



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL NO. 154 OF 2017

AKUISI FARMERS COMPANY LIMITED.....APPELLANT

VERSUS

ROBERT NDIRITU GITONGA.....RESPONDENT

(Appeal from judgment of the Chief Magistrate's court of Kenya at Nakuru (Mr. B. Mararo, Principal Magistrate) dated 18th October 2012 in Nakuru CMCC No. 1198B of 2016)

JUDGMENT

1. This appeal arose from the trial court's judgment delivered on the 18th October 2017 in favour of the plaintiff, now the Respondent, in the sum of Kshs.3,000,000/= plus interest and costs. The said sum is in respect of money lent to the Respondent on 2nd March 2002 initially Kshs.2,000,000/= with interest at 50% in the first two years, plus another Kshs.1,000,000/=penalty as a result of nonpayment being terms agreed between the two parties, and acknowledged by the defendant (Appellant) by an **agreement dated 2nd March 2002**.

2. In its statement of defence and counter-claim dated 20th June 2007 the appellant denied all and singular the respondent's claim and by way of counter-claim sought for production of all financial records, documents official receipts books as well as all liquid cash which come into his possession by virtue of his position as a director and treasurer in the appellant's company between the year 2001 and 2004, and sought dismissal of the suit, and judgment upon the counter-claim.

3. The appellant was aggrieved by the judgment and preferred this appeal upon numerous(twelve) grounds that can be summarized into four(4) that

(1) The trial magistrate erred in law and fact by relying on documents that we neither tendered in evidence during the trial nor produced as exhibits – grounds 1, 2 and 3

(2) That the trial magistrate erred in law and fact by relying on documents whose authenticity and admissibility were questionable- ground No. 6 and 7

(3) That the trial magistrate's findings and conclusion were against the weight of evidence-Grounds No. 8, 9 and 10

(4) That the trial magistrate erred in law and fact by dismissing the appellants counter-claim.

4. Prior to the hearing of the primary suit, both parties filed lists and bundles of documents.

I have considered the evidence on record as adduced by the Appellant and Respondent's witnesses.

The Original plaintiff died while the suit was pending for hearing. He was substituted by his son **Robert Ndiritu Gitonga**, the Respondent. Three witnesses testified for the Respondent while one testified for the appellant. I have considered the entirety of the parties' evidence.

5. There is no dispute that the Respondent's father, the late Charles Gitonga Kariuki was a director and treasurer of the Appellant Company at the material times during which time the loan agreement dated 2nd March 2002 was drawn and executed. This agreement is the basis of the primary suit as well as this appeal.

6. The deceased agreed to loan the company a sum of Kshs.2,000,000/= upon agreed terms as stated therein that

(1) Term of loan – two years

(2) *In default, the lender shall take any movable or immovable assets of the company land LR 8944/8943 Solai Farm -to repay himself.*

(3) *The money should be paid with interest of 50% for two years.*

7. An advocate witnessed the execution of the agreement. There is filed the Board of Directors Minutes of the day, the 2nd March 2002 wherein they acknowledged having received Kshs.2,000,000/= from the said Charles G. Kariuki, as well as acknowledging the agreed payment terms as stated in the agreement.

8. During the Annual General Meeting of the Appellant company held on the 10th May 2003 the loan of Kshs.3,000,000/= owed to Charles Kariuki (deceased) was acknowledged as a debt by the company (Min 3/10/03) – and the new directors elected on the 1st March 2003. This is the debt stated in the plaint and Amended plaint dated the 26th April 2016. These documents are among the plaintiff's list and bundle of documents filed on the 4th May 2016.

9. In his evidence in chief, the Respondent Robert Gitonga(PW1) testified to the Kshs.3,000,000/= loan to the company that the new directors failed to repay. There is evidence on record that the loan agreement dated 2nd March 2002 was produced and marked as plaintiff Exhibit No 2, and duly admitted as evidence. However, the company documents that were admitted by the trial court did not have a company seal or rubber stamped (the agreement and minutes of the board of directors).

10. **PW2 Gilbert Kabage**, a real Estate agent testified that he was the consultant of the Appellant Company during the period, 1995/1996 and was aware of the loan to the company by the respondent and witnessed the loan process.

PW3 Joseph Nderitu a land Surveyor also confirmed having been aware of the loan borrowed from the then treasurer Charles Kariuki, deceased of Kshs.2,000,000/= with which he was paid part of his survey fees by the appellant. He testified that the new directors failed to pay his fees balance, for which he also filed a recovery suit in 2006.

11. The Appellant called one witness, a member and director of the company, Joseph Githaiga Ndirangu. He testified as DW1. In his testimony he confirmed the deceased as having been the company's director and Treasurer but was not a director when the loan agreement was entered into. He stated that he never saw it nor was it handed over (with other documents) to the new directors.

He denied that the debt was ever an agenda in any of the Annual General Meeting or any other meeting.

12. When shown minutes of the meeting of May 2003 where the then directors acknowledged the debt, he stated that he did not attend the meeting, yet it was his evidence that he never missed any meeting – but agreed that the loan agreement was signed by the directors of the company.

13. Based on the above evidence the trial court was satisfied that the Respondent's father indeed lent the Appellant the suit amount, and that the loan agreement was executed by the then directors to the company and therefore that the loan agreement dated 2nd March 2002 was genuine as was duly acknowledged by the company directors.

14. As the first appellate court, I have re-examined the entire evidence adduced as well as the trial court's judgment, and also submissions by both counsel on the appeal. - **Selle –vs- Associated Motor Boat Company (1968) EA 123.**

The documents that are alleged to have been relied on by the trial magistrate to form the basis of his judgment, and alleged to have not been produced or marked as exhibits are the loan agreement dated 2nd March 2001 and the minutes of the Board directors when the loan was acknowledged held on the 2nd March 2002. I have herein above held that the two documents were indeed produced as exhibits by the plaintiff on the 14th June 2017 when he was recalled, without any objection from the appellants Advocate (paragraph 22 proceedings) The loan Agreement was marked a PExt 2.

15. In the case **Kenneth Nyaga Mwige -vs-Austin Kiguta and 2 Others (2015) e KLR, the Court of Appeal** discussing the matter of production and admission of unmarked documents and the evidential effect of a document marked for identification, and not formally produced in evidence, nor marked as an exhibit, and whether such document can form part of evidence rendered that

“First, when a document is filed the document though on file does not become part of the judicial record.

Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; and admission of a document in evidence as an exhibit should not be confused with proof of the document.

Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents...”

16. Thus, as expounded by the Judges of Appeal in the case, when the court is called upon to examine the admissibility of a document, it concentrates only on the document, but when it is called upon to form a judicial opinion on whether the document has been proved or not, the court would look not at the document alone but would take into consideration all the facts and evidence on record.

17. The Court of Appeal in the above case went further to render

“That once a document has been marked for identification it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case if the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the documents would only be hearsay, untested and unauthenticated account.”

18. Back to the present appeal. The appellant does not submit that the loan agreement was not produced and admitted as evidence. **The issue is whether the said agreement was proved by failure by the Respondent (PW1) to call witnesses who were present when it was made and executed.**

I have perused and considered the loan agreement. It is shown to have been drawn, executed and witnessed by an Advocate Mirugi Kariuki (now deceased). Eight directors of the Appellant Company appended their signatures thereto, in the presence of the said Advocate.

19. The advocate before whom the execution of the agreement died a while back. The eight directors of the company were the only directors.

DW1 was not certified to have been a director or at all, and in any event, he alleged to have become a director in 2006. **PW2** and **PW3** were all along aware of the loan granted the company by the deceased in 2002.

20. The appellant did not call any evidence to dispute existence and execution of the loan agreement save to deny its existence and knowledge in its defence.

