



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**CIVIL APPEAL NO.104 OF 2019**

**FAMILY BANK LTD.....APPELLANT**

**VERSUS**

**PAUL OJIGO OMANGA.....RESPONDENT**

*(Being an appeal from original conviction and sentence in Civil case No.51 of 2018 of the Chief Magistrate's Court at Homabay dated 21/11/2019 by Hon. T. Obutu, SPM)*

**JUDGMENT**

[1] This appeal is against the decision and judgment of the Senior Principal Magistrate at Homabay in **CMCC(ELC) No.51 of 2018**, in which **Family Bank Ltd** (the appellant) was sued by **Paul Ojigo Omanga** (the respondent) for damages arising from an alleged breach of contract.

[2] It is on record that the suit was initially filed at the High court in Kisumu before being transferred to the Magistrates' court at Homabay where it proceeded on formal proof there being a judgment already entered against the bank in default of appearance and/or filing defence

[3] The respondent/plaintiff testified in the formal proof where he indicated that the cause of action emanated from a loan of kshs.7,000,000/-, advanced to him by the appellant and repayable for a period of eighty four(84) months with effect from the date of completion of the development of the respondent's building described as Salama Building Block 1/317, situated in Homabay town and its occupation by tenants.

[4] A deed of assignment was completed between the parties on 7<sup>th</sup> August 2015 and registered accordingly. Its effect was to preclude the appellant bank from demanding immediate repayment of the loan until such time that the building was occupied by tenants. The respondent indicated further that the actual payment of the loan onset to him was made on the 10<sup>th</sup> September, 2015, but the construction of the building was completed as at 28<sup>th</sup> September, 2016. Its occupation by tenants commenced on 1<sup>st</sup> November, 2016.

[5] It was the respondent's contention that on 21<sup>st</sup> October, 2016, prior to the occupation of the building by tenants, the appellant served upon him a notice for the sale of the building and caused abandonment of the building by the tenants for fear of uncertainty. Later, in the month of December, 2016 and January 2017, the property was advertised for sale.

As a result of the foregoing action by the appellant, the respondent filed this suit claiming general damages for breach of contract against the appellant.

[6] The trial court considered the evidence availed by the respondent in formal proof of the claim and entered judgment in his favour against the appellant for the sum of kshs.1,500,000/-million being general damages for breach of contract and disrepute to the respondent's reputation.

The appellant was aggrieved by the decision and preferred the eighteen(18) grounds of appeal set out in the memorandum of appeal dated 18<sup>th</sup> December, 2019 and filed herein on 19<sup>th</sup> December, 2019. This was accompanied by a Notice of Motion seeking stay of the impugned judgment.

[7] The Notice of Motion also dated 18<sup>th</sup> December, 2019, was fixed for inter parties hearing on 4<sup>th</sup> February, 2020, on which date the matter was pushed forward to the 30<sup>th</sup> March, 2020, but due to the current **Covid-19 (Coronavirus) pandemic**, it stalled and was re-activated on the 15<sup>th</sup> June 2020, when it was fixed for mention for directions on 13<sup>th</sup> July 2020, on which date the motion was withdrawn by consent of the parties. It was then that the court directed that the appeal be canvassed by way of written submissions and be mentioned on 5<sup>th</sup> October, 2020, to confirm compliance. Parties were granted leave to file further and/or supplementary record of appeal.

[8] On the 12<sup>th</sup> August 2020, the appellant filed a supplementary record of appeal dated 3<sup>rd</sup> August 2020 and on 17<sup>th</sup> August, 2020, it filed a second notice of motion for stay of execution pending inter-parties hearing of the application and also pending hearing and determination of the appeal. This was filed under the vacation rules and was fixed for inter-parties hearing on 16<sup>th</sup> September, 2020. In the meantime, a temporary order of stay of execution was issued.

[9] When the parties appeared in court on 16<sup>th</sup> Sept 2020, they recorded a consent to the effect “inter-alia” that there be a stay of execution of the impugned judgment pending hearing and determination of this appeal.

All interlocutory issues having been settled, the parties informed the court on the 5<sup>th</sup> October 2020, that they had filed their respective submissions. The court then fixed the matter for hearing or further hearing on 2<sup>nd</sup> November, 2020, with each party being given the liberty to file supplementary submissions before then as no opportunity was to be granted for oral highlighting of the submissions.

