



REPUBLIC OF KENYA



KENYA LAW
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**Otieno v Odhiambo (Civil Appeal E095 of 2022)
[2024] KEHC 15029 (KLR) (25 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15029 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E095 OF 2022
RE ABURILI, J
NOVEMBER 25, 2024**

BETWEEN

PHILIP OTIENO APPELLANT

AND

DAVID ODUOR ODHIAMBO RESPONDENT

*(Appeal arising from the judgment and decree in Kisumu CMCC No. 35
of 2020 delivered on 10th November, 2021 by Hon, W.K.Onkunya, SRM)*

JUDGMENT

Introduction

1. The appellant was sued by the respondent vide a plaint dated January 30, 2020 for the sum of Kshs. 2,700,000 together with interest from the date of judgement being funds he allegedly advanced to the appellant to facilitate the completion of periodic maintenance of roads which the appellant had been awarded.
2. The respondent averred that he initially advanced the appellant Kshs. 2,000,000 and later topped up with Kshs. 700,000 at the insistence and request of the appellant/defendant. It was the respondent's case that it was a term of their agreement that the appellant would refund the said money upon completion and payment of the said project but not less than four months from the date of advancement of the said loan.
3. The appellant filed a statement of defence dated 12th February 2020 denying all the respondent's averments.
4. In her judgement the trial magistrate found that the respondent had proved his case on a balance of probabilities and was thus entitled to Kshs. 2,000,000 but that he had failed to prove that he was entitled to Kshs. 700,000.



5. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 11th October 2022 raising the following grounds of appeal;
 - a. The learned magistrate erred both in law and in fact in failing to take into account the facts and circumstances of the alleged agreement.
 - b. The trial court failed to take into account the standards of proof in a civil suit that made him arrive at a skewed decision contrary to the evidence on record.
 - c. The trial court failed to appreciate and take into account the principles in awarding damages.
 - d. The award in damages by the trial court was/is manifestly and inordinately excessive on account of the evidence on record.
 - e. The judgement, findings and award by trial magistrate is against the weight of the evidence on record.
6. The parties filed written submissions to canvass the appeal and both complied with the Court's directions.

The Appellant's Submissions

7. The appellant submitted that Order 21 Rule 12 of the Civil Procedure Rules 2010 grants the court power to allow a judgement debtor pay the decretal sum by instalments and that such discretion must be exercised judiciously as was held in the case of *Keshval Jethabhai & Brothers Ltd v Saleh Abdul* [1959] EA 260.
8. It was his submission that he had shown a sign of good faith in settling the decretal sum and exhaustively explained why he was unable to pay the decretal sum at once. The appellant proposed to liquidate the debt in monthly installments of Kshs. 50,000 and an initial lump sum deposit of Kshs. 100,000 until final settlement.

The Respondent's Submissions

9. The respondent submitted that he had proved his case on a balance of Probabilities and that the trial court was right to hold as such.
10. It was submitted that the instant appeal lacks merit and the same be dismissed with costs and the Trial Court's judgment and decree issued on 10th November 2021 be upheld.

Analysis and Determination

11. This Being a first appeal, the court relies on a number of principles as set out in *Selle and Another v Associated Motor Boat Company Ltd & others* [1968] 1EA 123:

“...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 into account of particular circumstances or probabilities materially to estimate the evidence.”



12. Having considered the pleadings herein, the submissions filed by the parties and the record herein, it is my view that the issue for determination is whether this court ought to set aside the judgement of the trial court passed on the 10th November 2021.
13. The suit was civil in nature. Sections 107, 108 and 109 of the *Evidence Act*, Cap. 80 of the Laws of Kenya places the incidence of burden of proof on the party which desired the court to find in its favour. That burden was on the Respondent.
14. In discharging the said burden, the Respondent was called upon to prove his case on a balance of probabilities.
15. The case before the trial court was as follows: The respondent testified that he had lend the appellant Kshs. 2,000,000 and later topped up with Kshs. 700,000. It was the respondent's case that it was a term of their agreement that the appellant would refund the said money upon completion and payment of the project but not less than four months from the date of advancement of the said loan.
16. In support of his case, the respondent produced as an exhibit a Soft Loan Agreement signed on the 14th July 2018 by himself and the appellant. The said agreement provided that the funds, Kshs. 2,000,000 would be deposited in the business bank account of Frontgate Investment Limited.
17. In his written defence, the appellant denied receiving the alleged funds from the respondent but in his testimony, the appellant admitted that he had an agreement with the respondent and subsequently that he received Kshs. 2,000,000 but not the additional Kshs. 700,000 as alleged by the respondent. The appellant admitted that he faced challenges repaying the advanced funds as his site engineer had defrauded him.
18. In his written submissions as summarised above, the appellant was seeking for time to settle or liquidate the decretal sum buy instalments.
19. I have re-evaluated the evidence presented before the trial court and the submissions filed by both parties in this appeal. The issue for determination is whether the respondent proved his case against the appellant on a balance of probabilities to warrant judgment in his favour.
20. It is settled principle of law that parties to contract are bound by the terms and conditions thereof, and that it is not the business of courts to rewrite such contracts. This was the holding of the Court of Appeal in the cases of *National Bank of Kenya Limited v Pipe Plastic Samkolit (K) Ltd* [2002] 2 EA 503 [2011] eKLR.
21. The parties had a signed soft loan agreement dated 14th July 2018 and the defendant now appellant conceded as much in his testimony in chief and on oath. In the submissions supporting this appeal, he concedes that he owed the respondent the money but that he was willing to settle by instalments. For the above reason, I find no fault in the judgment of the trial court which is impugned herein. The trial magistrate correctly held that the appellant was bound to repay the Kshs. 2,000,000 advanced to him by the respondent. I dismiss the appeal challenging judgment and decree of the lower court and uphold the trial magistrate's judgement of 10th November 2021.
22. I observe that appellant subsequently filed an application dated 15th December 2021 predicated on Order 21 Rule 12(4) of the Civil Procedure Rules, seeking to be allowed to liquidate the decretal sum of Kshs. 2,000,000 by payment of an initial sum of Kshs. 100,000 and subsequent monthly installments of Kshs. 50,000 until final settlement.
23. In her ruling of 8th April 2022, the trial magistrate found that the appellant failed to meet the requirements to warrant the court exercise its discretion and order payment of the decretal sum in



- installments. The trial magistrate ordered the appellant to make a deposit of Kshs. 1,000,000 within 45 days of the ruling and to settle the balance in installments of Kshs. 100,000 per month on the 25th of every month until payment in full.
24. The appellant has made submissions before this court urging this court to vary the aforementioned terms, which is quite interesting but because he is a prose litigant, I shall excuse him for mixing up the appeal against judgment and an application for payment by instalment. It is the merits or substance that matters in such instances.
25. I note that the appellant's submissions in no way relate to the grounds of appeal raised in his memorandum of appeal. The grounds of appeal raised by the appellant directly impugn the judgement of the learned Senior Resident Magistrate of 10th November 2021 and not the ruling of 8th April 2022.
26. Order 21 rule 12 (1) and (2) of the Civil Procedure Rules provides as follows: -
1. Where and in so far as a decree is for the payment of money, the court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by installments, with or without interest, notwithstanding anything contained in the contract under which the money is payable.
 2. After passing of any such decree, the court may on the application of the judgment-debtor and with the consent of the decree-holder or without the consent of the decree-holder for sufficient cause shown, order that the payment of the amount decreed be postponed or be made by installments on such terms as to the payment of interest, the attachment of the property of the judgment-debtor or the taking of security from him, or otherwise, as it thinks fit.
27. In view of the above, under order 21 rule 12(2) the Court has power and discretion to order payment of the decretal sum in instalments on application by the judgment-debtor with or without the consent of the decree holder. The judgment-debtor however has to show sufficient cause as to why he should be allowed to pay the decretal sum in instalments and/or why the payments should be postponed. This Court's discretion to order payment in instalments and/or on such terms it deems fit must be exercised judiciously having regard to the facts and circumstances of each individual case.
28. In *Diamond Star General Trading LLC v Ambrose D O Rachier* carrying on business as Rachier & Amollo Advocates [2018] eKLR, G L Nzioka J relied on order 21 rule 12(2) to exercise his discretion to allow the applicant pay the decretal sum in instalments. The Judge cited with approval the case of *Kshs.Vaji Jethabhai & Bros Limited V Saleh Abdulla* [1959] EA 260 which laid down the principles that should guide the court in exercising its discretion as follows:
- a. Whilst creditors' rights must be considered each case must be considered on its own merits and discretion exercised accordingly;
 - b. The mere inability of a debtor to pay in full at once is not a sufficient reason for exercise of the discretion;
 - c. The debtor should be required to show his bona fides by arranging prompt payment of a fair proportion;
 - d. Hardship of the debtor might be a factor, but it is a question in each case whether some indulgence can fairly be given to the debtor without prejudicing the creditor.
29. In the present case, the appellant failed to demonstrate any reason for his inability to settle the decretal sum in one lump sum. There was no iota of evidence save the statement that it was in an environment of tough economic hardship. One must demonstrate sufficient reason so as to attract the court's



discretion. That notwithstanding, the trial court exercised its discretion and delivered the ruling of 8th April 2022 setting the terms for repayment of the decretal sum.

30. The appellant by his submissions in this appeal is asking this court to interfere with the trial court's exercise of discretion in the ruling of 8th April 2022.

31. The general principles on when an appellate court may interfere with a discretionary power of a trial are now well settled. In the case of *Mbogo & Another v Shah*, [1968] EA, these principles were set out as follows:

“An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.”

“The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.”

32. In *Patel v E.A. Cargo Handling Services Limited* (1974) E.A. 75, this Court held as follows:

“There are no limits or restrictions on the judge's discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules: the principle obviously is that unless and until the court has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure.”

33. In the instant case, the appellant has failed to demonstrate that the trial court misdirected itself in some matters and as a result arrived at a decision that was erroneous in its ruling of 8th April 2022 in setting the terms of the repayment of the decretal sum. Further, it is not manifest from the case as a whole that the court had been clearly wrong in the exercise of judicial discretion and that as a result there was misjustice.

34. The upshot of the above is that I find that this appeal to be devoid of any merit and the same is hereby dismissed with an order that let each party bear their own costs of the appeal.

35. This file is closed. The lower court file be returned forthwith, with copy of this judgment on email.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 25TH DAY OF NOVEMBER, 2024.

R.E. ABURILI

JUDGE

