REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 469 OF 2018

VICTORIA MISEDA.....APPELLANT

-VERSUS-

BENTAL SERVICES LIMITED.....RESPONDENT

(Being an appeal against the judgment delivered by Senior Resident Magistrate Hon. D. A. Ocharo (Mr.) in Milimani CMCC no. 7390 of 2015 delivered on the 6th September 2015.)

JUDGEMENT

1. Bental Services Ltd, the respondent herein, filed an action before the Chief Magistrates court against Victoria Miseda, the appellant herein, seeking for judgment in the sum of kshs.1,966,935 with interest at 15% per month from October 2015 until full payment plus costs. The claim is said to be in respect of a loan advanced to the appellant with interest. The appellant filed a defence and denied the respondent's claim.

2. When the suit came up for hearing before Hon. D. A. Ochara, Learned Senior Resident Magistrate, the plaintiff (respondent) prosecuted its case to its conclusion. The appellant's case was closed when she failed to present evidence. In the end, the learned Senior Resident Magistrate gave judgment in favour of the respondent in the sum of ksh.1,966,395/= with interest at 15% per month from October 2015 until full payment plus costs.

3. The appellant was aggrieved hence he filed this appeal and put forward the following grounds:

i. THAT the learned magistrate erred in law and in fact by delivering judgment in favour of the respondent after denying the appellant an opportunity to defend herself and/or call her witnesses thereby disregarding Article 50 of the Constitution and the rules of Natural Justice which dictate that every person has a right to be heard and ought to be given a real and effective opportunity to be heard.

ii. THAT the learned magistrate erred in fact and in law by failing to recognize that the appellant herein had enjoined a 3rd party to the proceedings who she sought indemnity against in the event that judgment was entered against her.

iii. THAT the learned magistrate erred in fact and in law by delivering judgment in favour of the respondent despite the claim having been founded on an illegal contract on account of the respondent not being a gazzeted money lending institution that could advance loans and apply interest on the same pursuant to the provisions of the Banking Act and Gazette Notice No.1617/1990. Regulation of Interest Rates and Terms of Credit of Specified Banks and Specified Financial Institutions, 1990.

iv. THAT additionally, the learned magistrate erred in fact and in law by failing to recognize the legal doctrine founded on the duplum principle which provided that arrear interest ceases to accrue once the sum of the unpaid (accrued) interest equals the amount of capital outstanding at the time.

v. THAT in the foregoing, while allowing the respondents claim and delivering judgment as against the appellant, the learned magistrate erred in fact and in law by failing to recognize the principles of the legal doctrine ex urpi cuasa non oritur action, which dictate that a party cannot base its claim on an illegal action such as the respondent's.

vi. THAT in addition thereto, in allowing the respondent's claim, the learned magistrate erred in fact and law by failing to appreciate decided case law which dictates that any suit instituted in the name of a company must be accompanied by a valid

resolution of that company authorizing the institution of the suit, a letter of authority allowing an individuals to execute documents on its behalf. This which was not done by the respondent.

vii. THAT in the foregoing, the learned magistrate failed to appreciate the submissions of learned counsel for the appellant by finding in favour of the respondent to the effect that the appellant was wrongfully held to be liable to pay the sums claimed.

viii. In all the circumstances of the case, the findings of the honourable magistrate are insupportable in law and on the basis of the affidavit evidence adduced.

4. When this appeal came up for hearing this court gave directions to have the appeal disposed of by written submissions, I have re-evaluated the case that was before the trial court. I have further considered the rival written submissions plus the authorities cited.

5. In the first ground of appeal, the appellant argued that she was not given a right of hearing.

6. The respondent is of the submission that the appellant was heard through her advocate who participated throughout the hearing. The record of the proceedings before the trial court show that the suit was certified as ready for hearing after undergoing pre-trial conference and there was no indication that a third party would be enjoined to the proceedings.

7. The record also shows that when the suit came for hearing on 5th June 2018, the appellant's counsel was present and informed the trial magistrate that he had no witnesses. He further informed the trial court that a third party who was not present in court had made a proposal and that is why he did not summons witnesses that day.

8. He also confirmed that nothing regarding the third party had been filed. It is apparent that the respondent's advocate informed the trial magistrate that she was not aware of the third party correspondences and urged the court to proceed for hearing arguing that the appellant's advocate was employing tactics to delay the matter. The record shows that the appellant's advocate was accommodated to summon his client and witnesses but he failed to do so.

9. It is clear that the appellant and her advocate were hellbent to frustrate the hearing of the matter from the beginning. It cannot lie in the mouth of the appellant to now say that she was not given a chance to be heard. The record of the trial court clearly shows that the appellant's advocate was given a chance to summon witnesses but he failed to do so. The appellant has herself to blame. I am satisfied that the appellant was given a chance to present her evidence but she failed to do so.

10. The other grounds of appeal relate to the merits of the decision. Grounds 3, 4 and 5 can be determined together since they are interrelated. It is the submission of the appellant that the respondent was not entitled to charge interest since it was not gazetted as a money lending institution. The appellant further argued that the respondent breached the duplum principle by charging interest in excess of the principal sum. The appellant further argued that the respondent was not entitled to demand payment because the outstanding amount is based on an illegal contract.

11. The respondent urged this court to dismiss the appellant's argument stating that the appellant and the respondent entered into an agreement which was produced as an exhibit in evidence.

12. It is pointed out that the letters of commitment were executed for kshs.138,000/= and kshs.115,000/= together with two post dated cheques.

13. It is clear from the record that the appellant does not contest the fact that she executed the agreements and letters of commitment. She did not also deny issuing two cheques. In the circumstances she was bound to honour the terms of the agreement. A court of law is not permitted by law to rewrite a contract between the parties. The parties to the agreement are bound by the terms of their contract unless it is shown that the contract was procured by fraud, mistake, undue influence coercion or misrepresentation which is not the case in this appeal.

14. The appellant failed to attend court to testify and prove that the agreement she signed and benefitted from was illegal. The appellant has argued that the respondent should not charge interest because it is not a gazette financial institution.

15. It is apparent from the gazette notice no. 1617/1990 that the regulations of interest rates and terms of credit of specified banks and specified financial institutions not for entities like the respondent. With respect, I am convinced by the respondent's submission that the respondent is not a financial institution as defined under the Banking Act. I am also persuaded by the respondent's argument that since the respondent is not a financial institution, then it was and is not bound by the duplum rule, the appellant does not deny she was advanced money by the respondent on terms she agreed by executing an agreement such agreements are not illegal.

16. The final issue which was ably argued is to the effect that the trial magistrate failed to appreciate that any suit instituted in the name of a company authorizing the institution of the suit which was not done in this appeal and the suit in the court below. The respondent urged this court to ignore the appellant's argument over this issue. The respondent argued that the appellant failed to adduce evidence to prove lack of authority on the respondent's part. With respect, I am persuaded by the respondent's submission that when the appellant was given an opportunity to present its case she failed to attend court to prove the lack of authority.

17. In the end, I find no merit in this appeal. The same is dismissed with costs to the respondent.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 17th day of December, 2020.

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J. K. SERGON

JUDGE

In the presence of:

……. for the Appellants

……. for the Respondents