



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KOOME, & SICHALE JJ.A)

CIVIL APPEAL NO. 181 OF 2015

BETWEEN

MUMBI KIGUNDU.....APPELLANT

AND

TOTAL KENYA LIMITED.....RESPONDENT

*(Being an appeal from the judgment and decree of the High Court*

*at Nairobi (Kamau J). dated 19<sup>th</sup> March, 2015*

*in*

*HCCC NO. 10 OF 2013*

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**JUDGMENT OF THE COURT**

The appeal herein is against the judgment of Kamau J. delivered on 19<sup>th</sup> March 2015.

A brief background to the appeal is that the respondent **TOTAL KENYA LIMITED** filed a plaint dated 9<sup>th</sup> January, 2003 and sought judgment for Ksh.6,127,622.95 being the cost of assorted petroleum products allegedly supplied to the appellant, **MUMBI KIGUNDU**(the then defendant) between August, 1996 and April 1999. The respondent further averred that on 5<sup>th</sup> January 2000, the appellant acknowledged owing the respondent the sum claimed. In a further amended statement of defence and counter-claim dated 4<sup>th</sup> May, 2010 the appellant denied being indebted to the respondent in the sum of **Kshs. 6,127,122/=** or at all and counter-claimed for **Kshs. 285,000/=** being the cost of equipment allegedly installed at the petrol station by her. The appellant sought an order for costs and interest.

The pleadings having come to a close, the trial proceeded before Kamau, J. who in a judgment dated 19<sup>th</sup> March, 2015 found as follows:-

***“That judgment is hereby entered in favour of the plaintiff against the defendant in the sum of Kshs. 3,265,594.84 together with interest at court rates from the date of filing suit till payment in full and costs of the suit.***

***That the defendant's counter-claim in the sum of Kshs. 285,000/= is hereby dismissed with costs to the plaintiff."***

The appellant was dissatisfied with the outcome of the trial and filed this appeal. In a memorandum of appeal dated 20<sup>th</sup> July, 2015 the appellant faulted the judgment of the trial judge in the following respects:

***"1. Failing to appreciate that the legal burden to prove the sum of Kshs. 6,127,622.95/= lay on the respondent (the then plaintiff).***

***2. Erred in finding that a certain number of invoices had not been paid.***

***3> In failing to find that the appellant was entitled to a refund of loss of equipment of Kshs. 285,000/="***

The appeal before us was canvassed by written as well as oral submissions.

In her written submissions dated 31<sup>st</sup> October 2016, the appellant faulted the trial judge for failing to find that it was the respondent's legal burden to strictly prove its claim of Kshs. 6,127,622.95 and that the trial Judge took it upon herself to look for evidence for the respondent. In support of this ground, the appellant cited a portion of the judgment in which the trial Judge decried the poor presentation of the respondent's case as follows:

***"Doing the best it could, the court was unable to get the total amount of the invoices from 18<sup>th</sup> July, 1999 to 26<sup>th</sup> May, 1999 as some of them were illegible. The plaintiff did not make it any easier for the court as the particulars of the computation of all the invoices was not itemized and/or furnished to the court. The court had to painstakingly go through the schedule of invoices on payments, invoices and letters from banks mentioned here below to come up with the figure of unpaid invoices, a duty that squarely fell upon the plaintiff. In short the case was badly set out. Similarly, although DW1 alluded to credit notes No's. 20404008, 20403664, 20603732, 2063901, 20604283 and 603666, she did not provide any evidence of the same."***

Secondly, the appellant faulted the trial court in finding that several invoices had not been paid contrary to the evidence adduced; that the unpaid cheques were offset by the credit balance reflected in the respondent's statement of account as set out at pages 148-154 of the record and finally that the appellant's counter-claim was dismissed in spite of evidence showing that the appellant had purchased equipment worth Kshs. 186,188.30 ***"... and loan interest of Ksh. 40,000/="*** and which equipment was retained at the time the respondent took over the station.

On its part, the respondent filed its written submissions on 14<sup>th</sup> December, 2016. It contended that the appellant had a running account with the respondent; that the letters dated 5<sup>th</sup> August, 1999, 28<sup>th</sup> July, 1999 and 11<sup>th</sup> September, 2006 from Barclays Bank of Kenya showed the appellants indebtedness to the respondent. The respondent's further submission was that the appellant's cheques had been dishonoured and that the appellant had failed to prove that she bought equipment worth Kshs. 285,000/=, the sum that she counterclaimed. Lastly, the respondent contended that on 6<sup>th</sup> January, 2000 the appellant had signed a reconciliation statement in which she acknowledged her indebtedness to be Kshs. 6,127,622.95.

