Ngunjiri v Kimani (Civil Appeal E068 of 2023)
[2024] KEHC 16170 (KLR) (17 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16170 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL E068 OF 2023

PN GICHOHI, J

DECEMBER 17, 2024

BETWEEN

EVERLINE WANGECHI NGUNJIRI ..... APPELLANT

AND

ELIZABETH WANJIRU KIMANI ..... RESPONDENT

(Being an Appeal from the judgement/ decree of Hon. D.M Macharia (RM/Adjudicator) delivered on 23rd March, 2023 in Nakuru Small claims case No. E671 of 2022)

JUDGMENT

1. The background of this appeal is that the Appellant sued the Respondent before the Small Claim Court vide a statement of claim dated 29th November and filed on 1st December, 2022 seeking the following Orders: -

    a. The sum of Kshs. 216, 803, being the amount recovered from the claimant to satisfy the Respondent's loan plus interest thereon at Court rate from the date of Judgement until payment in full.

    b. Costs of this suit together with the interest therein at such rate and for such period of time as the Court may deem fit to grant.

2. His claim was that he was one of the guarantors to the Respondent who had obtained loan of Kshs. 200,000/= from United Amani Savings and Credit Cooperative Society on 27th September 2016. The Respondent however failed to service the said loan and ran into arrears and the sum stood at Kshs. 216,803 as at October, 2022 causing recovery of the said sum in full from the Appellant's deposits. The Appellant therefore prayed for the refund of Kshs. 216,803 recovered by the Sacco from her savings to pay the Respondent loan in default.

3. In response to the claim, the Respondent filed a statement of response dated 3rd January, 2023. She denied owing the Appellant any money and further denied the jurisdiction of the court stating that the Co-operative Tribunal is best suited to handle the claim. She also denied being in arrears and maintained that she paid all her loan to the Cooperative Society and therefore, the claim should be dismissed with costs.

4. In her statement dated 23rd January, 2023, the Respondent admitted to taking a loan from United Amani Saving and Credit Cooperative Society and asking the Appellant, Grace Kariuki, Naomi Wambui, Faith Gathii and Mary Warugu to guarantee her the said loan. That they accepted and the loan was given to her on terms that she would make monthly repayment of Kshs. 7,560/=.

5. She was however unable to meet the instalments and in January, 2019, she asked for the instalment to be reduced to Kshs. 3,000/= and continued servicing the loan slowly. However, on 26th July 2022, she received a demand from the firm of Raydon Mwangi Associates Advocates demanding for immediate payment of Kshs 198,582 being the loan in default of Kshs. 180, 529/= and Kshs. 18,053/= collection fees.

6. In the letter, the Advocate confirmed that the said money had already been collected from her guarantors in the sum of Kshs. 39,430/=, 39,430/=, 39,430/=, 22,809/= and Kshs. 39,530 respectively.

7. She states that on 8th October 2022, she received another demand letter from the Advocates asking for payment of Kshs. 240,097/= being the loan in default of Kshs. 216, 803/= and Kshs 23, 294/= penalties. That on 3rd November 2022, she learnt that a resolution was passed on 26th October, 2022 to have the said loan recovered from the five guarantors.

8. She reiterates that the Appellant herein had only guaranteed her the sum of Kshs. 40,000/= therefore there was no basis for demanding for the sum of Kshs. 216, 803/= purportedly recovered from her deposits. She states that she had deposits of Kshs. 89,000/= which should have been used to partially clear the loan arears.

9. After hearing the parties, the trial court rendered its Judgment 23rd March 2023. Firstly, it found that it had jurisdiction to handle the matter as the issues raised were between the Appellant and the Respondent and not the Sacco.

10. Secondly and on the claim for the loan recovered, the court dismissed the prayer for the reason that it was not proved to the required standard as no evidence was tendered in support of the loan recovered by the Sacco from the Appellant. The court further held that the loan figures quoted kept fluctuating and therefore, the court was unable to ascertain the exact loan recovered from the Appellant herein.

11. Aggrieved by the dismissal of her case, the Appellant herein lodge this Appeal by a Memorandum of Appeal dated 12th April, 2023, raising 12 grounds as follows: -

    1. THAT the judgement of the learned magistrate is against the law and the weight of evidence on record.

    2. THAT the learned magistrate erred in law and fact by misconstruing the standard of proof in civil matters.

    3. THAT the learned Magistrate failed to utilize the literal rule in interpreting the documents presented before him by the Appellant more so on the law of guarantee.