Section 107 -109 of the Evidence Act Cap 80 Laws of Kenya is plain and clear that he who asserts must prove and if no evidence is called to prove, then contents in a document, a defence, or counter-claim remain as such, mere statements of no evidential value – **Shaneebal Ltd - vs- County Government of Machakos (2018) e KLR.**

21. Failure to affix the seal of the company and stamp) to an agreement, is it fatal?

The loan agreement is subject to the **repealed Company Act, Cap 486 Laws of Kenya.**

Section 34 thereof provides

“A contract if made between private persons would be by law required to be in writing, signed by the parties to be charged therewith may be made on behalf of the company in writing signed by any person acting under its authority, express or implied.”

22. **Section 35 of the 2015 Companies Act** is to the same effect, that

(1) A contract may be made

a) by a company, in writing under its common seal, or

b) On behalf of a company, by a person acting under its authority, express or implied.

Thus a corporation may be represented by its authorized officers which authority may be express or implied. Directors of a company are such officers. My understanding of **Section 35** above is that such authority need not be in writing or even filed. It could be implied, by conduct of the parties.

23. If that was not so, the drafters would have expressly stated so. That goes to support the Constitutional imperatives under **Article 159(2) (d)** that justice should be dispensed without undue regard to procedural and technical failures. This is 2002, long before the current constitution was promulgated.

The above was also stated in the case **Leo Investments Ltd –vs- Trinident Insurance Company Ltd. (2014) e KLR**, where Gikonyo J rendered that

“if a suit is filed without a resolution of a corporation it may attract some consequences. The mere failure to file the same with the plaintiff does not invalidate the suit ---but may be filed anytime before the suit.”

24. In the instant appeal, all the eight directors of the company signed the Loan agreement. They were authorized officers of the company in terms of **Section 2 of the Companies Act, and Order 9 rules (2) of CPR.**

Article 98 of the Articles of Association of the Appellant Company empowers the company to borrow money for its benefit. This is what it did, which was within its mandate.

25. In its Board of Directors meeting held on the 2nd March 2002, the company was duly authorised by its resolution to borrow and receive the sum of Kshs.2,000,000/= shillings from the Respondent – Min 3/10/2003 – which resolution formed the basis of the loan agreement.

26. The only requirement missing from the agreement is the seal of the company. However **Section 34(1)** is specific that director's action shall bind the company so long as the said actions are done in good faith, and that power is free from limitations if at all as may be contained in its constitution; or that they may have exceeded their powers – **Section 34(1) (2)**.

27. In the absence of fixation of the company seal, provisions under **Section 37 of the Companies Act** came to play. It provides that

37(1) A document is executed by a company if it is signed on behalf of the company

(a) By two authorised signatories or

(b) By director of the company in the presence of a witness who attests the signature

37(2) – A document is validly executed by a company if it is signed on behalf of the company

(a) by two authorized signatories, or

(b) by a director of the company in the presence of a witness who attests to the signature.

28. Considering the above legal provisions I find nowhere where it is mandatory that a document must be signed under the seal of the company to make it valid. These are options that the company may take.

I decline to find and hold that failure to affix the seal of the company invalidates an otherwise valid document or agreement.

29. I wish to echo the holding by Ringera J (as he then was) in **Microsoft Corporation –vs- Mitsumi Computer Garage Ltd & Another (2001) e KLR**. that, and specifically in the new justice dispensation under the Kenyan Constitution 2010 that

“----Rules of procedure are hand maidens and not mistresses of justice and should not be elevated to a fetish as theirs is to facilitate the administration of justice in a fair orderly and predictable manner....”

30. Having come to the above findings and being mindful that the court is not empowered to make or amend mutually agreed agreements/contracts by parties, but only to enforce them unless fraud or misrepresentation are evidently proven, I find no fault with the trial magistrate's finding that the appellant was and is obligated to meet its obligations under the agreement dated the 2nd March 2002, to the extent stated in the plaint as Kshs.3,000,000/= and clearly exhibited and acknowledged in the Board of Directors resolution on even date.

31. For the above reasons, I uphold the trial court's judgment delivered on the 17th October 2017.

The appeal is therefore dismissed with costs to the Respondent.

Signed, delivered and dated at Nakuru this 30th Day of July 2019.

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J.N. MULWA

JUDGE