IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI, PCA, OUKO & KIAGE, JJ.A)

CIVIL APPEAL NO. 38 OF 2002

BETWEEN

SUSAN MUNYI ……..…..……APPELLANT

AND

KESHAR SHIANI ……....……..……..…..……RESPONDENT

(Appeal from the decision and decree of the High Court of Kenya at Nairobi (Ransley CA.) dated 29th June 2012

in

HCCC NO. 1162 OF 1999)

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JUDGMENT OF THE COURT

The appellant **SUSAN MUNYI** and the respondent **KESHAR SHIANI** are, at any rate were, at all times material hereto, advocates of the High Court of Kenya. They were also very close friends at personal, professional and, apparently, family levels. So close were they that they assisted each other in the various areas of legal practice where one was more conversant than the other and even referred clients for legal services in their respective law firms in the City of Nairobi. Moreover, they would also have all manner of financial dealings in which they advanced each other loans now and then.

That close and cordial relationship between the parties was tested, tried and torn, however, over a payment by the respondent to the appellant, of the sum of Kshs. 1 million on 17th October 1996 which is at the centre of the litigation between the two who did not agree on the true meaning, character and antecedents of the said payment.

To the respondent, the payment made vide a Bankers cheque No. 0020711 and drawn on Akiba Bank, Moi Avenue Branch, in favour of the appellant was a friendly loan advanced for the use of the appellant at her request. The respondent contended in a statement of claim filed at the High Court that the parties had agreed that the appellant would, after the expiry of six months from the date of the advance, start repaying the same by monthly instalments of Kshs. 100,000. She contended further in the plaint and in testimony before the trial court (T.J. Ransley, C.A.), that it was agreed the loan would attract interest at prevailing market rates in the event of any instalment default .

The respondent averred in her suit that the appellant in fact failed, refused and or neglected to pay the first instalment that fell due on 17 May 1997 or any other instalment thereafter with the result that, in the respondent's reckoning, the loan started attracting interest at the rate of 33% per annum from that date.

It was contended for the respondent in pleadings and testimony that the appellant eventually made a single payment, one for Kshs. 100,000 on 16th September 1998 and even then to the respondent's law firm thereby leaving a balance of Kshs. 2,176,997.60 as at August 1999 when the respondent filed suit having failed to obtain any further payments.

In answer to the respondent's claim, the appellant filed a defence in which she denied the respondent's claim in entirety. She denied requesting for a loan advance and denied "being lent the sum of Kshs. 1m or that any banker's cheque for the said sum was drawn in favour of the (appellant) in the circumstances alleged in paragraph 4 of the plaint or at all" and also denied any agreement as to repayment. The appellant denied that the Kshs. 100,000 she paid to the respondent was meant to honour the debt or any other financial obligation. Instead, she asserted, the payment was solely for the accommodation of the respondent. She also pleaded in the alternative at paragraph 7 as follows;

> **"7. In the alternative, the defendant says that the said sum of Kshs. 100,000 was received and paid (if at all) to Susan Munyi & Co. Advocates a firm solely owned by the defendant for services rendered to Keshar Siani & Company advocates, a firm solely owned by the Plaintiff at the request of the plaintiff and on the terms agreed orally between the parties in 1996."**

Particulars of services rendered

> **"The services rendered covered an expansive period of 1990 to 1996 or thereabouts and involved numerous injury claims, whereby the plaintiff's firm being on retainer by an insurance company purported to also act for the insurance company insured solely for her firm's gain and benefit, making use of the defendant's services to cover up for the apparent conflict of interest, full particulars of which are well within the plaintiff's knowledge".**

The defence was later to be added to by amendments which also introduced three new paragraph as follows;

> **"8. The defendant further states that over a period of time the plaintiff requested the defendant to advance her various sums of money to either reconcile her client's account or buy business or for any other financial accommodation.**
>
> **9. Further the defendant states that on various dates the plaintiff who is not conversant with conveyancing requested the defendant to do her conveyance matters at an agreed fee. The defendant would do the plaintiff's conveyance work and share equally the fees the plaintiff charged her conveyancing clients.**
>
> **10. The sum of Kshs. 1,000,000.00 was paid by the plaintiff to the defendant in settlement of the sums advanced by the defendant to the plaintiff and also in part settlement of the fees the plaintiff owed and still owes the defendant for the said conveyance work".**

The appellant prayed that the respondent's suit be dismissed with costs.

