Kimweli v Kimweli (Civil Appeal 660 of 2019)
[2022] KECA 1394 (KLR) (16 December 2022) (Judgment)

Neutral citation: [2022] KECA 1394 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 660 OF 2019

KI LAIBUTA, JM MATIVO & PM GACHOKA, JJA

DECEMBER 16, 2022

BETWEEN

PETER KIMONYI KIMWELI ..... APPELLANT

AND

LOISE NDETO KIMWELI ..... RESPONDENT

(Being an appeal from the judgement of the Environment and Land Court at Machakos (Angote, J.) dated 20th September, 2019) in ELC No. 119 of 2011)

JUDGMENT

1. This is a first appeal from the decision of the High Court (Angote, J) in Machakos ELC Case No 119 of 2011.

2. A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses firsthand. (See *Selle & another v Associated Motor Boat Co Ltd & Others [1968] EA 123* and *Peters v Sunday Post Limited [1958] EA page 424*).

3. A first appeal is a valuable right of the parties and, unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of this Court must, therefore, reflect its conscious application of mind and record its findings supported by reasons, on all the issues arising along with the contentions put forth and pressed by the parties for decision by this Court. A first appellate court is the final court of fact ordinarily and, therefore, a litigant is entitled to a full, fair, and independent consideration of the evidence. Anything less is unjust. The first appeal has to be decided on facts as well as on law. In the first appeal, parties have the right to be heard on both questions of law as well as on facts, and the first appellate court is required to address itself to all issues and decide the case by giving reasons.

4. The factual background which triggered the dispute before the High Court culminating in this appeal as we glean it from the respondent's plaint dated May 18, 2011 is that, in 1985, the respondent claimed that she gave the appellant, who is her step son, Kshs 5,080/= to purchase shares for her at Malili Ranch Limited. The respondent averred that the appellant bought the shares using her money but unlawfully caused them to be issued in his name. She averred that, in 1994, the appellant conceded causing the shares to be issued in his name, but promised to have his name cancelled and fresh share documents issued in her name.

5. Additionally, the respondent averred that, between 1994 and 1997, the appellant passed to her all the dividends paid by the said company. However, he kept on giving her false promises that he would transfer the shares to her. It was her case that, in 2007, the said company allocated its shareholders two parcels of land each measuring 7.8 acres and 50ft x 100 plots respectively, and the appellant was allocated two plots as aforesaid on account of her shares. Further, since 2007, the appellant has been promising he would transfer the shares and the said plots to her.

6. The respondent also averred that, on April 5, 2010, the appellant admitted in writing that she gave him money to buy the said shares, and that he bought the shares in his name, but he declined to transfer the shares and the parcels of land to her. Instead, he offered to refund her Kshs 5,080/= plus interests. She averred that the appellant held the said shares and the plots in trust for her and prayed for the following orders:

    a. A declaration that the appellant holds shares in Malili Ranch Limited in trust for her and the shares should be transferred to her;

    b. A declaration that the appellant holds plot no. 1274 situated in Malili Ranch Limited and measuring 7.8 acres or thereabouts and a commercial plot measuring 50 feet by 100 in trust for her, and that the two parcels of land should be transferred to her;

    c. An order of injunction restraining the appellant either by himself, his agents and or servants from selling, charging or in any other way alienating land parcel No 1274 situated in Malili Ranch Limited and measuring 7.8 acres or thereabouts, and a commercial plot thereto measuring 50x 100 feet;

    d. Costs of the suit and interest.

7. In his defence dated August 3, 2011, the appellant denied having been given Kshs 5,080/= by the respondent to buy shares in Malili Ranch Limited and insisted that he purchased the shares using proceeds from his garage business in Nairobi. He stated that, in 2007, as shareholder in the said company, he was allocated the two properties and disputed admitting that he held the shares in trust for the respondent.

8. Both parties and their witnesses testified during the trial essentially adopting their written witness statements. In the impugned judgment, the learned judge concluded that, if indeed the money the appellant received from the respondent in 1985 was for her sick son as the appellant contended, why did the appellant agree to refund the money in two meetings? The learned judge also noted the coincidence that the appellant purchased the shares at the same time that he was given money by the respondent purportedly for her sick son.

9. The learned judge further held that the Minutes of April 21, 2003, which were produced by both the respondent and the appellant, shows that the elders were convinced that the respondent gave to the appellant Kshs 5,080/=, which was the amount required for one to be entitled to be a member of the company. Consequently, the learned judge found that the respondent had proved her case on a balance

of probabilities and issued a declaration that the appellant held shares in Malili Ranch Limited in trust for the respondent; that the said shares should be transferred to the respondent; that the appellant held plot no 1274 situated in Malili Ranch Limited measuring 7.8 acres or thereabouts, and a commercial plot thereto measuring 50 feet by 100 feet in trust for the respondent; and that the two parcels of land should be transferred to the respondent.

10. Aggrieved by the decision of the trial court, the appellant seeks to have the judgment set aside and be substituted for a judgment dismissing the respondent's claim in its entirety with costs. The appellant cites six grounds of appeal, namely:

    a. That the learned judge erred in law and in fact in failing to make a finding that the suit was statute barred by virtue of section 7 of the Limitations of Actions Act;

    b. That the judge erred in relying wholly on the respondent's testimony that her money was used to buy the shares when in fact the appellant had already bought his shares by the time she allegedly gave him the money;

    c. That the judge erred in finding that the respondent was entitled to the said parcels of land without supporting evidence;

    d. That the judge erred in holding that the respondent had established a case on a balance of probabilities;

    e. And that the judge erred in failing to consider all the issues raised by the appellant in both the written and oral submissions, and misdirected himself in law in arriving at his decision.

11. The appellant submitted that, even though the issue of the suit being statute barred pursuant to section 7 of the *Limitation of Actions Act* was never raised before the trial court. The trial court erred in entertaining a statute barred suit despite the fact that the respondent never obtained extension of time. He argued that the cause of action arose in 1985 when the respondent purportedly gave the appellant money to buy shares on her behalf, so, the suit ought to have been filed within 12 years from 1985. To support his argument, he cited *Securicor (Kenya) Ltd v EA Drappers Ltd and Another [1987] KLR 338* where this Court stated that it had discretion to admit a new point of law at the hearing of the appeal, but that such discretion needs to be exercised sparingly.

12. The appellant also submitted that, notwithstanding the fact that the respondent admitted that she did not know when she gave him the money, and that she admitted in cross- examination that he had already bought shares in Malili ranch at the time she allegedly gave him money to buy shares on her behalf, the trial court still found that he held the land in trust for her without any basis and in disregard of all the evidence before him.

13. Further, the appellant submitted that the learned judge disregarded his evidence and wrongfully indicated that the minutes of April 5, 2010 by the Amutei clan consisted an admission that he owed the respondent land, and that the meeting of the family elders held on April 21, 2003 established that the appellant was to pay her Kshs 10,400/=, and that she gave him money but she did not complete paying the amount needed in time, so, there was no basis to claim land which she had failed to complete payment for.

14. Lastly, the appellant submitted that the allegations that the respondent used to receive dividends from Malili Ranch Limited were never substantiated.

15. The respondent's submissions were essentially a replication of her evidence as opposed to legal issues. She submitted that the reason why she gave Kshs 5,080/= to the appellant with instructions to buy shares for her at Malili Ranch Limited was because payment was being made through the bank, and

that it was easier for the appellant who worked in Nairobi to make the payment on her behalf, and that she trusted him as her step son.

16. She submitted that, in 1994, the appellant promised to transfer the shares to her and to make good his promise, he authorized dividends paid by the company from the year 1994 to 1997 to be paid to her, only to change after the parcels of land were allocated to him, at which point he offered to refund her Kshs 5,080/= plus interests. She submitted that the trust relationship between her and the appellant ended and, therefore, the said parcels of land ought to revert to her.

17. We have carefully re-considered and re-evaluated the evidence on the record as put to us. We have also considered the judgment of the learned Judge as well as the parties' submissions. We will first address the issue whether the suit was statute barred by virtue of section 7 of the Limitations of Actions Act.

18. Undeniably, this ground was not pleaded before the ELC No evidence was led on it. The parties did not address the court on this issue, nor did the learned judge pronounce himself on the issue. This concern was well articulated by Lord Birkenhead LC in *North Staffordshire Railway Co v Edge [1920] AC 254* as follows:

> ' The appellate system in this country is conducted in relation to certain well-known principles and by familiar methods. The efficiency and the authority of a Court of Appeal, are increased and strengthened by the opinions of the learned judges who have considered these matters below. To acquiesce in such an attempt as the appellants have made in this case is in effect to undertake decision which may be of the highest importance without having received any assistance at all from the judges in the courts below.'

19. The overriding fear is to avoid prejudicing a party who is made to meet an entirely different case late in the day at the appeal stage without the opportunity of adducing evidence that may be necessary to counter or dispel the new point. On this consideration, Lord Evershed MR in *United Dominion Trust Ltd v Bycroft [1954] All ER 455* stated as follows:

> ' As a matter of principle the Court of Appeal has always been strict in applying the rule that an appellant from a county court, unless the other party consents, cannot be allowed in this court to raise a new point of law not raised below. It is not in accordance with public interest that a party who has fought a case in a county court and has been defeated should then raise in this court a new point and put his case in an entirely different way as a matter of law and so make the other party, hitherto successful, litigate the matter again at the risk of having to pay costs not only below, but in this court.'

20. Due to these fundamental concerns, this Court has developed fairly elaborate principles that guide it in determining whether or not to allow a new point on appeal. In Securicor (Kenya) Ltd v EA Drappers Ltd and Anor [1987] KLR 338, it was held that this court has a discretion to admit a new point at appeal, but the discretion must be exercised sparingly; the evidence must all be on record; that the new point must not raise disputes of fact; and that it must not be at variance with the facts or case decided by the court below.

21. Similarly, this Court in *Wachira v Ndanjeru [1987] KLR 252*, held as follows:

> ' The principles can be summarized as follows: the discretion to allow a point of law to be taken for the first time on appeal will not be exercised unless full justice can be done between the parties. It will not usually be allowed when to do so would involve disputed facts which were not investigated or tested at the trial. Nor will a party be allowed to raise on appeal, a

case totally inconsistent with that which he raised in the trial court, even though evidence taken in that court supports the new case.'

22. We have carefully re-examined the evidence on record on this aspect. It is common ground that, in 2007, the appellant was allocated two (2) parcels of land measuring 7.8 acres and 50 feet by 100 feet respectively. On May 26, 2011, four (4) years later, the respondent filed her suit in the High Court. Section 7 of the *Limitation of Actions Act* provides as follows:

> ' An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action occurred to him or, if it first accrued to some person through whom he claims, to that person.'

23. Since the two parcels of land were allocated to the appellant in the year 2007, we find and hold that the respondent's suit was not statute barred because twelve years had not lapsed as at the time the suit was instituted before the ELC in 2011. In any event, the respondents claim is premised on her argument that the appellant held the shares in trust on her behalf. A claim premised on trust cannot be subject to limitation of actions, so the suit was not statute barred.

24. Next, we address the question whether the respondent proved her case against the appellant on a balance of probabilities. The appellant argues that there was no basis for the trial court to hold that the appellant held the land in Malili Ranch in trust for the respondent. His argument is premised on his reasoning that the respondent in her Witness Statement dated November 14, 2014 stated that, at the time she purportedly gave the money to the appellant, the appellant already owned land in Malili Ranch, a position he argued was affirmed in cross- examination when the respondent stated as follows:

> ' I cannot remember the exact date I gave to peter the money. I know the defendant had his share in Malili Ranch. By the time I gave him, the defendant had his shares in Malili.'

25. The appellant also argued that the learned judge completely disregarded the evidence of PW2, Julius Muthoka Kimweli, when he held that the appellant had not demonstrated that he had other shares in Malili prior to being given the Kshs 5,080/= by the respondent, yet it was confirmed in cross-examination of PW2 that the appellant had a share in Malili Ranch, and that he used his money to buy the shares.

26. In his judgment, the learned judge held that the appellant's testimony was contradictory on the question when the respondent's son was admitted in hospital. In his written statement, which he adopted, the appellant testified that his stepbrother was attacked and hospitalized in 1985, and that, around June the same year, the respondent began giving him money to fend for her sick son. However, in cross-examination, the appellant stated that the respondent's son had been admitted at Kenyatta Hospital in 1979, and that he lived with the son from 1976 to 1987.

27. The learned judge also opined that, if indeed the money the appellant received from the respondent was for her sick son, why did the appellant agree to refund the money in the two meetings, and whether it was a mere coincidence that the appellant purchased shares in Malili Ranch at the same time he was given money by the respondent purportedly for her sick son in 1985. In arriving at the finding that the respondent had proved her case on a balance of probabilities, the learned judge based his finding on the appellant's admission that he received money from the respondent in 1985, and that there was no evidence to show that the money received was towards treating the respondent's sick son.

28. The key question here is whether the trial judge's findings above were supported by the evidence on record, and whether the respondent proved her case to the required standard in civil cases. It

is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Cases are decided on the legal burden of proof being discharged (or not). Lord Brandon in *Rhesa Shipping Co SA v Edmunds [1955] 1 WLR 948 at 955* remarked:

> ' No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take.'

29. Undeniably, whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. As Rajah JA in *Britestone Pte Ltd v Smith & Associates Far East Ltd [2007] 4 SLR ® 855 at 59* stated:

> ' The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him.'

30. Whoever desires a court to give judgement as to any legal right or liability, dependent on the existence of fact which he asserts, must prove that those facts exist. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. A plaintiff must prove his case on the balance of probabilities before the defendant can rebut them. A court of law can only weigh up the proved facts without concerning itself with speculating on evidence that was never adduced, or which does not follow by reasonable inference from the proved facts. Inference, it was observed by Lord Wright in *Caswell v Powell Duffryn Associated Collieries Ltd [1939] 3 All ER 722 (HL) at 733* must be carefully distinguished from conjecture or speculation:

> ' There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases, the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases, the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation.'

31. Before the trial court, the parties presented diametrically opposed factual positions. The question here is whether the trial court correctly determined the completely conflicting positions and arrived at the correct finding. In *Stellenbosch Farmers Winery Group Ltd & Another v Martell & Others, 2003 (1) SA 11 (SCA)* at para 5, the South African Supreme Court of Appeal explained how a court should resolve factual disputes and ascertain as far as possible where the truth lies between conflicting factual assertions. It stated:

> ' To come to a conclusion on the disputed issues, a court must make findings on:
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> i. The credibility of various factual witnesses;
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> ii. Their reliability; and
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> iii. The probability or improbability of each party's version on each of the disputed issues In light of the assessment of (a), (b) and (c), the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be a rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the

former, the lessor convincing will be the latter. But when all factors equipoised, probabilities prevail.'

32. The onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. Where the onus rests on the plaintiff, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true, accurate, and therefore acceptable, and the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not, the court will weigh up and test the plaintiff's allegations against the general probabilities.

33. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the court will accept his version as being probably true. If, however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.

