



REPUBLIC OF KENYA



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**Mirigo v Mutinda (Civil Appeal E113 of 2023)
[2024] KEHC 6315 (KLR) (24 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6315 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E113 OF 2023**

DKN MAGARE, J

MAY 24, 2024

BETWEEN

SUSAN WAHITO MIRIGO APPELLANT

AND

MOSES MUTINDA RESPONDENT

JUDGMENT

1. The appeal arises from the Judgment of Hon. D.W. Mburu dated 27/4/2023 in Mombasa CMCC No. 1274 of 2019. The appeal was filed vide a Memorandum of Appeal dated 15/5/2023, with the following grounds: -
 - a. That the trial Court erred in law and in fact that considering the circumstances and the manner in which the Appellant and the Respondent were dealing in their business as equal partners, it was unjust to order the appellant to refund the money to the Respondent, following the loss that was incurred in the business.
 - b. The court erred in that its judgment created ambiguity with regard to the commencement date of the payment of interest.
 - c. Trial court erred in that it placed an insurance relationship as between the appellant and the respondent with regard to the trading partnership when there was no evidence to justify such holding.
 - d. That court erred in its judgment which resulted in making the appellant an insurer of the respondent whereas the appellant and the respondent were involved in partnership business where one partner was not an insurer of the other.
 - e. That the trial court erred in that the judgement is totally against the weight of law and evidence as to represent an erroneous judgment of the court.



2. The issues that arise are, whether: -
 - a. A failure to consider that the parties were partners.
 - b. Ambiguity on the payment of interest
 - c. Insurance in a partnership without justifying the holding
3. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
4. In the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
5. The duty of this court on a first appeal was stated in the case of Selle and Another v Associated Motor Boat Company Ltd and Others [1968] 1 EA 123 (CAZ) as follows in the judgment of Sir Clement De Lestang, V-P.,

“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. 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 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 or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v. Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).”
6. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.
7. In the case of Peters vs Sunday Post Limited [1958] EA 424, court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

Submissions

8. The Appellant filed submissions. They stated that the Appellant filed a defence stating that there was a partnership for selling shirts. The Respondent contributed Ksh. 650,000 towards the partnership. The parties made profit and Ksh. 100,000/= was given. They purchased goods worthy Ksh. 1,150,000.



The second venture failed as the goods were rejected citing poor quality. The Respondent turned into the Court and instituted CMCC CRC 2045 of 2015. The same was unsuccessful. The Respondent confiscated all receipts.

9. The Appellants stated that the court interpreted the transaction as our insurance contract. They relied on the case of Pius Kimaiyo Langat v Cooperative Bank of Kenya Ltd (2017) eKLR, for the proposition that it is not the business of the courts to rewrite contract/agreements between the parties and the parties are bound by the terms of their contract unless coercion, fraud or undue influence are specifically pleaded and proved.
10. He stated the parties cannot unilaterally alter terms of the agreements entered into. It was her case that the sum of Ksh. 100,000/= was received as a share of profits. She stated that parties are bound by their pleadings. She relied on the case in the case of Philmark Systems Co. Ltd v Andermore Enterprises [2018] eKLR, Justice T. W. Cherere held as doth; -

“ 18. The next issue for determination is whether respondent can enforce the contract between appellant and Andmore Timber Yard. Halsbury’s Laws of England, 3rd Edition, Volume 8 at paragraph 110 which was quoted extensively in Agricultural Finance Corporation v Lengetia Limited & Jack Mwangi [1985] eKLR states as follows: “As a general rule a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”

11. She relied on the acquittal as evidence that there was business loss. They stated that the fact that receipts were not produced was the only reason the court found the Appellant liable.
12. She raised an issue with the order of the court stated that interest was from the date of filing till payment in full while on another page, interest was as prayed in the plaint. They stated that the court was ambiguous. The plaint prayed for interest from 1/7/2018 while filing was 30/7/19. They stated that the respondent was not entitled to interest from 2015 – 2019.
13. They also questioned the interest from 2019 to 2019 which is not attributed to the Appellant. They rely on the case of Lee G. Muthoga v Habib Zurich Finance (K) Limited & another [2016] eKLR, where the court stated as follows: -

“It would not be fair, in our view, for the appellant to bear the burden resulting from the long delay which has given rise to the interest that has accrued. The delay of 15 years in the disposal of the suit is attributable to the court. An act of the court should prejudice no one (actus curiae reminem gravabit). The learned Judge did not address this issue. In exercising our discretion on the issue of interest, we have to consider what is fair under the circumstances in this case.”



