



IN THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO 55 OF 2018

CHARLES MAINA GATHUA KIMARUAPPELLANT

VERSUS

PATRICK BM WABOMBA.....1ST RESPONDENT

SELINA AMBASA ANYOSO.....2ND RESPONDENT

EVERLYNE KAVERE3RD RESPONDENT

JUDGMENT

1. The appeal herein arises from the judgment and the decree of the Kakamega Cooperative Tribunal in Case No. 490 of 2014, delivered on the 13th March 2016, in the following terms.

‘1. The judgment is hereby entered in favour of the respondents against the appellant as follows -

1st Respondent: Kshs 7426.00,

2nd Respondent: Kshs 9016.00, and

3rd Respondent: Kshs 13,920.00

2. Plus costs and interest on the sums awarded from the date of filing till payment in full.’

2. The appellant aggrieved by the Tribunal’s decision, lodged an appeal, vide a memorandum of appeal dated 9th April 2018. In his memorandum of appeal, he raised eight grounds of appeal which are as follows-

a) Without either party to the suit seeking leave to amend the claim, and before hearing the testimonies of the parties, to be heard on the issues, and without the appellant being given an opportunity to be heard on the issue, the learned members of the Tribunal fell into grave error, at the preliminary stage in making a finding that the only contested issue in the matter was about the accrued interest and such finding made them shut out material evidence which would have enabled the Tribunal arrive at a fair logical and balanced conclusion;

b) That the learned members of the Tribunal erred in law and in fact in disregarding to apply the Cooperative Societies Act and the Financial Act in which the loanee is in default, such loan should be recovered from the loanee or guarantors cumulative of interest;

c) That the learned members of the Tribunal erred in law and in fact in concluding that the appellant was liable to pay each of the respondents as accrued interest and yet such interest was inclusive in the sum of Kshs 75,157.00 which sum had been shared by the three respondents equally, each paying Kshs 25,052 and which sum was consequently refunded to them in full by the appellant as at 21st September 2013 way before the respondents filed the claim;

d) That the learned members of the Tribunal were wrong to hold that the respondents had proved their case on a balance of probability and yet their evidence was full of contradictions, inconsistencies and against their pleadings particularly their statement of claim of Kshs 108,157.73;

e) That the learned members of the Tribunal misdirected themselves in believing the respondent’s evidence as a whole and their exhibits without evaluating the same and disregarding the appellant’s evidence, exhibits, written submissions without giving sound

reasons and which led them to a wrong conclusion;

f) That the learned members of the Tribunal ought to have allowed the parties to adduce full evidence as pleaded by either side instead of confining them to the issued of accrued interest and therefore that led to a miscarriage of justice on the part of the appellant;

g) That the learned members of the Tribunal erred in law and fact in considering irrelevant issues in the case and failing to consider relevant issues, leading the Tribunal to arrive at an erroneous conclusion; and

h) The learned members of the Tribunal ought to have dismissed the respondents claim with costs as there was no evidence and or sufficient evidence to support their claim of Kshs108,157.73 or any part thereof.

3. It was the respondents' case at the Tribunal that the appellant had asked them to guarantee him in a loan for the sum of Kshs 280,000.00 from Transnational Times Sacco Limited. They stated that the appellant defaulted in paying the same and thus their salaries were attached. They had to pay a principal of Kshs 25,052.00 each and the interest on the same.

4. The appellant on his part denied the allegation of the interest accrued. He stated that he had paid the entire amount to the respondents and that the interest claimed had also been paid. He admitted having defaulted in paying the loan and that the Sacco had attached the respondents' salaries and made deductions from the same. During cross-examination, he admitted that interest accrued on every standing order. That he confirmed was as per the respondents' Sacco account statements.

5. The only issue for determination by court in this appeal is whether the Tribunal's decision to determine that the issue of accrued interest was the only issue for determination before it was prejudicial to the appellant.

6. It is the appellant's contention that the respondents imported into the pleadings what is called accrued interest. The accrued interest he claims was not pleaded in their claim. He stated that he was ambushed when the Tribunal ordered that the trial proceeds only on the issue of accrued interest. He submitted that this was a new claim introduced in the middle of the proceedings and that he ought to have been given time to respond to the new claim.

7. Page 105 of the record of appeal shows that the respondents confirmed to tribunal that the appellant had paid each of the Kshs 25,260.00 and that the remaining balance was the interest levied. They prayed for an opportunity to prove the same. The appellant on his part reiterated that he had paid the respondents Kshs 25,260.00 each and that there was no interest payable.

