



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
CIVIL APPEAL NO. 33 OF 2010

BENARD OPUBA.....APPELLANT

VERSUS

MARK OPUBA OWARA.....RESPONDENT

(An Appeal against the Judgment of Hon. E. O. Obaga PM Delivered on 18/5/2010 in Busia PM CC No. 84 of 2010)

J U D G M E N T

1. This Appeal must succeed. It is a challenge by (the Appellant) of the Decision of The Subordinate Court of 18th May 2010 in which it struck out the Appellants Defence and entered Judgment for the Respondent as prayed for in the Plaint.
2. It is proposed that the parties herein be referred to in their Litigating capacities at The Subordinate Court. The Appellant was the Defendant and the Respondent the Plaintiff.
3. The Plaintiff is the father of the Defendant. In a Plaint dated 23rd February 2009, the Plaintiff sued the Defendant for the sum of Kshs.10,000/- being the value of the Plaintiff's doors allegedly damaged by the Defendant. In Paragraph 4 of the Plaint, the Plaintiff averred:-

“That vide written agreement dated 1/10/2009 the Defendant pledged to pay the Plaintiff Kshs. 10,000/- being the value of the Plaintiffs doors damaged by the Defendant, which the Plaintiff now claims”.

4. In his written statement of Defence dated 17th March 2010, the Defendant denies the claim and avers that the alleged agreement of 1st October 2009 is a forgery.
5. On 12th April 2010, the Plaintiff filed an Application for the following prayers:-
 - a. **The Defence herein as filed be struck off.**
 - b. **Consequent to No. 1 above the whole Defence be dismissed and judgment be entered for as in the Plaint.**
 - c. **Cost be provided for.**

It was that Application that the Subordinate Court allowed on 18th May 2010 and which has triggered this Appeal.

6. Although the Defendant has on this Appeal, raised 6 grounds, this Court proposes to allow it on one ground without discussing the others. Ground 2 of the Memorandum of Appeal is as follows:-

“2 The Learned Magistrate erred in law and fact by relying on the respondents advocate's

affidavit together with evidence from the bar which were not pleaded consequently arriving at an unfair decision”.

7. The Affidavit in Support of the successful application was sworn by Ipapu Philip Jackah on 12th April 2010. Proceedings in the Lower Court show that during the hearing of the Appeal, Mr. Wanyama for the Defendant criticized the swearing of the Affidavit by Counsel. Mr. Wanyama argued that since there was an allegation that the agreement was a forgery it is the Plaintiff and not his Counsel who should have sworn the Affidavit in Support. This is because the Advocate for the Plaintiff was not a party to the agreement.
8. Persuaded, however, by argument by the Plaintiff’s Advocate, the Learned Magistrate resolved that matter thus;

“A counsel is not precluded from swearing an affidavit on matters which are not contested”.

9. Whilst the statement of the Learned Trial Magistrate is undoubtedly correct, the circumstances herein clearly show that the authenticity of the agreement was a matter in contention. That was first raised in Paragraph 4 of the statement of Defence which reads:-

“4 The defendant states on without prejudice basis that if any agreement exists (which fact is specifically denied) then the said agreement is inadmissible and has been fraudulently conjured with the aim of extorting money from the defendant.

PARTUCULARS OF MISCONDUCT OF PLAINTIFF

- a. **Using unrecognized and forged signature**
- b. **Bringing witness without sufficient description and or identification”.**

It was the specifically reiterated in Paragraph 4 of the Defendants Replying Affidavit of 7th May 2010 sworn in opposition to the Chamber Summons of 12th April 2010, when he said,

“THAT I never participated in and did not sign any agreement between my father and myself as alleged in annexure KML (1) & (2) or at all and I regard the same as having been forged by the applicant to enrich himself.”

10. The agreement of 1st October 2009 was the mainstay of the Plaintiffs case. Yet the question as to its authenticity had been raised by the Defendant. The genuineness of that agreement was therefore contested. For this reason, only the Plaintiff himself could attest to its genuineness. It was not for his Advocate who was not party to the agreement to do so. The Plaintiffs’ Advocate did not say that the Plaintiff himself was not available to swear the Supporting Affidavit and so the Advocates statement on the agreement amounted to hearsay and was therefore inadmissible.
11. I have to find that the Learned Magistrate allowed the Application dated on 12th April 2010 on the basis of inadmissible evidence. With respect the Learned Magistrate fell into error when he did so. It is for this reason that I allow the Appeal with costs to the Defendant. The order of The Subordinate Court of 18th May 2010 is hereby set aside and the matter remitted to hearing before any other Magistrate of competent Jurisdiction other than E. O. Obaga PM whose decision this Court has just set aside.

F. TUIYOTT

J U D G E

DATED, DELIVERED AND SIGNED AT BUSIA THIS 10TH DAY OF MARCH 2015.

IN THE PRESENCE OF:

KADENYICOURT ASSISTANT

WANYAMA.....FOR APPELLANT

MAKOKHA holding brief for IPAPU.....FOR RESPONDENT