Njuguna v Kibe (Civil Appeal E067 of 2023)
[2024] KEHC 15281 (KLR) (4 December 2024) (Judgment)

Neutral citation: [2024] KEHC 15281 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL E067 OF 2023

PN GICHOHI, J

DECEMBER 4, 2024

BETWEEN

MOSES N NJUGUNA ..... APPELLANT

AND

MARGARET GATHONI KIBE ..... RESPONDENT

(Being an appeal against the judgement /decision of Hon. D.M Macharia R/M/ Adjudicator in Nakuru Small Claims Court Case No. E672 of 2022 delivered on 23/3/2023)

JUDGMENT

1. The background of this appeal is that the Appellant sued the Respondent before the Small Claim Court on 1st December 2022. His claim was that he was one of the guarantors to the Respondent who had obtained loan of Kshs. 1,500,000/= from United Amani Savings and Credit Cooperative Society.

2. The Respondent however failed to repay the loan as a result of which the Society deducted from the Appellant a sum of Kshs. 452, 933/= thus settling the arrears due. The Appellant therefore filed the claim seeking that judgment be entered against the Respondent for: -

    a. The sum of Kshs. 452,933/= being the amount recovered from the Claimant to satisfy the Respondent's loan plus interest thereon at court rate from the date of judgment until payment in full.

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

3. Upon being served, the Respondent filed a Response to the statement of Claim and denied owing the Appellant any money for reasons that: -

    a. The Claimant was not a guarantor for the Respondent herein.

b. The dispute herein relates to members of the same cooperative Society and this court lacks jurisdiction to handle the dispute.

c. The claim is incompetent and the same should be dismissed with costs.

4. Further, the Respondent stated that the matter was filed before the wrong court as it ought to have been filed before the before the Cooperative Tribunal.

5. Upon hearing parties on submissions on the Preliminary Objection, the court delivered its ruling on 19th January 2023 dismissing the Preliminary Objection on the grounds that the court had jurisdiction to entertain the Claim.

6. The court proceeded to hear both the Appellant and the Respondent who were the sole witnesses in that Claim. In its judgment the court held: -

> " The Claimant did not provide her own statement of account s to ascertain what the figure could have been deducted from her own savings account. I thus find that the suit has not been proved to the required standards hence the same is dismissed. Owing to the relationship of parties, each to bear her own costs.

7. Dissatisfied with that decision, the Appellant preferred this appeal on the grounds that: -

1. That the learned Magistrate erred against the law and the weight of evidence.

2. That the learned Magistrate erred in law and the fact by construing the standard of proof in civil matters.

3. That the learned Magistrate failed to utilise 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 matters thereby reaching an absurd decision.

5. That the learned Magistrate erred in law and fact by failing to appreciate and find that the Claimant not prove the case on a balance of probabilities.

6. That the learned Magistrate erred in law and fact when he maintained that the appellant had not proved his case when in actual sense there was no evidence adduced by the Respondent to controvert that of the Appellant.

Appellant's Submissions

8. While aware that an appeal from the Small Claims Court is on matters of law only under Section38 of the Small Claims Act, that whether the Appellant proved his case of a balance of probabilities is a point of law. Relying on Section 107 of the *Evidence Act*, the Appellant submitted that generally there was no dispute in regard to existence of a loan but the issue is the claim of Kshs. 452,933/= as per the claim and evidence though the trial court captured in its judgment the wrong figure.

9. It was his submissions that document the statement of account (CWE4) showed that the sum of Kshs. 452,933/= was deducted from his account and the letter from the Society dated 31st October 2022 (CWE5) captured the same.

10. It was therefore submitted that the letter was a concrete confirmation that the society deducted Kshs. 452,933/= from the Appellant. It was further submitted that the Respondent admitted in her Exhibit 8 that the Respondent still had a pending loan.

11. It was therefore the Appellant's submissions that the Respondent never produced evidence that she cleared the loan due. That in those circumstances, there is no way the court should have arrived at the conclusion that the Appellant had not proved his case.

12. Regarding failure by the court to utilise literal rule while interpreting the Appellant's documents, the Appellant relied on the signed repayment guarantee in the Loan Application Form (CWE3) and submitted that whether the loan amount was stated or not was irrelevant and the court should not have used it to conclude that the Appellant had not proved his case on a balance of probabilities.

13. The Appellant therefore urged the Court to interfere with that trial court's decision and allow the appeal.

Respondent's Submissions

14. The Respondent opted to handle all the grounds of appeal as one being whether the Appellant had proved his case to the required standards, that is on a balance of probabilities.

15. In that regard, the Respondent extensively quoted section 107 and 108 of the *Evidence Act* and caselaw including the decision by the Court of Appeal had this to say in Palace Investments Ltd v Geoffrey Kariuki Mwenda & another [2015] eKLR in determining whether ownership of a motor vehicle had been proved: -

> " 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: -
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> "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."

16. While submitting that the parties were all members of the United Amani Savings and Credit Cooperative Society, Respondent submitted that the according to the Appellant's Exhibit 8, the loan was for Kshs. 1,500,000 and there were four (4) guarantors but what was to be collected was loan but not penalties and therefore, the amount guaranteed by the Appellant was Kshs. 100,000/= as per the loan agreement.

17. Further, it was submitted that the Appellant confirmed that as at the time of taking the loan, he was also an official of the Sacco yet that was not allowed. It was the Respondents further submissions that there was contradiction in letters dated 22/11/2022 and 26/7/2022 in regard to the amount paid by the Appellant.

