Muge v Kiptum (Civil Appeal E001 of 2023)
[2024] KEHC 3066 (KLR) (22 March 2024) (Judgment)

Neutral citation: [2024] KEHC 3066 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KABARNET

CIVIL APPEAL E001 OF 2023

RB NGETICH, J

MARCH 22, 2024

BETWEEN

RICHARD CHEROGONY MUGE ..... APPELLANT

AND

JOSHUA CHEBURET KIPTUM ..... RESPONDENT

(Being an appeal from the judgement and decree of Hon V.O Amboko (SRM) in Kabarnet Chief Magistrate's court, Civil Suit No. 52 of 2018 delivered on 29th September,2022)

JUDGMENT

1. The Respondent instituted this suit vide a plaint dated 14th May 2018 filed on 15th May, 2018 seeking Kshs 300,000/=plus costs of the suit and interest from the defendant. The plaintiff filed amended plaint dated 23rd April 2021 on 26th April 2021.He amended the claim to kshs 400,000. He avers that he advanced the said amount to the defendant at his request but failed to refund. In response, the Appellant filed his defence dated 25th February, 2020 on 27th February and amended dated 23rd April 2021 filed on 26th April 2021.The defendant denied receiving kshs 400,000 from the plaintiff and went further to state that if money was advanced to him, it amounted to kshs 260,000 which amount has been settled.

2. By judgment delivered on 29th September 2022, judgment was entered for the plaintiff/respondent against the defendant/appellant for kshs 350,000. The Appellants being dissatisfied with the Judgement of the trial court filed this appeal on the following grounds: -

    i. Thatthe learned Magistrate erred in law and fact in finding that the evidence adduced proved that the Defendant owed the Plaintiff Kshs 400,000/= as at 24th October, 2016.

    ii. Thatthe learned Magistrate erred in law and fact in entering judgement for the plaintiff against the defendant for Kshs 350,000/= plus costs and interest from the date of filing the suit.

iii. Thatthe learned Magistrate erred in law and fact in failing to determine that the amount claimed by the Respondent in the plaint varies from the amount claimed by the said Respondent in the amended plaint.

iv. Thatthe learned Magistrate was biased in her findings against the Appellant's suit.

4. The Appellant prayed that the judgement of the trial court be set aside and the Respondent's claim be dismissed with costs and/or an order for retrial. This appeal was canvassed by way of written submissions.

Appellant's Submissions

5. Appellants identified the following as issues for determination: -

i. Whether the amount advanced to the Appellant as per the pleadings dated 14.5.2018 was Kshs. 300,000/=.

ii. Whether the Appellant had paid Kshs. 150,000/=.

iii. Whether the Appellant owes the Respondent Kshs. 800,000/= as per the current Notice to show cause and subsequent warrant of arrest issued against him.

6. The appellant submits that the respondent advanced him Kshs. 190,000/= and together with transaction costs comes up to a total Kshs. 200,000/=. He further stated that he paid back Kshs. 100,000/= in cash and later paid Kshs. 50,000/= through the law firm of Tarus & Co. Advocates who were on record for the Respondent. That upon close scrutiny, the Respondent changed his mind and amended his pleadings after a period of about 5 years from the date of filing his original pleadings to claim Kshs. 400,000/=. The appellant's argument is that he has cleared the money advanced to him.

7. The Appellant further argues that the respondent says the appellant owed him Kshs. 500,000/= which was to attract an interest of Kshs. 70,000/= and was advanced an additional of Kshs. 240,000/=but questions why in the case which he filed on 14.5.2018 he asked for only Kshs. 300,000/= and in cross examination, the Respondent said he had received a total of Kshs 150,000/= from the Appellant. He urged this court to allow this Appeal and set aside the lower court's judgement and the subsequent orders issued thereto.

Respondent's Submissions

8. The Respondent identified the following as issues for determination:-

i. Whether the Appellant owed the Respondent Kshs 400,000/= as per the amended plaint.

ii. Whether the trial court was biased.

iii. Who should pay costs.

9. On whether the appellant owed the Respondent Kshs 400,000/= as per the amended plaint, the Respondent argues that he was granted leave to amend plaint and the Appellant was granted corresponding leave to file defence which he did and upon full trial, the trial court was able to assess the evidence tendered by both parties and make determination. Respondent submit that the appellant does not dispute that a Memorandum of Understanding dated 24th October, 2016 was entered between him and the Respondent as it was done by his advocate and produced by the same Advocate in court as an Exhibit.

10. The respondent further submits that on 18th August 2022, the Appellant issued a cheque of kshs. 571,000/= to the respondent in lieu of payment of the amount owed to the Appellant but the cheque bounced leading to the arrest of the Appellant. That the Respondent agreed with the Appellant in the presence of Advocate Mwaita who was acting for the Appellant at the police station for payment of Kshs 500,000/= waiving interest of Kshs 70,000/=. This led to the parties entering into a Memorandum of Understanding which was drafted by Mr. Mwaita Advocate and was duly executed by both parties.

11. The respondent submit that he was paid Kshs 100,000/= leaving balance of Kshs 400,000/= and he tendered his evidence orally and documentarily that the Appellant owed him Kshs 400,000/= at the time of instituting the suit before he was paid Kshs 50,000/= through the firm of Tarus & Company Advocates leaving a balance of Kshs 350,000/=.