The above submissions were highlighted by the respective counsel when this appeal came before us for plenary hearing on 2<sup>nd</sup> February, 2017. Mr. Mungla, learned counsel for the appellant in adopting the submissions filed on 2<sup>nd</sup> November, 2016 contended that the respondent had failed to prove its claim of Kshs. 6,127,622.95. She faulted the trial Judge ***"for looking for evidence"***, a task force that was outside her mandate, the onus of which fell on the respondent. Secondly, the appellant faulted the trial Judge for finding that certain invoices had not been paid, a position that was factually incorrect.

It was counsel's contention that the appellant had a schedule of invoices and payments (found at pages 171 and 172 of the record) in support of her contention that she had fully paid the respondent. As for the unpaid cheques, it was counsel's position that these were taken care of by the debt balance of Kshs. 480,667.95 as at July, 1990 as reflected on the reconciliation statement dated 6<sup>th</sup> January, 2000. On the counter-claim, the appellant's submissions were that she had shown vide an agreement dated 24<sup>th</sup> May, 1995 that she purchased a computerized wheel balance, one battery charger and a wheel aligner from **JOHN MICHAEL MAINA KANYEKI** at a cost of Kshs. 186,188.30, which sum was exclusive of a loan interest of Kshs. 40,000/=.

In opposing the appeal, Miss. Kinyua learned counsel for the respondent adopted the respondent's submissions filed on 14<sup>th</sup> December, 2016. It was their contention that the reconciled statement dated 6<sup>th</sup> January, 2000 was signed by both the appellant and the respondent and that the appellant had not dislodged the respondent's evidence on the bounced cheques issued by her. Further, the respondent denied that the appellant was owed Kshs. 285,000/= as she never installed the equipment allegedly purchased from one **MICHAEL MAINA KANYEKI**.

We have considered the record, the oral and written submissions made before us, the authorities cited and the law. As this is a first appeal, we remind ourselves of our primary role of re-analyzing and re-evaluating the evidence tendered in the trial court. In so doing, we should never lose sight of the fact that we never had the benefit of hearing and observing the demeanour of the witness. In the celebrated case of **Selle v Associates Motor Boat Company [1968] EA, 123**, it was held:

*“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must 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 this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Mohamed Sholan (1955), 22 E.A.C.A 270.”*

We also remind ourselves that this Court will not be in haste to interfere with a finding of fact by a trial court, unless such a finding is based on no evidence or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he/she did. See **EPHANTUS MWANGI & ANOTHER V DUNCAN MWANGI WAMBUGU [1982-99] 1 KAR 278**.

In her first ground of appeal, the appellant faulted the findings of the trial judge on the basis that the respondent had failed to prove its case to the required standard. **Section 107** of the **Evidence Act** provides that:-

**“107 (1) whoever desires any court to give judgment as to any legal right or inability dependent on the existence of facts which he asserts must prove that those facts exist.**

**(2) when a person is bound to prove the existence of any fact or is said that the burden of proof lies in that person.”**

Suffice to state that the onus of proof is on the one who alleges and the standard of proof in civil claims is on a balance of probabilities. In **PALACE INVESTMENTS LTD VS GEOFFREY KARIUKI MWENDA & ANOTHER [2007] eKLR**, this Court adopted the decision of **Denning J.** in **MILLER VS MINISTER OF PENSIONS [1947]2 ALL ER 372** where he held as follows:-

*“The degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribuna can say: “we think it more*

***probable than not; the burden is discharged, but, if the probabilities are equal it is not.***

***Thus, proof on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties' explanations are equally (un) convincing, the party which bears the burden of proof will lose because the requisite standard will not have been attained.***

