REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 379 OF 2019

GEORGE MUCKOYA.....APPELLANT

-VERSUS-

ARYA SAMAJ EDUCATION BOARD.....1ST RESPONDENT

P.T. XAVIER.....2ND RESPONDENT

(Being an appeal from the judgment and decree of Honourable D.A. Ocharo (Mr.)

(Principal Magistrate) delivered on 7th June, 2019 in MILIMANI CMCC no. 4107 of 2014)

JUDGMENT

1. At the onset, the appellant lodged a suit against the 1st and 2nd respondents through the plaint dated 3rd July, 2014 and sought for the sum of Kshs.35,000/= plus costs of the suit and interest on the said amount.

2. The appellant pleaded in the plaint that his son, JLM, was at all material times a student at [particulars withhheld] ("the school") of which the 1st respondent is in charge, while the 2nd respondent was at all material times the Principal of the school.

3. The appellant pleaded in the plaint that sometime on or about the 18th April, 2012 he deposited the sum of Kshs.31,000/= into the 1st respondent's Account No. xxxxxx held with Kenya Commercial Bank (KCB) Ngara Branch being payment towards school fees for his son, and further paid the sum of Kshs.4,000/= towards caution money, which sum was refundable.

4. In the plaint, the appellant pleaded that before commencement of the 2nd semester of his son's education, he informed the respondents of his intention to withdraw his son from the school and therefore sought a refund of the abovementioned sums, but that the respondents refused and/or neglected to comply.

5. The respondents entered appearance on being served with summons and filed their joint statement of defence on 4th December, 2014 to deny the averments made in the appellant's claim.

6. At the trial of the suit, the appellant testified whereas the respondents called a single witness.

7. Upon close of submissions, the trial court by way of the judgment delivered on 7th June, 2019 dismissed the appellant's suit with costs but ordered that the caution money amounting to the sum of Kshs.4,000/= be refunded to the appellant.

8. Being aggrieved by the dismissal order, the appellant has now sought to have the same set aside by filing the memorandum of appeal dated 5th July, 2019 featuring the following grounds:

i. THAT the learned trial magistrate erred in law and fact by making a finding that the respondents herein proved their case on a balance of probabilities.

ii. THAT the learned trial magistrate erred in law and fact by making a finding that the contract between the appellant and the 1st respondent was enforceable by law.

iii. THAT the learned trial magistrate erred in law and fact by considering and giving undue weight on the hearsay evidence of the respondents herein as against the strength of evidence produced by the appellant.

iv. THAT the learned trial magistrate erred in fact by finding that the sum deposited by the appellant herein in the 1st respondent's account was for school fees.

v. THAT the learned trial magistrate erred in fact and in law by ignoring the appellant's evidence and submissions.

vi. THAT in all the circumstances of the case, the findings of the learned trial magistrate are not supported by the evidence adduced in court.

9. The appeal was canvassed through written submissions.

10. In his submissions, the appellant argues that since his son declined to continue with his education at the school, this frustrated the contract between the appellant and the respondents, and hence the appellant was entitled to a refund of the sum of Kshs.31,000/=.

11. The appellant therefore faulted the trial court for not finding his favor in relation to the agreement between the parties and for declining to award him the abovementioned sum, adding that the respondents had unjustly enriched themselves at his expense.

12. To buttress his argument above, the appellant referred this court to the case of **Stephen Karanja Kibuku v Safaricom Limited [2018] eKLR** where the court held that:

"The principle of unjust enrichment requires that a party has received a benefit unjustly, and such party is required to make restitution to the other party. It presupposes that-

a) A party has been enriched by the receipt of a benefit

b) That he has been so enriched at the expense of the giver and

c) That it would be unjust to allow him to retain the benefit."

13. In closing, the appellant urges this court to find that the respondents' refusal to refund the sum of Kshs.31,000/= amounts to unjust enrichment, and to set aside the judgment delivered by the trial court.

14. The respondents by way of their joint submissions contend that courts are not permitted in ordinary circumstances to rewrite contracts entered into between parties and hence the appellant is estopped from claiming a refund of fees already paid, pursuant to the agreement entered into between him and the school.

15. To support their arguments above, the respondents have cited *inter alia*, the case of **Serah Njeri Mwobi v John Kimani Njoroge [2013] eKLR** where the Court of Appeal rendered itself thus:

"The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person…"

16. The respondents further deny the allegations of unjust enrichment and submit that the appellant was at all material times aware of the policy on school fees.

17. I have considered the rival submissions and authorities cited on appeal. I have similarly re-examined the pleadings, material and evidence which was tendered before the trial court.

18. It is noted that the appeal essentially lies against the decision by the learned trial magistrate to dismiss the appellant's claim. I will therefore address the six (6) grounds of appeal contemporaneously.

19. The appellant who was PW1 adopted his executed witness statement as evidence and produced his list and bundle of documents as exhibits.

20. In cross-examination, the appellant testified that his son got admitted in the school in the year 2011 and that he signed a declaratory form stating that school fees was non-refundable and that he voluntarily withdrew his son from the school following a change in the school syllabus.

21. Martin Nyagaya who was DW1 equally adopted his signed witness statement as evidence and produced the respondents' list and bundle of documents as exhibits and stated that he was the Deputy Principal of the 1st respondent.

22. In cross-examination, it was his testimony that the witness that caution money is refundable upon production of the original receipt within 3 months of leaving the school.

23. It was also the testimony of the witness that in the instance of the appellant's son, the school fees in the sum of Kshs.31,000/= was not refundable.

24. In his judgment, the learned trial magistrate reasoned that the appellant withdrew his son from the school on his own volition and upon previously paying school fees for the 2nd semester, and hence the respondents could not be faulted.

25. The learned trial magistrate also reasoned that the appellant was aware of the 1st respondent's guidelines regarding school fees and hence he could not turn back and claim a refund on the school fees already paid.

26. In the circumstances, the learned trial magistrate dismissed the appellant's claim but found that the appellant was entitled to a refund of the sum of Kshs.4,000/= being the caution money.

27. The law is clear that the onus is on a plaintiff to prove its case against a defendant, whether or not the claim is defended. In this respect, I turn to the proviso of **Section 107** of the **Evidence Act** which stipulates that a person who desires judgment on liability must prove that the facts pleaded exist.

28. Upon my re-examination of the pleadings and evidence, it is not in dispute that the appellant's son was at all material times a student at the school, up until his withdrawal from the school in 2012 before the commencement of the 2nd semester.

29. Upon my further re-examination of the pleadings and evidence, it is also not in dispute that the appellant had previously paid the sum of Kshs.31,000/= and it is apparent that the said sum was for all intents and purposes school fees for the 2nd semester of the appellant's son's 2nd semester education.

30. Upon my study of the record, I support the learned trial magistrate's finding that there was credible evidence to show that the appellant was aware as to the non-refundable nature of the school fees, once paid.

31. Further to the foregoing, I took into account the oral testimony by the appellant that he had signed a declaration form to that effect, which supports the above position that he was at all material times aware of the policies and guidelines of the 1st respondent.

32. In the circumstances, I concur with the argument brought forth by the respondents and restated by the learned trial magistrate that the appellant was and is estopped from claiming a refund of the school fees. I will borrow from the case of **Serah Njeri Mwobi v John Kimani Njoroge [2013] eKLR** quoted in the respondents' submissions, in which the Court of Appeal succinctly stated that:

"The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person…"

33. Upon my perusal of the record, I concur with the reasoning by the learned trial magistrate that in the circumstances, the appellant was however entitled to a refund of the caution money since the same was refundable, going by the guidelines established by the 1st respondent.

34. In view of the foregoing circumstances, I am satisfied that the learned trial magistrate adequately considered the evidence and submissions which were placed before him and arrived at a reasonable finding. I therefore concur with the finding of the learned trial magistrate that the appellant did not prove his case against the respondents on a balance of probabilities.

35. The upshot therefore is that the appeal is hereby dismissed for want of merit, with costs to the 1st and 2nd respondents.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 1ST DAY OF APRIL, 2022.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the 1st and 2nd Respondents