Chege v Theuri (Environment and Land Appeal 81 of 2023)
[2024] KEELC 13335 (KLR) (21 November 2024) (Judgment)

Neutral citation: [2024] KEELC 13335 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA

ENVIRONMENT AND LAND APPEAL 81 OF 2023

YM ANGIMA, J

NOVEMBER 21, 2024

BETWEEN

SAMUEL GITAU CHEGE ..... APPELLANT

AND

JOYCE WAGUTHII THEURI ..... RESPONDENT

(Being an appeal against the judgment and decree of Hon. S.N. Mwangi (SRM) dated 15.05.2019 in Nyahururu CM ELC No. 208 of 2018)

JUDGMENT

A. Introduction

1. This is an appeal against the judgment and decree of Hon. S.N. Mwangi (SRM) dated 15.05.2019 in Nyahururu CM ELC No. 208 of 2018 – Samuel Gitau Chege -vs- Joyce Waguthi Theuri. By the said judgment, the trial court dismissed the Appellant's suit against the Respondent with costs.

B. Background

2. The material on record shows that vide a plaint dated 13.06.2017 the Appellant sued the Respondent before the trial court seeking the following reliefs:

    a. A declaration that the plaintiff is entitled to L.R. No. Nyandarua/Kiriita Mairo Inya Block 2 (Ngai Ndethia)/4441 and for the District Land Registrar – Nyandarua to be compelled to remove all the cautions and/or restrictions lodged therein and to transfer the same in his favour.

    b. In the alternative the defendant be ordered to pay to the plaintiff a sum of Kshs.221,000/= plus interest and 30% per month from 26/4/14 until payment in full.

    c. Costs of this suit plus interest.

d. Any other or further reliefs that this honourable court may deem fit and just to grant.

3. The Appellant pleaded that vide a loan agreement dated 26.04.2014 he granted the Respondent a soft loan of Kshs.221,000/= at the Respondent's request on the understanding that the same would be refunded on 26.05.2014. It was pleaded that it was agreed by the parties that should the Respondent default on repayment of the loan then the same would attract interest at the rate of 30% per month until payment in full.

4. The Appellant further pleaded that when the Respondent defaulted on repayment of the loan she voluntarily agreed to transfer her Title No. Nyandarua/Kiriita Mairo Inya Block 2 (Ngai Ndeithia) 444 (the suit property) to him and the consent of the relevant Land Control Board was obtained for that purpose. It was also pleaded that the Appellant was unable to effect the transfer of the suit property because the Respondent had colluded with one, Meshack Macharia to caution the property.

5. It was the Appellant's case that the Respondent had totally refused to repay the said loan despite issuance of a demand and notice of intention to sue thus rendering the suit necessary.

6. The record shows that the Respondent filed a statement of defence dated 27.07.2017 denying the Appellant's claim in its entirety and putting him to strict proof thereof. She denied having signed any loan agreement dated 26.04.2014. She denied having executed a transfer form and pleaded that she had not even signed any application for consent of the Land Control Board for the purpose of transferring the suit property to the Appellant and contended that the purported consent obtained by the Appellant was a forgery.

7. It was the Respondent's case that she had merely acted a witness to a loan agreement between the Appellant and her sister one, Purity Njoki Kariuki, and that she had merely offered the title deed for the suit property as a form of security until her sister provided a certain motor vehicle log book to the Appellant as security for repayment of a loan of Kshs.170,000/=.

8. The Respondent denied having colluded with Meshack Macharia to caution the suit property and pleaded that the cautioner was her husband who had lodged the caution on 11.02.2014. It was her defence that all the documents relied upon by the Appellant were complete forgeries hence the Appellant was not entitled to the reliefs sought in the suit.

9. The Appellant filed a reply to defence dated 08.08.2017 in which he joined issue with the Respondent on her defence. He maintained that the Respondent was the borrower of the soft loan and that she was the one who signed all the relevant documents to facilitate transfer of the suit property upon defaulting on the loan. He denied the allegations of forgery contained in the defence and pleaded that the Respondent had previously borrowed funds from him in July, 2013 on the security of the same suit property.

