



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. E362 OF 2020

EQUITY BANK LIMITED.....APPELLANT

-VERSUS-

RICHARD KEROCHI AYIERA.....RESPONDENT

(Being an appeal against the judgment and decree

delivered by Hon. D.O. Mbeja (Mr.) (Senior Resident

Magistrate) on 24th April, 2020 in Milimani CMCC no. 7245 of 2015)

JUDGMENT

1. The respondent in this instance lodged a suit against the appellant and sought for reliefs namely a permanent injunction; a refund of the sum of Kshs.300,000/= and an order lifting the name of the respondent from the Credit Reference Bureau (CRB) Blacklist, together costs of the suit and interest thereon.
2. The respondent pleaded in his plaint that on 17th August, 2012 he had entered into a sale agreement with one Daniel Amisi Omambia (“the third party”) for the purchase of the motor vehicle registration number KBQ 213A (“the subject motor vehicle”) at the purchase price of Kshs.3,850,000/=.
3. The respondent pleaded that he paid the deposit sum of Kshs.1,540,000/= towards the aforementioned purchase and took out a loan facility with the appellant through its Ongata Rongai branch in order to pay the balance of Kshs.2,310,000/=.
4. It was pleaded in the plaint that the respondent was able to repay the loan sum of Kshs.600,000/= leaving an outstanding balance of Kshs.1,700,000/= which he was unable to repay due to financial constraints.
5. It was further pleaded in the plaint that consequently, the subject motor vehicle was repossessed by the appellant and sold by way of a public auction which the respondent alleges to have been irregular and illegal.
6. The respondent pleaded that whereas the appellant managed to recover the sum of Kshs.2,000,000/= out of the aforesaid sale, it continued to claim an outstanding sum of over Kshs.1,500,000/= and went ahead to submit the name of the respondent for blacklisting with CRB.
7. The respondent therefore sought inter alia, for the recovery of the sum of Kshs.300,000/= being the sum recovered by the appellant from the sale of the subject motor vehicle over and above the outstanding loan amount owed by the respondent.
8. Upon entering appearance, the appellant filed its statement of defence to deny the allegations set out in the plaint.
9. At the hearing of the suit, the respondent testified while the appellant relied on the testimony of one (1) witness.
10. Upon close of submissions, the trial court granted the reliefs sought in the respondent’s plaint in its judgment delivered on 24th April, 2020.
11. The appellant has now sought to challenge the aforementioned judgment on appeal and has put forward seven (7) grounds of appeal as seen in the memorandum of appeal dated 6th November, 2020:

i. THAT the learned trial magistrate erred in law and in fact in issuing a permanent injunction against the appellant from

recovery of loan arrears from the respondent.

ii. THAT the learned trial magistrate erred in law and in fact in assessing the sum of Kshs.300,000/ as a sum refundable to the respondent.

iii. THAT the learned trial magistrate erred in law and in fact in ordering that the respondent's name should be lifted from the Credit Reference Bureau.

iv. THAT the learned trial magistrate erred in law in failing to find that the respondent was still in debt to the appellant.

v. THAT the learned trial magistrate erred in law and in fact in finding that the respondent had proved his case on a balance of probabilities.

vi. THAT the learned trial magistrate erred in law and departed and/or ignored the decided authorities relied upon by the appellant without justification.

vii. THAT the learned trial magistrate erred in law and in fact in not considering the submissions and correspondence relied upon by the appellant on whether a sum was still owing to the appellant or not, and the prevailing factors thereto.

12. At the directions of the court, the parties put in written submissions on the appeal. The appellant on the one part submits that the trial court fell into error in finding that it was entitled to refund the respondent the sum of Kshs.300,000/= in the absence of proof of the same.

13. The appellant further submits that the respondent continues to be indebted to it in the sum of Kshs.1,564,981.25 and yet the trial court issued a permanent injunction restraining it from recovering the aforementioned sum from the respondent.

