Mutunga v Letshego Kenya Limited (Civil Appeal 177 of 2021)
[2024] KEHC 9651 (KLR) (31 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9651 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL 177 OF 2021

BM MUSYOKI, J

JULY 31, 2024

BETWEEN

ABUBAKAR JUMA MUTUNGA ..... APPELLANT

AND

LETSHEGO KENYA LIMITED ..... RESPONDENT

(Being an appeal from judgement and decree of Honourable Hon. M.E. Analo RM dated 29-09-2021 in Machakos Chief Magistrate Court civil case no. 271 of 2019)

JUDGMENT

1. The respondent filed a suit in the lower court against the appellant through plaint dated 9-05-2019 which was later amended vide amended plaint dated 25th October 2019. The prayers in the amended plaint were;
    a. The defendant be compelled to render accounts for the loan advanced to the plaintiff and the payment made to date.
    b. Refund of;
        i. Kshs 9,684.00 being the over payment in the loan account.
        ii. Kshs 12,000.00 that was paid for the transfer of motor vehicle registration number KBD 259Q.
        iii. Kshs 143,600.00 being the deposits held by the defendant in his saving account.
    c. Cost of the suit.
    d. Any such other or further relief as this honorable court may deem fit and just to grant.

2. The defendant filed defence dated 14th November 2019 denying liability as claimed. The matter went for full trial with the plaintiff testifying and respondent calling one witness. In its judgement dated 29-09-2021, the court found that the appellant had not proved his case on a balance of probabilities and dismissed the suit with costs.

3. The appellant has brought this appeal raising 7 grounds which he has listed as;

    1. That the learned magistrate erred in law and fact by misapprehending the issues for determination.

    2. The learned magistrate erred in law and in fact by holding that the appellant did not re-schedule the loan repayments.

    3. The learned magistrate erred in law and in fact by holding that the appellant's request for rendering of accounts was only meant to sanitize default.

    4. The learned magistrate erred in law and in fact by making a finding that the appellant did not over pay his loan.

    5. That the learned magistrate erred in law and in fact by holding that the appellant was not owed a refund for payment of transfer of the motor vehicle registration number KBD 259Q.

    6. The learned magistrate erred in law and in fact by including and making determinations on matters that were neither pleaded nor evidence tendered.

    7. The learned magistrate erred in fact and in law by holding that the appellant did not prove that he had savings with the respondent.

4. This being a first appeal, I am required to re-examine and re-evaluate the evidence produced in the lower court and come into my own independent conclusion. I must however remind myself and bear in mind that unlike me, the lower court had an advantage of seeing the witnesses and taking their evidence first hand. The court had the advantage of observing the demanour of witness and in the circumstances, I must be careful where I am faced with matters of discretion. In that case, I will reproduce the evidence of the witnesses as hereinbelow.

5. The plaintiff testified 7-10-2019. He adopted his statement filed on 21-09-2019 and told the court that he was a client to the respondent and he used to save money with the respondent. In 2017, he applied for a loan of Kshs 450,000.00 which was approved and disbursed. He claimed that he was to repay the loan by monthly installments of Kshs 20,000.00. The appellant alleged that he paid the installments until May 2017 when he ran into financial difficulties and approached the respondent for rescheduling of the loan and the branch manager agreed to him paying a sum of Kshs 10,000.00 per month. He also told the court that he requested that a sum of Kshs 100,000.00 he had saved with the respondent be used to offset the loan. He told the court that he proceeded to pay the loan and remitting weekly savings from 23-05-2017 to 10-02-2018. The appellant added that he had discovered that the respondent had not captured his savings of Kshs 143,00.00.

6. In cross examination, he acknowledged that the loan was to be paid in 24 months and that he was required to pay Kshs 28,073.82. He alleged that he did not know the amount of interest as he acted on trust. He stated that he never defaulted but in the same line he said that he never paid Kshs 28,073.82 as stipulated in the loan agreement. He went further to say that he requested for statement but he was never supplied with the same. He confirmed that his request for statement were not in writing. He said that he was to be refunded Kshs 12,000.00 which was for transfer of the log book because it was the respondent who was to pay for the same. The motor vehicle was to be used as security. He

maintained that there was a payment of Kshs 10,000.00 which was not reflected in the statement of account supplied by the respondent. The appellant produced the following documents as his exhibits;

a. His letter dated 15-05-2020.

b. Demand letter dated 23-11-2017.

c. Letter dated 21-11-2017.

d. Loan statement dated 24-07-2019.

e. Mpesa statement extract.

f. Loan application form.

7. One Winnerrohi Wafula testified on behalf of the respondent. She stated that she was the legal officer of the respondent. She confirmed that the appellant had been advanced a loan of Kshs 450,000.00. As security for the loan, the appellant provided motor vehicle registration number KBD 259Q, a fridge, sofa set and wall unit. According to this witness, the appellant started defaulting immediately after the loan was disbursed sometimes paying as little as Kshs 4,000.00. Due to the defaults, the respondent issued the appellant with a 14 days' repossession notice which he ignored.

8. On 25-11-2018, the respondent instructed Chador Auctioneers to recover the outstanding loan by disposal of the respondent's chattels through a public auction. It was the witnesses' evidence that as at 24-07-2019, the appellant had an outstanding loan of Kshs 52,526.02 which continued to attract interest. He added that the respondent had complied with Movable Security Rights Act, 2017. He produced the following documents as his exhibits;

a. Disbursements instructions dated 9-11-2025.

b. Loan counter summary dated 19-11-2015.

c. Appraisal form dated 2-12-2015.

d. Loan application loan dated 7-12-2015.

e. Guarantee and undertaking agreements.

f. Repossession notice dated 19-10-2018.

g. Letter of instructions dated 19-10-2019

h. Loan statement dated 24-07-2019.

9. In cross examination, he confirmed that the appellant's exhibit number six showed that the appellant had savings of Kshs 89,900.00. He stated that the appellant was granted the loan by virtue of being a member of Muungano Self Help Group. He acknowledged that some Kshs 10,000.00 shown in appellant's exhibit 5 was not reflected in his loan statement. He also said that the appellant had savings of Kshs 76,000.0 as at 25-01-2017 and also that appellant's exhibit number 6 confirmed that the appellant had shares of Kshs 59,900.00 as at November 2015. He added that the loan stood at Kshs 66,155.00 as at 19-10-2018. He denied that there was a request by the respondent for transfer of the respondent's shares from Muungano Self Help Group to pay the loan. He stated further that the respondent was still holding the logbook for the motor vehicle and that no money was received for registration of the security but the same was deducted from the loan. He confirmed that the respondent did not register the security despite deducting Kshs 4,660.00 for the exercise. He was re-examined and stated that the respondent utilised the appellant's savings to offset the loan which was shown in the

loan statement as Kshs 20,000.00 on 25-01-2017, Kshs 30,000.00 on 25-04-2017 and Kshs 26,100.00 on 30-06-2017.

10. The appellant did not file submissions despite directions given by the court on 6-03-2024 and 7-06-2024. I have carefully read the proceedings recorded in the lower court, pleadings of the parties and submissions of the respondent dated 16-06-2024. Having done so, I have formed opinion that the main issue for consideration in this appeal are whether or not the appellant had overpaid the loan as alleged and if so by how much? This issue will settle all the others. In faulting the magistrate, the appellant has raised the grounds shown above. In answering the issue, I will deal with the grounds as listed above against the evidence and findings of the magistrate.

11. The appellant has alleged that the learned magistrate erred in law and fact by miscomprehending the issues for determination. The appellant did not tell this court in which way the trial court miscomprehended the evidence. He has also not identified which part of evidence the honourable court miscomprehended. I have not seen any part of the judgment that went outside or misapplied evidence produced by the parties. In my opinion, the trial court's analysis of the evidence was sound and comprehensive. The first ground of appeal has no merit.

12. The appellant has also faulted the magistrate for finding that he did not reschedule the loan. The appellant is on record saying that he wrote to the respondent requesting for rescheduling of the loan. The appellant alleged that he agreed with the branch manager one Mr. Amos to have his loan rescheduled to payment of installment at Kshs 10,000.00 per month. He relied on a handwritten letter dated 15-05-2017 addressed to the respondent's branch manager. I have read this letter which is clearly asking for transfer of savings of Kshs 100,000.00 to payment of the loan. As properly observed by the trial court, there is no evidence that this letter was received by the respondent. There is no response to the same. When pressed about it, the appellant alleged that the arrangement was oral. I decline to take that explanation. A loan reschedule cannot be done that casually. The loan was a contract which by virtue of parole evidence rule cannot be amended, varied or changed by oral arrangements. The parole rule was restated in the case of Fidelity Commercial Bank Limited vs Kenya Grange Vehicle Industries Limited (2017) eKLR where the Court of Appeal held that;

> 'So that where the intention of the parties has in fact been reduced to writing, under the so called parole evidence rule, it is generally not permissible to adduce extrinsic evidence, whether oral or written, either to show the intention, or to contradict, vary or add to the terms of the document, including implied terms.'

13. The magistrate declined to grant an order for giving accounts. The appellant has raised this as his 3rd ground of appeal. I have noted that the appellant claimed that he did not have the statement of his loan by the time he filed the suit. I have also noted that his further list of documents dated 20-11-2019 has the loan statements dated 24-07-2019 and 15-10-2016. The same list has his Mpesa statement for the period between 1-06-2017 and 2-11-2017. The appellant has not stated the quarrel he had with the loan statement save for a transaction of Kshs 10,000.00 for 8-09-2017 which the respondent acknowledged was missing. He has not identified any other problem with the two statements. He has not laid basis for provision of accounts and what nature of entries he disputed other than the one mentioned above.

14. This court does not see the basis for issuance of an order for provision of accounts without the appellant having laid basis for the same. In any event, what purpose would an order for provision of accounts have different from the statement already produced by both parties which were not disputed? I may not agree with the statement by the magistrate that the appellant filed the suit in order to sanitise his default but I hold the position that the prayer for accounts was not justified. The difference between my position in this judgment and that taken by the magistrate is merely a matter of choice of words.

15. I do acknowledge that a debtor is entitled to accounts of his transactions with a lender but there must be a basis for a court order to that effect. The respondent was not under duty to supply accounts other than what has been produced in this court. I share the same position with my brother Justice Anuro in Aggarwal vs NCBA Bank Kenya PLC & Another (2024) KEHC 3419 (KLR) where the plaintiff had prayed for provision of account. The Honourable Judge had the following to say about the prayer for accounts;

> 'Regarding the prayer that the court do issue an order that the 1st defendant provides an account and/or statements of account for the loan/escrow account, the 1st defendant has already attached the relevant bank statement to its replying affidavit and I therefore believe that prayer has been addressed and is no longer necessary.'

16. The appellant had claimed that he had overpaid his loan by Kshs 9,684.00 and prayed for refund of the same. Apart from making that general statement in the plaint, there was no evidence led to that effect. The appellant himself produced two loan statements in his further list of documents dated 20-11-2017. The first statement is dated 24-07-2019 which shows that as at 25-11-2018, the loan balance was Kshs 52,526.02. The second statement shows that the loan balance as at 15-10-2016 was Kshs 310,038.00. These were his own documents which he did not challenge during the hearing. The loan balance shown in the first statement is equivalent to what the respondent's witness told the court.

17. The mpesa statement produced by the appellant proves nothing more than the payments he paid between 1-06-2017 to 2-11-2017. He has not shown any payment he made after 25-11-2018 which is the last date of the last entry of the first loan statement. On this issue, the trial court said that no evidence had been adduced by the appellant to illustrate that he did an overpayment of the stated amount and in absence of such proof, the appellant's claim had to fail. I can't agree more. I see no reason to upset this finding.

18. In the fourth ground of appeal, the appellant complaints that the magistrate erred by holding that the appellant was not owed a refund for payment of transfer of the motor vehicle registration number KBD 259Q. On the issue, the trial court held that since the plaintiff was the one seeking loan facility, he was under obligation to provide security. I see no fault in such finding. It is acknowledged by the respondent that the said amount was debited to the loan account being the cost of regularizing the security. The appellant testified that the security was in the name of a third party and in order to have it transferred to the guarantor for purpose of qualifying to be security, there was bound to be expences. All loans granted by financing institutions have administrative costs and there was nothing wrong with the respondent charging the same. As rightly observed by the trial court, the appellant did not produce any evidence to show that he was entitled to the refunds. In any event, even if the appellant was entitled to this refund, the same was way below what he owed the respondent and as such the order for refund was not tenable.

19. The appellant has also complained that the magistrate included in his issues for consideration matters which had not been pleaded or evidence for the same produced. I have struggled to make meaning out of this ground in vain. The appellant chose to leave the appeal to the court for consideration. He decided not to prosecute it. I say so because he failed to file his submissions. Perhaps if he did file, he would have assisted the court to identity the extraneous issues the court had introduced. Even if the trial court considered extraneous issues, which I don't think it did, the same can only be points for consideration if such consideration would have effect or impact on the outcome of the court's decision. There is nothing to show that the court's judgment was influenced by any extraneous matter. This ground of appeal fails.

20. The last ground raised by the appellant is that the court erred when it found that he had not proved that he had savings with the respondent. The magistrate held and I quote 'the plaintiff failed to adduce evidence to illustrate that he had savings with the defendant herein.' I agree with the trial court that the appellant did not lead any evidence that he had savings with the respondent. This is not the same as saying that the appellant did not deposit or pay savings to the respondent. The appellant may not have led evidence to prove that he had savings with the respondent but the respondent's witness is on record admitting that the appellant had savings. The question is, were there any savings owed to the appellant for refund as at the time of the trial?

21. The respondent's witness told the trial court that the savings the appellant had with the respondent was used to offset the loan arrears. I have gone through the appellant's loan statement and it is clear to me that the Kshs 76,000.00 was liquidated to reduce the loan as follows; Kshs 20,000.00 on 25-01-2017, Kshs 30,000.00 on 25-04-2017 and Kshs 26,100.00 on 30-06-2017. That being the case, it is my finding that the appellant was not entitled to the savings. He did not prove savings of Kshs 143,000.00 and those admitted by the respondent were lawfully utilized to reduce the loan. I see no reason to disturb this particular finding.

22. The totality of the above is that I find no merits in the appeal and proceed to dismiss it with costs to the respondent.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY 2024.

B.M. MUSYOKI

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JUDGE OF THE HIGH COURT

Judgement delivered presence of Mr. Mr Kisa for the respondent and in absence of Counsel for the respondent.