REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

HIGH COURT CIVIL APPEAL NO.16 OF 2016

JANE WAHITO GATIBIRI.....APPELLANT

VERSUS

STEPHEN MAINA.....RESPONDENT

(Being an appeal from the judgment of Hon. K. Onesmus SRM dated 14th March 2016 in Nyeri CMCC NO.333 of 2011)

JUDGMENT

This matter started way back in 2004. The appellant and respondent are related. It concerns the use, occupation, possession and ownership of stall No.317 at Open Air Market Nyeri.

It is not in dispute that the respondent STEPHEN MAINA is the registered proprietor of the stall in the Council Records.

The appellant JANE WAHITO GATIBIRI claims that in 2004 the respondent was indebted to AGEWA Women's Group- he owed the group Kshs. 3,300/-.

As at that time he had allowed her to use the said stall to keep her bananas- suddenly the chairlady of AGEWA Women's Group went there and told her to vacate the stall for the reason that the respondent had used the stall as collateral for a loan, and had defaulted.

It is then that she went looking for respondent's mother who looked for the respondent and they agreed that she would pay the debt of Kshs.3300/- to AGEWA Women's Group and possess the stall. She paid the loan after the execution of certain documents which were marked as MFI-P1 during the hearing of the case. She took possession of the stall.

Sometime in 2010, she was ordered to leave the stall. That is when the real dispute began.

The matter was reported to the Council- the parties were invited to a consultative meeting during which it emerged that the Council Records clearly showed the stall belonged to the respondent, and he could not be compelled by the Council to transfer it to anyone.

This meeting appears to have come after the appellant wrote to the Town Clerk Nyeri Municipal Council on 30th August 2010 requesting for a caution and to the effect that the respondent had in 2006 requested her, since he was in financial doldrums, to pay council dues for him and she had paid the same since. She later rescued the same stall from a shylock to whom he was indebted – that if the respondent was to transfer it to anyone- then she ought to get priority because she was the incumbent user and he, the proprietor owed her money.

The town clerk determined that the issue of the debt was beyond his jurisdiction. It is soon thereafter that this matter was brought to court.

The appellant filed a plaint dated 10th October 2011 where she sought orders: -

> *a) An injunction to restrain the Defendant by himself his agent and/or any other person purporting to act in that behalf from evicting the plaintiff, harassing, affecting and /or in any other way engaging activities impacting negatively on her carrying on lawful business from stall No.317 at the OPEN AIR MARKET-NYERI till conclusion of this court.*
>
> b) *An order for specific performance to issue against the Defendant to transfer the stall No.317 OPEN AIR MARKET and failure to which to which, The Municipal Council of NYERI to facilitate legal, valid and legal transfer of the said stall into the name of the plaintiff without further reference to the Defendant*.

To support those prayers, she pleaded willful default, breach of contract and bad faith on the part of the respondent- itemizing the following particulars: -

a) Willfully defaulting and/or refusing to transfer the stall into the name of the plaintiff.

b) Refusing to honour his part under the agreement.

c) Breaching the agreement.

d) Trying to sell the self- same stall to a third party.

e) Misleading the plaintiff to clear loan for him.

f) Failing to pay to the plaintiff her calculated dues for economic loss.

g) Being insincere

h) Threatening to eject the plaintiff.

The duty of the first appellate court was set out in **Selle & another –vs- Associated Motor Boat Co. Ltd.& others (1968) EA 123** in the following terms:

…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.

This position was taken by the Court of Appeal for East Africa in ***Peters –vs- Sunday Post Limited [1958] EA 424*** where Sir Kenneth O'Connor stated as follows: -

It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in ***Watt vs. Thomas (1), [1947] A.C. 484.***

"My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

I take guidance from the above authorities to evaluate the evidence afresh and draw my own conclusions always bearing in mind that I never saw or heard the witnesses testify.

The documents produced as MFI P1 were an agreement between AGEWA United and Jane W. Gatibiri headed inter alia ***"Amount of loan Three Thousand Hundred (3,300)"***. It states further: -

"I Jane Wahito Gatibiri has agreed to service the above defaulted loan by Stephen Main ID No.13884585 on condition that she will possess stale (sic) No.317 at Open market. The above loan was obtained from AGEWA United Women on 18th June 2004 to be repaid in a month's time to July 2004 as follows: -

Current weekly repayment- 300 for 11 months =3,300/-

Lonee (sic) Jane G. Gatibiri

ID NO.11128383

Signed

1st witness - Catherine Nyambura

I D No……...

2nd witness- FM Wachira (ESQ) DR.5740032

6835395

Signed

Chairlady AGEWA United Group

Financier –ID No.0237310

Signed

c.c. - Market Chairman Nyeri

Mother of Defaulter Catherine Nyambura

P O Box NYERI

Defaulter –Stephen Maina."

As is evident, the same was only copied to the respondent – he did not sign it.

The other document was an acknowledgment dated 18th June 2004 indicating that the respondent had received what appears to be Kshs.4300/- from Agnes W. Wachira – cancelled to read AGEWA Women Group. It indicated money is to be repaid on or before 18th July 2004.

The respondent who was the defendant in the lower court filed his defence dated 19th October 2011- he denied all the allegations against him. Specifically, that he had contracted the appellant/any person to pay any debt to the AGEWA Women Group, that he had no intention of transferring the stall to the plaintiff and /or anybody else hence there was no default and /or breach as pleaded by the plaintiff/appellant.