The matter eventually proceeded to trial before the learned Commissioner of Assize. The respondent testified on her own behalf and informed the trial court how the appellant approached her and discussed her financial situation which was so bad the appellant wanted to sell her automobile, make BMW, to raise funds with which to pay fees for her daughter who was reading law in the United Kingdom. The respondent dissuaded her from selling the car as she would not get a good price whereupon the appellant

asked of her to advance her some Kshs. 1m. The respondent advanced that money to the appellant confident that she would repay the same since she was aware the appellant was owed various sums of money as legal fees from clients.

The respondent maintained in her testimony, even in the face of intense, searching and rigorous cross examination from the appellant's counsel, that the Kshs. 1 million was advanced as a genuine loan to a friend in need, intended and promised to be repaid but that the appellant did not repay it save for some Kshs. 100,000. The respondent denied that the Kshs. 1 million was payment she made to the appellant on account of legal fees as alleged and stated that no fee notes were ever issued to her by the appellant.

The appellant did also testify and whereas she admitted that her daughter was indeed studying law at Leicester University in the UK, she denied seeking or obtaining a loan from the respondent. She also told the learned Commissioner of Assize that her husband, a pilot, was working for Tawahal Airlines and it is he that paid their daughter's fees. She denied ever intending to sell the motor vehicle to raise school fees.

The appellant also called one other witness, a Mr. Leo Masore Nyangau whose testimony seemed to suggest that the respondent, for whom he had worked at some point in time, did have some dealings with the appellant and had indicated she would talk to the appellant to advance her some money. He did not provide any details of this. He did also admit that the respondent had sued him in Nairobi **RMCC No. 7861 of 1999** for amounts in respect of matters he had handled for her but he also counterclaimed for monies she had apparently not remitted to the Kenya Revenue Authority on account of his income tax.

After taking submissions from both parties, the learned Commissioner of Assize wrote a brief judgment in which he found for the respondent with respect to the 1 million being a loan advanced to the appellant of which only Kshs. 100,000 was repaid. He rejected the respondent's claim for interest at commercial rates, however, and ultimately awarded interest only at court rates from the date of filing suit. He also granted the respondent only half of the costs as the appellant had succeeded on the question of interest.

Unhappy with the decision of the trial court, the appellant moved to this Court and filed a Memorandum of Appeal raising an astonishing nineteen (19) grounds for challenging the judgment that was a mere three pages long. To his credit, Mr. Kaburu, learned counsel for the appellant, argued all nineteen grounds together as one namely that the learned Commissioner fell into error in not believing the appellant's version of the story to the effect that the Kshs. 1 million paid to her was for services rendered or a repayment of monies advanced by her, and not a loan. He criticized the trial court for attaching undue weight to the fact that the appellant did not issue any fee notes to show she had rendered professional services to the respondent and in the fact that the appellant did have financial problems at the material time.

On his part, the learned counsel for the respondent, Mr. Muturi, urged us to dismiss this appeal. He stated that the issue before the High Court turned on the critical question of who between the parties the court would believe. He maintained that the respondent had given help to a friend in distress and the appellant's allegation that the payment was for services rendered absent an express counterclaim and/or set off amounted to a trial by ambush. He was, moreover, dismissive of that line of defence as being merely generalized and falling short of the need for the alleged services to be specifically pleaded.

Mr. Muturi concluded by adverting to the Kshs. 100,000 that the appellant admittedly paid to the respondent and posed rhetorically why she would make the payment if she was owed by the respondent. He asserted that since the trial court had chosen to believe the respondent over the appellant, it was not open to us, as an appellate court, to substitute that finding with our own.

It is not disputed that the learned Commissioner was confronted with two competing and mutually conflicting narratives as to what bankers cheque No. 0020711 dated 17th October 1996 was all about. In the end, the learned Commissioner had to pick one narrative over the other and pick he did. He believed the respondent's version thus;

"I preferred the evidence of the plaintiff to that of the defendant. Although I accept

> **that there were financial dealings between the plaintiff and the defendant and that work passed between them, I accept that the sum of Kshs. 1 million had nothing to do with these transactions and that the defendant did have financial problems and asked the plaintiff to lend her Kshs. 1 million. Had this been fees as the defendant alleges, I would have expected to see a fee note for this sum ….**
>
> **The defendant had repaid Shs. 100,000 which I do not believe was payment for fees as she allege (sic!). In the result, the defendant owes the plaintiff Shs. 900,000 and I award this sum with interest thereon at court rate from the filing of the plaint until payment in full."**

As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.

