



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CIVIL APPEAL NO. 5 OF 2017

GABRIEL MATHU NGUGI.....APPELLANT

VERSUS

MIRIAM WANGUI NJOROGE.....RESPONDENT

JUDGEMENT

A. INTRODUCTION

1. The instant appeal arises from the decision of Hon. C. Maundu (the Chief Magistrate Garissa) in CMMC No. 38 of 2009 delivered on 26th April, 2017. The appellant in his memorandum of appeal raises the following grounds:-

- 1) THE Learned Chief Magistrate erred in Law and fact by holding that the plaintiff had applied for and awarded tender No. GSA/DPO/02/2007-2008 contrary to the evidence adduced**
- 2) THE Learned Chief Magistrate erred in Law and fact by granting declaratory orders when the subordinate Court had no Jurisdiction to grant such orders as prayed in Prayer A(II) of the plaint amended on 11th June, 2008.**
- 3) THE Learned Chief Magistrate erred in Law and fact by finding that the works had been done and concluded by the plaintiff when there was no evidence on record to prove the same.**
- 4) THE Learned Chief Magistrate erred in Law and fact by holding that the defendant was not coerced to enter into an agreement with the plaintiff when the evidence adduced was to the contrary**
- 5) THE Learned Chief Magistrate erred in Law by disregarding the evidence of DW2 Engineer Edward Ndinya**
- 6) THE Learned Chief Magistrate erred in Law and fact by finding that the plaintiff had proved her case on a balance of probabilities when there was no evidence on record to prove the same.**

2. The appellant asked this Court to Order that:-

- 1) The appeal be allowed with costs**
- 2) The Hon. Chief Magistrate has no Jurisdiction to grant declaratory Orders as prayed by the plaintiff in their amended plaint and accordingly CMMC NO. 38 OF 2009 Should be struck out**
- 3) That the costs in the lower court and the appeal be awarded to the appellant.**

B. BACKGROUND:

3. The genesis of the dispute between the Appellant and the Respondent is in respect to a tender No. GSA/DPO/02/2007-2008 secured by Mathu and Brothers Construction Company, a company owned by the Appellant. The tender was from the Ministry of Agriculture and Livestock for fencing an abattoir in Garissa.

4. The Respondent through her plaint and evidence tendered in the lower Court alleged that she entered into an oral agreement with the Appellant to allow her use his company to secure and execute the above tender on a consideration of Kshs. 50,000/=. She alleged that the said agreement was later reduced into writing at the office of the DCIO Garissa, where the appellant acknowledged receipt of Ksh.15, 000/= as part payment.

5. The Respondent pursuant to the said agreement secured the tender as per the evidence tendered in the lower Court, where she subsequently opened a joint account at Equity Bank together with the appellant, where upon execution of the tender, an Initial sum of Kshs. 1,196,210/= was deposited and later the sum of Kshs. 1,020,625/= was transferred to the Respondent's personal account.

6. Issues arose when the second and final batch of the payments were to be made, as the Appellant wrote to the District Commissioner stopping the said payment. This necessitated the Respondent to file CMMC No. 38 of 2009, the basis of this appeal.

7. The defendant in response to the Respondent suit alleged that he is the owner of by Mathu and Brothers Construction Company, and that he applied and was awarded tender No. GSA/DPO/02/2007-2008.

8. In his testimony before the lower Court he produced a letter dated 27th March, 2008 addressed to the Provincial Works officer, citing interference from two ladies in regard to the said tender. He alleges that when he raised a complaint with the DCIO, he was arrested and coerced to enter into an agreement with the Respondent and forced to receive the sum of Ksh. 15,000/= to force him to allow the respondent use his company. He alleged that he never consented to the Respondent use of his Company, it was due to coercion.

9. The Lower Court upon hearing all the parties and the evidence tendered entered Judgment in favour of the Respondent leading to the instant appeal.

SUBMISSIONS:

10. When the matter came up for the hearing of the appellant appeal on 26th March, 2019 only the appellant Counsel appeared and argued the appeal, whereas the Respondent was absent.

11. The appellant submitted in support of the grounds of appeal in the memorandum of appeal. In respect to ground 1 and 2 the appellant argued that PW1 (the Respondent) in her evidence in Court stated that she did not submit the tender documents to the District Commissioner Office, yet the court in its decision found that she had submitted the tender documents. Additionally, he alleges that the lower court issued a declaratory order which is a preserve of the High Court.

12. In regard to ground 3, the appellant submitted that the lower Court erred in reaching a finding that the respondent executed the work as per the tender awarded, yet no document was produced to that effect, for instance no receipt was produced, which they argue that a strict mandatory prove is demanded and that the court erred in finding for the plaintiff on a balance of probability. Further, he argues that the Respondent evidence that her sister helped her execute the work cannot be sustained as she was not called as a witness thus denying the court crucial evidence.

13. On ground 4 the appellant submitted that that the agreement between him and the Respondent was entered into pursuant to coercion and therefore the lower Court failed to consider the circumstances in view of the environment in which the agreement was entered into. He states that the agreement, the subject of this appeal was recorded at the DCIO office and that the court ought to have cautioned itself.

