



REPUBLIC OF KENYA



KENYA LAW
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**Kiboi v Sisimwo & another (Civil Appeal 43 of 2019)
[2023] KEHC 19833 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19833 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CIVIL APPEAL 43 OF 2019
AC MRIMA, J
JULY 6, 2023**

BETWEEN

KELVIN KIBOI APPELLANT

AND

SIMON MENGICH SISIMWO 1ST RESPONDENT

LINET NDIEMA 2ND RESPONDENT

(Being an Appeal arising out of the judgment and decree of Hon. P. K. Mutai (Senior Resident Magistrate) in Kitale Chief Magistrate's Court Civil Case No. 73 of 2017 delivered on 4th September, 2019)

JUDGMENT

Introduction:

1. The appellant herein, Kelvin Kiboi, was the 1st defendant in Kitale Chief Magistrates civil case No 73 of 2017; Simon Mengich Sisimwo & Linet Ndiema v Kelvin Kiboi & Nathan Asega (hereinafter referred to as 'the suit').
2. He was dissatisfied with the decision in the suit and lodged an appeal which is the subject of this judgment.

The Appeal:

3. A memorandum of appeal was both dated and filed on September 27, 2019. The appeal raised four grounds disputing the findings of the trial court.
4. The appellant faulted the entry of judgment in favor of the respondents in the absence of an executed agreement. He found that the appellants failed in their duty to establish their case on a balance of



probabilities. He also found fault in the findings of the trial court which he contended were against the weight of the evidence and relied on extraneous matters not pleaded.

5. For these reasons, the appellant prayed that his appeal be allowed by setting aside the judgment in the suit and that it be substituted with an order dismissing the suit with costs.
6. He further prayed for costs of the present appeal.
7. The appellant filed written submissions in support of his plea. The submissions were dated October 19, 2022.
8. In reiterating and buttressing the grounds of appeal, the appellant challenged the evidence of the respondents when identifying the tractor as lacking probative value. He cited the respondents' evidence as weak for failing to produce receipts proving that they traveled to Nakuru for inspection since full particulars were not disclosed, the appellant concluded that the evidence of the respondents remained indeterminate.
9. The appellant argued that he was a middleman. By virtue of that position, he ought not to have been sued in those proceedings. He continued that the evidence in relation to one Joshua Obonyo was marred with inconsistencies. In his view, the said Joshua Obonyo was the real culprit that pitted him as the sacrificial lamb.
10. He also averred that there was contradictory evidence as to who was to supply the tractor. In his view, that contradiction was so material that it affected the final outcome. In view of the above, the appellant submitted that he had been framed urging this court to allow his appeal.
11. The respondents opposed the appeal. They filed written submissions dated November 3, 2022.
12. They submitted that the parties were well known to each other as neighbours creating little or no room for error in the evidence adduced. They argued that they had adduced evidence at the trial of the suit to demonstrate that they paid sums of monies sent to the appellant and the 2nd defendant respectively. As a result, the respondents dismissed the appellant's allegation that the trial court crafted extraneously issues and decided them.
13. The respondents observed that the role played by one Joshua Obonyo was unclear and may have informed the appellant not to call him as a witness. They submitted that the appellant elected not to file third party proceedings yet that remained his only recourse. They lauded the trial court's decision as having considered the evidence of all parties before arriving at a just conclusion.
14. In the upshot, the respondents urged this court to dismiss the appeal with costs.

Analysis:

15. The High Court, as the first appellate court, is enjoined 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).
16. This court, nevertheless, appreciates the settled principle 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).



17. To enable this court, to ascertain the issues for determination and their discussion, it is imperative that the parties' cases in the suit be revisited. To that end, this court will begin with the plaintiffs' case in the suit and who are the respondents in the instant appeal.

The Plaintiffs' Case:

18. The plaintiffs' case was precise. The plaintiffs are a couple. That they desired to buy a tractor from the proceeds of the sale of their maize. They shared their intention with the defendant (now appellant) who was their neighbour.
19. After a short while, the defendant informed the plaintiffs that he had a friend in Nakuru who was willing to sell his tractor to them. That person was the 2nd defendant, Nathan Segga. The tractor was a Massey Ferguson 290.
20. On October 4, 2016, the 1st plaintiff (Simon Mengich Sisimwo) and the 1st defendant (Kelvin Kiboi) proceeded to Nakuru for inspection of the tractor. They were joined by the said Nathan Segga (2nd defendant) who led them to a garage where the tractor was being repaired. They inspected the tractor and the 1st plaintiff agreed to purchase it. The purchase price was agreed at Kshs 450,000/= on which day the 1st plaintiff paid Kshs 200,000/= by way of cash.
21. The tractor was to be delivered in Kitale on or before the October 31, 2016 and the balance of the purchase price was to be settled before then. The balance was to be paid by way of Mpesa transactions. Parties also agreed to reduce the agreement into writing on full payment of the purchase price.
22. True to the agreement, on various dates, the plaintiffs disbursed a total sum of 432,900/= via Mpesa and as follows: -

Mpesa Account Statement for Simon Mengich Sisimwo – the 1st respondent (PEXh 1)

October 25, 2016 – Kshs 40,300.00 sent to Kelvin Kiboi;

October 28, 2016 – Kshs 10,100.00 sent to Kelvin Kiboi;

October 28, 2016 – Kshs 50,300.00 sent to Kelvin Kiboi;

October 31, 2016 – Kshs 12,200.00 set to Kelvin Kiboi.

