



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL APPEAL NO. 53 OF 2015

(Being an appeal arising from Judgment and Decree in Kitale Chief

Magistrate's Court in CMCC No. 172 of 2013 delivered by C.C. Kipkorir (RM) on 4/11/13)

TABITHA WANGOI.....APPELLANT

VERSUS

PATRICK NGUGI.....1ST RESPONDENT

PATRICK KUNGU.....2ND RESPONDENT

VERONICA NJERI.....3RD RESPONDENT

JUDGMENT

1. The facts of this appeal are clear and straightforward. The appellant according to her plaint advanced Kshs 680,000/= to the Defendants sometimes in March 2013 for purposes of purchasing fertilizer and thereafter repay her.
2. From the pleadings, the Respondent did receive the same but failed to pay necessitating the Appellant to seek legal redress through a criminal case No. 712/2013 at Kitale Chief Magistrate's Court.
3. The parties subsequently entered into an undertaking where the Respondent agreed to pay the said amount by surrendering the cash bail of Kshs 180,000/= as the first installment and thereafter a monthly payment of Kshs 30,000/=.
4. Upon the said payment the appellant was to withdraw the criminal charges facing the Respondents.
5. It appears that the undertaking was never honoured prompting the Appellant to institute this suit. The matter went to full trial and the lower court dismissed the same arguing that it was the Appellant who breached the undertaking.
6. That prompted this appeal. The same generally revolves around the undertaking namely, that the court misdirected itself in arriving at the decision that it was the Appellant who breached the undertaking despite finding that indeed she was owed the amount.
7. The Appellant though served did not contest the appeal.
8. I have read the statements and cross-examination of the three Respondents. Clearly, the reason they did not honour the payment was because the Appellant did not withdraw the Criminal case against them. They in essence agreed that they were advanced the money.
9. The said undertaking stated that;

(1) That the parties have agreed to reconcile and accused have agreed to pay the complainant a sum of Kshs 680,000/= factored as herein forthwith.

(2) That the complainant shall withdraw Kitale CMCC Cr. Case No. 712 of 2013.

The following conditions to be met thereafter by the accused persons.

a) That cash bail deposited by the accused amounting to Kshs 180,000/= to be paid to the complainant upon being refunded

to the depositor.

b) That the accused jointly shall be paying each a sum of Kshs 10,000/= monthly w.e.f 10th June 2013 until payment in full.”

10. The reading of the above undertaking is clear and straightforward. The criminal case was to be withdrawn upon the Respondent making the above payments albeit in installments as agreed. It was therefore expected that the Appellant was to withdraw the criminal charges. Infact the cash bail of Kshs 180,000/= would have been he first installment.

11. How then was the criminal case to be withdrawn and pave way for the payments of kshs 180,000/= before the criminal case is withdrawn yet its alleged that the depositor of the cash bail failed to turn up? It was in my view incumbent upon the Respondent to effect their part of the agreement. They owed the money and not vise versa.

12. All that they did was to split hairs. The bottom line is that they owed the Appellant Kshs 680,000/= and they agreed to pay. Infact, had they paid, there would have been sufficient reason to argue that the Appellant did not honour part of the agreement to withdraw the charges in the criminal court.

13. For now I find that the trail court arrived erroneously at its conclusion . It applied the wrong Principles which necessitates this court's interference. *See Mwanasokoni Vs Kenya Bus Service Ltd (1982 – 88) 1 KAR 278 and Kiruge Vs Kiruge & Another (1988) KLR 348.*

14. In short the Respondents evaded paying the debt and they used all means to frustrate the Appellant as can be deduced from the litany of applications on record.

15. The appeal is hereby allowed. The lower court judgment is set aside and judgment is hereby entered against the Respondents jointly and severally as prayed for in the plaint.

16. The appellant shall have the costs of this appeal as well as costs at the lower court.

Delivered, signed and dated at Kitale this 3rd day of April, 2019.

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H.K. CHEMITEI

JUDGE

3/04/19

In the presence of:

Ms Arunga for the Appellant

No appearance for the Respondent

Court Assistant – Kirong

Judgment read in open court.