



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**CIVIL APPEAL NO. 48 OF 2017**

**JOSHUA ABADÉ OWIRO.....APPELLANT**

**-VERSUS-**

**ROSE ADHIAMBO.....RESPONDENT**

***(Appeal arising from the judgment and decree of E. M. Nyagah, Chief Magistrate in Migori Chief Magistrate's Court Civil Case No. 316 of 2016 delivered on 07/03/2017)***

**JUDGMENT**

1. The appeal herein revolves on which of the two agreements produced in evidence was enforceable. On 11/05/2016 the Respondent filed **Migori Chief Magistrate's Court Civil Case No. 16 of 2016** (hereinafter referred to as '**the suit**') against the Appellant claiming the sum of Kshs. 497,300/= being sums due out of two transactions on sale of bags of maize carried out on 15/07/2014 and 25/07/2014 respectively.

2. The Appellant denied the claim *in toto* and put the Respondent into strict proof. The suit was heard where the Respondent testified as **PW1** and availed two witnesses **Francis Mazipende (PW2)** and **James Ghati (PW3)** who confirmed signing one of the agreements in issue. The Appellant testified as **DW1** and his son one **Bryon Aade Owiro** testified as **DW2**. Parties thereafter filed written submissions and the court rendered the decision subject of this appeal.

3. The Appellant in a 6-ground Memorandum of Appeal challenged the finding of the trial court in allowing the claim as under: -

- 1. THAT the learned magistrate erred in law and fact when he entered judgment for the plaintiff against the weight of evidence.***
- 2. THAT the learned magistrate erred in law and in fact when he failed to find that the agreement exhibited by the plaintiff had been altered and forged.***
- 3. THAT the learned magistrate erred in law and fact when he failed to find that the money owed Kshs. 450,000/= had indeed been paid by the Appellant.***
- 4. THAT the learned magistrate erred in law and fact when he required a higher degree of proof on the part of the Appellant as opposed to the Appellant.***
- 5. THAT the learned magistrate erred in law and fact when he introduced extraneous issues such as requirements for the Appellant to report to the authorities or replying to demand notice.***
- 6. THAT the learned magistrate was biased against the Appellant.***

4. Directions were taken, and the appeal was disposed of by way of written submissions where both parties duly complied where each party rooted for its position.

5. As the first appellate Court, it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga –versus- Kiruga & Another (1988) KLR 348**).

6. I have carefully perused and understood the contents of the pleadings, proceedings, judgment, grounds of appeal and submissions referred to by the parties. As earlier on stated the main issue for determination is which of the twin agreements was enforceable. That being so, I will

critically look at the said agreements.

7. Both agreements were dated 25/07/2014 and generally have similar contents save that the one produced by the Respondent was an original, captured the debt of Kshs. 450,000/= together with an additional sum of Kshs. 497,300/=, has the cost of each bag of maize and was signed by PW2 and PW3. I will refer to that agreement as '**the Respondent's Agreement**'). The agreement produced by the Appellant was a photocopy, only captured the debt of Kshs. 450,000/=, did not provide the cost of each bag of maize and was not signed by the witnesses. I will refer to that agreement as '**the Appellant's Agreement**').

8. That parties are bound by their pleadings in an adversarial system of dispute resolution is a settled issue. (See the Supreme Court ruling in **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR, the Court of Appeal judgement in Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR** among others). A party will therefore be called to only adduce evidence in support of its pleadings and any evidence introducing any new issue is for rejection.

9. In this case the Respondent adduced evidence which was in tandem with her pleadings. Her averments in the plaint were supported by the evidence of the Respondent and her witnesses and was buttressed by the documents produced as exhibits including the original Respondent's Agreement. On his part the Appellant made a somewhat general denial of the claim. The Statement of Defence did not raise the issue of the Appellant's Agreement at all. He even denied dealing with the Respondent in any way whatsoever. The Appellant only introduced the Appellant's Agreement at one of the hearings which prompted an objection and a subsequent adjournment by the Respondent. That approach denied the Respondent the opportunity to specifically respond to the Appellant's Agreement as to raise an issue for determination. The Appellant's evidence therefore on the Appellant's Agreement, regardless of its probative value, was inadmissible for not being in line with the Statement of Defence.

10. The only admissible evidence on the part of the Appellant was that which challenged the contents of the Respondent's Agreement without reference to the Appellant's Agreement. I have perused the evidence on record and in totality thereof I find that the Respondent's Agreement was produced in accordance with the law and its contents were not impugned hence holding. In making the finding, I must however point out that I have noted the discrepancies between the two agreements and had the Appellant rightly approached the alleged issue of fraud and alteration of the agreements, that would have given the trial court an occasion to deal with the matter squarely and further. As things now stand, there is nothing admissible on record for this Court to impugn the Respondent's Agreement since as a caged animal, this Court can only move but within the legal confines. I must also take note that two witnesses buttressed the Respondent's Agreement. The upshot is that the Respondent's Agreement must carry the day.

11. The Respondent proved her claim within the law and was rightly entitled to judgment. Based on the foregone the appeal is unmeritorious and is hereby dismissed with costs.

Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 4<sup>th</sup> day of October, 2018.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered in open Court and in the presence of: -**

**Mr. Kerario Marwa** Counsel instructed by Messrs. Kerario Marwa & Company Advocates for the Appellant.

**Mr. Omonde Kisera** Counsel instructed by Messrs. Omonde Kisera & Company Advocates for the Respondent.

**Evelyne Nyauke** - Court Assistant