REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO 92 OF 2018

NIC BANK KENYA PLC.....APPELANT

VERSUS

JOSHUA ONANI OGEMBO.....RESPONDENT

(Being an appeal from the order of the ruling of Hon. S. N. Makila (SRM)

delivered on 6th October 2017 pursuant to a preliminary objection raised

on 4th September 2017 in Kisii CMCC No. 239)

JUDGMENT

1. In this appeal, the appellant has challenged the ruling dated 6th October 2017 entered against it. The appellant was the defendant before the subordinate court while the respondent was the plaintiff. I shall refer to the parties in their capacities before the trial court for ease of reference unless the context otherwise admits.

2. The genesis of the suit is contained in a Plaint dated 3rd June 2015, lodged CC 239/2015 in CM's Court at Kisii in which the Plaintiff is claiming the following orders;

> *i. Declaration that upon repossession of Motor Vehicle Registration Number KBA 736 M, FortonForland Truck, the **Hire Purchase Agreement Number HPR-4-560-002274** lapsed and/or stood terminated and the defendant herein was only entitled to payment of the installments, which were in arrears , as at the 16th day of July 2010, when repossession was effected.*
>
> *ii. Declaration that the installments in arrears at the foot of **Hire Purchase Agreement Number HPR-4-560-002274**, prior to the repossession, have since been fully and duly paid and hence there is no balance due and payable to and/or in favor of the defendant.*
>
> *iii. An order for refund on account of overpayment in the sum of Kshs 46,656.34 only, together with interest at courts rates w.e.f November 2014.*
>
> *iv. An order directing and/r compelling the Defendant, to rescind the reference of the Plaintiff's name to the Credit Reference Bureau (CRB) and cause the plaintiff's name to be thereby removed and/or cancelled there from.*
>
> *v. Permanent Injunction to restrain the Defendant, either by herself, agents, servants and/or employees from further referring the plaintiff to the Credit Reference Bureau (CRB) (sic) on the basis of the outstanding loan balance, (sic) due at the foot of the **Hire Purchase Agreement Number HPR-4-560-002274**.*

3. The matter was set out for hearing and the plaintiff case was heard on 1st February 2017. The defence hearing failed to take off immediately as the defendant sought several adjournments. On 30th May when the matter came up for hearing and the defendant sought to have the hearing adjourned the trial court made an order closing the defence case.

4. On 28th June 2016 Defendant lodged Notice of Motion dated 26/04/2013 seeking the defence case to be re-opened and the defendant to be at liberty to participate in the matter and adduce its evidence. Vide a ruling delivered on 6th October 2016 the defence case was re-opened and the defendant directed to set down the defence case for hearing within 14 days.

5. Subsequently on 21st October 2016 the defendant filed an application seeking to amend its defence which application was dismissed on 6th October 2017. The defendant then sought to schedule the defence hearing for 4th September 2017 and the plaintiff raised an objection to the hearing of the defence case. The main issue that came up before the trial court was whether the defendant had acted in contravention of the earlier court orders made on 6th October 2016. The court found that the defendant had occasioned unnecessary delay in the matter contrary to **Article 159 (2) (b)** of the **Constitution of Kenya** and marked the defence case as closed and directed the parties to file their submissions.

6. The defendant has now filed this instant appeal to have the defence case re-opened and the trial court's orders made on 6th October 2017are set aside on the following grounds;

> *1. THAT the learned trial ,magistrate erred in law and in fact in making a decision based on the wrong principles in law/or a decision that was not founded in law.*
>
> *2. THAT the learned trial magistrate erred in law and in fact in upholding the preliminary objection raised without being guided by the principles of **Article 159** of the **Constitution of Kenya**, **Order 1A** and **1 B** of the **Civil Procedure Act Cap 21 Laws of Kenya**.*
>
> *3. THAT the learned trial magistrate erred in law and in fact in making a decision that was tantamount to denying the appellant an opportunity to be heard thereby condemning the appellant unheard contrary to the Constitution and principles of natural justice.*
>
> *4. THAT the learned trial magistrate erred in law an in fact in failing to dismiss the preliminary objection raised by the respondent's advocate in view of the prevailing circumstances, the court record and the law.*
>
> *5. THAT the learned trial magistrate erred in law and fact in failing to hold that the preliminary objection raised had no basis and that he Appellant was ready and willing to be heard having awaited its witness in court.*

7. The appeal was dispensed by both oral and written submissions. I have considered the parties submissions, evidence on the record and the laws. This being a first appeal, I am alive to the principle that the first appellate court is required to reconsider the evidence, evaluate it and draw its own conclusions making an allowance for the fact that it neither heard nor saw the witnesses testify ***(see Selle v Associated Motor Boat Company Ltd [1968] E.A. 123, 126)***.