Mpesa Account Statement for Linet Ndiema – the 2nd respondent (PEXh 2)

October 6, 2016 – Kshs 50,100.00 sent to Nathan Asega;

October 7, 2016 – Kshs 60,000.00 sent to Nathan Asega;

October 20, 2016 – Kshs 10,100.00 sent to Kelvin Kiboi.

23. In total, the respondents contended that they paid a sum of Kshs 432,900/= being the cash payment together with the Mpesa transactions.
24. The plaintiffs contended that even after making the said payments, the chattel was and has never been delivered to them.
25. The plaintiffs then reported the matter to the police at Kapkoma Police Post where they were advised to pursue a civil claim. Through their counsel, they issued a demand notice which was never heeded to and eventually filed the suit.
26. The plaintiffs denied knowing the said Joshua Obonyo. They further denied and remained strangers to the allegation that the said person would enroll his children to the military.



27. They urged the court to grant allow the suit.

The Defendants' Cases:

28. The 2nd defendant, Nathan Asega, did not defend the suit. It was the 1st defendant (now appellant) who vehemently contested the suit.

29. It was the appellant's case that he did not know the 2nd defendant. He denied all the allegations set out in the plaintiffs/respondents' claim in toto. Although acknowledging that the respondents were his neighbours, he denied having taken money from them.

30. He averred that on October 4, 2016, the 1st plaintiff/respondent approached him with a view to seeking assistance to enroll his child to the Kenyan Army. The appellant contented that the respondents used his Mpesa line and his phone, in his capacity as a witness, to transfer amounts on diverse dates sequentially: -

Mpesa Account Statement for Kelvin Mutai Kiboi – the appellant (DExh1)

October 20, 2016 – Kshs 10,100.00 received from Linet Ndiema;

October 20, 2016 – Kshs 10,000.00 sent to Joshua Obonyo;

October 24, 2016 – Kshs 500.00 received from Joshua Obonyo;

October 25, 2016 – Kshs 40,300.00 received from Simon Sisimwo;

October 25, 2016 – Kshs 40,000.00 sent to Joshua Obonyo;

October 28, 2016 – Kshs 50,300.00 received from Simon Sisimwo;

October 28, 2016 – Kshs 50,000.00 sent to Joshua Obonyo;

October 28, 2016 – Kshs 2,050.00 received from Joshua Obonyo;

October 28, 2016 – Kshs 10,100.00 received from Simon Sisimwo;

October 28, 2016 – Kshs 9,000.00 sent to Joshua Obonyo;

October 29, 2016 – Kshs 3,000.00 received from Joshua Obonyo;

October 30, 2016 – Kshs 2,500.00 received from Joshua Obonyo;

October 31, 2016 – Kshs 12,200.00 received from Simion Sisimwo;

October 31, 2016 – Kshs 11,500.00 sent to Joshua Obonyo;

31. In sum, the appellant testified that he disbursed Kshs 122,000/= as directed by the plaintiffs/respondents.

32. The appellant testified that to his utter shock and surprise, he was confronted by the police and auctioneers on September 12, 2017 where he was arrested and taken to the AP Camp in Gitwamba. He was later taken to Kaptama Police Station on the strength of the respondents report referenced OB No 13/20/11/16 which evidence was produced as DExh2.

33. The appellant urged the trial court to dismiss the suit with costs.

34. The foregoing was the basis upon which the trial court entered judgment in favour of the plaintiffs as follows: -For Kshs 123,000.00 against the 1st defendant;For Kshs 110,000.00 against the 2nd defendant;The claim for Kshs 200,000.00 was dismissed;The plaintiffs were awarded costs and interests.



35. It was that judgment that yielded the instant appeal.
36. Having carefully perused the pleadings, responses, proceedings, parties' submissions and the decisions variously referred to, this court fully appreciates the matter at hand.
37. Flowing therefrom, the following issues fall for determination: -
 - a. Whether there was a contract between the parties.
 - b. If the answer in (a) above is in the affirmative, then whether the contract was breached.
 - c. Reliefs, if any?
38. The issues will be dealt with in seriatim.

a. The Contract:

39. From the record, there seems to be an endeavour by the respondents to demonstrate that there existed an oral agreement in this case. That agreement was allegedly towards the purchase of a tractor.
40. It is trite law that oral agreements are recognized in our jurisdiction and can be discerned in two ways. That is from the conduct of the parties or by implication.
41. This position was discussed by the Court of Appeal in *Ali Abid Mohammed v Kenya Shell & Company Limited* [2017] eKLR as under: -

It therefore follows that a contract can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded. See *Timoney and King v King* 1920 AD 133 at 141. In the circumstances of the instant case, there existed an enforceable contract between the parties by reason of conduct. Indeed, it was not disputed by the respondent that it supplied petroleum products to the appellant at a specific amount per liter and for a certain period of time.