    4. THAT the learned magistrate erred in law and fact in misapplying and misconstruing the law governing the burden of proof in civil matter thereby reaching an absurd decision.

5. THAT the learned magistrate erred in law and in fact by failing to appreciate and find that the claimant proved his case on a balance of probabilities.

6. THAT the learned magistrate erred in law and facts when he maintained that the appellant had not proved his case on a balance or probabilities when the actual sense there was no evidence adduced by the Respondent to controvert that of the Appellant.

7. THAT the learned magistrate erred in law and fact when he disregarded the uncontroverted evidence of the Appellant.

8. THAT the learned magistrate misdirected himself in law and fact by not relying on uncontested evidence thereby causing a miscarriage of justice.

9. THAT the learned Magistrate erred both in law and fact when he considered irrelevant facts and arguments not helpful in the claimant's case thereby occasioning a miscarriage of justice.

10. THAT the learned magistrate erred in law and facts by making the judgement without taking into consideration the pleadings, evidence exhibited and the applicable laws.

11. THAT the learned magistrate erred in his apprehension of the law applicable and the evidence adduced in support of the Appellant in the circumstances of the case.

12. THAT the conclusion of the Magistrate of evidence and law was improper and therefore raises a need to be interfered with by this Court.

12. The Appellant therefore prayed for Orders; -

a. That the appeal be allowed with costs in this court and the subordinate court.

b. That the learned trial magistrate's judgement in Nakuru Small claim case no. E672 of 2022 be quashed and/ or set aside and the Appellant's claim in the subordinate Court be allowed as prayed.

Appellant's Submissions

13. The Appellant submitted that Appeal to this Court emanating from the small claims court are limited to issue of law as per the Small Claims Act. On that note, it is submitted that section 107 of the *Evidence Act*, places a duty on the applicant to prove their case on a balance of probability as was stated in James Minui Mucheru Vs National V Bank of Kenya Ltd C.A No. 365 of 2017 [2019] eKLR that: -

> " Indeed, it is settled law that in civil cases the standard of proof is on a balance of probability. This is in effect to say that the courts will make a finding based on which party's version of the story is more believable."

14. The Appellant therefore submitted that the existence of the loan was not in dispute, rather, it was the amount of the loan. It was argued that the Cooperative Society sought to recover Kshs 216,803 which figure is supported by the Respondent's statement of accounts.

15. Further, the Appellant submitted that the figure is corroborated by the letter dated 31st October, 2022 from the Society which indicated that the entire amount was recovered from the Appellant. On that note, it was argued that the letter and the Respondent's statement of account are enough evidence that the loan was owing and recovered from the Appellant's deposits.

16. On interpretation of documents, the Appellant submitted that the important rule to be applied is the literal rule. The appellant argued that in dismissing the Appellant's suit, the court stated that the loan form did not indicate the amount each guarantor was to take responsibility over, when the issue was irrelevant.

17. It was submitted that the term jointly and severally liable used in the guarantor's form means that either of the guarantors will be liable for the deductions in case of default and therefore based on the said term, the Sacco elected to recover the entire loan from the Appellant's deposits to the exclusion of the other guarantors.

18. In conclusion, the Appellant urged this Court to allow the Appeal and award the claim as prayed in the trial Court.

Respondent's Submissions

19. The Respondent began by citing the case of Gitobu Imanyara & 2 Others V Attorney General [2016] eKLR where the Court held that: -

> " This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that 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 allowances in this respect."

20. It was her submissions that as per the grounds of Appeal raised, the only issue for determination is whether the Appellant has proved his case to the required standard.

21. She submitted that proof of case in civil matters is on a balance of probability and that the Appellant herein is the one that should prove her case as required under section 107 to 109 of the *Evidence Act*. In support of that line of submissions, the Respondent cited the cases among them the case of Palace Investment Ltd Vs Geoffrey Kariuki Mwenda& Another [2015] eKLR where the court of Appeal held that: - "In making such a determination we need to examine whether the appellant discharged its burden of proof on a balance of probability to prove ownership of the motor-vehicle. The burden of proof is placed upon the appellant and is to be discharged on a balance of probabilities. Denning J. in Miller –vs- Minister of Pensions [1947] 2 ALL ER 372 discussing the burden of proof had this to say: -

> " That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

22. From the foregoing, the Respondent submitted that she indeed borrowed and got a loan of Kshs. 200,000/= and prior to this, she was required to source for guarantors which she got 5 members of the Sacco including the Appellant herein and therefore, if any loan was defaulted then deposits from all the Five (5) guarantors were to be taken to cover the loan.

