REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 93 OF 2018

ELIJAH NJAGI IRERI.....APPELLANT

VERSUS

SETH MUCHUIMA WEKESA.....1ST RESPONDENT

ALEXANDER KIMANI.....2ND RESPONDENT

(Appeal from the judgment of the Chief Magistrate's court at Kiambu,

B. KHAEMBA, SRM, dated 20th July, 2018 in CMCC No. 227 of 2016)

JUDGMENT

1. ELIJAH NJAGI IRERI (Ireri) filed a suit before the Kiambu Chief Magistrate's Court against ***SETH MUCHUMA WEKESA (Wekesa)*** and ***ALEXANDER KIMANI (Kimani).*** Ireri sought judgment jointly and severally against Wekesa and Kimani for Kshs.141,579.

2. The facts relating to that alleged debt was that Ireri agreed to purchase a motor vehicle Nissan Tiida which Wekesa informed him was at high seas. According to Wekesa, he agreed to import the said vehicle for Ireri, similarly as he had previously done for friends and relatives, at a fee of Kshs.10,000. Wekesa also stated that he used his account managers in Japan to import the vehicle for Ireri. Wekesa said at request of Ireri he negotiated the price of the vehicle, which was at high seas to a price of 3150USD. An invoice of that amount was issued and Wekesa was expected to make payment into his account with the company selling the vehicle that is SBT Japan.

3. Ireri accepts that the price of the vehicle was 3150 dollars, no indication is given however by Ireri which dollar rate this was but he stated it was at exchange rate of Kshs.102.15 to the dollar. Ireri stated that he made payments to Wekesa of Kshs.327,000 which amount he deposited into Wekesa's bank account and Kshs.8,000 which he forwarded to Wekesa through Mpesa money transfer. According to Ireri the payments he made to Wekesa were an overpayment for the vehicle by Kshs.13,700. Ireri further contended that Wekesa was not entitled to a fee because he had agreed to undertake the transaction on a friendly basis.

4. Wekesa denied receiving Kshs.8,000 allegedly sent to him by Ireri through Mpesa money transfer. Wekesa further stated that the forex currency rate of exchange to dollar was Kshs.106.1 to the USD. According to Wekesa he spent an extra amount of Kshs.8,765 to pay for Ireri's vehicle after catering for the extra charges.

5. Wekesa stated that Ireri requested Kimani to clear the vehicle at the port of Mombasa. Further, that Ireri also requested Kimani to arrange for a driver to drive the car to Nairobi. Kimani charges for those undertakings was his fee for Kshs.10,000 and the driver's fee of Kshs.10,000.

6. Wekesa stated that Ireri requested him to send Kshs.208,000 to Kimani to pay duty and other charges at port of Mombasa. That when Ireri issued Wekesa with two cheques as reimbursements for that amount, the two cheques were dishonoured which costs Wekesa Kshs.1,100 being banking fees for the unpaid cheques.

7. Wekesa confirmed that after receiving all the payments from Ireri, he had an extra Kshs.16,597 from which he deducted Kshs.10,000 as his fee and Kshs.6,597 as part payment he made to pay for the car.

8. Ireri stated that his claim against Wekesa and Kimani is for Kshs.141,579. Ireri alleges he paid to both Wekesa and Kimani total of Kshs.450,250 of which only Kshs.322,371 was required for the transaction and therefore he overpaid Kshs.127,879 with an additional payment of Kshs.13,700.

9. The trial of this matter proceeded before the Kiambu Chief Magistrate's court. By the judgment dated 20th July, 2018 Ireri's claim was dismissed being aggrieved by that dismissal he has preferred this appeal.

10. I will be guided by the holding in the case ***SELLE & ANOTHER VS. ASSOCIATED MOTOR BOAT CO. LTD & OTHERS (1968) EA 123*** where the duty of the first appellate court was stated to be as follows:-

> **" 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** *(ABDUL HAMMED SAIF V ALI MOHAMED SHOLAN (1955), 22 E.A.C.A. 270)."*

11. The trial court rejected Ireri's claim on the ground that the contract between Ireri and Wekesa and Kimani was not reduced in writing. The trial court further dismissed Ireri's claim against Kimani on the ground that it was Wekesa who dealt with Kimani and Ireri therefore was not privy to contract with Kimani.