14. In respect to grounds 5 and 6 of the memorandum, the appellant submitted that the lower Court failed to take into account the evidence of DW2 Engineer Ndinya, whose evidence gave a detailed account of the process and history of the tender awarded herein and argues that the Respondent did not tender sufficient evidence to support her case.

15. In sum, the appellant submits that the lack of certificate of execution and clear circumstances of how the appeal was made, the trial Court erred in finding that the plaintiff/Respondent had met the threshold by discharging the burden of proof on probabilities. The Appellant in sum prays that the appeal be allowed with costs both in Lower Court and high Court be borne by the Respondent.

C. ANALYSIS AND ISSUES:

Duty of the First Appellate Court:

16. It is trite that the role of an appellate court is to re-evaluate and analyse the evidence that was adduced before the lower court and come to its own independent decision. In **Epantus Mwangi and Geoffrey Ngatia vs Duncan Mwangi Wambugu [1982 – 88] 1 KAR 278**, the Court stated the role of the first appellate Court on appeal as:-

“The principle is that a court on appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles.”

17. There are two issues for determination in my view, these issues are intertwined, being as to whether there was an agreement between the appellant and the Respondent, and if the same exists, whether it was entered into pursuant to coercion perpetuated by the Respondent and the DCIO Garissa.

18. But before going to the two core issues, there is a collateral issue on whether magistrates' court could entertain declaratory suits. Of course there is no legal or constitutional provision which bars subordinate courts from entertaining declaratory suits. It is trite law that provided the subject matter lies within the monetary jurisdiction of the said courts, the same can entertain a declaratory suit.

19. On the other 2 issues above, the court views are as hereunder.

20. Section 33 (1) of the Law of Contract Act, Cap 23 Laws of Kenya provides as follows:-

“No suit shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages 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 thereunto by him lawfully authorized.”

21. It apparent to this Court that the Appellant seems to be denying the existence of any agreement between him and the Respondent regarding the tender No. GSA/DPO/02/2007-2008, and if the same exist he alleges it was due to coercion perpetuated by the Respondent through the DCIO Garissa.

22. As to the existence of the agreement between the Appellant and the Respondent, the Respondent in her testimony before the Court stated that they entered into an oral agreement with the Appellant to the effect that the Respondent was to use the Appellant Company to secure and execute tender No. GSA/DPO/02/2007-2008 for a consideration of Kshs. 50,000/=. She alleged that they later reduced the same into writing at the DCIO office Garissa, where she was further paid another 15,000/=.

23. In further confirmation of the existence of the said agreement, the Respondent tendered evidence to the effect that together with the appellant they opened a Joint account, where the initial sum of Kshs. 1,196,210/= was deposited and later the sum of Kshs. 1,020,625/= was transferred to the Respondent’s personal account. This was not disputed by the appellant and therefore it buttress the lower court finding that he Appellant subsequent conduct goes on to affirm the existence of their agreement with the Respondent. This court therefore based on the same finds no basis to disturb the lower court finding on this aspect.

DURESS:

24. The appellant as a ground of appeal has argued that the Hon. Chief Magistrate wrongly found that the circumstances that the agreement between the appellant and the Respondent was entered into raises the aspect of coercion and duress. The appellant submitted he was coerced to sign the agreement at the office of the DCIO Garissa thus was under duress and is null and void and not enforceable. The lower Court in this respect found that the Appellant did not tender evidence to prove these allegations.

25. Section 107 (2) of the Evidence Act provides as follows:-

“When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

26. It is apparent from the record that other than making the allegation, the appellant did not call any evidence to prove that the agreement in issue was obtained through coercion or duress. Am therefore in agreement with the lower court that the appellant did prove that their impugned agreement with the Respondent was not obtained through coercion or duress. As such, I am satisfied that the said agreement was willingly signed by the parties in the presence of the DCIO Garissa. It is also as stated by the Hon. Chief Magistrate that most disputes are justly resolved at the police station without necessarily ending in court, this position is qualified by this Court.

27. In **D.T. Dobie & Co. Ltd. vs Wanyonyi Wafula Chebukati [2014] eKLR, Kasango J.** cited with approval the case of **Miller vs Minister of Pensions [1947] 2 ALL ER 372**, where Denning J. had this to say:-

“The degree is well settled. It must carry a reasonable degree of probability but not so high as required in a criminal case. If the evidence is such that the tribunal can say; we think that it is 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 where a 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.”

28. In this instant case, the Respondent produced their agreement with the appellant, duly executed by both parties. The same is enforceable as no evidence was tendered proving duress or coercion.

CONCLUSION:

29. In conclusion, it is my considered view after looking at all the evidence adduced before the lower court, that indeed the Respondent discharged the burden of proof on a balance of probabilities as held by the lower court. Therefore this court makes the following orders;

(1) Appeal is hereby dismissed for want of merits.

(2) Costs to the respondent.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT GARISSA THIS 21ST DAY OF MAY, 2019.

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CHARLES KARIUKI

JUDGE