Case Number:	Civil Appeal 145 of 2002
Date Delivered:	03 Nov 2006
Case Class:	Civil
Court:	Court of Appeal at Nyeri
Case Action:	Judgment
Judge:	Samuel Elikana Ondari Bosire, Emmanuel Okello O'Kubasu, William Shirley Deverell
Citation:	Johnson Ndegwa Kanyuira & 3 others v Nyambura Maina & 3 others [2006] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	H.C.C.A NO. 38 OF 1997
Case Outcome:	Appeal dismissed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL OF KENYA

AT NYERI

CIVIL APPEAL 145 OF 2002

JOHNSON NDEGWA KANYUIRA & 3 OTHERS…….....…….APPELLANTS

AND

NYAMBURA MAINA & 3 OTHERS…….....….RESPONDENTS

(Appeal from judgment of the High Court of Kenya at Nyeri (Juma, J) dated 18th October 2001

in

H.C.C.A NO. 38 OF 1997)

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JUDGMENT OF THE COURT

In this second appeal, there are three appellants, Johnson Ndegwa Kanyuira (1st appellant), Grace Wangari (2nd appellant), Purity Ngima (3rd appellant) and Isabella Wairimu Ndegwa (4th appellant). They were the defendants in a suit commenced by plaint against them as officials and members of a group known as Mungi Nyakinyua Women Group, by Nyambura Maina (1st respondent), Lucy Wangari Ndegwa (2nd respondent) and Wairimu Maina (3rd respondent) as chairlady, secretary, and treasurer of Mungi Nyakinyua Poultry Women Group.

The plaint made a liquidated demand of Kshs. 50,000/- interest thereon at 23 per cent from 1st March 1994 until payment in full, General damages and costs of the suit. The suit started before the Resident Magistrate's Court at Karatina, and upon trial judgment was entered for the plaintiffs as prayed. General damages were assessed at Kshs. 10,000. Upon computation of interest the total decretal sum came to Kshs. 140,400/-. The costs awarded came to Kshs 21,830, inclusive of disbursements. The appellants were dissatisfied with the decision and appealed against it to the superior court. Eight grounds of appeal were preferred, namely;

"(1) The learned trial Magistrate erred in fact by finding the appellants to have been formed on 25th February, 1999.

(2) The learned trial Magistrate erred in fact and in law by leaving out major issues for determination.

(3) The learned trial magistrate erred in fact and in law in finding the amount in question to have been a loan as opposed to a grant.

(4) The learned trial Magistrate erred in law in not seeking evidence from the donor of the said cheque.

(5) The learned trial Magistrate erred in law and in fact by upholding the evidence of Joseph Muchira Ng'ang'a as against that of Johnson Ndegwa Kanyuira.

(6) The learned trial Magistrate erred in law and in fact by not appreciating the actual names on the cheque vis-a-vis those of the litigants.

(7) The learned trial Magistrate erred in law and in fact by finding the appellants to have acted in bad faith.

(8) The learned trial magistrate erred in law and fact by excluding and/or downplaying documentation evidence as opposed to oral evidence."

From the foregoing grounds of appeal it is quite clear that the appeal was largely challenging findings of fact. That being the case we consider it essential to set out the background facts in detail.

Mungi Nyakinyua Poultry Women Group to which the respondents are officials was formed sometime in 1983. In or about 1988, the group sought for and was granted financial assistance by a Canadian donor agency through the Kenya National Farmers Union (KNFU) amounting to Kshs. 50,000-/-. Payment was to be by cheque and although the cheque was made for that purpose, it did not reach that group. Instead it was received by the appellants. This is admitted in a joint written statement by the 2nd, 3rd and 4th appellants but the written statement of defence is silent on whether they had applied for any financial assistance from the Canadian donor agency.

When eventually the respondents learnt that the appellants had received a cheque which, in their view, was meant for them, they made a written demand for the return of the money. The appellants refused to give up the money and thus provoked the suit against them as earlier on stated.

The main, if not the only issue, before the trial court, was whether the disputed cheque was meant for the respondents or the appellants. The respondents averred in their plaint, *inter alia*, that the appellants fraudulently converted the cheque to their own use by forming a women's group with a similar name as their own, an allegation the appellants deny. The respondents called five witnesses in support of their case, and the appellants called two, the 1st and 2nd appellants.

In his judgment the trial Magistrate framed a two-pronged issue, namely, whether the appellant's group was formed "with the aim of intercepting the cheque of Kshs. 50,000 and who of the two groups is entitled to the Kshs. 50,000." In his consideration of the evidence he found as fact that the appellants' group was formed in a hurry, that it was formed about the time the cheque was ready for delivery, that it had among its membership names of people who were not aware of the group's existence, and who had not been consulted about its formation, that some of the committee members were fictitious, that the 2nd appellant who was said to be the chairperson of the group did not know some of the named committee members of her group, that the 1st appellant, a former employee of KNFU, used his knowledge of the operations of that organization to plan and execute the fraud against the respondent, and that the totality of the evidence pointed to the fact that the appellants' group was formed with a view to intercepting the cheque in question which, in his view, was meant for the respondents' group. He then proceeded to give judgment for the respondents.