23. It was submitted that the money demanded by the Appellant through Raydon Mwangi & Associates Advocates was Kshs 180,529/= as at 26th July, 2022 out of which Kshs. 39,430/= was to be deducted from the Appellant's deposits. However, on 3rd November, 2022, the Firm of Nyagaka S.M & Co advocates stated that the Sacco had recovered the sum of Kshs 216,803/= from one of the guarantors (the Appellant herein) without giving an explanation for the turn of events and the conflict in the two letters.

24. Furthermore, it was submitted that during hearing, the Appellant had told the court that she decided on her own volition to pay the entire loan in areas and follow up the matter with the Respondent. The Respondent submitted that this is a further indication that the alleged loan amount was in dispute and no demand had been sent to the Appellant for the said money.

25. The Respondent further submitted that as per procedure, the Sacco ought to have first made a demand to her before pursing the guarantors.

26. In support of this, she relied on the case of Martin Kirima Baithambu vs Jeremiah Miriti [2017] eKLR where Gikonyo J stated: -

> " As a general rule, a guarantor is not entitled to relief until the guaranteed debt has become payable by him. He may not, therefore, call upon the principal debtor to make provision for payment of the debt before the debt is due. However, this does not mean that the guarantor does not have rights to call upon the principal debtor to pay the guaranteed debt until and unless he has paid the guaranteed debt. Needless to state that guarantor's rights accrue from the relationship created by the guarantee, and not merely when he discharges the principal debtor's obligations. Therefore, it is not the law that the guarantor has no rights- equitable or otherwise- until he has paid the guaranteed debt. "

27. Arguing that the sum being sought herein is in the nature of special damages which ordinarily must be strictly pleaded and proved, the Respondent submitted that on one hand, the Appellant stated that the loan was to be divided among all 5 guarantors. That on the other hand, another letter indicated that the loan was deducted from only one guarantor.

28. Consequently, it was therefore submitted that there lacked clarity on issue bearing in mind the Appellant's statement with the Sacco was not exhibited in support of these allegations and therefor, the trial Court was justified in dismissing the case for lack of proof. In conclusion, the Respondent prayed that the Appeal herein be dismissed with costs.

Analysis And Determination

29. Whereas it is a fact that the first appellate court should give a fresh look at the evidence adduced before the trial court bearing in mind that it had no benefit of having seen or hearing the witnesses as they testified as was held in Selle & Another vs Associated Motor Boat Co. Ltd (1968) EA 123, it is also born in mind the provisions of Section 38 (1) of the Small Claims Court that :-"A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law."

30. Though the claim before the trial court was for special damages and the law requires that the same be specifically pleaded and strictly proved. It is also borne in mind the simplicity within which a Small Claims Court was meant to operate. That Court is not bound by rules of evidence.

31. A perusal of the grounds of Appeal and submissions by parties shows that the issues raised are both on points of law and facts making them outside the provisions of Section 38 of the Act. That shows the difficulty in which parties find themselves in when they appear on Appeal.

32. While dealing with provisions of Section 56 (2) of the *Tax Procedures Act* (TPA) which provided that an appeal to the High Court or to the Court of Appeal would be on a question of law only, Majanja J (as he then was) had this to say in the case of Commissioner of Domestic Taxes v W. E. C. Lines (K) Limited (Tax Appeal E084 of 2020) [2022] KEHC 57 (KLR) (Commercial and Tax) (31 January 2022) (Judgment):-

> " An appeal limited to matters of law does not permit the appellate court to substitute the Tribunal's decision with its own conclusions based on its own analysis and appreciation of the facts. What amounts to matters of law are the interpretation or construction of *the Constitution*, statute or regulations made or their application to the sets of facts established by the trial court. The court's engagement with the facts is limited to background and context and to satisfy itself, when the issue was raised, whether the conclusions of the trial court were based on the evidence on record or whether they were so perverse that no reasonable tribunal would have arrived at them. The court cannot be drawn into considerations of the credibility of witnesses or which witnesses were more believable than others; by law that was the province of the trial court.
>
> When a court that is limited to dealing with matters of law had a concern regarding the issues that dealt on facts, then the court would also be limited to re-evaluation of the lower court's conclusions and if the conclusions were erroneous and were not supported by evidence and the law, then the matter becomes a point of law."

