023 and reiterated that the appellant was his neighbour and they had an agreement on the repayment of the amount. That his evidence was corroborated by his two witnesses, and was consistent.

15. He argued that suit by the appellant is an afterthought to unjustly enrich himself as he filed the suit only after his wife had passed away. Further the appellant failed to provide an iota of evidence that he incurred loss of dividends to the tune of Kshs 61,012. That in the circumstances the appellant failed to prove his case to the required of proof. He relied on the case of *Palace Investment Ltd v Geoffrey Kariuki Mwenda & another* (2015) eKLR where the Court of Appeal cited Denning J, in *Miller v Minister of Pensions* (1947) 2 ALL ER 372 and stated the burden of proof in civil is discharged on reasonable degree of probability and a balance of preponderance of probability however narrow.

16. At the conclusion of the argument by the parties and having considered the appeal in the light of the material placed before the court and the submissions tendered, I find that, the main issue is to determine whether the appeal is merited. In that regard, the role of the court as the 1st appellant court, was stated by the Court of Appeal in the case of; *Selle & another v Associated Motor Boat Co. Ltd. & others* (1968) EA 123, is to re-evaluate the evidence afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses.

17. The court thus observed: -

> "I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of 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 and should make due allowance in this respect.

> In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

18. Further, the law is settled that, he who alleges proves. Section 107 of the *Evidence Act* (Cap 80), Laws of Kenya thus provides that:

> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

19. Furthermore parties are bound by their pleadings. In this regard, the appellant, pleaded at paragraph 3, of the plaint that, he acted as a guarantor for a loan advanced to the respondent by Tower Saving & Credit Cooperative Society Limited. He was thus under a legal duty bound to produce evidence to support that averments. Under section 3(1) of *Law of Contract Act*, a contract of Guaranty has to be in writing and states that: -

> (1) No suit shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person unless the agreement upon which such suit is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.

20. Similarly, the Court of Appeal in *Chase International Investment Corporation and another v Laxman Keshra and 3 others* [1978] eKLR Madan.J stated that

> "I am aware that in the case of a claim under a guarantee the plea would be that it is unenforceable for want of writing under section 3 of the *Law of Contract Act*."

21. Therefore the best the appellant would have done was to produce evidence of the guarantee contract he signed. The saving grace is that, the respondent conceded to the same. However, further, despite the appellant pleading at paragraph 5, that, he was called up to repay the guaranteed sum upon default by the respondent, he did not produce the letter the Sacco served him with.

22. At paragraph 4 of the statement of defence the respondent, averred that, he fully repaid the entire sum guaranteed by the appellant and puts the appellant to strict proof to the contrary, yet the appellant did not produce the demand letter. Even if the respondent did not advance the defence of repayment of the subject money through the appellant's wife, the appellant case would still have collapsed due to his failure to prove that, he guaranteed the subject loan and there was default.

23. In the same vein, at paragraph 5 of the plaint, the appellant avers, that he has lost dividends in the sum of Kshs 61,012.87 and in response, the respondent at paragraph 5, of the statement of defence denies the same and puts him to strict proof. However, during the trial, the appellant did not produce a single document to prove inter alia, he is a bona fide member of the Sacco that, he had any shares therein that, that dividend was declared and, he was entitled to the amount pleaded (if any) and was not paid, or even how he arrived at the figure of Kshs 61,012.87.

24. In *National Social Security Fund Board of Trustees v Sifa International Limited* [2016] eKLR the Court of Appeal held that:-

> " It has been stated time without number that special damages must not only be pleaded, they must be specifically or strictly proved. This Court in the case of *William Kiplangat Maritim & another v Benson Omwenga*, Civil Appeal No 180 of 1993 (Nairobi) cited with approval its decision in *Coast Bus Service Ltd v Murunga Danyi & 2 others*, Civil Appeal No 192 of 1992 (UR) and stated as follows: -
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> > "We would restate the position. Special damages must be pleaded with as much particularity as circumstances permit and in this connection, it is not enough to simply aver in the plaint as was done in this case, that the particulars of special damages were to be supplied at the time of trial. If at the time of filing suit, the particulars of special damages were not known, then those particulars can only be supplied at the time of trial by amending the plaint to include the particulars which were previously missing. It is only when the particulars of the special damages are pleaded in the plaint that a claimant will be allowed to proceed to strict proof of those particulars..." (our emphasis)

25. Finally, the respondent all through testified that, the money was repaid to the appellant's wife. It is unfortunate as observed by the trial court that, she is deceased, but there is no evidence as to when she died, as the appellant did not adduce evidence thereof. It is not clear whether it was before the suit was filed or after.

26. The upshot of the aforesaid is that, the appellant's case was not proved on the balance of probability as required under the law and I find that, the learned trial magistrate analysed the evidence well and arrived at the correct decision. The appeal is thus dismissed with costs to the respondent.

27. It is so ordered

DATED, DELIVERED AND SIGNED THIS 5TH DAY OF JUNE 2023

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr. Nyawira for the appellant

N/A for the respondent

Ms. Ogutu Court Assistant