[10] On the 2<sup>nd</sup> November 2020, the appellant appeared through Learned counsel, **Mr. Minishi**, holding brief for **Mr. Mukele**, while learned counsel, **Mr. Ochola Onyango** appeared for the respondent. They both confirmed having filed their respective submissions, and judgment on the appeal was fixed for delivery on 12<sup>th</sup> November, 2020 which is today.

[11] At this stage, the duty of this court is to re-visit the evidence availed in the trial court and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses. Herein, the sole evidence was that of the plaintiff/respondent (**PW1**). His role was to formally prove his claim against the defendant by explaining the genesis of his contractual relationship with the defendant bank and how that relationship turned sour, and led to this suit. In the process he also tendered documentary evidence (PExt 1-7) in support of the claim and the alleged culpability of the appellant from whom he claimed general damages for breach of contract together with costs of the suit and interests.

[12] The appellant failed to enter appearance and/or file statement of defence. Consequently, default or interlocutory judgment was entered against itself on or about the 16<sup>th</sup> February, 2017. After the ex-parte hearing of the matter, the trial court concluded that the appellant/defendant was in breach of contract for which the respondent/plaintiff was entitled to damages and was indeed awarded damages in the sum of 1,500,000/- together with costs and interests.

[13] This appeal is an expression of the appellant’s dissatisfaction with the trial court’s decision. The respondent’s objection to the appeal was based **Firstly** on its competencies and **Secondly**, on the demerits of all its supporting grounds. Therefore, what clearly emerges as the main issue for determination herein is whether the appeal is proper and competent before this court and if so, whether the grounds in support of the appeal are meritable for the purposes of interfering with the judgment made by the lower court in favour of the respondent against the appellant.

[14] With regard to the propriety and competence of the appeal which is really a matter touching on procedural technicalities, **Order 42 Rule 2 of the Civil Procedure Rules**, provides that:-

*“where no certified copy of the decree or order appealed against is filed with the memorandum of appeal the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79(b) of the act until such a certified copy is filed”.*

[15] It was herein contended by the respondent that the jurisdiction of this court to entertain this appeal is ousted on account of this appellant’s failure to extract a formal decree before filing the memorandum of appeal and before lodging a record of appeal. That, whereas the memorandum of appeal was filed on **18<sup>th</sup> December, 2019**, a formal decree had not been extracted until after nine(9) months after the filing of the memorandum of appeal.

[16] The respondent further contended that the appeal was incompetent by dint of **Order 42 Rule (13)(4) of the civil Procedure Rules** and should therefore be struck out even at this juncture. He cited several decisions of the High Court and the court of Appeal in support of his contentions, among them, **Ndegwa Kamau t/a Sideview Garage Vs Fredrick Isika Kalumbo (2016)eKLR and Kyuma Vs Kyema(1988)KLR 185**.

In the Former case, the court was commenting on **Section 79(G) of the Civil Procedure Act**, when it stated that:

*It is clear from this provision of the law that a decree or order appealed from is a pertinent and an extricate part of an appeal filed in the high court against a decision from the subordinate court without the decree or order appealed from there is in effect no appeal.*

*It is clearly for this reason that Section 79G provides a window for extension of time to file the appeal if the decree or order could not for one reason or another, be secured within the ventilation period. It therefore follows that the preparation and delivery of the decree or order for the purpose prescribed in Section 79G of the Act is not a pastime which one may choose to overlook but rather it is a mandatory ritual within which no legitimate appeal can be said to have been lodged in the high court against the decision of the subordinate court”.*

[17] Further to the foregoing, the court also stated that:-

*“the importance of the decree or the order appealed against in an appeal to the high court is also mirrored in order 42 Rule 2 of the Civil Procedure Rules”.*

And in the case of **Kyuma(Supra)**, the court held that:-

*“The section address the thirty days to be extended by such period as was required to make a copy of the decree or order of the court. As the appeal was to be placed beyond the 30 days, presented by the rules, the appellant ought to apply and file with the memorandum of appeal, not only the order of the court but also a certificate of delay”.*

[18] The appellant submitted that the appeal is proper before the court and what is to be determined herein are the issues raised in the memorandum of appeal. That, the fact that a formal decree is not included in a Record of Appeal does not make an appeal incompetent. That, the absence of a decree in the Record of Appeal is not fatal to the appeal as there is no dispute that the memorandum of appeal dated 18<sup>th</sup> December, 2019 and filed on the 19<sup>th</sup> December, 2019, was in accordance with **Section 79G** of the **Civil procedure Act**.

