Njiru & 4 others v Mairani (Civil Appeal 60 of 2017)
[2022] KECA 606 (KLR) (24 June 2022) (Judgment)

Neutral citation: [2022] KECA 606 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 60 OF 2017

DK MUSINGA, MSA MAKHANDIA & F SICHALE, JJA

JUNE 24, 2022

BETWEEN

JOSIAH KATHEE G. NJIRU ..... 1ST APPELLANT

PATRICK NJUE GEORGE ..... 2ND APPELLANT

MOSS NJUKI ..... 3RD APPELLANT

SIMON NTHIGA GEORGE ..... 4TH APPELLANT

BENSON NJERU ..... 5TH APPELLANT

AND

NICODEMUS IRERI ARTHUR MAIRANI ..... RESPONDENT

(An appeal against the judgment/decree/order of the High Court of Kenya at Embu (J.M. Bwonwonga) dated 14th December, 2016 in H.C.C.A NO. 62 OF 2013)

JUDGMENT

1. By an amended plaint dated 1st August, 2012, Nicodemus Ireri Arthur Mairani, the then plaintiff and the respondent herein filed suit at the Chief Magistrates' Court, Embu. In the plaint, the respondent averred that he together with George Kathande Thomas (the father of the plaintiff, now deceased) were co-owners of two houses on plot No. 22, Manyatta Market; that the respondent contributed much more than the deceased; that on 30th July, 1999, the matter was referred to Manyatta Market Welfare Committee, which determined that Kshs 299, 327.00 was due and owing to the respondent; that the

parties thereto agreed in writing to reimbursement of the said amount by the deceased. His prayer was for judgment for:

> "(a) A sum of Kshs 299,327.00 plus interest at 22% p.a from 1st August, 1999 till payment in full in the alternative the plot be shared 20x80 feet for plaintiff and 14x80 for defendants."

2. In a joint amended statement of defence and counter-claim dated 29th August, 2012, the appellants averred that the respondent constructed the alleged houses at his own risk and that he had been occupying and /or letting out the two shops and a hotel for five years and hence he had recovered the sums expended. The appellants further contended that the respondent's contribution was Kshs 116,380 following which he was to take possession of three shops which he was to lease for 3 years whilst the appellant took possession of only one shop. They sought the following prayers:

> "(a) Accounts in respect of Plot No. 22 Manyatta Market be taken and the Defendants be given their rightful share of the rent from the year 2001.
>
> (b) The said Plot be shared out between the two parties equally.
>
> (c) Costs of this Counter-claim.
>
> (d) Any other relief this Honurable Court deems fit to grant."

3. In a judgment dated 26th November, 2013, Honourable Wachira, the then Chief Magistrate, Embu Law Courts, found as follows:

> " Based on a finding that plaintiff incurred only Kshs 178,280, the plaintiff admits that he has been collecting rent from 3 shops or units. There are no documents to prove how much rent he has collected from the year 2000 to date. The Defendant put the figure at around 165,000/= per year while Defendants receive Kshs 30,000/= per year. The plaintiff doesn't disclose how much rent he collects.
>
> Having considered that plaintiff has been collecting rent for the 3 shops for over 13 years, the rent is more than enough to repay himself the amount of Kshs 178,280/=. The plaintiff is not entitled to the sum of Kshs 299,329/= or any interest whatsoever. The plaintiff's claim of the said amount is hereby dismissed.
>
> The defendant's prayer of taking accounts is considered. I have looked at the Defendant's further statements where they have tabulated the amount received by the plaintiff on yearly basis. I have considered there are no properly kept records in this matter. The plaintiff is silent on the rent he has received throughout the period 2000 to date. I direct that accounts be taken to establish the rent payable. I further direct that both parties shall agree on the firm of auditors to take such accounts to establish how much the plaintiff should pay to the Defendants.
>
> On the 2nd prayer of sharing of the plot, I direct that the plot be shared out equally between the parties. That sharing out should be done in smooth manner so as not to interrupt the business of tenants on the premises. The parties to agree on smoot sharing of the plot failure to
>
> which parties shall propose to court how to share the plot and units thereon.

I further direct that rent from all the units from month of December, 2013 and onwards be deposited in an interest earning account in Names of both parties and their advocates pending smooth taking of accounts and sharing of the plot.

Each party shall bear their own costs."

4. The respondent was dissatisfied with the said outcome and in a memorandum of appeal dated 20th December, 2013 filed in the High Court at Embu, he raised 13 grounds of appeal faulting the trial court's findings. It is crucial to highlight the prayers. These are:

(a) Do allow the appeal and set-a-side the decree of the Lower Court plus costs.

(b) The Honourable court do award appellant Kshs 299,327/= plus interest at 22% from 1st August 1999 till payment in full in the alternative plot shared 20 x 80 feet for appellant and 14 x 80 for respondents."

5. Bw'onwonga, J. became seized of the matter and in a judgment dated 14th December, 2016, rendered himself as follows:

"In view of the foregoing, I find that the trial court did not have evidence to determine the issues in contention in the absence of the audited report of accounts. Furthermore, it could not have made any findings unless the parties had made admissions, upon which the court would have entered judgment.

