Sakwa v Muaka (Civil Appeal 148 of 2019) [2025] KECA 590 (KLR) (28 March 2025) (Judgment)

Neutral citation: [2025] KECA 590 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 148 OF 2019

K M'INOTI, FA OCHIENG & WK KORIR, JJA

MARCH 28, 2025

BETWEEN

BERYL AWINJA SAKWA ..... APPELLANT

AND

ANGALUKI MUAKA ..... RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya at Nairobi (Tuiyott, J.) dated 1st February 2019 in Civil Case No. 393 of 2014)

JUDGMENT

1. By a judgment dated 1st February 2019, the learned trial Judge held that there was an agreement between the parties herein, which was embodied in a document dated 14th February 2013.

2. Pursuant to the terms of the said agreement, the respondent advanced to the appellant the sum of Kshs.1,977,797 which was to constitute the start-up capital for establishing and running a joint business venture called, "Colon Cleansing and Beauty Shop."

3. The appellant acknowledged receipt of the said funds. The respondent claimed he was entitled to a refund of the start-up capital, plus Kshs.300,000 every month. It was also his further claim that if the appellant defaulted in remitting the monthly instalments of Kshs.300,000 she would be liable to pay him a penalty fee of 5%.

4. However, the appellant rejected that notion, asserting that she did not give any commitment to the respondent, that she would repay any money which had been advanced to her. Her further contention was that she was under no obligation to pay any penalties or interest.

5. The appellant went on to state thus, at paragraph 5 of her defence:

> " The purported business did not take off and profits were conditional to the success of the same."

6. She attributed the said failure to the respondent. Notwithstanding the demands which the respondent had made for a refund of his money, the appellant said:

> " 8. The defendant was justified to ignore the plaintiff's demands on the ground that the plaintiff has no cause of action against the defendant."

7. In his judgment, the learned trial judge noted that whilst the defence had asserted that repayment was pegged upon the profitability of the business, the appellant stated as follows, when she was being cross-examined;

> " I have not refunded the money. It was not a loan.
>
> ...The repayment of the principal was not pegged on the success of the business."

8. In the light of that express concession by the appellant, the trial court held that the repayment due to the respondent was not pegged on the success of the business. It was on that basis that the trial court held that the appellant was liable to repay the sum of Kshs.1,977,797.

9. Meanwhile, as regards the respondent's claim for Kshs.300,000 monthly with effect from June 2013, the trial court awarded the total sum of Kshs.600,000 being Kshs.300,000 for June 2013, and a further Kshs.300,000 for the month of July 2013.

10. The Court rejected the respondent's claims for the repayment of Kshs.300,000 monthly, for the months commencing 1st August 2013. The said finding was based on the express terms of Clause V6(a) of the agreement, which stipulated as follows;

> " After a grace period of three (3) months from the launch of the anticipated business services on 1st March 2023 the Operator shall pay the financier, Kenyan shillings three hundred thousand (300,000) every first of the month for the first two (2) months of June 2013 and July 2013."

11. As the said payments which were due in June 2013 and July 2013, had not been paid by the appellant, the learned trial judge invoked the provisions of sub-clause 6(a) and (b), and awarded the late payment fee of 5% for each of the 2 months. The amount awarded on account of the 5% late payment fees was Kshs.30,000.

12. Ultimately, judgment was entered in favour of the respondent as follows:

    a. Start-up capital Kshs.1,977,707

    (b) Kshs.300,000 per month for 2 months ..... Kshs. 600,000

    (c) Late payment fees Kshs. 30,000

    TOTAL Kshs.2,687,797

13. The Court also awarded interest on that amount, at the Court rates, with effect from the date when suit was filed.

14. Finally, the Court awarded costs of the suit, to the respondent.

15. Being dissatisfied with the judgment, the appellant lodged the appeal to this Court. In the memorandum of appeal, the appellant listed a total of 18 grounds of appeal. However, in her

submissions, the appellant decided to summarise the grounds of appeal into 3 broad lines, in the manner following:

> " i) Whether the trial judge misdirected himself in law?
>
> ii. Whether the trial judge misapprehended the facts?
>
> iii. Whether the trial judge's decision is plainly wrong."

16. Based upon those 3 broad areas, the appellant lay down the following as the issues which would require determination by this Court:

    a. Pursuant to the Partnership Act No. 16 of 2012, should the dispute have been referred to arbitration, in accordance with the express terms of the agreement?

    b. Why did the High Court assume a jurisdiction, which it did not have, yet there was no evidence to show that the respondent had referred the dispute to arbitration?

    c. Was this agreement a "domestic arrangement", or rather than a commercial agreement? This issue stems from the appellant's contention that she was the wife of the respondent, and that the respondent offered to put up the business for her benefit.

    d. As the respondent did not claim that he suffered any losses, should not the claim have been dismissed?

17. Both parties filed written submissions. Thereafter, when the appeal came up for hearing on 20th October 2024, the appellant represented herself, whilst the respondent was represented by Mr. Kagwimi Kangethe, Advocate.

18. The first issue that was canvassed by the appellant was the issue of jurisdiction. It was her submission that the High Court lacked jurisdiction to handle the matter, because in their written agreement the parties had decided that any disputes which might arise, would be referred to arbitration.

19. In support of her submissions, the appellant cited the following words from the case of Adero & Another vs Ulinzi Sacco Society Limited [2002] 1 KLR 577.

> " The jurisdiction either exists or does not ab initio, and the non-constitution of the forum created by statute to adjudicate on specified disputes could not of itself have the effect of conferring jurisdiction on another forum, which otherwise lacked jurisdiction. Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.
>
> Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal."

20. As the agreement herein contained an arbitration clause, the appellant submitted that the clause had ousted the jurisdiction of the Court.

