



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT KISUMU

APPEAL NO. 4 OF 2015

(Formerly Kakamega HCCA No. 4 of 2014)

(Before Hon. Justice Mathews N. Nduma)

MUMIAS SUGAR CO. LTDAPPELLANT/RESPONDENT

-VERSUS-

JOEL A. MAKOKHARESPONDENT/APPLICANT

JUDGMENT

1. This is a first Appeal by the Appellant from the Judgment of Hon. Susan Shitubi, chief Magistrate Kakamega in Kakamega Chief Magistrate's Civil Case No. 214 of 2008 delivered on 26th June, 2013.

2. The grounds of Appeal are set out in the Memorandum of Appeal as follows:-

i. THAT the learned magistrate erred in rigidly fettering her discretion and failing to address an apparent injustice of double payment which was vividly brought to her attention.

ii. THAT the learned trial Magistrate erred and occasioned a miscarriage of justice in failing to allow for review even after noting that the letter, details and evidence on the double payment of Kshs.1,919,970/- was acknowledged on 11/9/2013.

iii. THAT the learned magistrate failed to canvass the cardinal principle of law that had the court been appraised of the intervening facts, the edict of the judgment would have been different.

iv. THAT the learned magistrate erred in law and occasioned a miscarriage of justice when she held that the appellant defendant had been heard.

v. THAT the learned magistrate erred in failing to address the issue of closure of the plaintiffs case without temperance of evidence hence condemning a party ostensibly for the mistake of his counsel.

vi. THAT the learned magistrate erred in failing to appreciate that any deficiency in the orders sought would have been adequately remedied by costs.

vii. THAT the learned magistrate erred in failing to consider in full and or at all the reasons for the non tenderance of evidence by the appellant defendant.

viii. THAT the learned magistrate erred in failing to condemn the conduct of the Respondents/plaintiffs that lead to the double enrichment.

ix. THAT the learned magistrate erred in making findings against the weight of the existing evidence.

3. This being a first Appeal, the court is entitled to relook the facts of the case bearing in mind that it did not have the advantage of listening to *vivavoce* evidence, like the Learned Magistrate did. See **Selle vs Associated Motor Boat & Co. [4968] E.A and Abdul Hameed Saif vs Ali Mohamed Sholan [1955], 22 E.A.C.A 270.**

4. From the record, the Respondent testified under oath in support of his claim to the effect that the Appellant offered voluntary early retirement scheme to its employees. The Respondent being one of the employees of the Respondent applied to retire under the scheme and his application was accepted by the Appellant by a letter dated 28th April, 2006 in which the package payable to the Respondent was reflected in the sum of Kshs.3,078,000. The Respondent was to pay government tax in the sum of Kshs.908,445.

5. The Respondent testified that he was owed Kshs.2,169,555 by the Appellant which he claimed. The Respondent also demanded a refund of Kshs.908,445, since there was no evidence that it was remitted to the tax authority. The Respondent admitted to have received the rest of the money from the expected sum of Kshs.3,078,000. The Respondent admitted he had a loan with the SACCO but was repaying the loan at Kshs.33,000 per month and had not authorized the Appellant to repay the full loan from his retirement benefits.

6. The Respondent was cross examined by counsel for the Appellant, Mr. Nyikuli and Respondent closed his case. Defence hearing was set for 20th January, 2013.

7. On 20th February, 2013, the matter was set down for 3rd April, 2013. On 3rd April, 2013 the matter was postponed by consent to 8th May, 2013.

8. On the 8th May, 2013 the matter was scheduled for hearing at 12 noon before the Learned Magistrate. Mr. Mwebi appeared for the Respondent whereas Mr. Nyikuli appeared for the Appellant. Mr. Nyikuli told the court –

“I have not seen any witness for the defence. We informed the Defendant of today’s date. I close the defence case”

9. On the basis of the submission by the counsel on record for the Appellant, the Learned Magistrate gave directions for filing of final submissions and delivery of judgment was set for 26th June, 2013 and was duly delivered on 27th June, 2013.

10. From the record there was no objection whatever from the Appellant in the manner the suit was heard to conclusion. No application was made to set aside the proceedings in the period between conclusion of the hearing and delivery of judgment.

11. A consent was recorded by Mr. Mwebi for the Respondent and Nyikuli for the Appellant on 31st July, 2013 on the bill of costs for a taxed sum of Kshs.186,069.

12. The decretal sum was subsequently deposited in court following a proclamation of goods and attachment.

13. An application to review and set aside the judgment of the Learned Magistrate was brought on the basis that the Applicant did not give evidence. That the amount paid to the Respondent in the sum of Kshs.1,919,970 amounted to double payment since an equal amount had been paid to Sukari SACCO on behalf of the Respondent and therefore amounted to unjust enrichment.

14. The application was opposed by Mr. Mwebi for the Respondent on the basis that no new facts had arisen and that the defence closed its case voluntarily upon failure to provide a witness. That the application was an afterthought after execution proceedings commenced against the Appellant.

15. The Learned Magistrate made a ruling delivered on 22nd January, 2013 to the effect that failure to tender evidence by the Defendant was not occasioned by a mistake but was a deliberate action by counsel for the Defendant and with knowledge of all the circumstances of the case at the time the closure of defence case happened.

16. The Learned Magistrate noted in the ruling that counsel for the Appellant did not apply to the court to grant an adjournment to allow the Appellant to call a witness.

17. The application for review was dismissed, the Learned Magistrate having considered authorities cited **Ndirangu vs Commercial Bank of Article 2 KLR [2002] 603** and **Shah vs Dharanchi (1981) KLR 561** on when an application for review of judgment may be granted.

18. The Learned Magistrate found that no new evidence which was not in the knowledge of the Appellant upon exercise of due diligence was presented and that no mistake on the face of record was discerned. The application was dismissed with costs.

Determination

19. Upon a careful analysis of the appeal record, comprising the proceedings, and judgment in the lower court, this court is of the considered view and finding that the Learned Magistrate correctly and reasonably applied her mind to the facts before court, appreciated the law applicable and arrived at a fair and just decision in her judgment. However, in the application for review it became apparent that the Appellant had arbitrarily remitted Kshs.1,919,970 to sukari SACCO to settle the Respondent’s account. The Respondent while not wholly denying the fact, protested that he had not authorized the Appellant to repay the loan on his behalf.

20. The court appreciates that the loan owed to the SACCO was not counter claimed by the Appellant and ordinarily ought not to be arbitrarily set-off from the decretal sum. The loan is a private contract between the Respondent and the SACCO and ought to be treated as such. The law of equity however frowns at unjust enrichment and the Learned Magistrate erred in not taking into account the remittance by the Appellant to the SACCO for the benefit of the Respondent. This was a fact, which the Appellant had no opportunity to present at the trial and the Learned Magistrate ought to have taken it into account in the application for review. Furthermore, the fact of double payment was discernible on the face of the record. The court therefore sets aside the award of Kshs.1,919,970 to the Respondent, it being a double

payment, and therefore amounts to unjust enrichment.

21. Accordingly, the court enters judgment as follows:-

i. The appeal is allowed and the judgment of the lower court set aside in respect of Kshs.1,919,970 already paid to sukari SACCO on behalf of the Respondent.

ii. Each party to bear their own costs of the Appeal.

Judgment Dated, Signed and delivered this 15th day of March, 2018

MATHEWS N. NDUMA

JUDGE

Appearances:-

Mr. Ombito for Appellant

Mr. Onsongo with Mr. C.M. Mwebi for Respondent

Chrispo: Court Clerk