I therefore allow this appeal and set aside the decree and all consequential orders granted by the trial court. Since the appellant has succeeded by default in the sense that it was his failure to prepare an auditor's report and tender it in evidence, he will not have the costs of this appeal.

The trial court should not have approved the resolution of the issues in dispute by submissions in the face of conflict in the pleadings of the parties and in the absence of an auditor's report or admissions by the parties. In view of the foregoing, I hereby remand this case to the trial court or a court of competent jurisdiction in terms of section 78(1)(b) to take evidence including an audited report of accounts and then proceed to determine the mode of sharing the subject plot among the parties and the rents that had been collected by the appellant/plaintiff and the respondents/defendants. Thereafter, the trial court should then prepare its judgment in accordance with Order 21 Rules 4 and 5 of the 2010 *Civil Procedure Rules*. I have taken this unusual step in view of the provisions of sections 1A and 1B of the *Civil Procedure Act* which mandates the court to administer justice efficiently effectively and taking into account the financial and other judicial resources that are available in an effort to reduce costs."

6. It was the appellant's turn to be aggrieved and hence this appeal. In a memorandum of appeal dated 4th May, 2017, the appellant listed 6 grounds of appeal. Grounds 1, 2 and 3 faulted Bw'onwonga, J. for ordering a retrial on the basis that the case could have best been resolved by adduction of oral evidence and that the pleadings, documentary evidence and the statements recorded were insufficient for purposes of determining the dispute. In ground 4, the judge was faulted for coming to the conclusion that the trial magistrate had dealt with issues which had not been canvassed before her. It was contended that the trial court rightly came to the conclusion that the plot was to be shared into two equal parts based on the agreed position as per the minutes of 3rd January, 1996. In ground 5, the judge was faulted for finding that it was unusual for the trial court to have excluded oral evidence and

instead concluded the matter based on the pleadings and/or the submissions filed. Finally, in ground 6, the learned judge was faulted for failing to find that the respondent herein did not urge his grounds of appeal filed at the High Court.

7. The appeal was opposed by the respondent and in his written submissions dated 28th March, 2018, it was contended that the respondent had contributed more money than the appellant in the partnership; that the respondent's claim was for Kshs 363,300.00 whilst the appellant admitted owing only Kshs 116,280.00; that the appellant's father had in a letter to Muruarui Kamande (an advocate) admitted that the respondent had spent Kshs 363,300.00 in the construction of two shops on that plot.

8. On 6th October, 2021, when the appeal came before us for hearing, learned counsel, Mr. Kathungu for the appellant and Miss Mukami Boore holding brief for Mr. P.M. Mugo for the respondent wholly relied on their written submissions as highlighted above.

9. On our part, we have considered the record, the rival written submissions and the law. Suffice to state that the appeal before us is a second appeal. Unlike a first appeal where the appellate court is by law enjoined to revisit the evidence that was before the trial court, analyze it, evaluate it and come to its own independent conclusion as set out in *Selle and Another v Associated Motor Boat Company Ltd and Others* (1968) EA 123. This Court on a second appeal confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.

10. The appellant's main grievance is that the first appellate judge erred in ordering a retrial. In urging this ground, it was posited that the trial magistrate had considered the pleadings and the parties' written statements in coming to the determination of the suit. In his view, the Judge found that the trial court did not have sufficient evidence to enable it craft the points for determination, its decision and the reasons for its decision. It is not in dispute that the partnership deal between the respondent and the appellant's father had been gripped by misunderstanding. The respondent claimed to have used much more money in developing the property. It was also alleged that he had collected rent for two shops as opposed to one and hence, he had recovered what he had expended. If this be the case, were the parties to share equally the proceeds from the two shops without taking into consideration the initial contribution? There was also reference to evidence that at some point it had been agreed how much money was to be refunded to the respondent. The appellants refuted this contention.

11. In our view, there was so much at stake that it would have been best if the case had proceeded by way of adduction of oral evidence which would then be subjected to cross-examination for purposes of testing the veracity of the allegations made. What was the trial magistrate to make of an issue which each side had maintained its position?

12. In our view, the trial court could only have arrived at the correct position after hearing the parties. On our part, we do not understand why counsel would opt to rely on the pleadings and written statements of the parties without oral evidence. This was not a case to be determined by way of pleadings and written statements which in our view needed to be tested in view of the varying positions.

13. It is because of the above that we think that the first appellate court directed as it did. We appreciate that there was no specific prayer seeking a retrial. But we hasten to add that the first appellate court relied on "Sections 1(A) and 1(B) of the *Civil Procedure Act* which mandates the court to administer justice efficiently, effectively..." We can do no better than to echo the provisions of Sections 1(A) & 1(B) of the *Civil Procedure Act*.

14. Accordingly, we find no merit in this appeal. It is hereby dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JUNE, 2022.

D.K MUSINGA(P)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR