Spire Bank Limited v Ngigi (Appeal E062 of 2021) [2023] KEHC 124 (KLR) (Commercial and Tax) (20 January 2023) (Judgment)

Neutral citation: [2023] KEHC 124 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

APPEAL E062 OF 2021

A MABEYA, J

JANUARY 20, 2023

BETWEEN

SPIRE BANK LIMITED ..... APPELLANT

AND

GEORGE NJOROGE NGIGI ..... RESPONDENT

(Being an appeal from the judgment of the Honourable (Ms. A.M Obura Chief Magistrate delivered on 25th June 2021 in CMCC No 1405 of 2018 at the Chief Magistrates Courts Nairobi)

JUDGMENT

1. This is an appeal arising out of the judgment of Honourable A.M Obura delivered on 25th June 2021. The appellant being aggrieved by that decision, lodged an appeal in this Court vide a Memorandum of Appeal dated 19/7/2021. The grounds upon which the appeal is premised on can be summarized as follows;

    a. That the trial court made an error in dismissing the appellants counterclaim and finding that the respondent did not owe the appellant any amount of money.

    b. That the trial court erred in directing that the appellant's name should be struck out of the Credit Reference Bureau and holding that there was no residue balance due from the respondent.

    c. That the trial court failed to acknowledge that the two motor vehicles were collaterals to the loan and were sold within the valuation amount after issuing all the required notices.

2. I have carefully considered the record of appeal, the submissions by Learned Counsel and the law. This being a first appellate court, it behooves the Court to re-evaluate the evidence afresh and come to its

own independent conclusions at all time having in mind that it never had the advantage of seeing the witnesses testify.

3. In *Selle vs. Associated Motor Boat Co.* [1968] EA 123, it was held: -

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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 the 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."

4. The case before the trial court was that the respondent instituted the suit against the defendant by a plaint dated 28/2/2018 seeking judgment against the appellant for Kshs. 3,400,000/- which was the value of the undervalued sale of the motor vehicles, a sum of Kshs 2,015,044.10 as the amount paid in excess of the loan and to have his name struck out from the Credit Reference Bureau.

5. The respondent had faulted the appellant for selling the two vehicles held as security at an undervalue and for not informing him of its intention to repossess the vehicles. After hearing the parties, the trial court dismissed the suit but ordered that his name be struck out from CRB and restrained the from charging any further interest on the loan. The appellants counterclaim was also dismissed.

6. The appeal was canvassed by way of written submissions which I have considered. The appellant submitted that by a letter of offer dated 16/9/2015 it granted the respondent a facility of Kshs 15,440,000/= payable in monthly instalments of Kshs 431,033/=. That the facility was secured by motor vehicle registration nos. KCF 212S and KBW 718Y.

7. That the account fell into arrears as the respondent had paid for one month only the expected amount of Kshs 431,033/= while the other months the amount was lower than the agreed monthly instalment. Counsel submitted that the appellant followed the laid down procedures of selling the vehicles at the market value based on the valuation reports. That the counterclaim ought to be allowed as it seeks the residue balance of the loan amounting to Kshs 3,908,637.18.

8. The respondent submitted that he promptly serviced the loan as agreed however there were instances where his business experienced low income and to cure that, he would subsequently make higher deposits exceeding the agreed monthly installments. That he was frustrated by the appellant's actions of repossessing his vehicles which were the income generating assets without giving him any notice.

9. That the respondent would have made good of his loan were he notified of the default by the appellant. That the appellant sold the vehicles after two years at a loss after subjecting the vehicles to depreciation. That the proclamation notice was not served upon the appellant as per rule 12(1) (c) of the Auctioneer rules.

10. From the grounds laid out in the memorandum of appeal, what appears to be the issue between the parties is whether the respondent was still indebted to the appellant and whether the appellant was justified in selling the motor vehicles to realize the security.

11. It is not disputed that the appellant granted the plaintiff a facility of Kshs. 15,440,000/- subject to monthly payments of Kshs. 431,033/-. The two vehicles KCF 212 S and KBW 718 Y were offered

as security for the loan. In his plaint dated 28/2/2018. The plaintiff admitted that at the time of repossession, the loan balance was Kshs. 13,784,955.93.

12. The respondent admitted that in some instances his business was down and would not make the monthly instalments as agreed but would cure that subsequent months by paying more than the required amount. He also admitted in his testimony that he had been defaulting in payment. In this regard, the appellant was entitled to call in its security.

13. The next is whether the appellant used the proper procedure in realizing the security. It was the respondent's contention that the appellant did not inform him that the vehicles would be repossessed and that his driver was ambushed and the vehicle taken from him. It was further contended that the vehicles were sold at undervalue two years after the appellant had repossessed them.

14. From the record, DW1 testified that the bank wrote a demand letter to the respondent. However, that letter was not produced in court. She further stated that the valuation was conducted after repossession and that the same was not communicated to the respondent.

15. On this issue, the trial court faulted the procedure adopted by the appellant in disposing off the vehicles stating that it was unlawful and unfair as the plaintiff was not notified of the sale.

16. Two issues arise, the respondent was entitled to notice before repossession. This was to enable him make arrangement, if any, to redeem the loan if not to make good the default. Secondly, the intended sale should have been communicated to the respondent. Though the appellant claims to have given the respondent the demand, there is no evidence of the same in the trial. In this regard, the trial court cannot be faulted in its finding on this issue.

17. The proclamation notice showed that the sale would be conducted on 7/11/16 while the sale took place in 2018. The vehicles depreciation in value was as a result of the appellant's delay in disposing off the vehicles. That is a loss that the appellant should bear and not pass the same to the respondent. Since there was nothing to delay the sale, it was incumbent upon the appellant to take reasonable steps to sell the vehicles as soon as practically possible and to realize maximum benefit or value. This it failed to do.

18. The appellant could not be allowed to benefit from its own wrong of delayed sale and seek additional sums while it contributed to the low sale amount. Equity demands that he who comes to court does so with clean hands. The appellant repossessed the vehicles without notice, kept the vehicles for 2 years well knowing that they were depreciating, then sold them without notice to the respondent and at an undervalue.

19. It was unfair and irregular for the respondent to hear of the sale via the demand letter of 12/2/18 wherein the bank was asking for more money after the sale was conducted at an undervalue. I find that the trial court did not err in declining the counterclaim.

20. That being the case, the name of the respondent could no longer remain in the CRB. The court having found that there were no more monies payable by him. That ground also fails.

21. In the upshot, I find no grounds upon which to interfere with the findings of the trial court and dismiss the appeal with costs.

It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JANUARY, 2023.

A. MABEYA, FCIArb

JUDGE