



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT HOMA BAY**

**CIVIL APPEAL NO. 11 OF 2014**

**BETWEEN**

**JOSEPH OTIENO ODIRA ..... APPELLANT**

**AND**

**JOHN ONDENG ..... RESPONDENT**

***(Being an appeal from the Judgment and Decree of Hon. B.O. Omwansa, Ag. PM in Ndhiwa Principal Magistrates Court Civil Case No. 44 of 2012 dated 18<sup>th</sup> June 2014)***

**JUDGMENT**

1. This appeal arises from a judgment and decree of the subordinate where the court entered judgment in favour of the respondent against the appellant for the sum of Kshs. 64,700.00 for livestock delivered, costs and interest. For ease of reference I shall refer to the appellant and the respondent in their respective capacities in the original suit.

2. The plaintiff, a businessman selling cattle, summarised his claim as follows;

*[3] The Plaintiff's Claim against the Defendant is for the sum of Kshs. 93,700 being the cost of Livestock supplied by the Plaintiff to the Defendant, particulars whereof are outlined in the Plaintiff's statement and list of Documents and are well within the knowledge of the Defendant.*

3. The defendant, a butcher operating a butchery in Karungu, Sori, replied as follows;

*[2] The Defendant joins issue with the Plaintiff in paragraph 3 of the Plaint and more particularly deny owing the Plaintiff the alleged Kshs. 93,700/= or any or at all on account of any livestock supplied by the Plaintiff to the Defendant and the Plaintiff shall be put to strict proof thereof and the Statement and documents referred to are not admissible in law and are totally denied.*

4. Although the pleadings as drawn were vague and without the particulars of the specific transactions, it is common ground from the testimony of the witnesses that the plaintiff and the defendant had a business relationship spanning a period of 2 years. The issue for resolution in the court below was whether the defendant owed the plaintiff the amount claimed on account of the livestock delivered.

5. The plaintiff, PW 1, testified that on 25<sup>th</sup> May 2012, he supplied 8 head of cattle to the defendant

for which he signed. The defendant did not pay for the same immediately but continued to pay by instalments recorded in an exercise book which the plaintiff produced as an exhibit. He contended that the defendant signed the relevant entries when he took the livestock. PW 2, a brother of the plaintiff, testified that the plaintiff and defendant were in business and that the defendant would sometimes make payments through him. PW 3, a cattle dealer, also testified that the plaintiff and defendant were in business together and that the plaintiff supplied the defendant with 8 head of cattle on 25<sup>th</sup> May 2012. He stated that PW1 and the defendant recorded the transaction in the exercise book but he did not see what was written.

6. The defendant testified that he dealt with the plaintiff but denied owing the sum of Kshs. 93,700/= claimed. He stated that he always paid for the cattle delivered upfront although in cross-examination he admitted that he paid some instalments through *M-Pesa*. He denied the allegation that the transactions between him and the plaintiff were recorded in the exercise book as alleged or that he signed it. He also denied that he would make payments through PW 2.
7. The learned magistrate analysed the evidence and came to the conclusion that the plaintiff had proved his case on the basis that the exercise book contained the evidence of the transactions as the same were signed and included the defendant's national identity card number which confirmed the transaction. He ruled that the record of transactions contained in the exercise book showed that the defendant owed Kshs. 64,700/= for which he entered judgment.
8. The appellant's case is set out in the memorandum of appeal dated 18<sup>th</sup> July 2014. The grounds were as follows;
  1. *The learned magistrate erred in law and fact in finding that the Respondent had proved his case against the Appellant on a balance of probability as required by law.*
  2. *The Learned magistrate erred in law and fact in misdirecting himself on the Law of Evidence and contract as relates to the matter herein which if correctly applied would have given a contrary result as there was no contract capable of being enforced between the parties and the evidence relied upon was not admissible as presented.*
  3. *The Learned Magistrate erred in law and in fact in failing to appreciate that there was no admission that the appellant wrote anything on the exercise book in question and therefore there was no need to prove or confirm the author of the unquestioned and material writings in the exercise book.*
  4. *The Learned Trial Magistrate erred in law and fact in creating an imaginary Agreement between the parties in the name of "unlocking."*
  5. *The Leaned Trial Magistrate erred in law and fact finding that it was only just to insist that a non-existence Agreement indeed existed between the parties.*
  6. *The Learned Trial Magistrate erred in law and fact in taking arbitrary initiative to fill gaps in an alleged Agreement was in law void, null and unreasonable.*
  7. *The Learned Trial Magistrate unequally manifested unique familiarity with an agreement which had no tangible evidence to show for.*
9. Mr Kisera, counsel for the appellant, submitted that the recordings in the exercise book relied upon by the learned magistrate could not found a contract between the parties. He submitted that under **section 70** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*, the defendant having denied the document and writings in question, it was the duty of the plaintiff to prove the same against the defendant. He contended that the plaintiff ought to have proved the contract by calling a witness who saw the document being written, a witness who had general knowledge of the writing, by comparison of the disputed document with any other documents to prove that handwriting was genuine, by admission of the party against whom the document is tendered, by a document purporting to be in solemn form made before a prescribed person or by evidence of a document examiner. Counsel referred to *Halsbury's Laws of England (Vol. 14, 4<sup>th</sup> ed)* para. 124.
10. Mr Kisera faulted the learned magistrate for holding that the defendant signed on the exercise book when in fact the plaintiff had not proved that the defendant signed or wrote his identify card