14. It is also the contention of the appellant that since the respondent had not repaid the full loan amount, it was proper to have his name listed with CRB and hence the trial court ought not to have ordered for the lifting of the respondent's name until the outstanding loan amount was paid in full.

15. The respondent on the other part argues that the subject motor vehicle was sold for the sum of Kshs.2,290,000/= and yet the appellant failed to inform him of such sale until two (2) years later, and which sum was well over and above the outstanding loan amount owed by the respondent.

16. The respondent therefore argues that the appellant had no basis for demanding any additional sums from him or continuing to have his name listed with CRB as a loan defaulter.

17. It is also the submission of the respondent that out of the sum recovered from the sale of the subject motor vehicle, he was entitled to a refund which explains the order sought and granted by the trial court to that effect.

18. The respondent contends that there was equally no basis for his name to continually be listed with CRB and hence the issuance of the permanent injunction by the trial court.

19. The respondent similarly contends that the consent entered into between the appellant and NIC Bank in respect to the sale of the subject motor vehicle and which consent was filed in a separate case does not have any binding effect upon the respondent, who was not a party thereto, and relies on the case of **James Muchori Maina v Kenya Power & Lighting Company Ltd [2005] eKLR** where the court determined that a consent only binds the parties thereto.

20. I have considered the contending written submissions on appeal together with the few authorities cited in support thereof. I have also re-evaluated the evidence which the trial court had the opportunity to look at.

21. Before I consider the merits of the appeal, I observed that the respondent sought to have the appeal dismissed on the basis that the appellant filed its record of appeal outside the timelines directed by the court.

22. Upon my perusal of the record, I note that the above issue was raised at the point of final submissions and not at the preliminary stages of the appeal.

23. Suffice it to say that under the provisions of **Section 95** of the **Civil Procedure Act** and **Order 50, Rule 5** of the **Civil Procedure Rules**, the courts have power to enlarge the time required for the performance of any act under the Rules even where such time has expired. On that basis and in the interest of substantive justice, I will therefore consider the merits of the appeal rather than to dismiss it at this stage.

24. It is clear that the appeal lies fundamentally against the decision by the trial court to grant the reliefs sought in the plaint. I will therefore address the seven (7) grounds of appeal under the two (2) limbs hereunder.

25. The *first* limb of the appeal concerns itself with whether the learned trial magistrate arrived at a proper finding that the respondent had proved his case against the appellant.

26. Upon adopting his executed witness statement as evidence, the respondent who was PW1 stated that the third party sold the subject motor vehicle to him in the year 2012 for a total sum of Kshs.3,850,000/= out of which he paid a deposit in the sum of Kshs.1,500,000/= and took

out a loan with the appellant for the balance of approximately Kshs.2,310,000/=.

27. The respondent stated that he was only able to repay part of the loan sum, leaving an outstanding balance of approximately Kshs.1,700,000/= thereby resulting in the sale of the subject motor vehicle at a consideration of Kshs.2,290,000/=the details of which were not disclosed to him until much later.

28. The respondent testified that consequently, he did not have any outstanding loan arrears with the appellant.

29. In cross-examination, it was the evidence of the respondent that at the time of purchasing the subject motor vehicle, he and the appellant had undertaken a search thereon and that he had no knowledge of a separate loan owed by the third party to NIC Bank.

30. It was also the evidence of the respondent that he later received communication from the appellant to the effect that he owed some money.

31. In re-examination, the respondent stated that upon repossessing the subject motor vehicle in 2013, the appellant kept him in the dark over the status of the sale despite him following up on the same.

32. Luke Ikigu (DW1) stated that he was at the time a Branch Manager at the appellant's Ongata Rongai Branch produced the court order dated 29th May, 2014 in Milimani CMCC no. 4626 of 2013 as D. Exh 1.

33. In cross-examination, the witness testified that at the time the parties herein entered into the loan agreement, he had not joined the Branch and that he had no evidence to show that the respondent was notified of the sale of the subject motor vehicle.

34. It was the evidence of DW1 that the offer price for the subject motor vehicle was in the sum of Kshs.2,290,000/ and that only part of the sale proceeds to the subject motor vehicle were made to the appellant.

35. In re-examination, the witness stated *inter alia*, that the respondent was not a party to Milimani CMCC no. 4626 of 2013 and that the appellant was under no obligation to notify the respondent of the sale upon repossession of the subject motor vehicle unless there is a deficit.

36. The learned trial magistrate reasoned that the appellant ought to have informed the respondent of the proceeds of sale and accounts taken but did not, thereby resulting in a breach of the duty of care owed by the appellant to the respondent. Consequently, the learned trial magistrate arrived at the finding that the respondent had proved his case against the appellant on a balance of probabilities.

37. Upon my re-examination of the pleadings, material and evidence on record, I note that it is not in dispute that the parties herein at all material times enjoyed a bank-customer relationship in which the appellant advanced the sum of Kshs.2,310,000/= to the respondent towards the purchase of the subject motor vehicle and subsequently, the subject motor vehicle was registered in the joint names of the parties herein.

38. It is also not in dispute that the respondent did not repay the full loan amount thereby resulting in the repossession and sale of the subject motor vehicle by way of a public auction.

39. A copy of the respondent's loan statement which was adduced as evidence shows that as at 24th July, 2013 preceding the sale of the subject motor vehicle, the outstanding loan balance stood at Kshs.1,626,527.95 which supports the averments made by the respondent.

40. Going by the evidence adduced, Milimani CMCC no. 4626 of 2013 was filed by NIC Bank against the appellant and other parties not before this court in respect to the subject motor vehicle and the court order issued on 29th May, 2014 shows that a consent order was made to the effect that *inter alia*, the proceeds of the sale be shared equally between NIC Bank and the appellant. It is clear that the respondent was not a party to that suit.

41. From my re-examination of the evidence, it is apparent that an offer was made in respect to the subsequent sale of the subject motor vehicle in the sum of Kshs.2,290,000/= though it remains unclear whether this amounted to the final offer made. It is also apparent from the evidence that whereas DW1 could not ascertain the exact sum realized from such sale, the appellant received three (3) cheques totaling the sum of Kshs.2,140,000/=.

42. In view of the foregoing and in the absence of any credible evidence to convince me otherwise, I find the position taken by the respondent to be more plausible than that taken by the appellant; that the latter was able to recover a sum from the sale which exceeded the outstanding loan amount owing from the former.

43. For those reasons, I support the finding of the learned trial magistrate that the respondent had proved his case to the required standard.

44. Further to the above, upon my perusal of the impugned decision, there is nothing to indicate that the learned trial magistrate overlooked the appellant's evidence or submissions together with the authorities cited.

45. This brings me to the *second* limb of the appeal touching on whether the respondent was entitled to the reliefs sought in his plaint and granted by the learned trial magistrate.

46. Concerning the permanent injunction sought, upon my finding above that the appellant was able to recover the outstanding loan sum owed by the respondent out of the proceeds of the sale I am of the view that the appellant had no basis for demanding any additional sums from the respondent arising out of the loan facility.

47. Consequently, I find that the learned trial magistrate acted correctly in issuing a permanent injunction against the appellant, restraining it from recovering the alleged loan arrears from the respondent.

48. In respect to the order for refund of the sum of Kshs.300,000/= the evidence tendered; as noted above; shows that the sums recovered from the proceeds of sale of the subject motor vehicle exceeded the outstanding loan amount.

49. The respondent brought credible evidence to support the aforementioned sum sought and hence I am satisfied that the learned trial magistrate was justified in awarding the same.

50. The final substantive relief sought was for the delisting of the respondent from CRB as a loan defaulter. In view of the foregoing circumstances and upon my concurrence with the decision of the learned trial magistrate, I am convinced that there was no basis for the name of the respondent to continue being blacklisted.

51. The upshot therefore is that the appeal is hereby dismissed for want of merit with costs to the respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent