Credit Reference Bureau Africa Limited t/a Transunion v
True African (Kenya) Limited (Civil Appeal E043 of 2020)
[2022] KEHC 11083 (KLR) (Commercial and Tax) (29 July 2022) (Judgment)

Neutral citation: [2022] KEHC 11083 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL APPEAL E043 OF 2020

EC MWITA, J

JULY 29, 2022

BETWEEN

CREDIT REFERENCE BUREAU AFRICA LIMITED T/A TRANSUNION ..... APPELLANT

AND

TRUE AFRICAN (KENYA) LIMITED ..... RESPONDENT

(Appeal from the Ruling and Order dated 21st August 2020 (Hon. L.T Lewa, (Ms.) (SRM), in CMCC No. 955 of 2019, at the Chief Magistrate's Court, Milimani Commercial Courts, Nairobi)

JUDGMENT

1. Credit Reference Bureau Africa Limited t/a Transunion (Transunion) entered into a service level agreement with True African (Kenya) Limited (True African) on 7th May 2015 for provision of Short Messaging Service (SMS) communication services for its customers whose KCB M-pesa loan applications were rejected and to provide them with access to a summary of their credit status, credit reports and other SMS services. The service agreement had an arbitration clause. Transunion terminated the agreement on 27th March 2019, claiming that True African had failed to adhere to the terms of the agreement.

2. Since both parties had claims against one another, they entered into negotiations which led to a set off agreement dated 31st July 2019. In that agreement, it was agreed that after settling accounts, True African owed Kshs. 4,108,240 to Transunion. True African declined to pay that amount prompting Transunion to file a suit before the Chief Magistrate's Court at Milimani Commercial Courts, Nairobi being CMCC No. 955 of 2019 claiming Kshs. 4,108,140 with interest and costs.

3. True African filed a memorandum of appearance dated 16th December 2019 and simultaneously took out Chamber Summons of even date under section 6 of the *Arbitration Act*, seeking to stay the proceedings and have the matter referred to arbitration on grounds that the agreement forming the basis of the suit had an arbitration clause.

4. On 16th January 2020, Transunion filed a notice of motion of even date under Orders 36 rules 1 (a) and (2) and 13 rule 2 of the *Civil Procedure Rules* seeking summary judgment or in the alternative, judgment on admission for the amount prayed for in the suit.

5. When the two applications came up for hearing before Hon. L.T. Lewa (Miss), (SRM) on 12th February 2020, the learned Magistrate directed that the application be heard by way of written submissions as both counsel had requested, without specifying which application. Parties filed and exchanged written submissions on both applications.

6. In a ruling delivered on 21st August 2020, the trial magistrate dismissed Transunion's application dated 16th January 2020 for summary Judgment with costs. The trial magistrate did not make a determination on application by True African dated 16th December 2019 for stay of proceedings and to referral of the matter to arbitration.

7. Transunion was aggrieved and filed a Memorandum of Appeal dated 17th September 2020, raising the following grounds, namely:

    a. The learned magistrate erred in failing to make a determination on the applications dated 16th December 2020 and 16th January 2020 as per the Honourable court's directions issued on the 12th February 2020.

    b. The learned magistrate erred in law and fact in failing to find that the operative agreement in this case was the set-off agreement dated 31st July 2019.

    c. The learned magistrate erred in law and fact in failing to find that the set-off agreement provided that any dispute would be submitted to the jurisdiction of a competent court in Kenya and not to refer the matter to arbitration.

    d. The learned magistrate erred in fact and law in failing to find that the Court had jurisdiction to handle the matter and not refer the same to arbitration.

    e. The Court erred in law and in fact in failing to find that the application for summary judgment/ judgment on admission for the sum of Kshs. 4,108,240/- was merited as agreed in the set off agreement dated 31st July 2019.

    f. The learned magistrate erred in failing to find that the respondent had made a clear and unequivocal admission of indebtedness in the set-off agreement dated 31st July 2019.

    g. The learned magistrate erred in law and fact by failing to consider the appellants' submissions and in doing so arrived at an erroneous conclusion.

8. Transunion urged this court to set aside the impugned ruling, order dismissal of the application by True African dated 16th December 2019, allow the application dated 16th December 2020 and enter summary judgment as prayed in the plaint against True African, costs of the appeal and of the suit before the trial court.

9. This appeal was disposed of through written submissions with oral highlights.

Submissions by Transunion

10. Transunion filed written submissions dated 20th September 2021. Transunion blamed the trial magistrate for dismissing its application on grounds that service level agreement existed yet that agreement had been terminated. According to Transunion, the trial magistrate should have taken note of the set off agreement which had rendered the service level agreement nonexistent.

11. Transunion relied on section 6 of the *Arbitration Act* to argued that the Court could not stay the proceedings or refer the matter to arbitration because the agreement that contained an arbitration clause had been terminated., and that clause (b) of the set off agreement provided that parties had first to explored informal negotiations and thereafter the dispute could be referred to court and not to arbitration.

12. Transunion argued that the trial magistrate erred by failing to make a determination on the application by True African dated 16th January 2019 together with its application dated 16th December 2020 since the two applications had been heard together following directions given on 12th February 2020. Transunion again argued that the learned magistrate fell into error when she failed to find that True African had admitted owing Kshs. 4,108,240 in the set off agreement. Transunion relied on section 17 of the *Evidence Act* on what amounts to an admission.

13. With respect to summary judgment, Transunion argued that it had a liquidated claim and under Order 36 of the *Civil Procedure Rules* True African had not raised a reasonable defence. Transunion relied on *James Juma Muchemi & Partners Limited v Barclays Bank of Kenya & another* [2012] eKLR and urged the court to allow the appeal.

Submissions by True African

14. True African filed written submissions dated 28th September 2021, True African contended that its application was based on the service level agreement which had an arbitration clause and which had given rise to the set off agreement. True African further contended that the impugned ruling was on the application by Transunion while its application is still pending determination. True African took the view that its application could not form the basis of this appeal since it was still pending before the trial Court. True African relied on section 6(2) of the *Arbitration Act* for the argument that further proceedings could not be undertaken until that application was determined.

Reply by Transunion

15. In a brief rejoinder, Transunion argued that this Court has jurisdiction to rehear both applications despite the fact that True African's application was not determined in the impugned ruling.

Determination

16. I have considered this appeal, submissions and the decisions relied on. I have also perused the record of the trial court and the impugned ruling. This being a first appeal, it is the duty of this court, as the first appellate court, to re-evaluate, reanalyse and reconsider the evidence afresh and come to its own conclusion on that evidence. The court should, however, bear in mind that it did not see the witnesses testify and give due allowance for that.

17. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal held that a first appeal is by way of a retrial and the principles upon which the court acts in such an appeal are well settled. The court must reconsider the evidence, evaluate it itself and draw its own conclusions, though

it should always bear in mind that it neither saw nor heard the witnesses and make due allowances in that respect.

18. In *Peters v Sunday Post Ltd* [1958] EA 424, the Court held thus:

> Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide.

19. This is an interlocutory appeal from the ruling and order of the trial court delivered on 21st August 202, dismissing the application for summary judgment. The trial court also failed to determine an application by True African for stay of proceedings and to refer the matter for arbitration. In that regard, the issues that arise for determination in this appeal are whether the trial court was in error when it dismissed the application for summary judgment and whether the trial court fell into error when it failed to determine the application for stay of proceedings and to refer the matter to arbitration.

20. There is no denial that there were two applications before the trial court by either of the parties, dated 16th December 2019 and 16th January 2020 respectively. A perusal of the record also confirms that on 12th February 2020, the trial court was informed that there were two applications for hearing. The court directed that the "application" be heard by way of written submissions. The record further reveals that indeed parties filed submissions in respect of the two applications and the court reserved the ruling for 21st August 2020.

21. On 21st August 2021, the trial court delivered a ruling in respect of the application dated 16th January 2020 only and made no reference to the application dated 16th December 2019. The impugned ruling leaves no doubt that the trial court only considered the application for summary judgment which was dismissed. The court did not render itself on the application for stay of proceedings and to refer the matter for arbitration. No directions were given regarding that application either. As it is, there is no indication what became of that application, whether it will be heard and, if so, when.

22. The trial court's directions were not clear on which application was to be heard. However, there being two applications and parties having submitted on the two applications, the trial court was under duty to determine the applications in the impugned decision or give specific directions on which application was to be heard and what would happen to the other application.

23. During the hearing of this appeal, counsel for True African argued that the application for stay of proceedings and to refer the matter for arbitration was pending determination. Counsel could not, however, tell this court when that application was due for determination since the ruling, the subject of this appeal, was silent on that, never mentioned the application or even set a date for delivery of the ruling on that application given that parties had submitted on it. I agree with Transunion that the trial court fell into error when it failed to determine the application since the two applications had been heard together.

Whether application for stay of proceedings could be made

24. True African filed the application dated 16th December 2019 seeking stay of the proceedings before the trial court and to refer the matter for arbitration. The basis of that application was the service level agreement between the parties which had an arbitration clause. Transunion on its part argued that the service level agreement having been terminated, there was no agreement on which that application could be based.

25. There is no dispute that the service level agreement had an arbitration clause. That agreement was, however, terminated, a fact True African does not deny. Thereafter, parties entered into a set off agreement signed on behalf of True African on 31st July 2019 and on behalf of Transunion on 1st August 2019 respectively. In that agreement, parties reconciled and set off their respective claims against each other, leaving a balance of Kshs. 4,108,240 which True African owed to Transunion. Parties also agreed that they would try to resolve the matter over the owing amount amicably within forty-five (45) days but in case there was no success, recourse would be had to courts of law in Kenya. There was no agreement or clause to refer the dispute to arbitration, and counsel for True African admitted during the hearing of this appeal, that the set off agreement did not have an arbitration clause.

26. There can be no argument that once parties entered into the set off agreement, the service level agreement ceased to exist and no reference could be made to it. True African could thus not rely on a none existent agreement to argue that there was an arbitration clause on the basis of which the matter could be referred to arbitration. In that regard, the trial court could not entertain an application for stay of proceedings in order to refer the matter to arbitration in the absence of an agreement to that effect. In other words, there was be no legal basis for such an application. This is so, because section 6 of the *Arbitration Act* can only be invoked where there is an agreement containing an arbitration clause.

27. It is my finding, and I so hold, that there was no legal or factual basis for filing the application dated 16th December 2019 for stay of proceedings or to refer the matter to arbitration and no order could be made to that effect. Similarly, the trial court could not refer the matter to arbitration once the agreement that had an arbitration clause had become redundant.

Application for judgment

28. Having determined that there was no basis for the application dated 16th December 2019 to refer the matter to arbitration, the issue is whether it was proper for the trial court to dismiss the application for summary judgment. According to the record, True African entered appearance on 16th December 2019 but did not file a defence within the time allowed by rules. Instead True African filed the application to refer the matter to arbitration, a remedy it ought to have known that was not available given the set off agreement parties had entered into that replaced the service level agreement.

29. I have read the ruling of the trial court and the reasons given for disallowing the application for summary judgment. The trial court stated that the reason why a defence had not been filed was because of the application to refer the matter to arbitration under section 6 of the *Arbitration Act*. The trial court concluded that failure to file a defence was not an admission of the claim considering the application dated 16th December 2019 was awaiting determination.

30. The trial court fell into error for assuming that True African could file such an application. The trial court did not direct its mind to the set off agreement which had replaced the service level agreement. Had the trial court taken time to address itself on the application for stay and the set off agreement, it would have come to the inescapable conclusion that there was no arbitration clause which would bring section 6 of the *Arbitration Act* into play and, therefore, True African was under duty to file a defence within the time allowed. Having not done so, Transunion could apply for judgment in default or as it did, apply for summary judgment or even judgment on admission.

31. In the application dated 16th January 2020, Transunion applied for summary judgment or in the alternative, judgment on admission. Order 36 rules 1 (a) provides that in a suit where a plaintiff seeks judgment for a liquidated demand with or without interest and where the defendant has appeared but not filed a defence, the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest. Under sub rule (2), the application should be supported by an affidavit either of the plaintiff

or of some other person who can swear positively to the facts verifying the cause of action and the amount claimed.

32. Indeed, True Africa filed entered appearance but did not file a defence which entitled Transunion to invoke Order 36 rule 1 for summary judgment. The supporting affidavit alluded to the fact that True Africa owed Transunion the amount claimed in the plaint. That fact was supported by the set off agreement that had not been challenged.

33. The law is settled that summary judgment may be entered where there is no plausible defence to save on court's precious time. However, summary judgment should only be entered in very clear cases. In *Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono* [2015] eKLR the Court of Appeal held that:

> [10] Before the grant of summary judgment, the court must satisfy itself that there are no triable issues raised by the Defendant, either in his statement of defence or in the affidavit in opposition to the application for summary judgment or in any other manner. What then is a defence that raised no bonafide triable issue. A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The Black's Law Dictionary defines the term 'triable' as 'subject to liable to judicial examination and trial.' It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the court.

34. In *Continental Butchery Limited v Samson Musila Ndura*, (Civil Appeal No. 35 of 1997), the Court of Appeal stated:

> With a view to eliminate delay in the administration of justice which would keep litigants out of their just dues or enjoyment of their property, the court is empowered in an appropriate suit to enter judgment for the claim from the Plaintiff under summary procedure provided by Order 35 subject to there being no triable issues which would entitle a Defendant leave to defend

35. (See also *Moi University v Vishva Builders* Limited (CA No. 296 of 2004 and *Ternic Enterprises Limited v Waterfront Outlets Limited* [2018] eKLR).

36. The set off agreement was clear that True African owed Transunion the amount claimed in the plaint. The agreement was also clear that if parties failed to mutually resolve the dispute recourse would be had to court. There was no room for referring the dispute to arbitration. The set off agreement was an unequivocal admission of True African's indebtedness to Transunion. The replying affidavit to the application did not raise any triable issue that would entitle True Africa leave to defend and have the matter proceed to trial. That being the case, there would be no point for Transunion to wait for the matter to go for trial when there would be no issue for trial regarding the indebtedness.

37. In that regard, therefore, having given due consideration to this appeal, submissions and considered the record, I have no hesitation in concluding that the trial court fell into error; first, the trial court failed to determine the application for stay of proceedings in order to refer the matter to arbitration despite parties having submitted on the two applications together. Second, the trial court fell into yet another error for dismissing the application for summary judgment when there was no viable defence, and given the unchallenged set off agreement showing that True African owed Transunion the amount claimed in the plaint.

38. In the end, I find that the appeal is merited and must succeed. Consequently, the appeal is allowed. The decision of the trial court delivered on 21st August 2020 dismissing the application for summary judgment is set aside. In place therefor, an order is hereby issued allowing the application for summary judgment with costs. For avoidance of doubt, judgment is entered for Transunion as prayed for the plaint. The application by True African dated 16th December 20219 is dismissed with costs. Transunion shall also have costs of this appeal and before the trial court.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JULY 2022

E C MWITA

JUDGE