



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO 48 OF 2017

GEORGE MUNA MWENDA.....APPELLANT

VERSUS

PENINA NDZAI.....RESPONDENT

(Being an Appeal from the decision and Judgment of the Senior Resident Magistrate Court

at Malindi, Hon Y.I.Khatambi dated 23rd August 2017 in Civil Suit No 111 of 2015

- Penina Nzai vs George Muna Mwenda)

JUDGMENT

1. Penina Ndzai (the Respondent) had sued George Muna Mwenda (the Appellant) in the lower Court for the sum of Ksh1,500,000 being money paid to the Appellant to construct a house for the Respondent. The Respondent had also prayed for the costs of the suit and interest thereon at court rates. The Appellant denied the claim and by an amended defence dated 15th June, 2016 counterclaimed against the Respondent the sum of Kshs.880,000 plus costs of the suit and interest thereon at court rates.

2. At the conclusion of the trial, the trial Court found in favour of the Respondent and dismissed the Appellant's counterclaim. Aggrieved by the decision, the Appellant has moved this Court to set aside the trial magistrate's judgment and enter judgement in his favour as per the counterclaim on the grounds that:-

“1. The trial magistrate erred in law and fact in finding from the evidence adduced in the Court that the Respondent had proved her case on a balance of probability.

2. The learned trial magistrate grossly erred in law and in fact by improperly and wrongfully analyzing the facts and evidence tendered before the Court thereby arriving at an unreasonable and illogical judgment in law.

3. The learned trial magistrate erred in fact and in law by basing her findings on facts and matters which were not supported by any evidence thereby arriving at an erroneous decision.

4. The learned magistrate erred in fact and in law by ignoring the evidence adduced before her that the Respondent herein was advanced money by the Appellant even though there is an express written agreement to that effect duly executed by both the Respondent and Appellant and Mpesa transaction records to that effect.

5. The learned magistrate erred in fact and in law by finding that the money deposited to the Appellant's account by himself was money advanced to him by the Respondent yet the deposit slips were in the name of the Appellant.

6. The learned trial magistrate erred in law and in fact in finding that a written agreement showing that an agreement has been entered is not prima facie of a loan and should be accompanied by deposit slips yet the Respondent herein did not produce any acknowledgement slips but only an agreement to show that there was an agreement. This is an irreconcilable contradiction.

7. The learned trial magistrate erred in law and in fact by holding that since money deposited by the Appellant was coincidentally of similar amounts to other deposits then the money must have been advanced to the Appellant without any evidence adduced to the effect.

8. The learned trial magistrate erred in law and in fact in that even though she held that there was indeed an agreement between the Appellant and the Respondent, there was no money advanced to the Respondent.

9. The learned trial magistrate erred in fact and in law by holding that there was no evidence to prove that it was not the Appellant who paid funds to the National Environment Management Authority yet the Respondent did not dispute the same.

10. The honourable trial magistrate grossly erred in fact and in law in dismissing the Appellant's counterclaim and condemning the Appellant to pay the Respondent costs of the suit."

3. This being a first appeal, the applicable principles are as re-stated by the Court of Appeal in the **Association for Physically Disabled of Kenya v Kenya Union of Domestic Hotels Educational Hospital and Allied Workers Union & Another [2018] eKLR; Civil Appeal No 116 of 2016 (Mombasa)** as follows:-

"[10] This is a First Appeal; it is therefore the duty of this Court imposed by law to evaluate afresh by way of a retrial the evidence recorded before the trial Court in order for it to reach its own independent conclusion. (See Selle v. Associated Motor Boat Co. Ltd (1968) EA 123) Selle and Another v. Associated Motor Boat Company Ltd And Others, [1968] 1 EA 123 (CAZ):

"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 Hameed Saif v. Ali Mohamed Sholan, (1955), 22 E.A.C.A. 270)."

4. Through the submissions filed on 6th December, 2018, the Appellant's case is that the learned trial magistrate was wrong in holding that the deposits in his bank account were payments made to him by the Respondent as the amounts deposited were similar to the instalments agreed between him and the Respondent in the agreement dated 1st October, 2013.