The superior court (Juma, J) on first appeal framed only one issue, namely, which of the two women groups was entitled to the cheque in dispute. The learned Judge, in a very short judgment dismissed the appellants' appeal on the following terms:-

"I have carefully gone through the proceedings of the lower court and the judgment of the learned Senior Resident Magistrate and I am satisfied that on the evidence adduced before the trial court the learned Magistrate had no alternative but to arrive at the decision that he made. He fully analyzed the evidence of the appellant's witnesses and in my opinion came to the right conclusion in giving judgment to the respondent herein. The upshot is that the appeal lacks merit and the same is dismissed with costs."

In **Selle and Another v Associated Motor Boat Company Ltd & Others [1968] EA 123** Sir Clement De Lestang v-P of the Court of appeal for East Africa, authoritatively stated;

" An appeal to this Court from a trial by the High Court is by way of a 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 demeanor of a witness is inconsistent with the evidence in the case generally Abdul Hameed Saif v Ali Mohamed Shokin (1955) 22 EACA 270)"

These words apply with equal force to a first appeal to the High Court. With due respect to Juma, J. he did not give due scrutiny of the evidence, and if he did he did not demonstrate it. It is not enough to state that one has considered the evidence without showing which evidence he has considered to justify a decision the court has come to or as the basis for affirming the decision of a lower court. No wonder the appellants complain in the first ground of appeal that the Judge's evaluation of the evidence overlooked the fact that the cheque in question was not made specifically in the names of the respondents' group.

The appellants' other grounds of appeal are;-

"(2) The learned Judge erred in law in not appreciating that the respondents in this case could not have a claim known in law against the appellants and the findings of the Resident Magistrate and the learned Judge were therefore erroneous.

(3) The issue as to whether the appellant was registered and when he(sic) was registered and whether he(sic) was a member of K.N.F.U. was irrelevant to this case and it made the learned Judge come to a wrong decision in his judgment.

(4) The judgment and orders made by the learned Judge were not supported by the evidence adduced in the lower court."

Mr Mukunya for the appellant, in his submissions before us, urged the view that on the basis of the evidence before the trial court no reasonable tribunal would have found for the respondents. In his view no cheque was ever made in favour of the respondents' group.

Miss Wangari, for the respondents was of a contrary view. She submitted before us that, the evidence overwhelmingly showed that the cheque was made in favour of the respondents' group.

It was common ground that the respondents' group had been in existence for long, was known by the appellants, the local Assistant **Chief and the K.N.F.U which is the organization which made out the cheque in dispute. The appellants' organization on the other hand was unknown. It comprised of the 1st appellant's wife who is the 4th appellant, his daughter, who is the 2nd appellant, and daughter in law, the 3rd appellant. The composition of the leaders of the appellants' group clearly shows that it was a family group. It was also**

stated, although the 1st appellant denied it, that the 1st appellant while he was still working for K.N.F.U, had assisted the respondents to apply for the financial assistance from the Canadian donor agency, but when the cheque eventually came, he had ceased working for KNFU. The trial Magistrate considered this aspect, and came to the conclusion that the 1st appellant used the information he acquired while working for KNFU, to plan the interception of the cheque in dispute. On the facts and circumstances of this case he was entitled to come to that conclusion. How coincidental was it that the appellants' group surfaced when the cheque was due for payment"

Besides considering the fact that the 2nd appellant, as chairperson of her group, admitted she did not know two ladies known as Alice Nyambura and Esther Murugi, who were named as committee members of her group, is evidence that the group was not genuine. She did not also have any document to show her group had applied for financial assistance.

Lastly, Samuel Mathatwa Kibachio (PW2), an employee of K.N.F.U, as at the time the cheque was made, testified that he knew as a fact that the cheque was made in favour of the respondents' group. There was no clear evidence to controvert that testimony. Consequently the respondent was the group for which the cheque was made. They had a right to it.

In view of the foregoing, the fact that the cheque as drawn did not include all the names of the respondents' group is neither here nor there. The names used were sufficiently descriptive of the respondents' group.

In the result, notwithstanding what we said about Juma J's handling of the appellants' first appeal, we find no basis for interfering with the superior court's decision. The decision was based on evidence which was before it as we have endeavored to demonstrate, and in the result we dismiss the appellants' appeal with costs.

Dated and delivered at Nyeri this 3rd day of November, 2006.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.O. O'KUBASU

…….

JUDGE OF APPEAL

W.S. DEVERELL

……...

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR