**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 168 OF 2018**

**ECOBANK KENYA LIMITED.....APPELLANT**

**-VERSUS-**

**EMMA WANYANGA WANGECHI t/a**

**MICROCAT AUTO SPARES & ACCESSORIES.....RESPONDENT**

***(Being an appeal from the judgment and decree of D.O. Mbeja (Mr.) (Senior Resident Magistrate) delivered on 27th March, 2018 in CMCC NO. 6383 OF 2013)***

**JUDGEMENT**

1. The appellant instituted the suit against the respondent vide the plaint dated 9th October, 2013 under CMCC NO. 6383 OF 2013. Therein, the appellant pleaded that by way of the agreement dated 4th June, 2009 it had granted the respondent a loan facility in the sum of Kshs.200,000/= upon request and which facility was to be utilized as a working capital and would be payable on demand.

2. The appellant pleaded that the respondent failed to repay the loan, causing the same to accrue interest. The appellant therefore sought for payment of the sum of Kshs.224,983/50 together with interest at the rate of 33% p.a. from 1st September, 2012 until payment in full and Kshs.13,924.14/= as at 31st August, 2012 together with interest at the rate of 35% p.a. from 1st September, 2012 until payment in full. The appellant also prayed for costs of the suit together with interest thereon.

3. The respondent, having been served with summons to enter appearance and the suit documents, neither entered appearance nor filed her statement of defence, thus prompting the appellant to obtain a default judgment on 7th March 2014.

4. The respondent filed an application seeking to have the *ex parte* judgment set aside and further sought for leave to file her statement of defence which application was allowed vide the ruling delivered on 27th March, 2015.

5. The suit proceeded for hearing where the appellant and respondent summoned one (1) witness to testify in support of their case.

6. Thereafter, the parties filed written submissions before the trial court. In the end, the trial court through its judgment of 27th March, 2018 dismissed the suit with costs to the respondent.

7. Being aggrieved by the dismissal order the appellant preferred this appeal and put forward the following grounds:

***i. THAT the learned trial magistrate erred in law by deciding the matter on an unpleaded and unframed issue.***

***ii. THAT the learned trial magistrate erred in law by basing his decision on a matter that he was neither invited to rule upon nor on which either party led evidence.***

***iii. THAT the learned trial magistrate misconducted himself by construing himself as a party to the suit when he was all along to be an impartial arbiter.***

***iv. THAT the learned trial magistrate erred in ignoring the pleadings, issues framed and submissions filed by both parties.***

***v. THAT the learned trial magistrate acted in excess of his jurisdiction in dismissing the appellant's suit.***

8. The appeal was disposed of by written submissions. It is the submission of the appellant that by virtue of the fact that pleadings are binding not only upon the parties but upon the court, a court of law ought not to determine issues that are neither pleaded nor addressed by the parties.

9. The appellant further argued that the issues presented before the trial court for consideration and determination touched solely on the agreement entered into between the parties and whether there was a breach of the same in terms of payment or alteration of the terms.

10. It is also the appellant's contention that the respondent did not dispute to the substitution of its witness with another witness from the appellant's offices, adding that there is no legal requirement for a company to file a resolution authorizing the institution of a suit by itself or a requirement that a written authority is given confirming a witness scheduled to testify.

11. On her part, the respondent argued that the issue of authority of the appellant was rightly addressed by the trial court notwithstanding that it was not pleaded by either of the parties. On this point, the respondent submits that the trial court properly held that the appellant lacked the authority to both institute the suit and substitute its witness in the absence of a company resolution. It is the appellant's submission that the appeal lacks merit and ought to be dismissed as a consequence.

12. I have considered the grounds of appeal together with the rival submissions and the authorities cited. I have re-evaluated the evidence placed before the trial court.

13. It is noted that the grounds of appeal are all tied to the learned trial magistrate's analysis of the appellant's authority to not only institute the suit but to substitute its witnesses. It is also noted that the learned trial magistrate did not address the merits of the suit despite having heard the parties on the same.

14. Stephen Syono, who was *PW1* before the trial court, testified that he worked with the appellant at all material times and went ahead to adopt his witness statement. He explained that the respondent took out the loan facility with the appellant in the sum of Kshs.200,000/= and a letter of offer dated 3rd June, 2009 was executed. The witness stated that the interest rate attached to the loan was 15.57% as the base rate and 3% on default, adding that at the time of filing the suit, the interest rate was at 33%.

15. During cross examination, the witness stated that the respondent had paid Kshs.87,000/= as at the time of filing the suit and that the appellant had never declined to issue her with statements of accounts.

16. On re-examination, PW1 maintained that the appellant reserved the right to alter the interest rate without notice to the respondent.

17. The respondent also adopted her witness statement as the sole witness for the defence case. She went on to state that while it is admitted that she took out a loan facility for the pleaded amount with the appellant, the interest rate being claimed differs with that which was agreed upon. She further testified that she has been making payments to the appellant in respect to the loan facility and that while she is yet to fully repay the loan, she indicated her willingness to do so on the premise that her statement is regularized. This was explained during cross examination and re-examination.

18. In his analysis, the learned trial magistrate reasoned that the appellant had not offered any evidence by way of a company resolution to ascertain that it had the requisite authority to institute the suit. The trial magistrate went further to find that the appellant had equally not adduced any evidence of authority on the part of its witness who testified. The learned trial magistrate dismissed the appellant's suit with costs.

19. As regards the issue touching on company resolution the Court of Appeal in ***Saraf Limited v Augusto Arduin [2016] eKLR*** expressed itself interalia as follows:

> ***"The law on the position where one is dealing with a limited liability company shows that one cannot probe into the internal affairs of a company. A party dealing with a limited liability company which has instituted a suit against him/her seeking relief or making a claim cannot go behind what ex facie appears to be legitimate and fail to answer the allegation on the claim and instead question legality of the action against him, that is to say, whether there was a resolution of the Board of Directors or a resolution of the general meeting. He must proceed on the footing that ex facie the action was commenced with the authority of the Board or the general meeting."***

20. The main issue in my view is whether the learned trial magistrate acted appropriately in raising and addressing the above issue. I have looked at the pleadings and re-evaluated the evidence; neither discloses that the appellant's authority to institute the suit was brought to question. In the same manner, there is nothing to indicate that the authority of the witness who testified in court was challenged by the respondent or at all raised before the learned trial magistrate.

21. It is thus apparent that the learned trial magistrate took it upon himself to consider an issue that was neither pleaded nor put to the court to determine. In my view and with due respect to the learned trial magistrate, there was really no basis for him to address his mind over those issues. The magistrate was not urged nor prompted to consider the subject at all.

22. I am of the opinion that unless absolutely necessary or called for, a court of law ought to limit itself to the pleadings and evidence tendered by the parties; and steer clear of addressing issues that have not been placed before it as this would amount to raising fresh issues for the parties. This explains the reason behind parties identifying issues that they wish to be considered and determined and thereafter, presenting them for determination by the court.

23. From the foregoing, the appeal is allowed consequently

***(i) The judgment delivered on 27th March, 2018 plus the resultant decree is hereby set aside.***

***(ii) The suit is reinstated to be heard afresh before another magistrate of competent jurisdiction other than Honourable D.O. Mbeja.***

***(iii) Costs shall abide the outcome of the suit***.

**Dated, Signed and Delivered at Nairobi this 25th day of September, 2019.**

**……**

**J. K. SERGON**

**JUDGE**

In the presence of:

.....for the Appellant

.....for the Respondent