12. In dismissing Ireri's claim on the ground that the contract was not reduced in writing, the learned trial magistrate cited ***Section 3(1) and (2)*** of the Law of Contract Act Cap. 23. That section provides:-

> **"No suit shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage 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 thereto by him lawfully authorized."**

13. It is clear that the above section relates to situation where the defendant promises to answer for the debt, default of miscarriage of another person. The Court of Appeal in the case ***JAGJIVAN SINGH TRADING T/A SPANCRETE VS. MENENGAI INVESTMENT LTD (1995) eKLR*** considered the provisions of **Section 3(1) Cap. 23** and cited 24th Edition of Chitty on contracts paragraph 4419 as follows:-

> **"It has been established from a very early date that the words "debt, default or miscarriage of another person" mean that the section only applies where there is some person other than the surety who is primarily liable. The section therefore applies when the surety assumes a secondary liability and agrees to be answerable if the principal debtor fails to meet debtor fails to meet his liability but it does not apply where the surety assumes a primary liability. This is the origin of the distinction between contracts of guarantee and contracts of indemnity, the former falling within the Section and the latter outside it…"**

14. The claim before the learned trial magistrate was not one where either Wekesa or Kimani assumed a secondary liability or agreed to be answerable to a principal debtor who failed to meet his/her liability. **Section 3(1) Cap 23** as it will be noted in the above case applies to contracts of guarantee. There was no contract of guarantee between the parties in this case and accordingly the trial court erred to find that Ireri's claim failed because of non-compliance with ***section 3(1) and (2) of Cap 23.***

15. This appeal is in the form of retrial of the parties case. That retrial however is undertaken with the caution sounded in the case **SELLE & ANOTHER VS. ASSOCIATED MOTOR BOAT CO. LTD & OTHERS** (supra).

16. Ireri having made the claim against Wekesa and Kimani bore the burden of proof as set out in **Section 105.7 Cap 80** as follows:-

> **"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 hose facts exists."**

17. Ireri had a burden to prove that the dollar exchange agreed was at the rate of Kshs.102.15 to the dollar; he had to prove that he did not authorise Kimani to clear the vehicle in view of his, (Ireri's) payment to Kimani's firm ***ZZED AGENCY*** of Kshs.67; he needed to prove that the amount he paid to clear the motor vehicle exceeded what was required to be paid; he needed to prove he paid Kshs.450,250 and Kshs.13,700 and above all he needed to prove that indeed he over paid the amount he claims in his suit, that is Khs.141,579. Even though Ireri alleged to have forwarded some funds through Mpesa money transfer, he failed to provide proof of the same. In the case ***JACQUILINE MUENI MUASYA vs. KENYA POWER & LIGHTING CO. KIMUNYA JULIUS (2019) eKLR*** the Court dealt with the provision of ***Section 107 of Cap 80*** as follows:-

> **"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."**

18. I have reproduced the facts which Ireri relied on. He bore the burden to prove his case by evidence and in law.

19. It is also useful to cite the above case ***JACQUILINE MUENI MUASYA*** (supra) again as follows:-

> ***"In*** EVANS NYAKWANA VS. CLEOPHAS BWANA ONGARO (2015) eKLR ***it was held that:-***

> **"As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of** *Section 107(i)* **of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore the evidential burden … is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in** *Section 109 and 112* **of law that proof of that fact shall lie on any particular person…The appellant did not discharge that burden and as** *Section 108* **of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side."...**

The question then is what amounts to proof on a balance of probabilities. *Kimaru, J* **in** *WILLIAM KABOGO GITAU VS. GEORGE THUO & 2 OTHERS [2010] 1 KLR 526* **stated that:**

> **'In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.'"**

20. I have reconsidered the evidence adduced before the trial court and I find that Ireri failed to meet both legal and evidential burden of proof.

21. I fail to understand how in the light of that failure, Ireri would allege in his ground of appeal that the trial court disregarded the "magnitude of evidence" he tendered. The only response I can give to Ireri is that there was no evidence that could assist his case before the trial court, let alone evidence with any "magnitude."

22. This appeal is without merit. The same fails and is dismissed with costs.

JUDGMENT, SIGNED DATED AND DELIVERED AT KIAMBU THIS 14TH DAY OF OCTOBER, 2021

MARY KASANGO

JUDGE

Coram:

Court Assistant: Ndege

For Appellant : No appearance

For Respondents: Miss Kariuki holding brief for Mr. Njehu

COURT

Judgment delivered virtually.

MARY KASANGO

JUDGE