21. The second issue that the appellant addressed was about the nature of the agreement. She said that the evidence which she produced in Court, showed that the agreement between her and the respondent was a "domestic agreement." According to her, the evidence proved that they were related as husband and wife.

22. Thirdly, the appellant submitted that the award of Kshs.630,000 was plainly wrong as the respondent had neither pleaded the amount specifically, nor had he proved it strictly. The appellant further stated that the respondent had not even made allegations that the appellant was in breach of contract.

23. In answer to the appeal, the respondent submitted that the agreement herein had provided that in the event of disputes arising between the parties, they were at liberty to seek recourse from the court if efforts to resolve disputes through arbitration had failed.

24. The respondent pointed out that in the first instance, he had declared, in writing, that a dispute had arisen. The respondent followed up by another letter, in which he requested the appellant to suggest the names of 2 arbitrators. When the appellant failed to provide the names of proposed arbitrators, the respondent felt obliged to file a suit in Court.

25. As to whether or not the agreement was one of a domestic nature, the respondent pointed out that the terms of the signed agreement spoke for themselves. And in the understanding of the respondent, the agreement was a contract, which the parties bound themselves to.

26. This matter was before us, in our capacity as the first appellate court. Both parties acknowledge our mandate is to re-analyze the evidence tendered before the trial court, with a view to determining whether or not the conclusions arrived at by the learned trial judge could be sustained. Whilst carrying out the duty of re-evaluation of the evidence, we must bear in mind the fact that, unlike the learned trial judge, we did not have the benefit of seeing or hearing any of the witnesses when they were testifying. In the case of Kenya Ports Authority v Kuston (Kenya) Limited [2009] 2 EA 212, this Court held inter alia that:

> "On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

27. We have undertaken the said task of re-evaluation of the evidence; and we have also given due consideration to the applicable law, the submissions presented by both parties, as well as the judgment.

28. It is noteworthy that on the day when the appeal came up for hearing, both parties made some oral submissions. The appellant confirmed that the agreement between the parties was embodied in the document at page 24 of the record of appeal. The said document bears the following heading:

> " Business Agreement
>
> between
>
> Beryl Awinja Sakwa
>
> and
>
> Angaluki Muaka"

29. Clearly, the parties made a choice to enter into a "Business Agreement," and not a domestic agreement, as suggested by the appellant. Whilst making her oral submissions, the appellant made reference to the agreement, saying;

> " The parties are bound by their contract."

30. It therefore appears that the appellant ultimately abandoned the contention that the parties had only entered into a domestic agreement. She embraced the respondent's assertion that there was a contract between the parties. In any event, even if the appellant had remained adamant about a domestic agreement, we find that the document speaks for itself. It was a "Business Agreement" which spelt out the obligations of each of the parties.

31. The agreement was executed by both parties, and as the appellant stated during her cross-examination, the execution was witnessed by her sister and also by the respondent's brother.

32. One of the significant terms of the agreement specified how disputes would be addressed by the parties. It is common ground that disputes ought to have been referred to arbitration, in the first instance. But the respondent sought to qualify the arbitral clause, by saying that if arbitration failed, the parties were in agreement that the dispute could then be resolved through litigation.

33. Indeed, the respondent expressly stated the following, at paragraph 7 of the plaint:

> " The plaintiff further avers that the defendant declined to accept the plaintiff's demands to refer the dispute to an arbitrator for amicable resolution, despite several requests made by the plaintiff, hence the filing of these proceedings by the plaintiff, before this honourable court."

34. The respondent exhibited letters that clearly declared a dispute, and also invited the appellant to suggest the names of proposed arbitrators.

35. During the hearing of this appeal, the appellant conceded that she never suggested any proposed arbitrators.

36. We are satisfied that when the appellant appeared unwilling to walk along the path of arbitration, the respondent became entitled to institute litigation. We so hold because Clause XII of the Agreement reads as follows:

> " 23. In the event that a dispute arises from this Agreement, initial good faith efforts shall be made to resolve such a dispute through an arbitration mechanism.
>
> 24. Should arbitration efforts at resolving the dispute fail, then the dispute shall be adjudicated by a court of competent jurisdiction sitting in the Republic of Kenya."

37. In the circumstances, there is no merit in the contention that the High Court had acted without jurisdiction. In effect, the High Court did not assume a jurisdiction which it did not have.

38. As regards the contention that the plaint did not contain particulars of special damages, we find that the respondent had expressly set out particulars of the capital outlay (in paragraph 4): the monthly instalments of Kshs.300,000 (in paragraph 5 and 6); the penalty for late payment (in paragraphs 5,6, and 8).

39. Furthermore, the respondent proved that he was entitled to make the said claims, pursuant to the express terms of the contract; and also, in accordance with the appellant's own admissions of her failure to comply with the relevant terms of the contract.

40. Accordingly, the learned trial judge did not err in law or in fact, by awarding the sums claimed. Meanwhile, on the issue of interest, the trial Court awarded the same at Court rates, with effect from the date of the judgment. Although the appellant faulted the trial court for awarding interest when

the same was not provided for in the plaint, we find that the interest is not just awardable when it is a term of the contract in issue.

41. Interest may be awarded by the Court, at its discretion, if the Court holds the considered view that the same is justified as a means of further compensating a plaintiff who has been compelled to file suit in respect of a claim which the defendant had failed to settle.

42. The appellant has failed to persuade us that the trial court had, in awarding interest at Court rates, with effect from the date when suit was filed, exercised its discretion wrongfully.

43. The award of interest did not occasion injustice to the appellant: therefore, there is no lawful reason for interfering with the same.

44. In the result, we find no merit in the appeal. The same is therefore dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF MARCH, 2025.

K. M'INOTI

.....

JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR