Murungi v M'Kirera (Civil Appeal E049 of 2024)
[2025] KEHC 2665 (KLR) (27 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2665 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CIVIL APPEAL E049 OF 2024

CJ KENDAGOR, J

FEBRUARY 27, 2025

BETWEEN

DR JAMES HENRY MURUNGI .... APPELLANT

AND

JOSEPH MUNGATHIA M'KIRERA .... RESPONDENT

(Being an appeal against the Judgment of Hon. H. Nyamweya, RM/Adjudicator in Meru Small Claims Court SMCC No. E046 of 2024 delivered on 7th March, 2024)

JUDGMENT

Introduction

1. The Respondent, (Joseph Mungathia M'kibera) sued Appellant (James Henry Murungi) at the Small Claims court in Meru. In his Statement of Claim, he alleged that on or about 9th February, 2022 he lent the Appellant Kshs.1,000,000/= on terms that the Appellant would pay back the money in two instalments of Kshs.500,000/= on/or before 9th August, 2022. He claimed that the Appellant breached the contractual terms by issuing 2 cheques of Kshs.500,000/= each which cheques bounced and the debt remained due and owing. He brought the suit and sought judgment in the sum of Kshs.1,000,000/= with interest. The Appellant filed a response and denied the whole claim. He also brought a counter-claim of Kshs.1,400,000/= against the Respondent, but forfeited Kshs.400,000/= of the counter-claim.

2. The Court delivered a judgment on 13th March, 2024 in which it held that the Respondent owes the Appellant Kshs.1,000,000/=. It also found that the Appellant owes the Respondent Kshs.1,000,000/=. Based on this, the Court held that the matter is to be marked as settled because each party owed each other Kshs.1,000,000/=.

3. The Appellant was dissatisfied with the judgment and appealed to this Court vide a Memorandum of Appeal dated 3rd April, 2024. His appeal was registered as Civil Appeal No E049 of 2024. It listed the following Grounds of Appeal;

    1. That the Learned Trial Magistrate erred in law and fact when she delivered a judgment ordering that since each party owes the other 1 million the matter be marked as settled without considering the fact that the Appellant denied to owe the Respondent and counterclaimed thereon to which he adduced evidence which the Honourable court did not consider.

    2. That the Learned Trial Magistrate erred in law and fact in refusing to accept the explanations given by the Appellant that the Cheques that were adduced by the Respondent as some of his documentary evidence, were obtained through fraudulent means and impersonation and went ahead to rely on them to deliver her judgment.

    3. That the Learned Trial Magistrate erred in law and fact in refusing to consider the Appellant's submission that the signature on the agreement is a forgery and not his.

    4. That the Learned Trial Magistrate erred in law and fact in failing to uphold the rule to a fair trial and appreciate that the right to a fair trial is a constitutional right and has a very high value in our judicial system and that it can only be taken away in very exceptional circumstances.

    5. That the Learned Trial Magistrate erred in law and fact in failing to appreciate the history of the suit before rendering judgment.

    6. That the Learned Trial Magistrate erred in law and fact when she disregarded the weighty triable issues raised in the Appellant's response to the claim.

    7. That the Learned Trial Magistrate erred in law and fact by disregarding the weighty evidence raised by the Appellant both in his pleadings, documentary evidence and submissions.

    8. That the entire finding and judgment of the Learned Magistrate is bad and is against the law and against the evidence on record.

4. He asked the Court to allow the appeal and set aside the judgment of the honourable Magistrate court and in lieu thereof give an order that the matter be reinstated for hearing on merit.

5. The Respondent was also dissatisfied with the judgment of the lower Court and appealed to this Court vide a Memorandum of Appeal dated 3rd April, 2024. This appeal was registered as Civil Appeal No E050 of 2024. He listed the following Grounds of Appeal;

    1. That the proceedings were a nullity and offend the provisions of Section 34 of the Small Claims Act which provides that a hearing be conducted.

    2. That parties were not given an opportunity to be heard, cross-examine witnesses, and or each other which goes against the rules of natural justice.

    3. That no hearing took place to warrant the judgment entered.

    4. That the learned magistrate erred in law in the manner she evaluated the evidence of the [Appellant] in the counterclaim this arriving at a wrong decision that the Appellant had proved his claim in the counterclaim.

    5. That the decision of the learned magistrate with respect to the counterclaim is perverse.

6. It asked the Court to allow the appeal and order that the proceedings in the lower Court were a nullity and remit the case to another court for hearing. In addition, he also asked the Court to find that the counterclaim was not proved and that the decision of the Court was perverse.

7. The two appeals; Civil Appeal No E049 of 2024 and Civil Appeal No E050 of 2024 were later consolidated by consent of the parties. The Civil Appeal No E049 of 2024 is the lead file. The term 'Appellant' in this judgment refers to the Appellant in Civil Appeal No E049 of 2024 and similarly for the term Respondent.

8. The Appeal was canvassed by way of written submissions.

Appellant's Written Submissions

9. The Appellant submitted that the judgment should be set aside because there was no trial conducted. He argued that he did not have a chance to examine the Respondent. He argued that he hoped to examine the Respondent during the trial and prove to the trial court that the Respondent was lying to Court. He argued that the magistrate erred by admitting into evidence expert opinions and documents without examining and cross-examining the makers of the said documents.

10. The Respondent argued that the lower Court's judgment should not stand because the proceedings were a nullity and offended the provisions of Section 34 of the Small Claims Act which provides that a hearing be conducted. He submitted that parties were not given an opportunity to be heard, cross-examine witnesses, and or each other which goes against the rules of natural justice. For these reasons, he argued that no hearing took place to warrant the judgment entered.

Issues for Determination

11. Having considered the Grounds of Appeal and submissions, I opine that there is one issue for Determination

    a. Whether the Judgment was properly arrived at.

The Duty of the Court

12. Being a first appeal, the duty of this Court is to review the evidence adduced before the lower Court and satisfy itself that the decision was well-founded. This principle was set out in Selle and another v Associated Motor Boat Company Ltd and others [1968] 1 EA 123 where the Court held:

> " ...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 ..."

13. Both the Appellant and the Respondent submitted that the proceedings were incomplete for the Court to render the judgment as it did. The Appellant submitted that there was no trial conducted that he did not have a chance to examine the Respondent. He also argued that it was wrong for the magistrate to rely on the documents without examining their makers. Similarly, the Respondent submitted that the proceedings went against rules of justice because a hearing was never conducted and parties were not given an opportunity to be heard, cross-examine witnesses, and or each other.

14. This court is being invited to relook at the proceedings and ascertain whether the proceedings before the lower Court were substantially and procedurally proper to warrant the impugned judgment.

15. I have seen the typed proceedings of the lower Court. According to the record, the matter came for hearing on 6th March, 2024. This is what the record reads:

> " 6/03/2024
>
> Before: Hon H. Nyamweya (RM)
>
> Court Assistant- Kathambi
>
> Nelima for Claimant
>
> James Henry- Respondent in Person
>
> Hearing at 10.00am
>
> Nelima: My client sent the Respondent 1,000,000. The Respondent acknowledged the debt through a letter dated 9/2/2022. He paid by way of 2 cheques which bounced. Then we did a demand letter which he was served.
>
> Henry: I deny all that. I will want to see the note. I do not owe him the one million. I also claim 1,000,000 from the claimant which was delivered to claimant through daughter the money was in cash. The daughter took the money to the dad who was in the case the amount 1.4 million.
>
> Henry: I forfeit the 400,000 from the amount of 1.4 million.
>
> Court: Judgment 13/3/2024"

16. I have also read the judgment. The Court says in part: "Upon perusal of all the documents filed in this court by the Claimant, it is without doubt that the Respondent owes the Claimant 1 million." It went on to state that: "The Respondent's counter-claim is supported by the witness statement of the Claimant's daughter which collaborates the Respondent's sentiments in the Counter-claim."

17. From the above extract of the judgment, I can clearly deduce that the lower Court relied on the Respondent's documents in arriving at the judgment. I can also deduce that the Court relied on the statement of the Respondent's daughter in arriving at the judgment. I have relooked at the record to ascertain the basis on which the lower Court relied on the said documents. However, there is no evidence that the parties agreed to adopt their documents without calling their makers.

18. I also note that the Respondent, who was the claimant at the lower Court, did not testify and did not call any witness to produce evidence in support of its case. From the record, the court was addressed by Nelima, who was the Respondent's Advocate. The Appellant argues that this denied him the right to cross-examine the Respondent and question the authenticity of his documents. From a look of the record, the parties did not produce any document as an exhibit to support their case. I thus do not find the basis on which the lower Court relied on the documents she mentioned in the judgment.

19. The Court of Appeal in Charterhouse Bank Limited (Under Statutory Management) v Frank N. Kamau [2016] eKLR, held as follows;

> " First and foremost, there can be no quarrel with the statements in the above judgments that averments by the parties do not constitute evidence. Madan, JA (as he then was) made this

abundantly clear in CMC Aviation Ltd v. Crusair Ltd (No1) [1987] KLR 103 when he stated:

> "The pleadings contain the averments of the three parties concerned. Until they are proved or disproved, or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded on them. Proof is the foundation of evidence.
>
> As stated in the definition of "evidence" in section 3 of the *Evidence Act*, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation, is proved or disproved. Averments are matters, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain unproven... The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents."

20. Kenyan Courts have also underscored the procedure for producing a document as an exhibit. The law is that a document that had not been properly produced and adopted as an exhibit does not have any evidential value. In Robert Ngande Kathathi v Francis Kivuva Kitonde [2020] eKLR, the Court held as follows;

> " In this case, however, instead of producing the exhibits by consent or otherwise, the parties proceeded to file submissions instead. No exhibits were produced before the trial court. The law is clear on how exhibits are to be produced. Even in a full-fledged trial, if documents are simply referred to by witnesses but not formally produced they do not acquire the status of exhibits in the case.
>
> ....In this case no witness was called and no document was referred to. It was not indicated that the parties were consenting to the production of certain documents filed with the pleadings. In fact, no reference at all was made to any such document. The Court was not addressed on what documents to rely on. However, the court relied on the copies of documents filed with the plaint as if there was a consent by the parties that the same were agreed documents. It also relied on submissions of the parties to which no agreed documents were annexed. Submissions, with due respect, do not amount to evidence unless expressly adopted as such. Consequently, in legal proceedings, evidence ought not to be introduced by way of submissions.
>
> 27. It is clear that the manner in which the proceedings before the learned trial magistrate rendered the whole trial a nullity. There was in fact no trial at all as contemplated by the law."

21. Similarly, in Kenneth Nyaga Mwige vs. Austin Kiguta & 2 Others (2015) eKLR where the Court held;-

> " 16. The fundamental issue for our determination is the evidential effect of a document marked for identification that is neither formally produced in evidence nor marked as an exhibit. Is a document marked for identification part of evidence" What weight should be placed on a document not marked as an exhibit"
>
> 18. The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either

party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not became part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence;

21. In Des Raj Sharma –vs- Reginam (1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification; and that the term "exhibit" should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of Michael Hausa –vs- The state (1994) 7-8 SCNJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence.

22. Guided by the decision cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production o the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.

23. In the instant case, we are of the view that the failure or omission by the respondent to formally produce the documents marked for identification being MFI 1, MFI 2 and MFI 3 is fatal to the respondent's case. The documents did not become exhibits before the trial court; they were simply been marked for identification and they have no evidential weight. The record shows that the trial court relied on the document "MFI 2" that was marked for identification in its analysis of the evidence and determination of the dispute before the court. We are persuaded by the dicta in the Nigerian case of Michael Hausa –vs- The state (1994) 7-8-SCNJ 144 that a document marked for identification is not part of the evidence that a trial court can use in making its decision.

24. In our view, the trial judge erred in evaluating the evidence on record and basing his decision on 'MFI 2' which was a document not formally produced as an exhibit. It was a fatal error on the part of the respondents not to call any witness to produce the documents marked for identification......."

22. I am alive to Section 30 of the Small Claims Act which allows the Court to conduct proceedings by documents only. It provides;

"30. Proceeding by documents only

Subject to agreement of all parties to the proceedings, the Court may determine any claim and give such orders as it considers fit and just on the basis of documents and written submissions, statements or other submissions presented to the Court."

23. However, the above Section is not applicable to the current case because, based on the record, the parties did not agree to such.

24. Based on the above authorities, I take the view that the lower Court was wrong to rely on the Respondent's documents when the same had not been produced as exhibits in Court and the parties had not agreed by consent to adopt their documents into evidence. In addition, the Court should not have relied on the statement of the Respondent's daughter in arriving at the judgment because the Appellant did not produce the same as exhibit. The lower Court's reliance on the said documents formed the backbone of the entire judgment so much that the judgment cannot stand without the reliance of the said documents. On this ground alone, I find that the judgment should be set aside.

Disposition

25. The two appeals Civil Appeal No E049 of 2024 and Civil Appeal No E050 of 2024 are allowed and the Judgment of the trial Court delivered on 13th March, 2024 is hereby set aside.

26. The case is referred back to the Small Claims Court for fresh hearing before a different adjudicator.

27. Each party shall bear their own costs of the appeal.

It is so ordered.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 27TH DAY OF FEBRUARY, 2025.

....

C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Ms. Nakandi Advocate for the Appellant