[19] The appellant contended that the argument by the respondent that the appeal should be dismissed for failure to avail a formal decree is to pander to procedural technicalities thereby defeating the provisions of **Article 159(2)(a)** of the **Constitution** and the overriding objectives of the Civil Procedure Rules.

In support of its contentions, the appellant also relied on several decisions of the superior courts including **Paul Obwao & Others Vs H.O. suing as Next friend of P.O(Minor) & Another[2017]eKLR**, where the court stated that :-

*“the omission to include a certified decree can be cured by the filing of a supplementary record which act will not occasion any undue prejudice to the respondents. Any prejudice likely to be suffered can be compensated by an award of costs”.*

[20] The appellant also relied on the decision in **Emmanuel Ngare Njoka Vs Kitheka Mutisya Ngata [2017]eKLR** where it was stated that:-

*“According to the judge, the record of appeal before him had a certified copy of the judgment of the trial court. Consequently, he reasoned, the record of appeal as completed notwithstanding the fact that a formal decree had not been included in the record. We entirely agree with the reasoning of the learned judge on this aspect. In any event, this was a mere technicality that could not have sat well with the current constitutional dispensation that calls upon courts to go for substantive justice as opposed to technicalities. Further holding otherwise would run counter to the overriding objective as captured in **Sections 1A and 1B** of the **Civil Procedure Act**. Finally, one would ask what prejudice the appellant suffered on the omission of the certified copy of the decree in the record of appeal. We do not discern.*

[21] The appellant submitted that in any event, leave was granted by this court pursuant to the provisions of **Order 42 Rule 13** of the **Civil Procedure Rules**, when it stated on the **13<sup>th</sup> July 2020**, by way of directions that:-

*“...the interlocutory application dated 18<sup>th</sup> December 2019 stands withdrawn paving way for directions on the appeal. In that regard, parties may have leave to file further and/or supplementary record of appeal or hearing of the appeal by way of written submissions which ought to be filed on or before the 5<sup>th</sup> October, 2020.....”.*

The appellant contended that it was pursuant to the foregoing direction that it filed its supplementary Record of Appeal on the 12<sup>th</sup> August 2020 containing a certified copy of the decree.

[22] The foregoing rival submissions having been given due consideration, it is the opinion of this court that the record clearly vindicates the appellant by showing that the circumstances ensuing herein did not point at the alleged abuse of the court process on the appellant's part as the appeal was actually filed within time and the omission to file the decree along with the record of appeal was effectively cured by the subsequent supplementary record of appeal for which leave was granted by this court right in the presence of the respondent.

[23] Therefore, the contention by the respondent that the appeal ought to be struck out for want of competence was untenable and hence, unsustainable. As a general principle of law, matters of procedure are not normally of a fundamental nature unless they go to the jurisdiction of the court (see, **Prabhudas & Co. Ltd Vs Standard Bank Ltd(1968)EA 619**).

Most importantly, courts exist for the purpose of dispensing justice and they derive their judicial power from the people by dint of **Article 159(1)** of the **constitution** which states that:-

*“Judicial authority is derived from the people and rests in and shall be exercised by the courts and tribunals established by/or under this constitution”.*

[24] **Article 159(2)**, is very clear that in exercising the judicial authority, the courts shall be guided by the principles stated in **Article 159(2)(a)**, to wit:-

*“Justice shall be administered without due regard to procedural technicalities”.*

Besides, the overriding objective of the **Civil Procedure Act** as captured in **Sections 1A and 1B** of the Act is to facilitate the just, expeditious, proportionate and affordable resolution of disputes.

The courts, in exercising judicial power are required to give effect to the overriding objectives and to handle all matters for the main purpose

of attaining the just determination of the proceedings before them.

[25] This appeal should ideally be heard and determined on its merits rather than by rigid application of rules of procedure which may ultimately result in the miscarriage or subversion of justice.

In **Microsoft Corp Vs Mitsuni Computer Garage Ltd & Another(2001) KLR 470**, It was stated that rules of procedure are the handmaidens and not mistresses of justice. They should not be elevated to fetish deviation from or lapses in form or procedure which do not go to the jurisdiction of the court or prejudice the adverse party in any fundamental respect ought not be treated as nullifying the legal instrument thus appealed.

[26] Rules of procedure as handmaidens of justice are designed to help secure and not override it, such that, technical lapses may in aggregate circumstances be excused to obviate in justice that may ensue therefrom (see, **Blue Seal Shopping Mall Ltd Vs the City Council of Nairobi & others, Civil Appeal No. 129 of 2013(C/A)**).

It would in the present circumstances be against the policy of the law to strike out this appeal on mere technicality as agitated for by the respondent. Basically, in relation to striking out a suit, the policy would be aimed at sustaining rather than terminating Litigation (see, **D.T. Dobbie Ltd Vs Muchira(1982)KLR 1**).

It is the duty of this court to ensure that each party is given a fair opportunity to state its case and to answer the case against it.

The respondent's contention that the appeal is improper and incompetent before this court is clearly lacking in merit and is hereby overruled.

[27] With regard to the merits of the appeal, the grounds in support thereof generally raise complaints with regard to the manner in which the lower court proceeded with the suit and rendered its judgment and insufficiency of evidence in proof of the appellant's alleged breach of contract, hence liability. Grounds 1 to 6 of the appeal relate to the first complaint while ground 7 to 15 essentially relate to the second complaint.

Grounds 16 to 18 were more or less dealt with or addressed herein above when the issue of the propriety and competence of the appeal was under consideration.

[28] It is apparent that the gravamen of the grounds one to six of the appeal is actually found in ground one where the appellant contended that the trial court erred in law by proceeding to hear the matter on formal proof based on the misguided belief or assumption that a default judgment had been entered against itself in **Kisumu High Court case No.311 of 2016**, when there was no such interlocutory judgment entered. That, in so doing, the trial court set the stage for manifest, flagrant and blatant violation of the appellant's right to a fair hearing which right is safeguarded by the law.

[29] In his objection to the foregoing, the respondent contended that the appellant was mislabeled as the record of the proceedings show that interlocutory judgment was applied for and entered on 16<sup>th</sup> February, 2017, after which the matter was set out for formal proof, the appellant having failed to file a statement of defence within the stipulated time thereby rendering the defence filed on 24<sup>th</sup> February, 2017 irregular for being out of time and for having been filed after the entry of the interlocutory judgment.

[30] In essence, the respondent implied that the appellant displayed indolence and lack of diligence by failing to regularize its defence and/or failing to have the interlocutory judgment set aside. As may be deciphered from the ruling of the trial court made on 21<sup>st</sup> November, 2019, the matter was firstly filed at the Environment and Land Court at Kisumu and registered as **ELC Case No.311 of 2016**. As at 17<sup>th</sup> February, 2016, it would seem that all the parties were very much aware of its existence but it was after one year on **16<sup>th</sup> February, 2017** that default judgment was entered against the appellant for failure to enter appearance and/or file its statement of defence within the stipulated time.

[31] Therefore, on the 5<sup>th</sup> April 2017 while the matter was still in Kisumu, it was fixed for formal proof on the 14<sup>th</sup> September, 2017. Before that, the parties presented several applications including one dated **22<sup>nd</sup> November, 2016**. However, the matter did not proceed as scheduled on 14<sup>th</sup> September, 2017. Instead, the aforementioned application was fixed for hearing on 30<sup>th</sup> January 2018, but it would appear that the parties engaged in an attempt to compromise all the pending applications and on the 2<sup>nd</sup> May 2018, the parties having agreed and marked as settled some of the applications, save the one dated 22<sup>nd</sup> November, 2016. The matter was then transferred to the Magistrate's court at Homabay after the court had ordered that the application dated 22<sup>nd</sup> November, 2016 be heard by way of written submissions

[32] As at that 2<sup>nd</sup> May 2018, both parties had already filed their submissions. It was then that the court at Kisumu ordered that:-

*“ Having heard both counsels and noting that the suit land is described to be in Homabay and that the defendant's verifying affidavit at paragraph 5(b) gives charge value as seven million while the plaintiff's affidavit at paragraph 8 gives the valuation value at fifteen million, this is therefore a matter that can be handled by the lower court.*

*It is accordingly transferred to Homa Bay CM's court for hearing and determination. Further mention on 21<sup>st</sup> May 2018, interim orders extended”.*

[33] A perusal of the original record by this court reveals more or less what has been stated herein above as captured by the trial court's ruling made on 21<sup>st</sup> November, 2019. It is therefore evidently clear that when the matter was transferred from the Environment & Land court in Kisumu to the Magistrate's court at Homabay, the purpose was for the hearing and determination of the suit in relation to the respondent's application dated 22<sup>nd</sup> November, 2016, for which the parties had already filed their respective submissions and what remained was the oral

highlights (if necessary) of the submissions and thereafter, a ruling on the application.

