



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 64 OF 2017

JAPHET MURIUNGI MUKIIRA.....APPELLANT

VERSUS

SIMON KANYARU NDATHO.....RESPONDENT

(Being an appeal from the Judgment and decree of Hon. L. Ambasi CM dated 10th July, 2017 in Meru CMCC No. 99 of 2016)

JUDGMENT

1. The appellant was the plaintiff in the trial court. He sued the respondent alleging that on 17th November, 2012, he gave him a sum of Kshs. 400,000/- to buy green grams on his behalf. That the respondent failed to buy him the said green grams whereby the appellant sought for the refund of the said sum with interest.
2. In his defence and counterclaim, the respondent denied the said allegations and put the appellant to strict proof. He admitted having only received from the Appellant Kshs. 40,000/- for the purchase of 10 bags of millet which the appellant failed to collect.
3. After trial, judgment was entered in favour of the respondent on 10th July, 2017 whereby the court dismissed the suit and directed the respondent to pay the appellant Kshs. 40,000/- based on his admission.
4. Aggrieved by the said decision, the appellant has appealed to this court setting out six grounds. The said grounds can be collapsed into three; ***that the trial court erred in holding that the appellant did not give the respondent Kshs. 400,000/- yet there was an acknowledgement therefor vide an agreement dated 8th May, 2013; that the trial court erred in holding that the agreement of 8th May, 2013 was signed under duress and/or undue influence and finally, that the trial court erred in holding that the agreement of 8th May, 2013 was unreliable or not genuine yet there was no evidence to support such finding.***
5. This being a first appeal, the court is enjoined to re-evaluate, re-assess and re-analyze the evidence afresh and arrive at its own independent findings and conclusions but having in mind that it did not have the advantage of seeing the witnesses. (*See: **Selle & Another vs. Associated Motor Board Company Ltd. [1968] EA 123***).
6. The evidence before the lower court was brief. **PW1 Japhet Muriungi Mukiira**, the appellant told the court that on 17th November, 2012, the respondent came to his home where he gave him Kshs.400,000/- cash for the purchase of 80 bags of green grams. However, the respondent did not deliver the same. This was in the presence of the appellant's wife. Subsequently, he met the respondent on 8th may, 2018 whereby they wrote and signed an agreement in which the respondent agreed to repay the money before 2nd June 2013. He denied the respondent's allegation that he had wanted to buy 10 bags of millet from the him.
7. **PW2 Nicholas Murithi Gikunyu** testified that on 8th May, 2013, he drafted the agreement between the appellant and the respondent produced as **PExh.1**. That the said agreement was signed by the appellant, the respondent Kenneth and himself.
8. On his part, the respondent testified as **DW1**. He denied the appellant's allegation that he had received Kshs.400,000/- allegedly for purchase of green grams. He contended that on 17th November, 2012, he sold to the appellant 10 sacks of millet for Kshs.45,000/-. The appellant paid a total of Kshs.40,000/ but failed to pay the balance. That the appellant returned after 6 months and demanded for the millet, enough of which the respondent did not have as he only had 5 sacks. The appellant demanded his money back which the respondent did not have. The appellant threatened that the respondent will pay back the money 10 times.
9. At the hearing of the appeal, the appellant submitted that the trial court's judgment was against the weight of evidence. For the respondent, it was submitted that the trial court reached the correct decision as the appellant did not discharge his burden of proof and that the agreement of 8th May, 2013 was unreliable. The cases of **Mbuthia Macharia v. Annah Mutua Ndwigwa & another [2017] eKLR** and **Josephine Mwikali Kikenye v. Omar Abdalla Kombo & another [2018] eKLR** were relied on in support of those submissions.

10. The first ground was that the trial court erred in holding that the appellant did not give the respondent Kshs.400,000/- yet there was an acknowledgement by way of an agreement dated 8th May, 2013. The appellants case before the trial court was that he gave the respondent Kshs.400,000/- for purchase of 10 sacks of green grams. That the respondent failed to supply the green grams and therefore agreed to enter into an agreement dated 8th May, 2013. He presented the person who drafted the agreement as a witness.

11. It should be recalled from the on set, that the respondent denied the appellant's claim. On receipt of the demand letter dated 20th September, 2013, the respondent denied owing the said sum of Kshs.400,000/- but instead admitted owing Kshs.40,000/- in respect of sale of millet.

12. The response by the respondent's letter dated 2nd October, 2013 was received by the appellant's Advocates on the same day (see page 10 of the record). The contents of that letter were neither denied nor challenged when the letter was received. Instead the appellant lodged his claim in court three years later by way of a plaint on 29th March, 2016. The appellant had kept quiet for 3 years after receipt of the respondent's letter of 2nd October, 2013.