18. Further it was submitted that the Appellant failed to produce the statement from the Sacco to show he paid off the amount to the Sacco or that it was deducted as claimed. That there is also no evidence of his shares at the Sacco, and no evidence of notification from the Sacco to the guarantor or guarantors that the money would be collected from them for failure to pay the amount to the Sacco.

19. It was the Respondent's contention that she ought to have been informed before any deducted due to default. On this issue, reliance was placed on the High Court decision in Martin Kirima Baithambu v Jeremiah Matiri [2017] eKLR.

20. Lastly, it was submitted that this being a special damage claim, the Appellant failed to produce documents to strictly prove the same and that ultimately, the court was right in finding that the Appellant failed to prove his case. The Respondent therefore urged this Court to dismiss the Appeal.

Analysis And Determination

21. In this case, the Appellant's claim was definitely a special damage claim which had to be specifically pleaded and proved. The basic issue for determination therefore, is whether the Appellant proved his case as required by law that he was entitled to the judgment for Kshs. 452,933/= cost and interest as pleaded.

22. 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."

23. It is noted that grounds of appeal and the submissions by parties are both on points of law and facts making them outside the provisions of Section 38 of the Act.

24. 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.
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> 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.
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> 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."

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

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> "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."

26. Guided by the above case law, there is no dispute that the Appellant and the Respondent were members of the Society and that the Appellant applied for a loan.

27. 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."

28. From their evidence before the trial court, and despite the Respondent's denial in her Response to the Claim that "the Claimant was not a guarantor for the Respondent herein", she admitted in cross examination that she applied for a loan as per the Appellant's CWE3 (Loan Application Form).

29. Part E thereof, the Appellant appears as number 4 in the list of eligible guarantors. He is member number 1 and the four guarantors signed committing themselves as follows: -

> "We the undersigned hereby accept jointly and severally liability for the repayment of the loan in the event of the borrower's default. We understand that the default will be recovered by an offset against our shares and that we shall not be eligible for loans unless the amount in default has been cleared in full."

30. The shifting of the evidential burden of proof was settled by the Supreme Court in Raila Amolo Odinga & Another vs. IEBC & 2 Others [2017] eKLR that: -

> "(132) Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and "remains constant through a trial with the Plaintiff, however, "depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.
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> (133) It follows therefore that once the Court is satisfied that the Petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the Respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the Petitioner bears an evidentiary burden to adduce 'factual' evidence to prove his/her allegations of breach, then the burden shifts and it behoves the Respondent to adduce evidence to prove compliance with the law..."

31. In her evidence in chief, the Respondent told the court that she did not agree that the Appellant paid the Kshs. 452,933/=. That the Appellant did not inform her of the deductions despite that he knew her complaint in the letter dated 25/10/2022. She further told the court that she was informed the interest was chargeable was 2.4 % because she was not an active member.

32. In cross examination, she told the court that the Appellant's Exhibit 4 showed the interest was 1.2 %. She had no evidence from the Sacco that she cleared the loan. She however stated that her Exhibit 8 indicates that there was a pending loan. That she did not inform the guarantors of the loan difference disputed at the Sacco. She had no evidence that the Appellant was the chairman in the year 2016.

33. In re- examination, she told the court that she did not inform the Appellant about with the Sacco as he was already an office holder and was aware of her issue and was the chairman of the Sacco when the loan was taken in 2016. She further told the court that the Guarantors guaranteed the loan not penalties.

34. That kind of evidence depicts the Respondent as not a reliable witness. Having been guaranteed the loan and having defaulted in repayment, she cannot argue that the guarantors guaranteed the loan not penalties.

35. The Appellant was deducted Kshs. 452,933/= as recovery of loan the Respondent defaulted in payment and this was confirmed by Exhibit CWE5 where it was stated: -

> "...it was resolved that the loan be recovered from the guarantors instead of suing the former member for recovery...As per our jointly and severally principle produced by the guarantee payment, clause the whole amount has been recovered from Member No. 1 Moses N. Njuguna and the loanee is advised to compensate him accordingly."

36. Once the deductions were done, it became a dispute between the Appellant and the Respondent for recovery of that money from her.

37. The Respondent's argument is that there is no evidence of Appellant's shares at the Sacco. That there is no evidence of notification from the Sacco to the guarantor or guarantors that the money would be collected from them for failure to pay the amount to the Sacco. That she ought to have been informed before any deductions due to default. These are non issues in the dispute between the Appellant and the Respondent herein.

38. The Appellant had no issue with the Sacco. His relationship with the Respondent was simply that of a guarantor to her application for loan. She was obliged to pay back what was deducted from the Appellant on account of her default.

39. The accuracy or otherwise as regards the outstanding arrears due to default by Respondent was an issue between the Respondent (as the loan Applicant) and the Sacco. That does not absolve her of her responsibility to compensate guarantor for what was recovered from him over that default.

40. While Appellant discharged both his legal and evidential burden in the circumstances herein, the Respondent failed to discharge her evidential burden going by the analysis above. As a consequence, the trial court erred in finding that the Appellant had failed to prove his claim.

41. In conclusion therefore, the judgment entered on 23rd March 2023 in the Small Claims Court Case No. E672 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. 452,933/= 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 4TH DAY OF DECEMBER, 2024.

PATRICIA GICHOHI

JUDGE

In the presence of:

Mr. Ombeo Mr. Nyagaka for the Appellant

N/A Ms Wangari for Respondent

Ruto, Court Assistant