8. I now turn to consider whether the intention of **Article 159** of the **Constitution of Kenya** was to operate by uprooting the established principles and procedures under the law. **Article 159(2)** of the **Constitution** which provides that in exercising judicial authority, the courts and tribunals shall be guided by the following principles-

> *a) justice shall be done to all, irrespective of status;*
>
> *b) justice shall not be delayed;*
>
> *c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);*
>
> *d) justice shall be administered without undue regard to procedural technicalities; and*
>
> *e) the purpose and principles of this Constitution shall be protected and promoted.*

In the case of **JaldesaTukeDabelo versus IEBC & Another [2015] eKLR**, where the court held inter alia, that:

> *"rules of procedure are hand maidens of justice and where there is a clear procedure for redress of any grievance, prescribed by an Act of Parliament that procedure should strictly be followed as Article 159 of the Constitution was neither aimed at conferring authority to derogate from express statutory procedures for initiating a cause of action"*

9. It is paramount to first get a clear picture of what transpired before the trial court. Having gone through the proceedings I note that the trial court on 6th October 2016 made the following order on the defendant's application to re-open the defence case;

> ***"2. The defence case is hereby re-opened and defendant applicant is directed to set the defence case for hearing within fourteen (14) days from today failure to which the defence case shall remain closed"***

10. The defence counsel immediately made an application to have the defence case fixed hearing, and the matter was fixed for defence hearing on 27th October 2016. However before the defence case could be heard the defendant sought to amend its defence and filed an application dated 18th October 2016. The trial court ordered that pending the hearing and determination of the said application, there a stay of the proceedings and/or further proceedings. The application to have the defence amended was dismissed and the defendant took a mention date. When the matter was mentioned on 17th July 2017 the Defendant through its advocate Mr.Bunde made an application to have a hearing date for the defence case, the trial court ordered that the defence case be heard on 4th September 2017 and a hearing notice to issue. On the date of the defence hearing Mr. Ochwangi counsel for the plaintiff argued that the matter was wrongly fixed as 14 days within which to fix the case for hearing had lapsed.

11. I agree with the defendant that the trial court erred when it found that the defendant failed to comply with the mandatory directions given on 6th October 2016. Why do I say so? The gist of the plaintiff's objection was that the defence had not been set down for hearing within 14 days. A keen observation of the chronology of events during the proceedings reveal that the defendant complied with the orders that were issued by the trial court on 6th October 2016 when it immediately set down the defence case for hearing. The trial court scheduled the defence hearing for 27th October 2016. The general position on the right to be heard has been stated in **Halsbury's Laws of England Fourth Edition Vol. 1 page 90 paragraph 74** as follows:

> *"The rule that no man shall be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard is a cardinal principle of justice..."*

12. It is important that in any judicial process, the parties have to be given an opportunity to present their case and have a fair hearing before the decision against them is made by the magistrate. In this case the trial court should have given the defendant the opportunity to present its case and it erred when it drove the defendant away without according it an opportunity to be heard and directing the parties to file their submissions.

13. The order which the appeal emanates from describes the objection by the plaintiff as a preliminary objection. The objection raised by the plaintiff in its nature was not a preliminary objection. In the case of **Mukisa Biscuits Manufacturing Ltd v West End Distributors Ltd (1969) EA 696**the law pertaining to preliminary objections was extensively discussed and Newbold P. held as follows;

> ***A preliminary objection is in the nature of what used to be called a demurrer. It raises a pure point of law, which is argued on assumption that all facts pleaded are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.***

Law, JA observed as follows;

> ***A preliminary objection consist of a point of law which has been pleaded, or which arises from a clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.***

14. In the end, I do find that the appeal is meritorious and hereby set aside the findings of the trial court. The matter should be mentioned within 14 days at the Chief Magistrate Court at Kisii before any magistrate other than Hon. S. N. Makila for directions on the hearing of the defence case. The Defendant shall have the costs of the appeal.

Dated, Signed and delivered at Kisii this 14th day of August, 2019.

R. E. OUGO

JUDGE

In the presence of;

Mr. Wesonga h/b Mr. Onyinkwa For the Appellant

Mr. Nyambati h/b Mr. Oguttu For the Respondent

Rael Court clerk