[34] The trajectory the suit was to take thereafter depended on the outcome of the application or any other application which could have been filed by either party after the ruling. It is instructive to note all along that course of the suit, there was the interlocutory judgment hanging like the “sword of Damocles” over the head of the appellant yet no action to have it set aside was taken. Most importantly, as the time the matter was transferred to and reached the Homabay Senior Principal Magistrate’s court, the interlocutory or default judgment remained intact.

[35] So when the matter was mentioned before the trial Senior Principal Magistrate’s court on the 6<sup>th</sup> September, 2018, further confirmation that all submissions have been filed by the parties was made. The matter was fixed for mention on 18<sup>th</sup> October, 2018, and a ruling date for the application dated 22<sup>nd</sup> November, 2016 was set for 29<sup>th</sup> November, 2018. The application was for temporary injunction orders to restrain the appellant/defendant from disposing off in any manner land parcel No. **Homa-Bay Municipality Block 1/317**, and the development thereon pending hearing and determination of the suit.

[36] The ruling of the trial court made on the 29<sup>th</sup> November 2018, effectively allowed the application to the extent that the appellant was restrained from dealing in any manner with the aforementioned suit property pending the hearing and determination of the suit.

Consequently, the matter was fixed for hearing on **16<sup>th</sup> May 2019**, when the court was notified by the respondent that the matter was actually for hearing by way of formal proof. The appellant requested for an adjournment but the respondent “dug on” and spearheaded for hearing of the matter as the presence of appellant was unnecessary in the formal proof due to the fact that they had more than enough time to file their papers.

[37] The court agreed with the respondent and ruled as follows:-

*“the record is clear that interlocutory judgment was entered way back on 16<sup>th</sup> September, 2017. Even though, the defendants have not moved this court as required by law to be heard. It therefore follows that today’s date was for formal proof and the defendant can fully participate with leave of the court. I direct that matter to proceed for formal proof as earlier ordered”.*

The matter then proceeded by way of formal proof with the respondent/plaintiff (**PW1**) testifying and closing his case thereafter. He did not call any other witnesses. The matter was then fixed for submissions on 13<sup>th</sup> June 2019, on which date the respondent confirmed having filed his written submissions. Judgment was therefore set for delivery on 25<sup>th</sup> July 2019.

[38] However, before the appointed judgment date, the appellant filed an application dated 11<sup>th</sup> July, 2019, for stay of proceedings, setting aside of the proceedings of the 16<sup>th</sup> May 2019 and leave to allow the applicant defend suit and adduce evidence.

After hearing of the application, the trial court dismissed it in its ruling of the 21<sup>st</sup> November, 2019 with the following concluding remarks:-

*“I am therefore unable to set aside the proceedings of 16<sup>th</sup> May 2019. The applicants have had enough time to regularize their papers but they have decided to sleep on their rights, this court will not be used to assist the indolent. Accordingly, the applicant’s application dated the 11<sup>th</sup> day of July 2019 is dismissed with costs to the respondents. Orders accordingly”.*

[39] The applicant was aggrieved by the ruling and expressed an intention to appeal.

In the meantime, the respondent prayed for judgment on the formal proof hence the entire suit.

The applicant made a request for deferment of the judgment but this was turned down by the trial court which proceeded to deliver the judgment which is now the subject of the present appeal.

[40] From all the foregoing, it is crystal clear that the trial court did not misguide itself as to the existence of the default and/or interlocutory judgment when it proceeded with the hearing of the suit by way of formal proof. The existence of a statement of defense irregularly filed by the appellant did not make matters any better as long as the interlocutory judgment was never set aside and remained intact throughout.

In failing to take necessary action within the prescribed timelines, the appellant found itself in an awkward position such that any efforts to redeem itself proved futile.

For those who are diligent, the law smiles at them, but for those who are indolent, the law frowns at them.

In sum, with regard to grounds one(1) to six(6) of the appeal, the same are clearly unsustainable and are hereby overruled.

[41] With regard to grounds seven(7) to fifteen(15) which are essentially based on the merits of the appeal, this court did carefully consider the evidence led by the respondent in proving his claim against the appellant on a balance of probabilities and now forms the opinion that the interlocutory judgment provided the respondent with an opportunity to establish and prove his claim against the appellant in the absence of any controverting evidence from the appellant. Before a litigant is entitled to damages for breach of contract, he is required to establish and prove the alleged breach by satisfactory evidence.