13. The contract for the sale and purchase of 10 sacks of green grams was oral. Those present were the appellant, the respondent and the appellant's wife. Those who testified on that contract are the appellant and the respondent alone. The fact is the wife of the appellant who was the 3rd witness was or should have been the appellant's witness. The appellant failed to call her as a witness. His explanation was that it was he who was the complainant and not her.

14. **Section 112 of the Evidence Act, Cap 80 of the Laws of Kenya** provides that:-

“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him”

15. It is the appellant who knew that his wife had the knowledge and had witnessed the alleged contract of sale of November, 2012. He alleged that she witnessed him handing over to the respondent the alleged sum of Kshs.400,000/-. However, he decided not to call her as his witness. The question that begs is, why did he not want her to testify on a matter she allegedly witnessed?

16. To my mind, the only logical inference is that, had she appeared and testified, her testimony might have been against the appellant.

17. **Section 107 of the Evidence Act** provides to the effect that it is he who alleges that must prove. It is the appellant who alleged that he had paid over to the respondent Kshs.400,000/- in the presence of a credible witness, his wife. He decided not to call her but decided instead to rely on an alleged consequent agreement. In this regard, the holding in **Mbutia Macharia v. Annah Mutua Ndwiga & another (supra)** to the effect that the legal burden of proof lies throughout on the claimant and never shifts comes in handy.

18. To my mind, the primary issue was the contract or the giving of Kshs.400,000/- to the respondent. The agreement of 8th May, 2013 was but secondary. That was but only corroborative of any oral testimony of the initial handing over of the Kshs.400,000/-. The only evidence before the trial court regarding the handing over of the alleged Kshs.400,000/- was the testimony of the appellant which had been strenuously disputed by the respondent.

19. To my mind, the trial court cannot be faulted for finding that there was no sufficient evidence to prove the alleged contract and the resultant handing over of Kshs.400,000/-. This is so in light of the clear evidence that the appellant shielded the evidence of his wife from court.

20. The other issue that militates against the appellant's claim is the contradictory evidence which he gave before the trial court. In his evidence in chief, he stated that ***“On 17/11/2012 he came to my home in Thuime and met my wife and children. He was with a friend. I gave him Kshs.400,000/= cash for purchase of 80 bags of green grams”***. In cross examination, he stated; ***“My wife was there when I gave him money. ... One sack measures approximately 90kg @ Kshs.8,000/-”***.

21. Firstly, the appellant did not disclose who this friend that the respondent came with was. He never sought to call him as a witness. Secondly, if the respondent was to sell 80 bags of green grams and each was costing Kshs.8,000/-, the total purchase price should have been in the region of Kshs.640,000/- and not kshs. 400,000/=. A question will arise as to the *bona fides* of the appellant's claim. He never challenged the respondent's contention that he, the appellant, had sworn that the respondent would pay the sum of kshs. 40,000/= he had paid to him ten times.

22. It is not lost of this court that, while the respondent aptly denied the appellant's claim immediately it was made and communicated to him in September, 2013, the appellant did not deny the version of the respondent when it was first communicated to him in October, 2013. He kept quiet for three years and said nothing about it until after he had lodged his claim in court. The first ground fails.

23. This leads to the 2nd and 3rd grounds of appeal, viz, the position of the agreement dated 8th May, 2013. It was the appellant's case that the agreement was executed by four people, the respondent included. The respondent's position was that he never executed the said agreement.

24. I agree with the appellant that nowhere in the defence of the respondent did he contend that he signed the said agreement out of coercion or due to undue influence. To the extent that the trial court held that the said agreement was entered into as such, it fell into serious error of judgment.

25. Further, there was no evidence that the said agreement was a forgery. All that the respondent stated was that he was a stranger to that document. On that front again, the trial court fell into serious error. The respondent did not tender any evidence to prove that fact.

26. All that the respondent stated was that, he never signed the agreement and for that reason it must have been a forgery. Firstly, the testimony of the respondent was not seriously challenged. Secondly, the agreement was in the form of an acknowledgement of debt. That to my mind cannot amount to an agreement or contract. There was no consideration for the alleged acknowledgement of debt.

27. In this regard, although the trial court was wrong on the grounds for which it rejected that agreement, nevertheless that agreement was not an agreement properly so called capable of being enforced and the claim was not predicated on it. Accordingly, although the 2nd and 3rd grounds succeeds, they do not change the course of the appeal.

28. Accordingly, I find the appeal to be without merit and the same is hereby dismissed with costs.

DATED and DELIVERED at Meru this 16th day of May, 2019.

A. MABEYA

JUDGE