5. It is the Appellant's case that he is a contractor with numerous projects and he is usually paid in instalments and the mere fact that he made deposits of Kshs.250,000 at various intervals in his bank accounts is not conclusive evidence that the said sums were advanced to him by the Respondent. He asserted that the Respondent did not produce any acknowledgement of any payments allegedly made to him or evidence that the money he deposited in his accounts originated from her.

6. The Appellant further submitted that the trial magistrate deliberately ignored the Respondent's admission that she received Kshs.50,000 from the Appellant. Further, that the Respondent had failed to explain the purpose of the money received from the Appellant. The Appellant also criticized the trial magistrate for failing to consider and adopt the loan agreement dated 3rd September, 2013 between him and the Respondent.

7. Finally, the Appellant submitted that he produced a receipt evidencing payment of Kshs.170,000 to National Environment Management Authority (NEMA) and it was erroneous for the trial magistrate to find that there was nothing in support of his counterclaim of Kshs.170,000 being money he paid to NEMA on behalf of the Respondent.

8. The Appellant concluded by stating that the trial magistrate erred in dismissing his counterclaim and urged this Court to allow his appeal with costs.

9. Through her submissions filed on 7th December, 2018 the Respondent stated that she adduced evidence of an agreement entered between her and the Appellant for the construction of a house on a specified parcel of land and the trial magistrate was therefore correct in finding that she had paid the Appellant Kshs.1,500,000 as part payment of the agreed contract price of Kshs.13,000,000.

10. It was the Respondent's further submission that she established, through her evidence at the trial, on a balance of probabilities that the Appellant had not given her any loan. She asserted that the trial magistrate was therefore correct in dismissing the Appellant's counterclaim.

11. A perusal of the record shows that during the trial both the Appellant and the Respondent testified without calling witnesses. The Respondent testified as PW1. Her evidence was that she entered into a written contract with the Appellant who was a contractor. The agreement was that the Appellant would build a house for her on a parcel of land known as plot No.12028/Malindi at a contract price of Kshs.13,000,000 inclusive of labour and materials. The Appellant was to be paid Kshs.250,000 per month and she complied with the agreement by making the monthly deposits. However, the Appellant failed to commence the construction. During cross-examination she confirmed having paid the Appellant the sum of Kshs.1,500,000 in five instalments. She denied paying the said sum to the family of Charo Shutu.

12. In his defence, the Appellant testified as DW1 and denied receiving any money from the Respondent. His testimony was that the sum of Kshs.1,500,000 the Respondent claimed to have paid him was actually paid to the family of Charo Shutu. It was also the Appellant's evidence that the family of Charo Shutu prevented the construction of the house.

13. The learned trial carried out a lengthy analysis of the evidence that was adduced and proceeded to conclude that the Respondent had proved that she had advanced Kshs.1,500,000 to the Appellant for the construction of a house. She found the Appellant's counterclaim wanting and dismissed the same.

14. On the Respondent's claim, the trial magistrate established that a total of Kshs.1,500,000 was deposited in the Appellant's accounts in Equity and Cooperative banks between 17th October, 2013 and 26th March, 2014.

15. On the Appellant's assertion that out of the Kshs.1,500,000 allegedly deposited by the Respondent two deposits amounting to Kshs.500,000 belonged to him as he made the deposits himself, the trial magistrate answered him thus:

“The plaintiff testified that she directed the defendant to deposit Kshs.250,000 on 30th November, 2013 and 26th March, 2014. The defendant's testimony was to the effect that the amount deposited belonged to him and not the plaintiff. The plaintiff submitted that the explanation given by the defendant was not reasonable, and that she requested the defendant to deposit the amounts in his favour on her behalf. I find the explanation by the plaintiff to be reasonable for the following reasons: The agreement stipulated the sum payable as Kshs.250,000 per month, amount deposited by the defendant was equivalent to the agreed instalments. I also note that the deposit slips were in the custody of the plaintiff. The defendant was unable to give an explanation as to how the said deposit slips ended up in the plaintiff's custody.”