[42] Being alive to this fact, the trial court in its impugned judgment framed the issues for determination as:-

(i) Whether there was a breach of contract by the defendant;

(ii) Whether the plaintiff is entitled to damages and if so the extent of the damages;

(iii) Costs of the suit.

The first issue was the most important as the other two issues were dependent on it. In that regard, the respondents evidence indicated that the cause of action arose from a loan facility extended to the respondent by the appellant for the sum of kshs.7 million which was repayable for a period of eighty four(84) months. The loan was secured by a charge instrument over the suit property being land parcel No. Homa-Bay Municipality Block 1/317 but after the respondent voiced his concern over the commencement of period of the repayment of the loan, he was allowed to complete the construction on the suit property and start the repayment thereafter. To that effect, a letter dated 4<sup>th</sup> August 2015 (PExbt2) was addressed to him by the appellant which then prepared a deed of assignment which was signed by both parties on 7<sup>th</sup> August 2015, and registered by the appellant.

[43] The deed was produced as PEx3. The respondent received the loan amount on 10<sup>th</sup> September, 2015 and completed construction on 28<sup>th</sup> September, 2016, and after receiving the necessary certificates from the County Government on 26<sup>th</sup> October, 2016, tenants started to occupy the building from 1<sup>st</sup> November 2016, however, before that date on the 21<sup>st</sup> October, 2016, the respondent received a notification of the sale of the property, issued at the behest of the appellant in realization of the security. The property was thereafter in the month of December 2016 and on 9<sup>th</sup> January 2017 advertised in local newspapers for sale by Public Auction. This action prompted the respondent to institute the present suit against the appellant for reasons that it had breached their agreement by advertising the suit property for sale.

[44] The trial court treated the deed of assignment (**PEx2**) as the basic agreement which was breached by the appellant against the respondent and in so doing stated that:-

*“On whether there was a breach of contract by the defendant, the evidence on records show that there existed a valid contract in the deed which was produced as PEx2. The defendant is therefore stopped from denying the agreement .....”.*

The court held that the appellant was entitled to its loan deductions from the month of November 2016, since that is when the tenants could have done their first payments. That, it was not proper for the appellant to proceed and advertise for the sale of property as per the sale verification issued on 21<sup>st</sup> October, 2016 and having done so, it breached the agreement thereby entitling the respondent to damages.

[45] It is this court’s opinion that the best document or instrument giving rise to the actual contractual relationship between the appellant and the respondent, vis-à-vis the suit property was the charge and not the deed of assignment. Neither was that crucial document produced in evidence nor alluded to by the respondent. He concentrated on the deed of assignment oblivious of the fact that the main contract document was the charge instrument on the basis of which the “disgraced” notification for sale of the suit property was issued.

[46] Since the deed of assignment did not find the basic contractual relationship between the respondent and appellant on the suit property, it could not be interpreted and considered on its own without reference to the charge instrument. The deed was undeniably a product of the main contract and could not therefore be viewed separately to find that the appellant was in breach of the terms and conditions of the charge instrument in issuing notifications for the sale of the suit property.

[47] The trial court’s finding that the appellant was in breach of contract against the respondent was therefore erroneous. This effectively meant that the respondent was not entitled to any damages from the appellant for breach of contract. He did not formally prove his claim by evidence which was cogent and satisfactory even though an interlocutory judgment was entered in his favour against the appellant.

In any event, it was a temporary judgment subject to proof of the claim by the respondent on a balance of probabilities. It is the holding of this court that the claim was not proved and ought to have been dismissed.

[48] Ultimately, grounds seven(7)to fifteen(15) of the appellant’s grounds of appeal are hereby sustained with the result that the appeal be and is hereby allowed to the extent that the judgment of the trial court delivered in favor of the respondent against the appellant on 21<sup>st</sup> November, 2019 is hereby set aside and substituted with a judgment dismissing the respondent’s suit against the appellant with costs. The appellant shall also have costs of this appeal.

[49] As a concluding remark, the court notes that the appellant in prosecuting the appeal made hitherto unnecessary, heavy weather or the trial court’s alleged bias towards the respondent in the course of the proceedings at the lower court, yet no credible evidence was given in support thereof. The allegation was therefore most unfortunate and completely unexpected from a reputable institution such as the appellant and by extension its counsel on record in this matter.

Otherwise, the appeal is allowed as indicated hereinabove.

Ordered accordingly.

(Delivered and signed this 12<sup>th</sup> day of November, 2020 )

**J.R. KARANJAH**

**JUDGE OF THE HIGH COURT**