8. In *Galaxy Paints Company Limited vs. Falcon Guards Limited* CA No. 219 Of 1998, the Court of Appeal stated that –

'... issues for determination in a suit generally flow from the pleadings and unless the pleadings are amended in accordance with the Civil Procedure Rules, the trial court by dint of the aforesaid rules may only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the court's determination.'

9. In *Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 Others* [2014] eKLR, the court cited the decision of the Malawi Supreme Court of Appeal in *Malawi Railways Ltd vs. Nyasulu* [1998] MWSA 3, in which the learned Judges quoted, with approval, from an article by Sir Jack Jacob entitled "The Present Importance of Pleadings." The same was published in [1960] Current Legal problems, at P174 whereof the author had stated:

'As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice...'

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice.'

10. In *Abdul Majid Suleman vs, Nyaki Farmers' Co-Operative Society Ltd* [2015] eKLR stated that

'The Courts have said time and again that issues for determination must always emanate from pleadings filed or evidence adduced by parties and not from ingenious craft or imagination of the Tribunal or judicial organ exercising quasi-judicial or judicial function.'

11. In the recent case of *Mareco Limited vs. Future Limited & Another* [2017] eKLR the Court of Appeal stated that -

'...It is trite that issues for determination by a court flow from the pleadings. A court cannot make pronouncement on issues not raised in the pleadings filed by parties and to do so would be tantamount to acting outside its mandate.'

The same was succinctly put in *Independent Electoral and Boundaries Commission & another vs. Stephen Mutinda Mule & 3 others* [2014] eKLR -

‘As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. The learned Judge, no matter how well-intentioned, went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on the basis of matters not properly before her. To that extent, she committed a reversible error, and the appeal succeeds on that score.

See also *Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others* [2013] eKLR.

In the case before us it is not in dispute that the appellant’s cause of action against the 2nd respondent was in respect of the assigned invoices which it believed had been accepted by the 2nd respondent. Similarly, it is not in dispute that the 2nd respondent in its defence contended that it had not duly approved the payment of the assigned invoices. It follows therefore that the issue of whether the invoices in question had been duly accepted by the 2nd respondent arose from the pleadings and evidence tendered by the parties. Consequently, we find no fault with the learned Judge considering that issue. Equally, in determining that issue the learned Judge was also bound to consider the evidence tendered by the parties as what ‘duly accepted’ entailed and to that extent he did not err in considering SCS, the procedure which the 2nd respondent stated it used in approving invoices.’

12. In the cause herein, the respondents claimed an amount of Kshs 108,157.73 from the appellant. Before the suit proceeded to hearing, the appellant had paid part of the amount claimed and the balance of it, the respondents claimed was interests levied. The appellant also denied that he owed the respondents any interests. It was thus obvious that the issue for determination was as to whether or not the remaining balance which the respondents claimed was courtesy of the interests levied was payable by the appellant and how much. This the Tribunal properly ascertained was the only issue for determination, if not there would have been no other determination in the suit. It must also be noted that the appellant was present when the said directions were taken. He participated in the hearing and cross-examination of the witnesses. He also adduced his evidence on the same. He cannot then claim that he was prejudiced yet he had several opportunities to raise the issue. It should be noted that no new issues were raised at the hearing of the suit as alleged and thus his argument cannot stand.

13. The appellant further contends that if had the Tribunal allowed the parties to adduce full evidence, it would have seen the distinction between normal interest and accrued interest. It should be noted that at no point during the hearing did the Tribunal restrict the appellant from giving evidence. As stated above, issues for determination emanate from the evidence and the pleadings and not the other way round. It is my conclusion that the tribunal rightfully held that the only issue of determination was the issue of the interests levied which formed the balance of the monies claimed by the respondents.

14. On the issue of proof, the respondents produced statements that indicated that the Sacco had levied interest on the deductions per month that was separate from the amount deducted. The respondents explained to the Tribunal that the interest was levied on the deduction. The appellant when cross-examined, said that he was not aware that interest was charged on the deductions. I am satisfied that the respondents discharged their burden of proof to the required standards and that the Tribunal properly came to the correct conclusions.

15. In the upshot, I find and hold that the appeal before me has no merit, and I hereby dismiss the same with costs.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 29th DAY OF April, 2019

W MUSYOKA

JUDGE