C. Trial Court's Decision

10. The record shows that upon a full hearing of the suit, the trial court apparently found for that the Appellant's lending activities contravened both the *Banking Act* (Cap.488) and the *Microfinance Act* of 2006; that the consent tendered by Appellant did not emanate from Ndaragwa Land Control Board; and that the Appellant's claim was doubtful since there were discrepancies in the Respondent's alleged signatures on the Appellant's supporting documents. The trial court also found no evidence of collusion between the Respondent and her husband since the suit property was cautioned well before the alleged loan agreement of 26.04.2014. As a result, the trial court was not satisfied that the Appellant had proved his claim to the required standard hence it proceeded to dismiss it with costs to the Respondent.

D. Grounds of Appeal

11. Being aggrieved by the said judgment, the Appellant filed a memorandum of appeal dated 13.06.2019 raising the following grounds:

    a. That the learned trial magistrate erred in law and in fact in finding that the Respondent did not owe the Appellant a sum of Kshs.221,000/= plus interest at 30% per month from 26.06.2014.

    b. That the learned trial magistrate erred in law and in fact in finding that the Appellant was a shylock and that the agreement dated 26.04.2014 offended the *Banking Act* and the *Microfinance Act*.

    c. That the learned trial magistrate erred in law and in fact for dwelling in extraneous issues which were not pleaded by the Respondent in dismissing the Appellant's suit.

    d. That the learned trial magistrate erred in law and in fact for disregarding the Appellant's overwhelming evidence that the Respondent borrowed a sum of Kshs.221,000/= from him on the 26.04.2014 and that the same was not refunded and for failing to award the same.

    e. That the learned trial magistrate erred in law and in fact in finding that the Respondent did not sign the agreement dated 26.04.2014.

12. As a result, the Appellant sought the following reliefs in the appeal:

    a. That the judgment and decree of the trial court be set aside.

    b. That the Appellant's claim in Nyahururu CM ELC No. 208/2018 be allowed with costs.

E. Directions on Submissions

13. When the appeal was listed for directions it was directed that the same shall be canvassed through written submissions. As a result, the parties were granted timelines within which to file and exchange their respective submissions. The record shows that the Appellant filed submissions dated 25.10.2024 whereas the Respondent's submissions were dated 28.10.2024.

F. Issues for Determination

14. Although the Appellants raised 5 grounds in his memorandum of appeal, the same boils down to the following issues:

    a. Whether the trial court erred in law and fact in dismissing the Appellant's suit.

    b. Whether the Appellant is entitled to the reliefs sought in the appeal.

    c. Who shall bear costs of the appeal.

G. Applicable Legal Principles

15. This court as a first appellate court has a duty to analyze, reconsider and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial court. The principles which guide a first appellate court were summarized in the case of Selle & Another –vs- Associated Motor Boat Co. Ltd & Others [1968] EA 123 at page126 as follows:

> " ...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 that 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 on the demeanor of a witness is inconsistent with the evidence in the case generally."

16. Similarly, in the case of Peters –vs- Sunday Post Ltd [1958] EA 424 Sir Kenneth O' Connor, P. rendered the applicable principles as follows:

> " ...it is strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally 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..."

17. In the same case, Sir Kenneth O'Connor quoted Viscount Simon, L.C in Watt –vs- Thomas [1947] A.C. 424 at page 429 – 430 as follows:

> "My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the class of cases in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a Tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other Tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

18. In the case of Kapsiran Clan -vs- Kasagur Clan [2018] eKLR Obwayo J summarized the applicable principles as follows:

    a. First, on first appeal, the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

    b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

c. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

H. Analysis and Determination

Whether the trial court erred in law and fact in dismissing the Appellant's suit

19. The court has considered the material and submissions on record. The Appellant faulted the trial court for holding that his business activity violated the *Banking Act* and the Micro Finance Act since he was not licensed by the concerned regulatory agencies. The court has perused the judgment of the trial court on this issue. The court considered the definition of "banking business" as set out in Section 2 of the *Banking Act* and held as follows:

> " My interpretation of "banking business" and "financial business" is that a person does such business only when he had been collecting money from the public and then lending it out or investing it. The plaintiff did not dispute that he lends money to people at an interest rate of 30% as was alleged by the defendant who called him a shylock. This does contravene the provisions of the *Banking Act* and the *Microfinance Act*."

20. It is evident from the evidence and material on record that the Appellant was not in the business of collecting deposits from the general public and either lending it or investing the money. The only evidence on record was that the Appellant was a businessman who was lending his own money at exorbitant rates. The trial court was thus alive to the fact that he was merely a lender hence his activities did not fall within the realm of banking business or financial business. Consequently, the only logical explanation for the last statement in the above quotation was that there was an error of omission by the trial court which left out the word "not" between "does" and "contravene" so that the sentence should have read that "this does not contravene the provisions of the *Banking Act* and the *Microfinance Act*." So, the Appellant's suit was not dismissed on the basis that he was not licensed to conduct banking business or financial business.

21. The court has noted that the trial court may have considered some extraneous matters which were not raised by the litigants at the trial such as the applicability of Section 3 of the *Law of Contract Act* (Cap.23). However, the Appellant did not suffer any prejudice for that reason in view of the fact that the trial court was not convinced on a balance of probabilities that the Appellant had actually lent the sum of Kshs.221,000/= to the Respondent and that she had given the title for the suit property as security for its repayment.

22. The court has considered the Appellant's submissions on the issue of the standard of proof. The Appellant contended that the trial court erred in fact in failing to find that he had loaned the Respondent Kshs.221,000/= despite overwhelming evidence to demonstrate the same. The court is aware that in civil litigation it is the quality and credibility of evidence and not the quantity thereof which matters. The court is further aware that the trial court had a special advantage or benefit which this court does not have at the appellate stage. The trial court heard and saw the witnesses at the trial and observed their demeanor.

23. There was a serous contest at the trial on whether it was the Respondent or her sister who was the borrower. There was a dispute as to the actual amount allegedly lent. There was a contest as to whether the Respondent ever signed the loan agreement dated 26.04.2014. There was a contest as to whether the application for consent, transfer form and consent of the LCB relied upon by the Appellant were genuine or forged.

24. The Respondent's evidence was that she simply escorted her sister to take a loan from the Appellant and that she did not sign the loan agreement dated 26.04.2014. She denied having signed any transfer form, or application for LCB. She denied having attended LCB meeting at which the consent was allegedly granted. The record shows that the respondent called the chairman of the LCB(DW2) at the material time who denied having signed and issued the consent letter dated 28.10.2015. He testified that his purported signature thereon was a forgery and that the suit property was not among those which were considered by the board during his time in office.

25. The trial court appears to have believed the evidence of DW2 who was the Assistant County Commissioner – Ndaragwa and took the view that the Appellant's claim was not genuine. The court finds no fault with the trial court in believing the evidence of the Respondent and DW2 that the consent letter dated 28.10.2015 was a fraudulent document which reflected badly on the credibility of the Appellant's claim as a whole. The trial court was entitled to consider the Appellant's conduct as a whole in determining whether or not his claim was credible and whether it had been proved on a balance of probabilities. This court's own evaluation of the evidence before the trial court leaves a serious doubt as to whether or not the Appellant's claim was proved to the required standard. It may well be the case that the Respondent's sister was the real borrower whereas the Respondent was merely acting as a guarantor who pledged her title deed as security for repayment of the loan. The court thus finds no fault with the final decision reached by the trial court. It was the duty of the appellant to prove her claim on a balance of probabilities using credible evidence.

Whether the Appellant is entitled to the reliefs sought in the appeal

26. The court has already found that the trial court did not err in law or fact in holding that the Appellant had failed to prove his claim against the Respondent on a balance of probabilities. It would, therefore, follow that the trial court was justified in dismissing the Appellant's suit. In the premises, the Appellant is not entitled to the reliefs sought in the appeal, or any one of them.

Who shall bear costs of the appeal

27. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd [1967] EA 287. The court finds no good reason to depart from the general rule. As a result, the Respondent shall be awarded costs of the appeal.

I. Conclusion and Disposal Orders

28. The upshot of the foregoing is that the court finds no merit in the Appellant's appeal. As a consequence, the Appellant's appeal is hereby dismissed with costs to the Respondent.

It is so decided.

JUDGMENT DATED AND SIGNED AT NYANDARUA AND DELIVERED VIRTUALLY IN THE PRESENCE OF THE PARTIES THIS 21ST DAY OF NOVEMBER, 2024.

Y. M. ANGIMA

JUDGE

In the presence of:

Appellant present in person

Joyce Waguthi the Respondent – present in person

C/A - Carol