In undertaking this task, however, we always bear in mind that unlike the trial court which had the advantage of hearing and observing the witnesses, we make our conclusions from the evidence as captured in the cold letter of the record. We therefore operate under a decided handicap as there is much to be gleaned from the demeanor and nuanced communication of a live witness that is inevitably unavailable, indeed lost, on the record. For precisely this common sense reason, an appeal court must accord due respect to the factual findings of the trial court and will be circumspect and slow to disturb them.

The general rule is that an appellate court will not interfere with a finding of fact made by a trial court unless the court is satisfied that the finding of the trial court is plainly wrong and this has been enunciated in a long line of authorities. In **MAKUBE Vs. NYAMIRO [1983] KLR 403**, the court stated that;

> **" … a Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did."**

In **KIRUGA Vs. KIRUGA & ANOTHER [1988] eKLR** the court reiterated the principles above. Apaloo JA outlined the following (page 22);

> **"An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. In the oft-cited case of Peters vs. Sunday Post [1958] EA 424, this Court accepted the principle laid down by the House of Lords in Watt vs. Thomas [1947] 1 All ER 582".**

The principle referred to was the one expressed by Sir O'Connor in the **Sunday Post** case thus;

> **"An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon the evidence should stand but this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion."**

In **OGOT Vs. MURITHI [1985] KLR 359**, Nyarangi JA also cautioned that in discharging its duties on appeal, an appellate court ought to be mindful that the trial court enjoyed an advantage; it saw the witnesses and was in a better position to assess the significance of the evidence. In that case, it was held that;

> **"The Court of Appeal in considering evidence should be mindful of the advantage enjoyed by the trial judge who saw and heard the witnesses and that the judge was in a better position to assess the significance of what was said and equally important**

what was not said."

In the instant case, the learned Commission or Assize may not have given any detailed reasons for preferring one story over the other but from what he had to say as quoted above, it is clear he found the respondent to be a more credible witness and her narrative more believable. We note from the record that on a number of instances the trial court took the trouble to record certain specific questions that were asked of the parties under cross examination and the specific answers they gave thereto. Those instances capture some contradictions and inconsistencies in the testimony of the appellant that must have contributed to the trial court's rejection of her case.

We note in addition that other than the payment of Kshs. 100,000 to the respondent whom she claimed was indebted to her, which is more plausibly explained by and is consistent with the respondent's assertion that it was part payment, the appellant was unable to explain why she never counter claimed nor mounted a set-off against the respondent's claim.

Indeed, a perusal of the defence and amended defence filed by the appellant, excerpts of which we have quoted herein, does not give any confidence that the appellant was putting forth a genuine, bona fide defence to the respondent's claim. Rather, it appears there was deliberate effort to obfuscate and be evasive in an attempt to come up with an answer to what was clearly a debt due, owing and payable. Mere denials do not constitute a good defence, as was expressed by the court in **MUGUNGA GENERAL STORES Vs. PEPCO DISTRIBUTORS LTD [1986] LLR 5111 (CAK)** when it stated that;

> **"First of all, a mere denial is not a sufficient defence in this type of case. There must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason."**

That apparent economy with the truth is also discernible from the testimony of the appellant as well and we are quite clear in our mind that the learned Commissioner had a good enough basis for preferring the version proferred by the respondent.

The issue before the trial court was one that was nearly balanced between the two sides and dependent on the word of one party against the other. In those circumstances we are persuaded that the proper approach is the one expressed by the House of Lords in **WATT Vs. THOMAS** (supra). In his speech, Lord MacMillan stated, and we respectfully concur, as follows; **KIRUGA Vs. KIRUGA & ANOTHER;**

> **"So far as this case stands on paper it not infrequently happens that a decision either way may seem equally open. When this is so, and it may be said of the present case, then the decision of the trial judge who has enjoyed the advantage not available to the appellate court becomes of paramount importance and ought not to be disturbed."**

We have not been given reason sufficient to disturb the findings of the trial court. The appeal fails and is accordingly dismissed with costs to the respondent.

Dated and delivered at Nairobi this 5th day of July 2013.

P. KIHARA KARIUKI

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PRESIDENT COURT OF APPEAL

W. OUKO

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

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