



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 27 OF 2018

ASHIT CHUNILAL KOTAKAPPELLANT

VERSUS

KOTECHA WHOLESALERS LIMITED..... RESPONDENT

[Being an appeal from Ruling and decree of the Hon. A. Odawo RM on the 28th March 2018 in Kisumu CMCCC No. 420 of 2011 between KOTECHA WHOLESALERS VS ASHIT CHUNILAL KOTAK]

JUDGMENT

The Appellant was found liable to refund to the Respondent the sum of Kshs 1,200,000/= which he had received from the Respondent.

1. The Appellant faulted the trial court for holding that the Respondent had given him a loan of Kshs 1,200,000/=.
2. He emphasized that although he received the amount of money in contention, the same was not a loan.
3. He said that the money given to him was in the nature of a Bonus.
4. The Appellant's submission was that pursuant to **Section 3 (1)** of the **Law of Contract Act**, the Respondent ought to have produced some memorandum or note, signed by the Appellant, showing that the money he received was a loan.
5. The Appellant denied the contention that the Respondent had given him the soft loan because the Appellant needed financial assistance to enable him pay for the cost of medical treatment for his mother.
6. The Appellant confirmed that his mother was unwell, however, he insisted that the costs for her medical treatment was paid for by the **NHS**, United Kingdom.
7. The Plaintiff had the onus to prove that the money given to the Defendant was a loan.
8. However, the Plaintiff was not under any obligation to prove that the money was needed for the purposes of paying the medical bills for the Defendant's mother.
9. I will revert to the issue as to whether or not the Plaintiff discharged that onus.
10. Meanwhile, as the Defendant confirmed having received the amount of money in question, but insisted that the same was not a bonus, I find that the Defendant should have led evidence to prove his said assertion. I so find because if the Defendant failed to prove his contention, the court would be entitled to conclude that his Defence was unfounded.
11. If the Defendant's line of Defence was simply that the money he received was not a loan, it would not have been necessary for him to prove what the money was for.
12. However, by his Written Witness Statement, which he re-affirmed by his oral evidence, the Defendant asserted that the sum he had received was a bonus for the financial year beginning September 2007 – August 2008.
13. It is that positive assertion, about the reason why he received the money, that the Defendant then assumed the obligation to prove.
14. The Defendant placed emphasis upon the fact that the money in question did not come from the bank account of the Plaintiff company. The money came from the account of **RAJESH KOTECHA**, who is a director of the company.

15. If the source of the funds was the basis for determining whether the funds were a loan or a bonus, I fail to understand how the Appellant wants the court to believe that it was alright for a bonus payable by the company to come from the account of a director, but that a director of the same company cannot give a loan to the Appellant, by using funds from the account of the said director
16. In my considered opinion, if the company could give a bonus by giving funds to the Appellant from the account of a director, it would be equally acceptable for the company to use funds from a director's account to give a loan to the Appellant.
17. The issue about whether or not the company had locus to institute proceedings against the Appellant ought to have been raised as a substantial Defence, which should then have been determined at the earliest opportunity in the proceedings.
18. I note that in the Defence the Appellant did not expressly raise the principle flowing from corporate personality as was espoused in **SALOMON Vs SALOMON [1987] A C 78**.
19. The said principle emphatically underscores the fact that, in law, a Company is a body corporate, with power to sue or to be sued, and its identity is independent of and distinct from its shareholders and directors.
20. In so far as the Company insists that it is the "person" who gave a loan to the Appellant, I find that the Company had the locus to institute these proceedings.
21. There is a document dated 11th August 2011, which appears to have been executed by two directors of the company, which is indicative of a resolution authorizing Rajesh Kotecha to execute the Verifying Affidavit and all other documents for use in the suit herein.
22. However, the said document does not indicate the date when the Board of Directors held the meeting at which the resolution was passed.
23. The absence of the date is, in my considered opinion, not fatal. The Company could have led evidence to demonstrate that the meeting was held on a particular date.
24. However, there is a much more fundamental question concerning the resolution itself. I so find because although it appears that the company's Board of Directors may have passed a resolution, the said resolution did not expressly state that the company had decided to institute proceedings against the Appellant.
25. In the case of **AFFORDABLE HOMES AFRICA LIMITED Vs HENDERSON & 2 OTHERS HCCC NO. 524 OF 2004** L. Njagi J. expressed himself thus;
- "The upshot of these considerations is that in the absence of a board resolution sanctioning the commencement of this action by the company, the company is not before the court at all."***
26. The only way a company can prove that there is a resolution sanctioning the commencement of legal proceedings in court, is by making available a copy of the said resolution.
27. In this case I find that the company exhibited a resolution.
28. There is no standard format for resolutions to sanction the commencement of legal proceedings.
29. The resolution herein could have been made more explicit or more elegant. But the intended message is clear, that Rajesh P. Kotecha was duly authorized to execute a Verifying Affidavit and all other necessary affidavits and documents;
- "in the company's suit against Ashit Chunilal Kotak for recovery of sums due in respect of a friendly loan given to him"***
30. I hold that the Plaintiff's Board of Directors passed a resolution which authorized the institution of these proceedings.
31. Finally, the big question is whether the money was a loan or was a bonus.
32. It is common ground that in the year 2009, the company paid Kshs 1.5 Million to the Appellant as a Bonus.
33. In the year 2010 the Appellant received the sum of Kshs 1.4 Million as a Bonus.
34. Therefore, the Appellant compared those two sums to the amount he received in 2008, and says that in that year, the sum of Kshs 1.2 Million was also a Bonus.
35. Logically, it sounds plausible that the amount could have been a Bonus.
36. However, I note that during re-examination, the Appellant acknowledged that in the years 2009 and 2010, the amounts he received as Bonuses, were taxed under his own account.

37. On the other hand, the sum of Kshs 1.2 Million, which was allegedly a Bonus was not similarly taxed. To my mind, the manner in which the sums received were subjected to taxation, is a clear indication that the sums received in 2008 was not in respect of a Bonus.

38. A bonus is, in my understanding, Income received by an employee or an agent, after they have met targets which had been set.

39. Just like in the years of 2009 and 2010 when the Appellant paid Tax on the Bonuses he received, he would have had to pay Tax in 2008, on the sum of Kshs 1.2 Million, if the said sum was a Bonus.

40. The Appellant confirmed, during cross-examination, that;

“I was given an annual bonus of Kshs 1.2 Million. Yes, I know what a bonus is. Yes, it is taxable. It was not taxed.”

41. In the result, I have no doubt that the reason why the sum of Kshs 1.2 Million was not taxed, (whilst other sums which were bonuses were taxed), is a clear affirmation that the said sum was a loan, rather than a Bonus.

42. Accordingly, I find no merit in the appeal, and it is therefore dismissed, with costs to the Respondent.

DATED, SIGNED and DELIVERED at KISUMU

This 24th day of July 2019

FRED A. OCHIENG

JUDGE