REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CIVIL APPEAL NO. 16 OF 2017

JULIANA MULIKWA MUINDI...APPELLANT

-VERSUS-

BOARD OF MANAGEMENT;

YANGUA MIXED SECONDARY SCHOOL..................1ST RESPONDENT

THE PRINCIPAL;

YANGUA MIXED SECONDARY SCHOOL.................2ND RESPONDENT

-VERSUS-

(Being an Appeal from the Judgment of Hon. M.M Nafula in the Principal Magistrate's Court at Tawa Civil Case No. 166 of 2015, delivered on 26th January 2017)

JUDGMENT

INTRODUCTION

1. The appellant was the plaintiff in the lower Court. Her claim against the respondents was for payment of Kshs. 35,500/=, costs of the suit and interest. It was averred that sometimes in the year 2014, the appellant had supplied firewood of the stated amount which the defendants failed, refused and/or neglected to pay.

2. The defendants filed a joint memorandum of appearance but failed to file a defence within the prescribed period. Consequently, an interlocutory judgment was entered against them on 03/11/2015.

3. The matter proceeded by way of formal proof after which the learned trial magistrate found that the case had not been proved on a balance of probability. She dismissed it with no order as to costs.

4. Aggrieved by the outcome of the suit, the appellant filed the instant appeal and listed 5 grounds as follows;

> ***i. The learned Magistrate erred in law and fact by finding that the appellant had not proved her case on a balance of probability.***
>
> ***ii. The learned Magistrate erred in law and fact by failing to take into account the appellant's submissions.***
>
> ***iii. The learned Magistrate erred in law and fact by arriving at a conclusion that was not supported by the evidence on record.***
>
> ***iv. The learned Magistrate erred in law and fact by relying on extraneous issues to inform the judgment of the Court.***
>
> ***v. The learned Magistrate erred in law and fact by relying on wrong principals of law to arrive at the judgment.***

5. The appeal was canvassed by way of written submissions.

6. I have looked at the evidence on record, the judgment of the trial Court, the appellant's submissions and the authorities cited therein and the only issue for determination in my view is whether learned trial magistrate erred by dismissing the appellants claim.

7. It is settled law that the duty of a first appellate Court is to analyze and re-evaluate the evidence on record in order to reach it's own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses.

8. The only evidence on record is that of the appellant **(PW1)**. She testified that in January 2014, she delivered three lorries of firewood, at Kshs. 12,500/= each, to the respondents' school at the request of the principal. She used to deliver firewood to the school before that incident but would not receive receipts.

9. The total amount due to her was Kshs. 37,500/= but she was only paid 2,000/=. Upon the transfer of the principal who she was dealing with, the new principal refused to pay her and the non-payment persisted leaving her with no choice but to sue.

10. Her advocate wrote a demand letter to the respondents but there was no response. She produced it as Exhibit 1. She however received a letter from the respondents' Board of Management dated 12/06/2015 informing her that she was only entitled to Kshs. 12,500/=. She produced the letter as exhibit 2. The appellant closed her case.

11. According to the learned trial magistrate, failure to call the former principal, who in her view was a critical witness, left the appellant's testimony uncorroborated and as such, the case was not proved to the required standard.

12. The burden of proof in Civil cases is on a balance of probability.

13. Lord Denning J. in **Miller –vs- Minister of Pensions (1947) 2 ALL ER 372,** discussing that burden of proof had this to say-

> ***"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it 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 in which the 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."***

14. In my view and as rightly submitted by the appellant, the letter from the respondents *(exhibit 2)* was a clear indication that some firewood was delivered by the appellant.

15. From the record, I noted that on 11/02/2016 when the matter came up for formal proof, Mr Mutua held brief for Miss Isika for the appellant and informed the Court that parties had agreed that the respondents would file their defence. The Court was also informed that there were negotiations going on between the parties. The respondents were represented by Miss. Mulsoli who confirmed that indeed that was the position.

16. In my view, the proceedings of that day buttressed the probability that indeed some firewood was delivered by the appellant. I do not think that the respondents would have agreed to negotiate if they were really convinced that there was no delivery.

17. From exhibit 2 the respondents actually acknowledged being indebted to the appellant but contested the amount claimed. Paragraph 2 of the letter was worded as follows;

> ***"The BOM met on 23/05/2015 on the above mentioned matter and others. The debt for Juliana Mulikwa Muindi was agreed to be settled of Kshs. 12,500 (one lorry) not the Kshs. 35,000 (three lorries) quoted due to dishonest of the matter and the assessment made."***

18. Be that as it may, the respondents did not bother to canvass their case in accordance with the laid down procedures despite being fully aware of the proceedings. So, what are the consequences of a party failing to adduce any evidence?

19. In **Motex Knitwear Mills Limited Milimani HCC 834/2002** Honourable Lessit J citing **Autar Singh Bahra & Another Vs Raju Govindji HCC 548 of 1998** stated as follows;

> ***"Although the defendant has denied liability in an amended defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the defendant in his defence and counterclaim are unsubstantiated, in the circumstances the counterclaim must fail…………" Where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged…….."***

20. In **Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001** Lesiit J expresses herself as follows;

> ***a. "It is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings."***

21. In **Janet Kaphiphe Ouma & Another vs. Marie Stopes International** (Kenya) Kisumu HCCC No. 68 of 2007 **Ali-Aroni, J.** stated as follows;

> ***a. "In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations…Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence".***

22. The legal position is therefore clear and I fully associate myself with the sentiments of the learned Judges. Failure by the respondents to file any pleadings and participate actively in the matter irresistibly lead to the conclusion that the appellant's claim was uncontroverted and unchallenged.

23. The appellant submitted as much in the lower Court and it is my view that the learned trial magistrate fell into error by failing to consider the submissions.

24. Further, requiring the appellant to call the former principal to corroborate the appellant's testimony was erroneous as it was tantamount to raising the standard of proof required in civil cases.

25. This requirement flew in the face of the evidence tendered before Court coupled with the fact that the respondents did not file any defence. It mattered not that the appellant had intended to call the former principal as a witness but closed her case without doing so.

CONCLUSION

26. The appeal has merit and same is allowed in the following terms;

> **a) The judgment of the lower Court is set aside in its entirety.**
>
> **b) The judgement is hereby entered for the appellant as prayed in the plaint.**
>
> **c) The appellant is also awarded the costs of the appeal.**

SIGNED, DATED AND DELIVERED THIS 16TH DAY OF MAY 2018 IN OPEN COURT.

C. KARIUKI

JUDGE

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