See also **DT DOBIE & COMPANY (K) LTD. vs WANYONYI WAFULA [2014] eKLR.**

For a start, the appellant and the respondent each called one witness. Each of the witnesses relied heavily on their statements filed on 7<sup>th</sup> December, 2011 (for the respondent) and 24<sup>th</sup> January, 2012 (for the appellant). In relying on this filed statement of 7<sup>th</sup> December, 2011 **PAUL MWITI (PW1)** testified that the respondent had sued the appellant for a sum of Kshs. 7,926,572.95 being the total amount owed by the appellant in respect of "her trading account and produce loan," that the respondent had entered into a Marketing Licensing Agreement with the appellant with agreement allowed the appellant to operate the respondent's service station at Sagana; that the appellant commenced the business in 1996 and operated the station until 1999 when the contract was terminated; that the respondent advanced the respondent a loan of Kshs. 2 million which was repayable by monthly installments of Kshs. 55,000/= and further supplied the appellant with petroleum products; that at the time of cessation of contact Kshs. 1,798,950/= was outstanding as the loan balance and Kshs. 6,17,622.96/= was the value of unpaid petroleum products; that the appellant had variously admitted owing the sums due to the respondent; that on several occasions the appellant issued cheques to the respondent which cheques upon presentation to the bank were dishonoured; that the value of the bounced cheques was Kshs. 2,323,928.10/=; that on 6<sup>th</sup> January, 2000, a reconciliation was carried out and the appellant was found owing Kshs. 6,127,622.95 on the trading account and Kshs. 1,798,950/= on the product loan; that on termination of the contract the appellant surrendered title No. **KIINE/GACHORO/892** registered in the name of **SIMON MAHUMI KIGUNDU** as security for the outstanding debt, the appellant being the lawful attorney of the registered owner of the property namely **SIMON MAHUMI KIGUNDU** and finally that the appellant signed a charge over the said title to cover the principal loan of Kshs. 2 million. During his testimony in chief, PW1 denied that the appellant purchased the equipment allegedly installed at the petrol station. He concluded his evidence by stating that due to the appellant's failure to pay the outstanding due, "***she wrote severally to us asking for indulgence.***"

However cross-examination PW1 admitted that although the total sum being claimed for the trading account and a product loan was Kshs. 7,798,950/=, the plaintiff indicated that the sum being claimed was Kshs. 6,127,622.95/=. The respondent did not call any other witness. The evidence of PW2 was countered by the evidence of **DW1, JOSEPHINE MUMBI KIGUNDU** who relied on her witness statement dated 7<sup>th</sup> February, 2011 in which she denied owing the respondent Kshs. 6,127,622.95/= or at all; she admitted having a Marketing License Agreement dated 4<sup>th</sup> November, 1988 with the respondent and as a result of which she operated **MWIHOTI TOTAL SERVICE STATION**. **DW1** maintained that she purchased equipment worth Kshs. 285,000/= which equipment was unlawfully confiscated by the respondent when it took over the petrol station and she had:

***"Never acknowledged being indebted to the plaintiff and any acknowledgment purportedly made by myself to the plaintiff must have been rash and made under duress as the plaintiff was harassing me a lot. I had no time to reconcile the accounts"***

and further that:

***"When the reconciliation was done, I was forced to sign because I believed they would give me back the petrol station."***

During cross-examination, she maintained that any documents signed by her were all under duress. She denied receipt of a loan of Kshs. 2 million and that the charge over property known as

**KIINE/GACHARO/892** was signed by her under duress and that although the respondent had the original lease of **KIINE/GACHARO/892** issued on 8<sup>th</sup> September, 1977, she too has an original lease of **KIINE/GACHARO/892** issued in the year 2001.

Suffice to state that the relationship between the appellant and the respondent was based on a Marketing License agreement dated 1<sup>st</sup> January, 1998. By virtue of this agreement, the appellant operated the respondent's petrol station known as Mwihoti Total Service Station at Sagana. It is common ground that the appellant had running account for the supply and delivery of petroleum products by the respondent. It is also not disputed that the appellant severally issued cheques for the supply of the petroleum products by the respondent but which cheques upon presentation to the bank would be dishonoured. The appellant's inability to pay for the products supplied to her is evidenced by the communication between her and the respondent. On 12<sup>th</sup> May, 1997 she wrote to the respondent as follows:

**“Mwihoti Total Service Station**

**P.O. Box 229, Tel. 31163**

**Muranga.**

**12.5.97**

**The Network Sales Manager,**

**Total Kenya Ltd.**

**P. O. Box 30736**

**Nairobi.**

**Dear Sir,**

**Ref: Request for Assistance**

**I appreciate the understanding extended to me by TKL in the past – in my perpetual financial problem.**

**However, I am anticipating that come September 1997, I'll be able to pull out of the same after the sale of our property, one of the buyers is currently waiting for the release of her loan from the bank.**

**In the meantime, I'm requesting for grace period in the repayment of the outstanding facility of Kshs.812,000/= and replacement of bounced cheque for Kshs.489,390/= so that I am not destabilized.**

**I'll endeavour to maintain high sales and high standards.**

**I remain, Yours faithfully**

**Mrs. Josephine M. Kigundu**

**CC**

**RSM – NRB**

**Marketing Rep – NRB 2”**

Again on 20<sup>th</sup> May, 1997, she wrote to the respondent as follows:-

**“Mwihoti Total S.S.**

**P. O. Box 229**

**Murang’a**

**20.5.97**

**The Network Sales Manager,**

**Total Kenya Ltd.**

**P. O. Box 30736**

**Nairobi.**

**Dear Sir,**

**Ref: Request for Assistance**

**I have analyzed my current situation and feel afraid that if the trend continues I will be handicapped. This has out (sic) clearly from my 7 months study on the bank account (copy of the study enclosed). I therefore request TKL to assist me through a product loan of Kshs. 2m, then consolidate with what I already owe TKL. I am confident that since the business is viable I’ll be able to repay the money back. Further, I hope to have sold our property to enhance stability in the station. This will minimize over-dependence on the bank, hence the erosion of my profile margin.**

