Narcol Aluminium Rolling Mills Limited v Del Petroleum Limited (Civil Appeal E108 of 2021) [2023] KEHC 22267 (KLR) (25 May 2023) (Judgment)

Neutral citation: [2023] KEHC 22267 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E108 OF 2021

F WANGARI, J

MAY 25, 2023

BETWEEN

NARCOL ALUMINIUM ROLLING MILLS LIMITED ..... APPELLANT

AND

DEL PETROLEUM LIMITED ..... RESPONDENT

JUDGMENT

1. This appeal arises from the judgment of Francis Kyambia CM given on 2/7/2021 in Mombasa CMCC 373 of 2019. In that case the court found that the Respondent had proved their case and granted orders 'as prayed in the plaint'. To start with, the nature and extent of the prayers in the plaint must be stated. Courts are discouraged from allowing prayers 'as prayed in the plaint'.

2. The plaint has the following prayers;

    a. The sum of Ksh. 3,877,867.40

    b. Interest on (a) above at court rates from 24/6/2013 until payment in full.

    c. Costs of the suit.

3. There is danger of allowing an omnibus prayer like that as seen from prayer (b) above. The interest is to run from 24/6/2013. In all cases, special damages or pecuniary damages do not attract interest without a special agreement to that effect before the suit is filed. Further, whichever interest is applied, court rates apply only when the suit is filed in court. It is not for parties to use out there.

4. In *Heinz Broer v Buscar (K) Ltd & others [2019]* eKLR, the court stated as follows;

    "

"22. The payment of interest on general damages from the date of judgment has been settled by the Court of Appeal in the cases of Shariff Salim & Another vs Malundu Kikava [1989] eKLR and Royal Media Services Ltd & Another vs Hon Jakoyo Midiwo [2018] eKLR amongst other cases.

23. In particular in the case of Shariff Salim & Another vs Malundu Kikava [1989] eKLR (Supra), the Court of Appeal rendered itself as follows:-

"There is no gainsaying the fact under Section 26 of the Civil Procedure Act, the award of interest on a decree for the payment of money for the period from the date of the suit to the date of the decree is a matter entirely within the discretion of the court. But this discretion being a judicial one must be exercised judicially. The whole idea at the end of the day is to do justice to both parties. In the case of Prema Lata vs Peter Musa Mbiyu [1965] EA 592, the appellant, in a suit for damages for personal injuries, was awarded Kshs 24,000, as general damages and Kshs 1,742.80 as special damages but the judge refused an application to award interest on these two sums from the date of filing suit until judgment. On appeal, the Court of Appeal for East Africa held that in personal injury cases, interest on general damages should not be awarded for the period between the date of filing suit and judgment but that interest should normally be awarded on special damages if the amount claimed has been actually expended or incurred at the date of filing the suit.....The judge gave no reason for ordering that interest even on general damages was to be paid from the date of filing the suit. According to the authorities interest on general damages should be paid from the date of assessment which of course is the date of judgment. That is the earliest date when the defendant's liability to pay does arise. That order even in relation to payment of interest on special damages is, in our view, unsupportable. Quite apart from the fact that the claim for special damages was not proved by any evidence beyond being itemised in the plaint, except for kshs 100, paid for police abstract, the remaining items had not been paid for at the date of the filing of the suit on August 19, 1983. As a result, it is impossible to ascertain the reasons which compelled the judge to award interest from the date of filing suit and this leads us to the inevitable conclusion that the learned judge wrongly exercised his discretion. This ground of appeal accordingly succeeds.

5. The result is that, the order that interest be from 24/6/2013 is set aside as being illegal. Whichever, decision I make on the way forward, this limb ought to be set aside in toto.

6. The judgment gave rise to the appeal, wherein the Appellant filed its 10 grounds of appeal. The appeal raises following issues.

a. Whether the claim for Ksh. 3,877,867.40 is time barred.

b. Where the claim for Ksh. 3,877,867.00 was discharged upon the cheques given to Tom Okinyi Orwa, being stolen.

c. Who is to bear costs

7. Both parties filed elaborate submission. They are elaborate with both binding and persuasive authorities. It was common ground that cheques were given to Tom Okinyi Orwa. These cheques were fraudulently converted by persons who were later charged and convicted. The respondent made heavy weather that the Appellant was the complainant hence the cheques belong to them.

8. The appellant was also of the view that the suit was time a barred by dint of the demand having been made on 22/6/2012 and as given the suit ought to have been filed by 22/6/2018.

9. They submit that the ruling of the court on the preliminary objection does not vitiate or kill the issue of limitation.

10. Further they submit that the Respondent was fully paid. The respondent produced evidence of Kshs. 6,328,448 instead of Kshs. 3,877,867.

Respondents submissions.

11. The Respondent supports the judgment and noted that unpaid invoices amounting to Ksh. 3,877,867.40 were admitted. The defrauded cheques were paid out to Tatree Agencies instead of the Respondents hence the amount is still due.

12. The Respondent stated the amount stolen is the property of the applicant. The fraudsters were found guilty and convicted. In those matters the Appellant was the complainant. Regarding limitation, they aver that the same was decided in the Ruling of 29/11/2019. To them the issue of limitation is most vital. They rely on the case of Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007 where Mwera, J (as he then was) held as follows: -

> " Submissions simply concretise and focus on each side's case with a view to win the court's decision that way. Submissions are not evidence on which a case is decided."

13. They also rely on several decisions to show that the issue is not time barred.

Analysis

14. This is a fairly straight forward matter. The two issues can be dealt with in a summary manner. The Ruling of 29/11/2019 is in pages 128 - 130 of the record of appeal. At page 130 the Senior Principal Magistrate stated that time started running on 24/6/2013. The correct position is time started when the dispute arose that is 10/7/2013 when the appellant denied liability. However, there was no Appeals from that finding. It therefore means that time started running on 24/6/13.

15. In *Godfrey Kinuu Maingi & 4 others v Nthimbiri Farmers Co-operative Society [2014]* eKLR the court stated as thus: -

> " Thus, in this case, this court must act, whether or not there is a right of appeal. I am further fortified by the decision cited with approval in Uhuru Highway Development Ltd (Supra) case that in the case of Yat Tung Investment Co. Ltd – Vs – Dao Hring Bank Ltd (1975) AC 581, 590 that:
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> "where a given matter becomes the subject of litigation in, and adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of the case. The plea of res judicata applies except in special cases, not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at that time."

16. The court proceeds to give an example on how an application becomes res judicata, if not appealed against or reviewed. The court in the above case, Godfrey Kinuu Maingi & 4 others v Nthimbiri Farmers Co-operative Society [supra] stated as doth: -

> " As was properly put forward by Law JA in the Kinyua – Vs Gachini Tuti case (Supra)
>
> "To sum up my view of this aspect of the case, an applicant whose application to set aside an exparte judgement which has been rejected has a right of appeal ... Alternatively, he may apply for a review of the decision, under Section 80 of the Civil Procedure Act. He can only successfully file a second application if it is based on facts not known to him at the time he made the first application. If the facts were known to him, his second application will be dismissed as res judicata, as happened hereof.
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> The position otherwise would be intolerable. A decree holder could be deprived of the benefit of his judgment by a succession of applications to set aside the judgment and the judges would in effect be asked to sit on appeal over judges. And as regards Madan JA's expressed feeling that justice can only be done by giving the appellant the right to defend, I would respectfully point out that there are always two aspects to the concept of justice. A successful litigant is convinced that justice has been done, the loser is unlikely to share that view."....."

17. My view is that the ruling delivered on 29/11/2019 foreclosed the issue of limitation of time. No appeal was preferred. This court cannot handle the same. The appeal on basis of limitation of time is dismissed in limine.

18. The issue that remains is whether there is a debt due from the Appellant to the Respondent. The matter basically turns on the question whether by the fraudsters disappearing with money meant for the Respondent, they stole the Appellant's money or the Respondents money.

19. It is clear the both parties feel that the other should shoulder the effect of the fraud and not themselves. It was common ground that there were no financial difficulty in paying. The only issue is whether the cheques, which were converted, discharge the appellant from the obligation to pay.

20. Section 3 of the Bill of Exchange Act defines a bill of exchange as;

> " a bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person or to bearer"

21. Under section 4 of the *Cheques Act*, the paying banker is protected and such payment is taken as payment in due course. The section provides: -

Protection of paying banker

"(1) Where a banker, in good faith and in the ordinary course of business, pays a prescribed instrument drawn on him to a banker, he does not in doing so incur any liability by reason only of the absence of, or irregularity in, endorsement of the instrument, and —

(a) in the case of a cheque, he is deemed to have paid it in due course; and

(b) in the case of any other prescribed instrument, the payment discharges the instrument.

(2) A prescribed instrument which is not endorsed but which appears to have been paid by the banker on whom it is drawn is evidence that the payee has been paid by the banker the sum of money specified in the instrument."

22. Therefore, payment to the fraudsters was payment in due course. The only question was to whose order.

23. To be able to discharge the appellant from the obligation to pay the Appellant should have paid and if there were issues, they should not have been contributed by the Appellant.

24. It is important to note that that criminal liability is separate and distinct from the contractual obligations. It was the Appellant's contention that the Appellant gave cheques to the Respondent's known agent, who signed on the reverse. Cheques for the sum of Kshs 6,328,448 were paid. However, some cheques were diverted to pay a third party. The cheques were for Ksh. 3,803,520.

25. The three cheques were negotiable instruments. The cheques were converted by the fraudsters after they were placed in the hands of the Respondent's Agent.

26. The agent converted the same by negotiating the same, albeit fraudulently to a third party. The bank was obligated to give value to the fraudsters.

27. In *Kitui Tobacco Distributors Ltd. – vs- Barclays Bank of Kenya (2001)* eKLR, held as follows: -

> "In my humble view is that the defendant having given (values) to BAT Kenya Ltd, upon depositing of those two cheques, the defendant became a holder for value of the cheques and was entitled to look upon the plaintiff for payment in accordance with tenets of those cheques."

28. Basically, once the cheques were presented the bank as obligated to honour them and debit the appellant's Account. The Respondent was under duty to ensure that cheques were not negotiated to third parties from the hands of their agent. No evidence was tendered on how the cheques left the hands of the agent to the fraudsters.

29. Section 27(2) of the Bill of Exchange Act, states;

> "Where value has at any time been given for a bill, the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill because parties prior to that time."

30. In other words, the value left the Appellant to the Agent of the Respondent and to a third party. The Respondent thus lost a claim against the appellant and gained a claim against the bankers and fraudsters. I refuse to be convinced that the appellant's complaint was evidence that they were the holders of value of the cheques.

31. The criminal law obligated the drawer and the parties to a bill of exchange to complain where a crime is committed against their bill of exchange. Therefore, nothing that turns on the case, except confirmation that the cheques were given to the Respondent, who was the principal.

32. In *Industrial & Commercial Development Corporation (ICDC) v Patheon Limited [2015]* eKLR, the Court of Appeal (Visram, Sichale and Kantai, JJA stated as doth; -

> "So who was to reimburse the respondent? We concur with the trial court that the relationship between the receiver and the appellant in this case was that of principal and agent. Why do we say so? The receiver was appointed by the appellant who was both

majority shareholder and a debenture holder in PVP. In addition, the receiver was an employee of the appellant. Further, Mr. Majani testified that he reported all activities to the appellant and all proceeds from the sale of PVP went to the appellant. The Concise Dictionary of Law, 2nd Edition, page 17 defines an "agent" as,

"A person appointed by another (the principal) to act on his behalf, often to negotiate a contract between the principal and a third party."

In Garnac Grain Co. Inc. -vs- H.M. Faure & Fair Dough Ltd and Bunge Corporation (1967] 2 All E.R. 353 Lord Pearson with the concurrence of the

House used the words-

> "The relationship of the Principal Agent can only be established by the consent of the Principal and Agent. They will be held to have consented if they have agreed to what amounts in law to such a relationship, even if they do not recognize it themselves and even if they have professed to disclaim it... the consent must, however, have been given by each of them, either expressly or by implication from their words and conduct."

33. Effectively, the Respondent was paid though its agents who negotiated the payment off to third parties. The criminal proceedings did not place any burden on the Appellant. The appellant as the drawer has a right to be a nominal complainant. Otherwise, there could have been no evidence that the cheques were due to the Respondents. The respondents let off their disclosed agent, the fraudsters and other parties. They picked on the most innocent of parties in the chain. By accepting cheques, and letting value disappear, the Respondents brought this upon their heads.

34. I therefore find that the appeal thus has merit. I therefore allow the same.

35. The parties were affected by the Respondent's agent. This strained the relationship between parties. I therefore do not think that award in costs will do any good to an already bad case.

Determination

36. I therefore make the following orders: -

a. The appeal herein is allowed in that the claim for Kshs. 3,877,867.00 is set aside and the Respondent's suit in the lower court is dismissed in *limine*.

b. The suit is not time barred.

c. Each case party to bear their costs in this court and the subordinate court.

d. The file is hereby closed.

Signed, dated and **delivered** at **Mombasa** this **25th** day of **May, 2023**

.....

F. WANGARI

JUDGE

In the presence of:

Ondego Advocate for the Appellant

N/A by the Respondent

Court Assistant, Guyo