



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL APPEAL NO.15 OF 2017

LILIAN TAABU SANYA (suing as the next of kin to

BENARD MANYASA SANYAPLAINTIFF

VERSUS

NATIONAL SOCIAL SECURITY FUND.....DEFENDANT

J U D G E M E N T

[1] In the Record of Appeal dated 30th October 2017 and filed herein on the 22nd February 2019, the appellant, **Lilian Tabu** (suing as next of kin to **Benard Manyasa Sanya**), was the plaintiff in Busia CMCC No.16 of 2014, in which she sued the respondent (**defendant**), National Social Security Fund (NSSF) for the taking of accounts with respect to the sum of money contributed to the fund by the late Benard Manyasa Sanya (**deceased**) while in employment as a civil servant and for the payment of the due amount to her together with interest at the rate of 14% from 1st January 1979 to the date of judgment.

[2] The claim was resisted by the respondent on the basis of the pleadings contained in the statement of defence dated 20th February 2014.

The matter proceeded to a full trial with the parties leading oral evidence and filing their respective written submissions.

In the process the appellant (**PW1**) gave her testimony and called a witness, **James Osogo (PW 2)**.

The respondent testified through its branch manager in Busia **Benjamin Mutai Kendagor (DW 1)**. After trial, the court rendered its judgment on the 19th January 2016, but the appellant was dissatisfied and preferred the present appeal on the basis of the grounds set out in the memorandum of appeal dated 30th October 2017.

[3] The hearing of the appeal proceeded by way of written submissions which were filed by both parties through **Balongo & Co. Advocates** and **Nyachae & Ashtiva & Co. Advocates**, respectively.

The appeal was opposed by the respondent. Therefore, the duty of this court was to re-consider the evidence availed before the trial court and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witness.

[4] Accordingly, this court considered all the evidence availed by the parties and opined that the basic issue for determination was whether there was any money or monies owed to the appellant by the respondent on account of contributions made by the deceased to the respondent fund and if so, whether such sum or sums of money were paid or are due for payment to the appellant. The issue was broadly framed by the trial court into two contestable issues i.e. with regard to the sum of the 52,252/65 cts allegedly paid to a stranger instead of the estate of the deceased in 1979 and the actual principal amount of money contributed by the deceased together with interest.

[5] Basically, no dispute arose with regard to the employment of the deceased in the civil service from the year 1977 up to the time of his demise in 1994. There was also no dispute that the deceased regularly made contributions to the respondent fund. Further, it was not disputed that the deceased's surviving widow received a payment of ksh.16,000/= from the respondent as survivors benefits but unfortunately passed away before receiving additional payments.

[6] It was evident that the appellant applied to the respondent for payment of the outstanding balance said to be a sum of kshs.52,252/65cts. This is the actual amount that the appellant demanded from the respondent together with interest and desired that an account be taken in respect thereof. On the basis of the evidence placed before the trial court and which evidence was re-visited in this appeal, the trial court concluded that the applicant failed to establish and prove her claim against the respondent to the required standard.

[7] In arriving at the conclusion, the trial court stated that:-

“I must admit that it is very difficult for this court to grant/determine that which the plaintiff/claimant does not know. The plaintiff does not know how much the principal sum was. She does not know how interest accrued. It is the law that the plaintiff (whoever alleges) must prove her claim on a balance of probability the plaintiff cannot leave gaps in her case and hope that the same should be filled up by the defendant. On a balance of probability, I find that the plaintiff has failed to prove her claim against the defendant.....Besides, there is no evidence that the plaintiff sought the statement of amounts from the defendants prior to the institution of the suit. This prayer or claim clearly shows that the plaintiff is not certain of what she is seeking. It would be a miscarriage of justice if the court would make findings based on guess work”.

[8] This court fully agrees with the trial court as it did not find any plausible reasons to depart from its conclusion which was based on the evidence available and which evidence clearly showed that the appellant was uncertain as to the amount owed to the estate of the deceased (if any) by the respondent.

On behalf of the respondent, Benjamin (DW1), adduced undisputed evidence showing that cheques amounting to more than the claimed amount of ksh.52,252/65cts were drawn by the respondent in favour of the deceased, widow after she had died and before the respondent was notified of the fact.

[9] According to the respondent the cheques were eventually received by beneficiaries of the estate of the deceased and not a mysterious person. This fact was never substantially disputed by the appellant. The fact that the appellant as one of the beneficiaries did not receive the cheques and the payments, represented thereon was no proof of non-payment of the outstanding amount to the deceased's estate. If a wrong person or imposter was paid, the transaction amounted to a criminal transaction which ought to have been referred to Law enforcers rather than being blamed on the respondent.

[10] In any event, the appellant admitted in cross examination that her late mother was paid ksh.16,000/= and a further sum of ksh.44,000/= was paid to the beneficiary in the year 2013. She contended that the interest amounting to ksh.52,000/= and above accrued between 1994 to 2013 but was not paid to her. This was the amount she claimed in this suit yet she did not know the accrued principal amount payable and how interest was computed in respect thereto.

[11] Most importantly, the appellant admitted that more than ksh.52,000/- was paid to the estate of the deceased but ironically, she alleged without proof that the sum of ksh.52,000/= belonging to the estate was paid to a stranger working with Thika County Council. In any event, if that were so, the matter became a police case for purposes of a criminal rather than a civil case such as the present one which was disproved by the respondent and found by the trial court to be lacking in merit for want of proof.

[12] For all the foregoing reasons, none of the grounds in support of the appeal are sustainable. They clearly implied that the appellant expected the respondent to shoulder her burden of proof oblivious of the fact that he/she who alleges must prove.

In sum, this appeal is devoid of merit and is hereby dismissed with costs to the respondent.

J.R. KARANJAH

J U D G E

[Dated and delivered this 13TH day of JULY 2021]