



REPUBLIC OF KENYA



**Equity Bank Limited v Ikiambai & another (Civil Appeal E007 of 2021)
[2022] KEHC 12787 (KLR) (31 August 2022) (Judgment)**

Neutral citation: [2022] KEHC 12787 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E007 OF 2021
EM MURIITHI, J
AUGUST 31, 2022**

BETWEEN

EQUITY BANK LIMITED APPELLANT

AND

JAPHET KUBAI IKIAMBAI 1ST RESPONDENT

JOMDOM KENYA LIMITED 2ND RESPONDENT

JUDGMENT

1. This appeal emanates from the judgment by the trial court Tigania PMCC no 148 OF 2012 where the appellant herein was the defendant whereas the 1st and 2nd respondents herein were the 1st and 2nd plaintiff respectively.
2. The respondents had pleaded in their Complaint that on November 12, 2012, the appellant, via its agents, visited the 2nd respondent's shop whereby it attached and carted away the various tools of work while purporting that the respondents had obtained a loan with the appellant. The respondents pleaded that the attachment was illegal and conducted out of malice since none of the respondents had taken a loan with the appellant. They pleaded that the illegal attachment had occasioned great loss to the 1st respondent to which they held the appellant liable.
3. The respondents pleaded that it was one Douglas Mwiti Nkuri T/A Dokkor Engineering Solutions that had obtained a loan facility with the appellant and that none of the respondents had stood surety or acted as guarantor to the loan. They further pleaded that Dokkor Engineering Solutions was a partnership between Douglas Mwiti Nkuri and Geoffrey Kimathi Nkuri. The respondents therefore pleaded that the appellant should have attached the properties supplied by Douglas Mwiti Nkuri as surety. In their prayers, the respondents sought that the appellant be compelled to release the attached goods as itemized under para 6 of the Complaint; general damages for loss of business; costs of the suit; any other orders as the trial court would deem fit.



4. The claim was opposed by the appellant by a statement of defence, in which the appellant admitted that indeed it had issued a loan to one Douglas Mwiti Nkuri t/a Dokkor Engineering Solutions and that none of the respondents had acted as surety or guarantor to the loan. The appellant also admitted that Dokkor Engineering Solutions was a partnership between Douglas Mwiti Nkuri and Geoffrey Kimathi Nkuri. The appellant contended that it attached the properties supplied by Douglas Mwiti Nkuri as security. Notably, the appellant pleaded that the respondents were strangers, as it did not have any cause of action with them.
5. The appellant also pleaded that contrary to the averments by the respondents, it did not attach the respondents' properties but rather it had attached the properties of Douglas Mwiti Nkuri t/a Dokkor Engineering Solutions, whom it had issued a loan facility. The appellant sought that the respondents' case be dismissed with costs.
6. The parties presented their evidence before the trial court whereby upon full hearing, the trial court found that the appellant was liable for the unlawful attachment of the respondents' goods and awarded kshs 5,000,000/- to the respondents as damages for wrongful attachment.
7. The appellant has challenged the judgment of the trial court by a Memorandum of Appeal dated January 14, 2021 in which it prays that the appeal be allowed and that the decision and judgment of the trial magistrate in *Tigania PMCC no 148 OF 2012* be set aside and the same be substituted with an order dismissing the respondents' suit before the trial court with costs to the appellant.
8. The Memorandum of Appeal raises eight grounds of appeal as follows:
 - a. That the trial court erred in finding the appellant liable for wrongful attachment whereas the respondents did not prove the attached goods belonged to them and not Dokkor Engineering Solutions, whom it had issued a loan facility;
 - b. That the trial magistrate erred in awarding inordinate general damages for wrongful attachment of goods which had not been pleaded in the Plaint;
 - c. That the trial magistrate failed to appreciate that general damages for loss of business are distinct from damages for wrongful attachment of goods and the two terms cannot be used interchangeably;
 - d. That the trial magistrate erred in relying on the case of *Chaplin vs Hicks* (1911) 2KB 786 which touched on damages for breach of contract, which award is different from damages for wrongful attachment of goods and general damages for loss of business;
 - e. That the trial magistrate erred in relying on the case of *David Njuguna Ngotho vs Family Bank* (2018)eKLR where the claim for general damages for loss of business was specifically pleaded and strictly proved, unlike in the instant case; and
 - f. That the trial magistrate erred in failing to consider the evidence tendered by the appellant, its submissions and the authority of *Capital Fish Kenya Limited vs The Kenya Power & Lighting Company Limited* (2016) eKLR as cited by the appellant.
9. The court is mindful of its duty as a first appellate court to review the evidence adduced before the lower court with a view of satisfying itself that the decision was well-founded; but bearing in mind that



it did not have the advantage of seeing or hearing the witnesses, as held in *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that 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...”

Issues for determination

10. Based on the analysis of the brief facts above, the issues for determination of this appeal are set out as follows:-
11. Whether the appellant is liable for the wrongful attachment of the respondents' goods?
12. Whether the award of general damages totaling to kshs 5,000,000/- for wrongful attachment of goods, was well-founded?

Whether the appellant is liable for the wrongful attachment of the respondents' goods?

13. Under the circumstances of this case, it is undisputed that there is no bank-customer relationship between the appellant and the respondents.
14. It is also undisputed that sometimes in February 2012, the appellant issued a loan facility of kshs 250,000/- to one Douglas Mwiti Nkuri t/a Dokkor Engineering Solutions. The loan was secured using movable goods said to belong to the said Douglas.
15. During the same period, Douglas Mwiti Nkuri is said to have been one of the Directors of Jomdom Kenya Limited, the 2nd respondent herein. The 1st respondent is also a director in the said Jomdom Kenya Limited. Douglas Mwiti Nkuri did testify before the trial court as PW2 in support of the respondent's case.
16. During the existence of the loan period, Douglas Mwiti Nkuri t/a Dokkor Engineering Solutions, defaulted in repaying the loan which led to him being listed in the CRB. Subsequently, the appellant sought to recover the unpaid balance by attaching some items said to have been used as collateral for the loan.
17. The respondents were aggrieved that the appellant had wrongfully attached their goods instead of attaching the goods of Douglas Mwiti Nkuri t/a Dokkor Engineering Solutions. The goods in question were set out as: 2 Tshirt printing machines (G+T-304E), Digital mug press machine (QQ4985293 518114), Trimming machine, 1 printer Epson R230 (GXSK 64725), Monitor (view sonic) 14 inch (PUN 052904821), CPU (S32005050182), 2 TFT Monitor (compaq) CNC 44705R7 and CNC 4110HCR, 3 CD Changer Sony HIF/6516260, Paper Cutter and Sub-Woofer sayona (sht-22154 CFM).
18. To support their averment that the goods had been attached from the premise of the 2nd respondent, the respondents produced a list of items taken from Jomdom Kenya Limited as “PEX 17”. The list was executed by Edward Mwirigi (PW3), an employee said to have been working at the 2nd respondent's premises when the goods were attached.



19. The court has reviewed the contents of the list adduced as “PEX 17”, and established that indeed the list has been executed by PW3. At the heading, the list is indicated to contain the “Items taken from Dokkor Engineering Solutions”, a fact confirmed from the cross-examination of PW2 and PW3 by the appellant’s counsel during the hearing before the trial court.
20. The respondents have argued that the said goods had not been purchased when Douglas Mwiti Nkuri t/a Dokkor Engineering Solutions took a loan with the appellant in February 2012. As such, the respondents have argued that Douglas would not have used the said goods as collateral to the loan. To support their averments, the respondents tendered various receipts said to have been issued to Douglas Mwiti Nkuri when he went to purchase the goods in China. They, therefore, argue that since the goods were expected to be imported in the country around March/April 2012, they could not be available for use as security for a loan facility issued in February 2012. The court has reviewed the various receipts on record and finds that since most of them are written in a foreign language (probably Chinese) they do not aid in the respondents’ case as no translator was available before the trial court to elaborate on the contents of the said receipts.
21. On its part, the appellant relied heavily on the contents of the loan application form executed by Douglas Mwiti Nkuri adduced in evidence by DW1 as “DEX 1”. The appellant also relied on the contents of the list of items adduced by the respondents as “PEX 17”.
22. Under the loan application form “DEX 1”, Douglas Mwiti Nkuri outlined the goods to be used as security as follows: sofa set 5 seater, 15 kgs cooking gas, 6 kgs cooking gas, floor carpet, wall unit, coffee table, television 21 inch plasma, DVD Player Sony, Sub-woofer Sayona, 2 T-shirt printing machine, 3 CD Changer, Trimming Machine, 2 TFT Monitor Compact, 1 monitor, CPU, Digital Press Machine, Paper Cutter and Printer Epson.
23. The underlined goods above are similar to the goods said to have been attached from the 2nd respondent’s premises, and the appellant contended that it attached the goods that had been offered as security by Douglas Mwiti Nkuri (PW2).
24. PW2 admitted that he filled the loan application form, however in re-examination he indicated that the items had been added using a different handwriting and that his signature under the loan application form had been forged. On the forgery, the court finds that the respondents did not call a handwriting expert to support this allegation and therefore it remains unsubstantiated. An allegation of fraud by forgery is a serious allegation which requires proof by cogent evidence on a balance of probability test for standard of proof in civil cases as held by House of Lords in *Re H & R (minors)* [1996] AC 563, [1995] UKHL 16, [1996] 2 WLR 8, [1996] 1 All ER 1, where Lord Nicholls of Birkenhead said:

“The balance of probability standard means that the court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.”
25. The court also takes notes of the contents of the list of items adduced by the respondents as “PEX 17”. The court reiterates that at the heading, the list indicates to contain the “Items taken from Dokkor Engineering Solutions.” The list was executed by PW3, an employee said to have been working for the 2nd respondent. Notably, during the cross examination and re-examination of PW3, no evidence was given to indicate that PW3 might have been coerced, compelled or was under any undue influence when executing the document so intitled.



26. The inescapable conclusion is that the appellant cannot be said to have wrongfully attached the respondents' goods. It is clear that the goods attached were in existence when Douglas Mwiti Nkuri (PW2) applied for a loan from the appellant as they are clearly set out in the loan application form, and the allegation of forgery has not been proved. Moreover, even though the respondents presented various documents and a narrative that the goods might have been purchased in China by the 2nd respondent, the respondents did not establish a clear nexus to show that the goods belonged to the respondents.
27. The court finds that the appellant cannot be held liable for wrongfully attaching the respondents' goods. The evidence on record, specifically "PEX17" and "DEX 1", clearly points to the fact that the appellant attached the goods belonging to Douglas Mwiti Nkuri T/A Dokkor Engineering Solutions.

Whether the award of general damages totaling to kshs 5,000,000/- for wrongful attachment of goods was well-founded?

28. In its judgment, the trial court awarded kshs 5,000,000/- as general damages for wrongful attachment of goods. From their pleadings, it is clear that the respondents had not sought the said damages. Additionally, having found the first issue to be in the negative, that the appellant cannot be held liable for wrongfully attaching the respondents' goods, it follows that an award of general damages for wrongful attachment of goods cannot be made and the same is not properly founded. The award of kshs 5,000,000/-, as made to the respondents is, therefore, set aside.
29. It may be argued that the trial magistrate might have interchanged the general damages for wrongful attachment of goods with the general damages for loss of business as sought in the Plaint. Did the respondents satisfy the prayer for general damages for loss of business? In determining whether the prayer for loss of business had been proved, the court is bound by the decision in *Abson Motors Limited v Dominic B Onyango Konditi* [2018] eKLR, where the Court of Appeal reiterated its findings in *Nyamogo & Nyamogo Advocates vs Barclays Bank of Kenya*, CA 69 of 2005 that, "loss of business must be specifically pleaded and proved."
30. The court finds that the respondents had not specifically pleaded nor proved the prayer for loss of business. The prayer for general damages for loss of business therefore fails.

Orders

31. Accordingly, the court finds that this appeal is merited and the same is allowed. The decision and judgment of the trial court in *Tigania PMCC no 148 OF 2012* is hereby set aside and substituted with an order dismissing the respondents' suit before the trial court with costs of the suit and of this appeal to the appellant.

Order accordingly.

DATED AND DELIVERED THIS 31ST DAY OF AUGUST 2022.

EDWARD M MURIITHI

JUDGE

Appearances:

M/S Mithega & Kariuki Advocates for the appellant.

M/S Mwirigi Kaburu & Co Advocate for the respondents.