42. In establishing the validity of a contract, a party must demonstrate the elements of offer, acceptance and consideration.
43. In this case, the respondents posited that the 2nd defendant, through the appellant, offered to sell his tractor at a price of Kshs 450,000/=. The respondents agreed to buy it and made a payment of up to Kshs 433,000/=.
44. Whereas the appellant denies any knowledge thereof, this court, for reasons to be rendered later in this judgment, finds that, indeed, there was a valid contract between the parties.

b. Was The Contract Breached?

45. It is again, without much difficulty, to ascertain that the contract was breached.
46. At this point in time, this court will now discuss why there was a valid contract and the manner the contract was breached.
47. The contention that there was no contract rested on the appellant's position that he knew nothing of it and that he did not even know one Joshua Obonyo to whom some of the money was sent to by the 2nd respondent herein. He also contended that the respondents only used his phone to send money to a third party, the said Joshua Obonyo, for facilitation of the respondents' son joining the Kenya Army.



48. The 2nd defendant did not defend the suit.
49. The question that begs an immediate answer is whether the appellant did not know the said Joshua Obonyo. To answer that question, the court will look at the parties' Mpesa transactions as contained in the statements which were produced in evidence.
50. According to the appellant's statement, the appellant seems to have received some money from the said Joshua Obonyo on some occasions. There are 4 such instances captured as follows: -October 24, 2016 – Kshs 500.00 received from Joshua Obonyo; October 28, 2016 – Kshs 2,050.00 received from Joshua Obonyo; October 29, 2016 – Kshs 3,000.00 received from Joshua Obonyo; October 30, 2016 – Kshs 2,500.00 received from Joshua Obonyo;
51. What stands out in each of the above four transactions is that the appellant would either receive money in his phone from the respondents and transmit to Joshua Obonyo or the money would be sent directly to Joshua Obonyo. On receipt thereof, Joshua Obonyo would send part of that money back to the appellant.
52. Holding it at that, let us get back to the appellant's position that the money was sent for facilitation of the respondents' son joining the Kenya Army. If that was the case, then, why was the appellant getting a share of the money? Did the appellant inform the respondents that Joshua Obonyo used to send him part of the money on every occasion they sent money to him? The simple answer is in the negative.
53. From the foregoing, it can, therefore, be safely deduced that the appellant knew and transacted with Joshua Obonyo. With that finding, the position taken by the 2nd respondent that it was the appellant who gave her the cellphone number for and asked her to send the money to Joshua Obonyo can only be true.
54. The above deduction renders the appellant's evidence largely unbelievable. The appellant comes out as an untruthful party and seems to have hidden a lot from the trial court. It is, undoubtedly, and apparent, that the appellant colluded with the 2nd defendant and the said Joshua Obonyo to defraud the respondents thereby leading to the arrangement that a formal written agreement on the sale of the tractor would only be made after payment of the entire purchase price.
55. To the contrary, the respondents come out as truthful parties. As such, this court believes their evidence and more so to the effect that on the basis of the appellant's words and conduct, the 1st respondent proceeded to Nakuru and was made to believe that he was buying the tractor which was undergoing repair works in a certain garage.
56. It is on the basis of the foregoing that this court finds that indeed the three elements of contract were established and that the non-delivery of the tractor to the respondents, and as agreed, signaled the breach of the contract.
57. The second issue is, hence, settled in the affirmative.

c. Reliefs?

58. Taking cue from the above, the appellant was at the heart of the contract and the breach thereof. In fact, he was to be found jointly and severally liable for the sums of money that were sent via the several Mpesa transactions. Had the respondents appealed or cross-appealed in this matter, this court would have allowed that appeal.
59. The upshot is that the respondents are entitled to a refund of the money they paid as a result of the breach of the contract. However, that can only be limited to the sums capable of proof and as captured



in the Mpesa statements. In other words, the sum of Kshs 200,000/= which was allegedly paid to the defendants in cash as part of the purchase price stands irrecoverable for want of proof.

60. The appellant is, hence, lucky to be liable only to the extent of the money he received in his cell phone. To that end, he cannot have any holding appeal. The appeal is, but, hot air.

Disposition:

61. In the end, the appeal is determined as follows: -
- a. The appeal is hereby dismissed.
 - b. For certainty, the sum of Kshs 123,000/= decreed as against the appellant herein shall accrue interest as from the date of filing of the suit.
 - c. The appellant shall shoulder the costs of the suit and of the appeal.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 6TH DAY OF JULY, 2023.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Chebii, Learned Counsel for the Appellant.

Mr. Nyakundi, Learned Counsel for the Respondent.

Regina/Chemutai – Court Assistants.