**I hope my request meets your approval.**

**I remain**

**Yours faithfully,**

**Mrs. J. M. Kigundu**

**CC**

**RSM – NRB**

**Marketing Rep – NRB 2”**

In the above two letters the appellant acknowledged her financial woes and sought indulgence as well as a loan of Ksh. 2 million.

It is also not disputed that a reconciled statement was prepared and signed by both the appellant and the respondent on 6<sup>th</sup> January, 2000. In the reconciliation, the appellant was found to be owing Kshs.6,127,622.95. This figure was stated to be the “balance including the loan repayment.” In a bid to get out of this written acknowledgement the appellant contended that she signed the reconciliation statement under duress. However, inspite of this allegation, the appellant never made any report to the police of the alleged duress. It was the appellant’s further evidence that apart from signing the reconciliation statement under duress, she had hoped that in so doing she would be given back the station which was then being managed by a “young man.” On our part we note that the license agreement had come to an end in April 1999 and the date of the reconciliation statement was 6<sup>th</sup> January, 2000. In our

view, it was far fetched for the appellant to have entertained the idea that she would be given back the station after nearly 8 months and we reject her explanation that the hope of getting back the station influenced her signing the reconciliation statement in which she acknowledged owing Kshs.6,127,622.95.

In our view, the learned judge erred in failing to appreciate that the reconciliation statement of 6<sup>th</sup> January, 2000 was strong evidence of the appellant's indebtedness to the respondent. It was therefore wrong of the trial judge to have dismissed the evidence of the appellant's acknowledgement of the debt by stating:

***“Indeed she may have appended her signature on the said statement willingly or unwillingly as she had contended but the fact remained that the burden was upon the plaintiff to demonstrate how this figure was arrived at.”***

In our view, we do not think that it was necessary for the respondent to demonstrate how the figure was arrived at as the appellant had acknowledged the debt. Further, it is not disputed that in operating the petrol station, the appellant experienced cash flow problems. She sought to explain her financial woes by the several letters she wrote to the respondent. Indeed, when her financial woes increased, she charged property known as **KIINE/GACHARO/892** as security for a loan of Kshs. 2 million. In her characteristic manner of denial, the appellant denied having executed the charge in favour of the respondent voluntarily. It was her version of statement that she had done so under duress. Yet in her letter of 20<sup>th</sup> May, 1995 she had made a specific request to be loaned Kshs. 2 million. She however did not deny receipt of the Kshs. 2 million loan. Again, the duress was not reported to the police. The appellant's evidence that she has the original certificate of lease of the charged property is intriguing as the respondent also has the original certificate of lease.

It is our considered view, that given the totality of the evidence, the respondent established its claim on a balance of probability and we decline the invitation to find that it failed to do so.

The appellant's second ground of appeal is that the learned judge failed to take into consideration that she had made payments to off-set her indebtedness. In this assertion, the appellant relied on a ***“schedule of invoices and payments made to the plaintiff.”*** Suffice to state that this was a schedule prepared by herself and it carries no weight in proving payments made to the respondent.

Finally, the learned trial judge was faulted for dismissing the appellant's counter-claim. The appellant contended that she bought equipment which she installed at the petrol station. However, no evidence of installation was tendered. All that the appellant did was to produce an agreement indicating that she bought the equipment for Kshs.186,188.30 which was exclusive of Kshs.40,000/= which also formed part of the claim.

This again was strange. Was the respondent being charged interest because the appellant bought the equipment from a seller who had borrowed money? It would appear to us that the agreement relied upon by the appellant as evidence of purchase of equipment was prepared for the sole purpose of supporting the appellant's counter-claim. However, be that as it may, we find that there was no proof that the equipment allegedly purchased by the appellant was installed at the respondent's petrol station.

The sum total of the above is that we find that there is no merit in this appeal. We further note that as the respondent did not file a cross-appeal, we shall leave the judgment of the High Court undisturbed. Consequently, we dismiss the appellant's appeal with costs.

***Dated and delivered at Nairobi this 28<sup>th</sup> day of July, 2017.***

**W. KARANJA**

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**JUDGE OF APPEAL**

**M. K. KOOME**

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**JUDGE OF APPEAL**

**F. SICHALE**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**