16. The trial magistrate proceeded to observe that:-

“I note that the defendant on one hand alleged that he never received a sum of Kshs.1.5 million, on the other hand [he] alleged that the sum received from the plaintiff was repayment of personal loan advanced. His third defence was that the said amount was paid to the Charo Shutu family. I note that the deposit slips were produced by the plaintiff. I have no reason to doubt the fact that the sums which the defendant deposited into his cooperative bank account were sums received from the plaintiff. This will explain why each deposit was at a sum of Kshs.250,000 as stated in clause 5 of the agreement dated 1st October, 2013. I note that no proof has been availed by the defendant to prove the allegation that the sum claimed by the plaintiff was paid to the Charo Shutu Family as alleged. The explanation given by the plaintiff that the deposits made in the defendant's Cooperative Bank [account] was under her directions is reasonable noting that the deposit slips were in her custody”

17. The finding by the trial magistrate that Kshs.1,500,000 was deposited in the Appellant's bank accounts by the Respondent cannot be faulted. The Respondent produced evidence showing that she directly deposited the sum of Kshs. 1,000,000 in the Appellant's accounts. She also proved that on two different occasions she gave Kshs. 250,000 to the Appellant to deposit for her. Kshs. 500,000 was therefore deposited by the Appellant in his own bank account pursuant to the instructions of the Respondent. The money that was deposited by the Appellant originated from the Respondent and belonged to her.

18. The Appellant's claim that Kshs. 1,500,000 was given to the Charo Shutu family does not make sense considering the deposit slips produced by the Respondent. If any money was paid by the Respondent to the family of Charo Shutu, and I find that there is no evidence of such payment, then such money is different from what the Respondent claimed from the Appellant. The Appellant did not adduce any evidence to show that he transmitted the money received from the Respondent to the family of Charo Shutu.

19. On the Appellant's counterclaim, the trial magistrate rejected the same holding that the agreement dated 3rd September, 2013 allegedly entered between the Appellant and the Respondent was a forgery. She also held that no documentary evidence was adduced to support the Appellant's claim that he had loaned Kshs.660,000 to the Respondent as per the said agreement.

20. The trial magistrate also went ahead and rejected the Appellant's assertion that he paid Kshs. 170,000 to NEMA on behalf of the Respondent and that he had loaned the Respondent Kshs. 50,000 through the Mpesa platform.

21. A perusal of the record will show that the trial magistrate was correct in her findings. When the Respondent was put under intense cross-examination about the Kshs.50,000 sent to her by the Appellant through Mpesa, she explained that the Appellant had sent her to get the registration certificate for his company from Sheria House and he sent her the money so that she could give it to a person at Sheria House. Her evidence was that she indeed gave the money to a certain person as directed by the Appellant. Considering the evidence adduced in this matter there is no reason to doubt the testimony of the Respondent. In any case, if indeed the Respondent owed the Appellant any money this amount ought to have been captured in the alleged agreement of 3rd September, 2013.

22. As for the Kshs.170,000 he allegedly paid to NEMA on behalf of the Respondent, the Appellant admitted that the receipt he had produced for Kshs.170,000 was not from NEMA. He also conceded that the money had been received from Ednah Nzai, the sister of the Respondent and the owner of the house that was to be constructed. In the receipt, which must have been generated by the Appellant, the purpose of payment was indicated as **“structural design and NEMA report.”** There was therefore no evidence placed before the trial Court in support of the Appellant's claim that some money was paid to NEMA on behalf of the Respondent. The trial magistrate was therefore correct in concluding that the Appellant did not pay any money to NEMA on behalf of the Respondent.

23. A perusal of the evidence adduced in this case creates an impression that the Appellant is a dishonest person. How can one reconcile his counterclaim of alleged unpaid loan of Kshs.660,000 advanced to the Respondent and his evidence that the deposit slips produced by the Respondent evidenced the repayment of the loan by the Respondent? He never explained why the alleged repayment exceeded the loan advanced and neither did he explain why he counterclaimed for a loan that had been paid. The impression one gets from the record is that the Appellant after failing to carry out his part of the bargain is now busy trying to evade refunding the Respondent's money.

24. In short, the Appellant's appeal is without merit. The same fails and is dismissed with costs to the Respondent.

Dated and Signed at Nairobi this 8th day of April, 2019

W. Korir,

Judge of the High Court

Dated, Signed and Delivered at Malindi this 9th day of May, 2019

R. Nyakundi,

Judge of the High Court