34. In finding facts or making inferences in a civil case, one may, as Wigmore states in his work on evidence, 'by balancing probabilities select a conclusion which seems to be more natural or plausible conclusion amongst several conceivable ones, even though that conclusion may not be the only reasonable one.' (Cited in *Govan v Skidmore, 1952 (1) SA 732 (N)*). The standard determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases, the standard of proof is the balance of probabilities. In *Miller v Minister of Pensions, [1947] 2ALL ER 372*, Lord Denning said the following about the standard of proof in civil cases:

> ' The {Standard of proof} is well settled. It must carry a reasonable degree of probability if the evidence is such that the tribunal can say: 'We think it more probable than not' the burden is discharged, but, if the probabilities are equal, it is not.'

35. Based on our reanalysis of the record, we are satisfied that the evidence presented before the trial court established on a balance of probabilities that the appellant in 1985 received money from the respondent to purchase a share in Malili Ranch Limited on behalf of the respondent. Further, we find that the learned judge correctly held that the appellant did not prove on a balance of probabilities that the money received from the respondent was to be utilized towards caring for the respondent's sick son. In fact, the appellant's evidence was contradictory on when the respondent's son fell sick as alluded to earlier in this judgment.

36. We also find that the appellant's credibility was questionable since, in cross-examination, he confirmed that, according to the letters dated April 21, 2004 by the elders of Kisyula family, and the letter dated April 5, 2010, he agreed to give the respondent Kshs 10,480/=. It is noteworthy that, according to the letter dated April 21, 2004, the total of Kshs 10,480.00 was arrived at after adding Kshs 5,080/= and the dividends the appellant had received from Mailili Ranch. It defeats logic why the appellant could refund the money he utilized to take care of the respondent's sick son together with dividends he received from Malili Ranch Limited for the reason of family unity. Furthermore, one wonders why the tabulation of the amount to be refunded included the purchase price of the shares and the dividends paid. Consequently, we find that the appellant's explanation on why he agreed to repay Kshs 10, 480/= to the respondent was implausible, unconvincing, not credible, and contradictory. His version did not dislodge the respondent's account that he bought shares in Malili Ranch on her behalf, but unlawfully had the shares registered in his own name for his own benefit. Consequently, on a balance of probabilities, the respondent's evidence carried the day.

37. Closely tied to the above issue is the appellant's contestation that the learned judge completely disregarded his evidence and the evidence of PW2 Julius Muthoka Kimweli, and also that the judge did not consider his submissions. Unquestionably, it is imperative for a trial court to evaluate all the evidence and the submissions presented by the parties because a court cannot afford to be seen to be selective in determining what evidence or submissions to consider. However, some evidence or submissions might be found to be irrelevant or of little value. The best indication that a court has applied its mind in the proper manner to all the material presented before it is to be found in its reasons for judgment.

38. On the other hand, requiring a trial court to consider and weigh all the submissions is not meant that the judgment of the trial court must also include a complete embodiment of all the evidence tendered and all the submissions made, as if it comprises a transcript of the proceedings. In other words, in order to determine the merit of the appellants' contention, this court must consider the evidence tendered by all the witnesses, the submissions made, and, juxtapose it against the judgment, and finally determine whether there is any basis for interfering with the judgment.

39. If this Court finds that a particular fact or submission is so material that it should have been dealt with in the judgment, but such fact or submission is completely absent from the judgment or merely referred to without being dealt with when it should have, this will amount to a misdirection on the part of the trial court. This Court must then consider whether either the said misdirection, viewed on its own or cumulatively together with any other misdirection, is so material as to affect the judgment in the sense that it justifies interference by this court. In addition, the duty of the appellate court is to determine whether the trial court applied the law or applicable legal principles correctly to the facts in coming to its decision.

40. We have evaluated the respective parties evidence and submissions tendered before the trial court and before this court. We find that the learned judge correctly considered all the evidence and submissions before him, and that he correctly applied the facts to the law in arriving at his findings. We therefore find no merit at all in the argument that the appellant's evidence and submissions were not considered.

41. In summation, we find and hold that this appeal is without merit. We dismiss it with costs to the respondent. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF DECEMBER, 2022.

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR