



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

HCCA NO. 24 OF 2019

DAMWANA KENYA.....APPELLANT

VERSUS

JUNIUS NYAGA NJIRU.....1ST RESPONDENT

FRED MWENDA NYAGA....2ND RESPONDENT

(Being the decision of Hon. J.M Njoroge (Chief Magistrate) Chuka Law Courts Civil Case No. 51 of 2016 delivered on 29th May 2019)

J U D G E M E N T

1. This is an appeal against the Judgement delivered by the Chief Magistrate in **Chuka Chief Magistrate's Civil Case No. 51 of 2016** which found that the Appellant's case had not been proved to the required standard.
2. A brief summary of the Appellant's case against the Respondents in the lower court indicates that the Appellant had lent some money (described as **"soft loans"**) to the 1st Respondent amounting to Kshs.39,000 inclusive of interests.
3. The Appellant's case was that the 1st Respondent offered L.R. Karingani/Ndagani/7267 as security and later colluded with 2nd Respondent and one Loise Kaari Njega (named as 3rd Defendant at the trial) to place caution on the same security. The Appellant sought orders to have the caution lifted and the security be handed over to it.
4. The Respondents on the other hand denied the Appellant's claim with the 2nd Respondent and the named 3rd Defendant (not a party in this appeal) denying any knowledge of the transaction between the Appellant and the 1st Respondent. The 1st Respondent on his part denied receiving Kshs.39,000/- but admitted receiving Kshs.25,000/-. The Respondents further averred that though the 1st Respondent was registered as the owner of Karingani/Ndagani/7267, he held the land as a trustee because the property was a family land. The Respondents further position was that the land was a matrimonial property and that the 2nd Respondent and 3rd Defendant (A child and wife to the 1st Respondent respectively) were not aware of the transaction and never consented to the same. They opined that the parcel of land was given a surety against absconding and not for repayment because the land valued at Kshs.1.5 million while the loan taken was Kshs.25,000/-
5. The trial court evaluated the evidence tendered and found that the Appellant's case against the Respondents had not been proved on a balance of probabilities. The trial court further found that the parcel of land at the time it was given out as security had a restriction (caution) registered against the title and therefore the same was unavailable in law as security. The trial court further found that there is no consent or proper charge registered against the title of the said parcel and given that the Appellant was also not registered as a financial institution, the transaction itself was irregular and could not confer any right.
6. The Appellant felt aggrieved with the trial court's finding as I have observed and filed this appeal raising the following grounds namely:-
 - a. That the Chief Magistrate erred in law and in fact by misapprehending the law and applying wrong principles thus arriving at an erroneous decision which was against the evidence on record.
 - b. The learned Chief Magistrate misdirected himself by addressing issues not pleaded and failed to consider the Appellant's submission and authorities provided.
 - c. The magistrate erred in law and fact by holding that the appellant failed to prove his case on a balance of probabilities yet the Respondent had admitted that he was loaned Kshs 25,000/= which he has not paid to date.

d. The learned magistrate erred in law and in fact by dismissing the appellant's suit against the weight of the evidence on record thus his findings were unsustainable and contrary to the law.

e. The magistrate erred in law and in fact by making a finding that the 1st defendant did not appear before the Land Control Board to obtain consent for transfer of LR Karingani/Ndagani/7267 yet no evidence was adduced by the Respondent to the contrary.

7. In his written submissions the Appellant submits that even if there was no formal charge created, **Section 79(6) (b)** provides for an informal charge and to buttress its position he relies on the case of *Eunice Jelagat and Another –vs- Mwananchi Credit Ltd & Another [2017] eKLR and Jamii Bora –vs- Wapak Developers [2018]eKLR* . In the two cases, the courts expressed that an informal charge may be created by depositing of a title deed. In the latter case, the court allowed the property to vest in the creditor. On the holding by the lower that the plaintiff was not a money lending institution as per the Banking Act, the appellant relies on the case of *Solomon Muvinga Kitheka versus Bernard Oyugi (2015)eklr* where the court stated that banking business and financial business refers to where a person collects money from the public as deposits and also lends out money but the law does not prohibit a person from using his own resources to lend money to a friend. The appellant submits that the court was therefore wrong in stating that the appellant was not authorized to lend money. He points out that these were not even issues raised in defence.

The Appellant submits that the debt was admitted. He also states that the documents produced from the Land Control Board were never cited as being fake and therefore the court erred in disbelieving their authenticity. He submits that it would be unjust enrichment for the respondent to be allowed to retain the money he received.

8. The Respondents have opposed this appeal through written submissions filed on 15th July 2020. The Respondent contends that the appeal is fatally defective for intentionally leaving about the 3rd defendant at the trial. Arguing that the Appellant was out to conceal material facts that cropped up during trial.

9. They submit that the trial court applied the relevant laws appropriately and arrived at the right judgment after consideration of the facts before it. They contend that there was no evidence of any intention either express or implied to charge the land or have it sold by the Appellant in case of default. They also point out that in any case, the transactions could not happen contrary to section 28 of the Land Registration Act i.e. without spousal consent of the 3rd respondent. They submit that it is inequitable, unfair and unjust to seek the disposal of the said property valued at over Kshs 2.5 million by public auction to settle a small claim which the respondents are willing to the pay. They also submit that the allegations of collusion by the respondents in registering the caution are clearly baseless as the caution was registered in 2009 while, the loan agreement was entered into in 2014. They are of the view that the appellant did not undertake due diligence and the transaction was faulty. They aver that the transfer sought is further illegal for lacking consent of the Land Control Board and having been founded on illegal lending business. They further contend that no person can claim right or remedy from an illegal transaction. On this point, they rely on that expression of the court in *Kenya Airways Limited versus Satwant Singh Flora(2013) eklr*. In that case, the Court of Appeal in overturning the High Court decision in the matter, held that the contract of employment was illegal as the employee had no work permit and the same could not be enforced. The court also faulted the Appellant for not relieving the employee of illegal duty and made no order as to costs despite the success of the appeal.

Analysis and Determination

10. This court has considered this appeal and the submissions made. I have also considered the response made. The issues that have cropped up in this appeal are as follows:-

- i. Whether the trial court erred by rendering itself on an issue not pleaded.
- ii. Whether the trial court misdirected itself on the weight of the Appellant's case.

i. Whether the trial court determined an issue that was not pleaded

11. The Appellant has faulted the trial court for determining that it was not a registered financial institution licensed to lend money. I have perused through the pleading filed at the trial court and although the issue was germane to the suit filed, it is clear that neither the Appellant nor the Respondent raised the issue. It is undeniable fact that the Plaintiff pleaded that it lend the 1st Respondent what is termed as “*soft loan*” of Kshs.39,000/- inclusive of interests. The Respondents on the other hand did not deny the fact that the 1st Respondent was advanced a loan of Kshs.25,000/- What is pleaded is that the title to parcel No. Karingani/Ndagani/7267 was given to the Appellant as a undertaking that the 1st Respondent would not abscond. The 1st Respondent claimed that the Appellant tricked him and took advantage of his dire need for money at the time.

12. The record of proceedings shows that the Appellant was challenged during cross examination to tell if indeed it had a licence to lend out money and though the Appellant indicated that it was a money lending institutions, its witness stated that it had no license to show the court apart from the certificate of incorporation.

13. The questions posed is whether the trial court was in order to determine an issue that though not pleaded cropped up during the trial. In my considered view, the trial court would have been at fault if the matter had neither been pleaded by any of the parties nor cropped up during the trial. However as I have noted above, the issue of lending was germane to dispute before the trial court and it automatically cropped up during trial when the Appellant's witness testified. It cannot be argued that the Appellant never had a chance to ventilate itself on the issue or that it did not get a chance to be heard. This court finds that the trial court was in order to render itself on the said issue because the Appellant was hard pressed to explain the basis for the lending.

14. This court takes the position that the Appellant would have been in a better position if it did not claim to be a financial institution but failed to tender evidence to prove the same. The certificate of incorporation on its own without Articles of Association & Memorandum of Association did not show that the company was involved in money lending business or any other related business. Had the Appellant stated as per the signed agreement that it just extended a friendly loan to the 1st Respondent without being a bank or financial institution, nothing in my view could stop it from claiming a refund especially given that the debt was acknowledged. The dynamics however changed when the Appellant claimed that it was a money lending institution and did lend the 1st Respondent Kshs.25,200/- which was to be repaid at Kshs.39,000/- inclusive of agreed interests. The trial court was perfectly in order to make a finding on that claim and the Appellant cannot say it did not get a chance to make its representations on it.

ii. Whether the Appellant's case was proved to the required standard.

15. The Appellant has submitted that the trial magistrate misdirected itself by holding that its case had not been proven to the required standard. It further contends that there are charge created against Karingani/Ndagani/7267 or the security offered by the 1st Respondent was informal one as provided under **Section 79(1)** of the **Land Act**.

16. This court has looked at the provisions of **Section 79(1)** of the **Land Act, 2012** and it provides for an informal charge the next question is what is an 'informal charge'.

An Informal charged under **Section 2** of the **Land Act** is defined as “*a written and witnessed understanding, the clear intention of which is to charge the chargor's land with the repayment of money or money's worth obtained from the chargee.....*”

17. The Appellant tendered an agreement dated 11th June 2014 headed “*soft loan agreement*” The agreement goes further to indicate that the debtor had been lent 39,000/- and that for the purpose of the agreement, it provided 4 items as security to wit, 5 seater Brown (not clear if it was a sofa set or whatever), a wall unit, a title deed Karingani/Ndagani/7267 and Junius Nyaga Njiru. It is a matter of conjuncture really whether the parties intended that any or all the securities would be sold in the event of default in repayment. What then arises is rationality of the Appellant to pick out one item listed as security and determine that that is what was meant to be sold. Why not pick for example, the sofa set or Junius Nyaga Njiru himself if that what the agreement literally meant? The agreement in my view did not show clear intention that the parcel of land known as Karingani/Ndagani/7267 was a charge on the “*soft loan*” Kshs.25,200/- or 39,000/- inclusive of interests. It is as clear as day that there is absolutely no correlation between the amount advanced with the value of the property which is over a million shillings given the value of land in Ndagani Area which is high and this court takes judicial Notice of that fact.

18. Secondly and more significantly is that under **Section 79(3)** of the **Land Act 2012**, any charge created over a matrimonial property whether or informal without spousal consent is invalid and void. The wife (3rd Defendant) to the 1st Respondent pleaded at the trial that she did not consent to the land parcel No. Karingani/Ndagani/7267 being charged or being used as security. In my considered view the denial by the 1st Respondent's wife that she did not give consent put the Appellant on a spot because it was required either to prove that there was a consent or concede that the transaction was invalid and perhaps that may have informed its decision to leave out the 1st Respondent's wife (who was the 3rd Defendant at the trial) in this appeal. That omission however could not help or cure the defect in the agreement entered between the Appellant and the 1st Respondent. The said defect was fatal to that transaction because it rendered the same invalid, and of no legal consequences. **Section 44(5)** of **Lands Registration Act No.3 of 2012** is clear on this.

19. The other imperfection to the transaction between the 1st Respondent and the Appellant was that at the time the 1st Respondent and the Appellant entered into an agreement for is soft loan (11th June 2014), that parcel of land known as Karingani/Ndagani/7267 was encumbered with a caution registered on 19th November 2009. It was not available to be charged and had the Appellant conducted a search out of due diligence, it could have noted that the property could not be charged in law because of the said encumbrance.

20. This court also finds that the trial court also correctly found that the transaction between the Appellant and 1st Respondent did not have the requisite consent from Land Control Board. In my view, the transaction between the Appellant and the 1st Respondent in respect to L.R. Karingani/Ndagani/7267 was simply unsustainable in law. The evidence tendered clearly showed that the 1st Respondent was lent some money Kshs.25,200/- by the Appellant but there was no intention to charge the parcel of land as security notwithstanding the fact that the 1st Respondent may have left the title deed with the Appellant. The charge created if at all was illegal invalid and the Appellant could not enforce it because it was not sustainable in law.

This court finds that the 1st Respondent having admitted to being indebted to the Appellant to the sum of Kshs.39,000/- should actually repay the debt. He could not have taken a “*soft loan*” and refuse/neglect to repay. He should and must pay Kshs.39,000/- to the Appellant as per the agreement and because the Appellant had sought “*for any other relief*” in his pleadings, he should at least have been awarded the sum conceded by the 1st Respondent.

In the end and for the reasons aforesaid this court finds no merit in this appeal. The same is disallowed but for the reasons I have advanced above, the 1st Respondent should repay Kshs.39,000/- to the Appellant with costs assessed at Kshs.15,000/- within 30 days from the date of this Judgment. I shall make no order as to costs in this appeal so each party to pay own costs.

Dated, signed and delivered at Chuka this 30th day of July 2020.

R.K. LIMO

JUDGE

30/7/2020

Judgment dated signed and delivered in the open court in presence of Appellant in person and Kiriimi for Respondent.

R.K. LIMO

JUDGE

30/7/2020