14. It was the appellant's submission that no reasons were given for interest from 1/7/2015 to 30/7/2019 they relied on the case of *Flannery V. Halifax Estate Agencies Ltd* (2000) 1 W.L.R. 337 at 381, Henry LJ stated that;

“The duty is a function of due process, and therefore justice.” It is submitted that constitutional justice imposes a requirement of procedural fairness and consequentially this necessitates a duty to give reasons in the very essence of arbitrariness as one's status could be redefined without adequate explanation as to why this was done. Secrecy creates suspicion, justly or unjustly. This secrecy may also be described as the hallmark of inefficient and corrupt administration. Reasons must therefore be disclosed. Besides, the giving of good reasons would inevitably earn respect for the decision maker.

15. They prayed that the court allows the Appeal.
16. The Respondent filed submission dated 10/1/2024. The Respondent stated that the matter related to a business venture between the appellant and Respondent where they proposed to enter into business to purchase shirts with each party contributing 650,000/= for purchase of shirts. They stated that the shirts were rained on but there were no receipts to prove that the shirts were spoiled.
17. They relied on Section 107 – 109 of the *Evidence act*. He stated that there were no records including tax Revenue. No receipts were produced. The Respondent stated that he was an OCS. He stated that there was no spoiled shirts or receipts. The money was received and not accounted for. They stated that the Appellant had an opportunity to prove but failed to do so. On the issue of duty of the court, the Respondent relied on the authority of *Peters vs Sunday Post Limited* [supra]. They submitted that the amount of Ksh. 650,00/= ought to be paid.

Pleadings

18. The Respondent filed suit on 30/7/2019. The stated that between 19/6/2015 and 1/7/2015 the plaintiff gave the Defendant Ksh. 650,000/= as a contribution to a business venture. They stated that the Respondent was informed that the shirts were bought, sold and the money was not refunded.
19. The Respondent filed defence on 28/1/2020. The Defendant averred that the money was used Ksh. 1,150,000/= to buy shirts but when they reached Garissa, they were rejected as of low quality. She was ordered to pay for transport which wiped out the expected profits and capital. The defendant discovered that the shirts were spoiled and as such the partnership ceased.
20. The defendant stated that he did not commit to pay any monies. The business ceased as a result of the losses.

Evidence

21. The Respondent testified that the Appellant, that she gave Ksh. 650,000/=. He did not get a refund. He denied taking the Receipts or accompanying the Respondent. The appellant testified that they were doing business. The costs of merchandise was 1,350,000/=. She contributed the balance while the Respondent contributed only Ksh. 650,000/=.
22. The goods were said to have been rejected and is in Garissa. There was no payment. The parties had made a first deal and shared profits.
23. The receipts were said to be with the Respondent. They stated that they did not pay taxes. The Respondent took all the documents. The Plaintiff received Ksh. 100,000/= in the first venture.



Analysis

24. The respondent pleaded that this is a case involving a partnership. They invested and the partner absconded with the money. The Appellant stated that she gave 100,00/= profit to the Respondent. The dispute was a word of one partner against another. If I believe both of them, every business requires outlay, licences and stock.
25. The Respondent did not pursue any cross examination on who the purchaser of the rejected goods was. No one partner had a right to keep record for another. If the goods were lost or money stolen, then the same belongs opt the partnership.
26. Order 37 rule 10 of the civil procedure Rules require that a dispute between partners be filed as an originating summons and application for account. The same states as follows: -

“When the existence of a partnership, or the right to a partnership, or the fact of the dissolution thereof, is not in dispute, any partner in a firm or his representatives may take out an originating summons returnable before the judge sitting in chambers against his partners or former partners or their representatives (if any) for the purpose of having the partnership dissolved (if it be still subsisting) and for the purpose of taking the accounts of and winding up such partnership.”
27. The parties being partners cannot sue for refund of money used in business. They can only sue for refund. Money invested in a business is not money had and received. If they have losses, or expenses they must bear both.
28. Without the application for accounts being done, neither of the partners can underwrite the other. The court was plainly wrong to state that the Appellant admitted receiving 650,00/=.
29. My reading of the evidence was that the amount was contributed to the joint business ventures. It cannot be the duty of one equal partner to account and not the other. The documents produced in court were a judgment in the criminal matter and a demand letter.
30. In the judgment annexed the trial court, Hon. M.O. Rabera, found that the state had failed to prove their case, the court found that the money was entirely a business commercial transaction. In the said matter the court found that the Respondent admitted that the money was used to buy merchandise and out of the sales the complainant was refunded some money.
31. The Aspect of refund of some money was not contradicted. By changing this time in the Civil case, the Respondent became a liar. The court could not therefore rely on this evidence, which contradicts a judgment, from which no Appeal had been proffered.
32. Section 46, 47 and 47 A of the [Evidence Act](#) provides as hereunder: -
 - “ 46. judgments, orders or decrees other than those mentioned in sections 43, 44 and 45 of this Act are inadmissible except where the existence of such judgment, order or decree is a fact in issue or is relevant under some other provision of this Act.
 47. Any party to a suit or other proceeding may show that any judgment, order or decree which is admissible under the provisions of this Act and which has been proved by the adverse party, was delivered by a court not competent to deliver it, or was obtained by fraud or collusion.



47A. A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.”

33. The partners must take both profits and losses. Without accounts being taken, they will never know the exact extent of the losses. The goods were said to be in Garissa and spoiled. The Respondent did not demand to have the spoils. Instead he chose the side of full refund. For argument purposes, the Respondent had been given 100,000/= or some money as the criminal court found, where is the rest of the merchandise.
34. There was no agreement that the goods must be sold. They can share the dead stock. It is not too late. To get money, the same was to be through accounts. There was no money to refund what was needed was to dissolve the business and each partner picks their tabs.
35. By ordering a full refund of 650,000/=, the Respondent was to unjustly enrich himself. He had already been paid 100,000/= out of his contribution and profit. It is also noteworthy that even where one of the parties Acts as a managing partner both parties have a responsibility to the business. The managing partner does not insure the losses of others.
36. Strangely, the court stated that the aspect of receipts was never pleaded and as such it is an afterthought. This was an afterthought. The money given was for business. If there was dead stock, it must be accounted for. The Appellant cannot bear for loss of business.
37. In paragraph 5 of the Defendant’s statement the appellant stated as doth:-

“ At the time of buying the plaintiff and I went together to the said go-down at Shimanzi to purchase the shirts and we were issued with payment receipts which the plaintiff took it (sic).”
38. This was filed the same day as the defence. The court thus could not find the defence to be an afterthought. This was an active issue. Further in the criminal judgement which was produced by the respondent, the court found that the goods worthy 1,150,000/= were bought from Mzee Kimeu. He added 300,000/= was refunded to make equal contribution.
39. The respondent confirmed to the criminal trial court that merchandise was bought with such an admission receipts were irrelevant. Section 4 of the [Evidence Act](#) provides as follows: -
 - “(1) Whenever it is provided by law that the court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.
 - (2) Whenever it is directed by law that the court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.
 - (3) When one fact is declared by law to be conclusive proof of another, the court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it
40. The totality of the evidence was that parties were in a joint venture as partners. The respondent joined a business he knew nothing about and lost his fortune. Losses must fall where they fall.



41. The Appellant was under no obligation in law to underwrite the partner's losses.
42. The burden of prove was on the respondent to show the clothes were sold. The respondent had already shown that the shirts were bought. The consequences of the foregoing is that I will allow the appeal and set aside the judgment of the court below and substitute it with an order dismissing the suit in the lower court with costs. The appellant shall have costs of 75,000/= for the appeal.
43. Before I depart I ned to address the issue of interest. The court below had ordered for two sets of: -
- a. As prayed in the plaint.
 - b. With interest from the date of filing suit.
44. It is dangerous precedent to allow the suit as prayed. The court must make a specific finding in the prayers that are allowed. Whether or not the appeal had succeeded the prayer "As prayed in the plaint" is untenable.
45. Further Section 26 of the *Civil Procedure Act* provides as doth:-
1. Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.
 2. Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum.
46. Interest for money had and received is payable from the date of filing suit. In the case of *Mukisa Biscuits Manufacturing Company Limited v West End Distributors Limited (1970) EA 469* which was to the same effect in the following words:
- “The principle that emerges is that where a person is entitled to a liquidated amount or to specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interests from the date of filing suit. Where, however, damages have to be assessed by the Court, the right to those damages does not arise until they are assessed and therefore interest is only given from the date of the judgment.
47. However, Interest on business merchandise that has not been sold or goods that cannot be ascertainable unless goods are sold, is from the date of judgment. Whichever the case the court equally failed to deduct Ksh. 100,000/= already admitted in the said Judicial proceedings. On costs the Supreme case of *The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR*, as follows: -
- “(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating



the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

48. The end result is that the Appal is merited and is accordingly allowed.

Determination

49. The upshot of the foregoing is that I make the following determinations: -

- a. The appeal is merited. Accordingly, I allow the same, set aside the judgement of the Hon. D.S. W. Mburu in CMCC 1274 of 2019 and substitute therewith an order dismissing the suit in the lower court in limine with costs.
- b. Costs of Ksh. 75,000/= to the Appellant herein payable within 30 days, in default execution do issue. Any security deposited be released to the Appellant.
- c. This file is closed.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 24TH DAY OF MAY, 2024.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:-

Murage for the Appellant

No appearance for the Respondent

Court Assistant- Norah