12. The respondent submits that courts have held that parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved and relied on the case of National Bank of Kenya Ltd -vs- Pipe plastics Samkolit (K) Ltd (2002) EA 503 and the case of Pius Kimaiyo Lanqat v Co-operative Bank of Kenya Ltd [2017] eKLR; and submits that no issue of coercion, fraud or undue influence was pleaded by the Appellant during trial and at the time he entered into memorandum of understanding on payment of the debt.

13. In respect to issue of bias by the trial magistrate, the respondent submits that if there was bias, it should have been raised before the trial magistrate and relied on the case of Philip K Tunoi & Another Versus Judicial Service Commission & Another (2016). The Respondent submits that as at 24th February, 2023, the appellant owed the respondent Kshs 724,782/= including interest which has continued to accrue and prayed that the Appellant's appeal be dismissed with costs to the Respondent.

Analysis and Determination.

14. This being the first appellate court I am required to reevaluate evidence adduced before the trial court and arrive at an independent determination while bearing in mind the fact that unlike the trail court, I did not get the benefit of taking evidence first hand and observe demeanor of witness and for this, I give due allowance. This position was held in the case of Selle vs. Associated Motor Boat Co. [1968] EA 123 where the court stated as follows: -

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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 the 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."

15. In view of the above, I have perused and considered evidence adduced before the trial court together with grounds of appeal and submissions filed herein. What I wish to consider is whether the plaintiff proved his case on a balance of probabilities. The respondent had the burden of proving on a balance

of probabilities that he was owed the said amount by the appellant. In Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR the court held as follows:-

> " As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden ... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

16. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 stated that:

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

17. On whether the respondent discharged his burden of prove, record show the respondent testified and availed the appellant's Advocate as Pw2.The respondent stated that he advanced the appellant Kshs 260,000/= and later Kshs 240,000/= on a condition that he refunds with an interest of Kshs. 70,000/=. He said when the money was due for payment, he looked for the appellant who gave him a cheque dated 18th May, of kshs 571,000 but the cheque was dishonored by the bank and the appellant disappeared and was found after 6 months and taken to police station. What followed was negotiation between the appellant and the respondent which led to an agreement which was reduced to memorandum of understanding drafted by appellant's lawyer Mr. Mwaita and executed by both parties. Evidence adduced is that the respondent agreed to forego the interest of kshs70,000 and at the time of executing the memorandum of understanding, he had received kshs 100,000 from the appellant; and after filing this suit he received another 50,000 from the appellant leaving a balance of Kshs 350,000.

18. It is not disputed Mr. Mwaita who was the appellant's Advocate was with him at the police station. He is the one who drafted the memorandum of understanding on 24th October, 2016 between appellant and the Respondent herein and they executed the MOU before Mr.Mwaita Advocate. The appellant who had legal representation voluntarily entered into an agreement with the respondent. He had earlier on also issued a cheque to the respondent for kshs 571,000 but the cheque was not honoured by the bank. The appellant now alleges that he did not owe the respondent. The question is, if indeed the appellant did not owe the respondent any money, why issue a cheque and also go ahead to execute agreement to pay the respondent kshs 400,000.

19. In my view, parties having entered into an agreement, the court has no business interfering with the terms of the agreement between contracting parties unless it is proved that there was fraud or coercion or illegality. In this case, the respondent had charged interest on the friendly loan but at the time of executing the memorandum of understanding, he decided to forego the interest; the appellant drew the cheque voluntarily and also executed the memorandum of understanding voluntarily; there is therefore no illegality in the said transaction neither is there any coercion as the appellant's Advocate was involved all through. In his testimony Mr. Mwaita who testified as pw2 stated that none of the parties was

coerced into signing the agreement. He produced the agreement as Exhibit 2. In view of the above, the amount owing at the time of conclusion of the hearing was kshs 350,000 and the trial magistrate did not err in entering judgment for the said amount.

20. In his defence, the appellant denied owing him Kshs.400,000/-. He stated that he had a debt of Kshs.200,000/= Kshs.190,000/= cash, Kshs.10,000/= fees bringing total to Kshs.200,000/=. He stated that he was to pay back a total of Kshs.260,000/= and he first paid Kshs. 100,000/= which the Plaintiff took from his home and the 2nd instalment of kshs 100,000 was paid at Advocate Chebii's office for onward payment to the plaintiff which Mr. Chebii confirmed he paid; and he gave Kshs.50,000/= to Mr. Kipkulei who is the Plaintiff's advocate and there is a receipt.

21. The appellant alleged that his cheque was forged. He however did not avail any evidence that his cheque was forged nor any report to police, any OB number or any other evidence. The fact that he did prove his allegation leaves the court with no other choice but to believe that he issued a cheque of kshs 571,000/= which bounced. The fact that he went further to voluntarily execute a memorandum of understanding to pay kshs 400,000 and paid kshs 100,000 raises money questions than answers concerning his defence. Upon looking at evidence of both parties, the narrative by the appellant do not add up. It is highly probable that money owing from the appellant to the respondent excluding the amount earlier on charged by respondent as interest is kshs 500,000 and kshs 100,000 and 50,000 having been received by the respondent, the balance is kshs 350,000 as found by the trail court.

22. From the foregoing, I find that the respondent proved that he was owed a balance of kshs 350,000 by the appellant at the close of hearing. The trial magistrate did not therefore err in find so. From the foregoing, I see no merit in this appeal.

23. **Final Orders: -**

    1. This appeal is hereby dismissed.

    2. Costs to the respondent.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 22ND DAY OF MARCH 2024.

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RACHEL NGETICH

JUDGE

In the presence of:

Court Assistant, Sitienei

Mr. Okara for Appellant present

Mr. Kipkulei for Respondent present