33. Further, the Court of Appeal in Mercy Kirito Mutegi v Beatrice Nkatha Nyaga & 2 others [2013] eKLR had this to say: -

> " 31. We wish to state on the onset that in determining the three or so legal issues that arise in this appeal, some of the issues may cut across the spectrum of the factual evidence especially on the conclusions arrived at after the analysis of the primary evidence by the Election Court. We are nonetheless conscious that our jurisdiction is only limited to determination of points of law and thus, our concern regarding the issues that dealt on facts will be limited to our duty of re- evaluation of the Judge's conclusions; and if the conclusions are erroneous; that is, not supported by evidence and the law; the matter becomes a point of law. As it was held in the case of Mwangi v Wambugu, [1984] KLR 453:
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> A Court of Appeal will not normally interfere with a finding fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding; and an appellate court is not bound to accept the trial Judge's finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

34. Persuaded and also guided by the above case law, the Court embarks on determine one issue in this Appeal, that is whether the trial magistrate misconstrued the law governing the burden of proof in civil matters that is, on the balance of probabilities in civil cases.

35. Regarding who bears the burden of proof, the Court of Appeal had this to say in Mbuthia Macharia v Annah Mutua Ndwiga & another Civil Appeal No. 297 of 2015 [2017] eKLR on the discharge of the legal and evidential burden: -

> "(16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the Appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced."

36. From the Court record, it is clear and undisputed that both parties were members of the same Sacco. It is not disputed that the Respondent herein borrowed Kshs. 200,000 from United Amani Saving and Credit Co-operative society and listed Grace Kimani, Naomi Wambui, Evelyne Ngunjiri, Faith Gathii and Mary Warugu as her guarantors who were to jointly and severally be liable for any default in payment of the said Loan.

37. Counsel argued that being jointly and severally liable meant that either of the guarantors is liable solely to pay the loan in case of default. Indeed, joint and several liability means that a liability can be divided equally among a group of people, or it can be placed on one or more specific members of the group.

38. In this case, the Appellant alleged that burden was thrown on her and the entire loan was deducted from her deposits. Though the basis of electing her to shoulder the loan with exclusion of four other guarantors was not stated, the Appellant produced the letter of 31st October, 2022 from the Cooperative Society addressed to Nyagaka Advocates confirming that the entire loan amount was paid from her deposits.

39. The same letter indicates that as per their record, each of the guarantor's penalty had been capped at Kshs 40,000/ but that the Cooperative Society unanimously decided to lamp the entire loan on the Appellant.

40. Those are not material issues in regard to the dispute before the trial court. From the record, the Respondent does not deny that the Appellant was one of the guarantors. She does not deny the fact that she did not repay the loan on time. She admitted that defaulted in payment of the loan. She admitted that the Sacco wrote to her to pay the loan she defaulted in payment. She claimed that interest was supposed to be 1.2% but the Sacco charged 2.4%. She also claimed that the guarantors should be deducted loan amount and penalties.

41. She told the court she made a complaint at the Sacco on the loan amounts. She stated that her issue was how after paying the loan, she still had a balance of Kshs.216,803/=. That was an issue between her and the Sacco and not the Appellant herein. Incidentally, the is the same amount that the Appellant says was deducted from her. It is the loan applicant who approaches members and most of the time pleads with them to be grantors. There is no member who can agree to guarantee another knowing that he will default in payment of the loan. It is therefore legal duty on the Applicant to repay the loan and default has consequences.

42. There was evidence of default of payment of the loan. The fact that the Appellant did not avail a statement of her account in the circumstances herein did not materially affect her claim. The material

before the trial court was sufficient and proved the Appellant's claim on a balance of probabilities as is required by law.

43. If the Respondent had any issue on penalties and how she still had a balance after allegedly repaying the loan, that was an issue between her and the Sacco not the Appellant. In the circumstances, the trial court was in err when it dismissed the Appellants Claim.

44. In conclusion therefore, the judgment entered on 23rd March 2023 in the Small Claims Court Case No. E671 of 2022 be and is hereby set aside and substituted with orders that Judgment be and is hereby entered in favour of the Appellant as against the Respondent for: -

    1. The sum of Kshs.216,803 /= plus interest thereon at court rates from the date of this judgment until payment in full.

    2. Costs of the suit together with interest at court rate from the date this judgment.

    3. Costs of this appeal.

DATED, SIGNED AND DELIVERED NAKURU THIS 17TH DAY OF DECEMBER, 2024.

PATRICIA GICHOHI

JUDGE

In the presence of:

Mr. Matoke H. for the Appellant

N/A Respondent

Ruto, Court Assistant