- number. In the circumstances, counsel submitted that the plaintiff failed to prove the case to the required standard.
11. Ms Sagwe, counsel for the respondent, supported the judgment and submitted that the learned magistrate analysed the evidence and found that the parties had indeed transacted. Counsel stated that the identity card was a private document and it only the defendant who would have supplied it to the plaintiff. She also submitted that the defendant's case was a mere denial and that the appeal should be dismissed.
  12. As the first appellate court, this court is called upon to analyse and re-assess the evidence on record and reach its own conclusions bearing in mind that it neither saw nor heard the witnesses testify (see *Selle v Associated Motor Boat Co.* [1968] EA 123 and *Jabane v Olenja* [1986] KLR 661).
  13. I have reviewed the testimony of the parties and as I stated earlier on, it is common ground that the parties had transacted in the past and that the issue for consideration is whether the defendant owed the plaintiff the amount claimed. Apart from oral testimony, the plaintiff produced an exercise book which was consistent with the transactions he entered into with the defendant. I am satisfied the exercise book produced by the plaintiff was authentic in so far as it reflected a contemporaneous record of transactions conducted by the plaintiff. I therefore find it a credible document and a reflection of the business transactions conducted by the plaintiff and the defendant.
  14. The respondent cannot argue that there was no contract created between him and the appellant. He admits that cattle were sold to him. The point of departure is whether he paid the price. The contract was evidenced in writing and the plaintiff's testimony that the defendant signed the relevant entries in the exercise book is supported by the name and signature of the defendant endorsed therein together with the defendant's identity card number. The defendant admitted that the number was his and that he keeps his identity card with him in his wallet. Like the learned magistrate, I find that an identity card number is a personal number which in the ordinary course of events would not be recorded unless the defendant wrote it himself or he gave it to the plaintiff. It is not a mere coincidence that the defendant identity card number appeared in the exercise book several times against his name and signature. Even if the defendant did not sign the document, I still find that the exercise book was a documentation of the dealings between the parties. The plaintiff's testimony was augmented by that of PW 3 who stated that he saw the plaintiff and the defendant record the transaction in the exercise book. I have no reason to doubt the plaintiff's evidence.
  15. As the case before the court was a civil case, proof is on the balance of probabilities. From the evidence adduced, it is more likely than not that the defendant signed the exercise book. It was not necessary for the plaintiff to call a document examiner to prove that the signature was the defendant's. On the other hand, it was open for the defendant to call a document examiner to prove that the handwriting was not his or was a forgery. As the case stands, the defendant's defence was a bare denial.
  16. The appellant condemns the learned magistrate for seeking to "unlock" whether there was money owing. The learned magistrate, by unlocking the agreement, was analysing the material before him in the exercise book to determine the debt due. The transactions between the plaintiff and the defendant are recorded in the entries of 25<sup>th</sup> May, 29<sup>th</sup> May, 2<sup>nd</sup> June, 4<sup>th</sup> June, 18<sup>th</sup> June and 15<sup>th</sup> July 2012. The entry of 15<sup>th</sup> July 2012 clearly shows that the defendant owed the sum of Kshs. 64,700.00. The learned magistrate did not err in coming to such a conclusion as it was supported by the documentary evidence which he found credible. I have also scrutinised the relevant entries and I uphold the decision of the learned magistrate.
  17. The appeal is therefore dismissed with costs to the respondent. I assess the costs at Kshs. 20,000.00 all inclusive.

**DATED and DELIVERED at HOMA BAY this 12<sup>th</sup> day of March 2015.**

**D.S. MAJANJA**

**JUDGE**

Mr Kisera instructed by Omonde Kisera and Company Advocates for the appellant.

Ms Sagwe instructed by Ochoki and Company Advocates for the respondent.