In his testimony he reiterated the contents of his defence telling the court that the appellant had refused to vacate the stall- claiming that he owed her money which he did not. That in fact she is the one who owed him for the lease for the period of time she had occupied the same.

In her judgment delivered on 4th March 2016 the learned magistrate found that there was no contract between the parties herein, the respondent was not obligated to transfer the stall to the appellant and that the appellant had not proved her case.

Relying on a case cited as **Otiende Drive Villas Ltd vs. David Kamau & Others, Frank Rwakijanju vs. Prince Patrick Kaboyo Fort Portal HCCA NO.1 of 1992 (1992) IV. KALR 132** and **Alfred Mo Michira vs. Gesima Posho Mills Ltd. Civil Appeal No.97 of 2000**

The learned magistrate found that the plaintiff had failed to prove her case on a balance of probabilities and dismissed the suit with costs to the defendant.

Submissions

For the appellant it was argued that there was sufficient evidence to prove the case that the trial magistrate had fallen into error by failing to consider the evidence of witnesses who were familiar with the business of AGEWA Women Group.

That the fact that the appellant had failed to produce original documents in support of her case was sorted out by the oral evidence in court confirms what was in those documents. That acting as lay persons the parties put down their intentions to trade in the said stall – that by clearing the respondent's loan the appellant created the nexus that would require the respondent to transfer the stall to her. He urged the court to apply the *maxim equity deems that which ought to be done as done*, and ignore all the legal irregularities that happened in this case. Counsel attached copies of two cases;

1. **National Bank of Kenya Limited vs. Anaj Warehousing Limited (2015) eKLR**

2. **Chon Jeuk Suk Kim & Another vs. E.J. Austin & 2 others (2013) eKLR**

Which he did not mention in any way in the submissions or state how the two cases applied to the appellant's case. Neither did he attach print outs of the cases, or point out any highlighted sections or anything.

The respondent's counsel did not cite any authorities. He relied on the evidence on record. He stated that there was no reason for this court to interfere with the learned magistrate's judgment as it was clear from the evidence before her that the appellant had failed to prove her case on a balance of probabilities.

Guided by the wise words in **Selle vs. Associated Motor Boat Company Ltd [1968] EA 123** and to **paraphrase,** I proceed

> *[to] consider the evidence, evaluate it myself and draw my own own conclusion and in so doing to always bear in mind that I neither heard witnesses make due allowance in this respect. And to keep in mind that I am not bound necessarily to follow the trial magistrate's findings of fact if it appears to me that he had 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 demeanor of a witness is inconsistent with the evidence in the case generally* ***'(Abdul* Hammed Sarif V Ali Mohammed Solan [1955] 22 EACA 270***).***

I have carefully considered the evidence and the submissions.

The only issue for determination is whether the appellant placed before the learned magistrate sufficient evidence as required by law to warrant the orders sought.

Was there any agreement between the appellant and respondent for her to pay his loan? Was there evidence of any default and demand from AGEWA Women Group? Was there any evidence that the appellant would pay the loan and then own the stall?

It is clear from the evidence on record that there was no agreement between the appellant and the respondent that

a) She would repay his loan.

b) In exchange for his stall No.317

The document marked by the appellant was between herself and AGEWA Women Group- that she would repay the respondent's loan, and take possession of his stall No.317. Nowhere in that document has the respondent signed. It is clear as day- on the face of the document that he was not present and was not a signatory to that document. It was copied to him. Hence no proof that there was any written agreement between her and the respondent for her to repay his loan.

There was no evidence from the giver of the loan that the respondent had defaulted on any loans if at all – there was no demand notice/or anything to confirm that indeed the said respondent was in default.

Neither was there anything placed before the court to confirm that the respondent had used the said stall as collateral for the alleged loan. The documents the appellant had were copies – they were marked for identification; they were not produced as exhibits – they did not form part of the evidence – hence could not be relied upon in the magistrate's path to the judgment.

The respondent conceded that he had allowed the appellant to use his stall. She was to pay Kshs.200/- to the council and Kshs.300/- to him per month. She never paid him any money but paid to the council.

The appellant sought over Kshs. 600,000/- as money due to her from the respondent with respect to fees and rates related to the market stall paid to the council. Surely this claim could not have been serious. She was in occupation of the stall- she was using it to trade- she was not paying anything to the owner. It is only logical that she would pay the market fees and rates for as long as she was occupying and using the stall.

However, it is also clear that this did not bestow on her any rights of ownership because as soon as the respondent needed his stall back he asked her to vacate severally. Even if the documents she had were reliable, the pending loan according to her was Kshs. 3,300/- to be paid over 11 months. If that agreement was credible then it would appear that on the face of it – she would occupy/possess the stall for the 11 months while she was paying the loan. Possession and ownership are worlds spent. Nowhere in the evidence placed before court did the parties ever speak of transfer of the stall to the appellant. The County Council made it very clear that she was merely a licencee whom the owner could remove at any time.

From the foregoing I find that the appeal must fail.

The appeal is dismissed with costs to the respondent here and the court below.

Dated, signed and delivered in open court at Nyeri this 7th Day of June 2019.

Mumbua Matheka

Judge

CA Nancy

Ms. Wambui Mwai holding brief for Muthee for Appellant

Mr. Karweru for Respondents

In the presence of: -