



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NUMBER 558 OF 2015

DIPAK TANK

T/A BOMBAY CHOWPARTY.....APPELLANT

VERSUS

INDRAVEN SONI

T/A CBD PROPERTY CONSTRUCTIONRESPONDENTS

(Being an appeal from the Judgment and Orders of Hon. M Chesang (Mrs.) delivered on 5th November, 2015 in Milimani CMCC No. 5214 of 2014.)

J U D G M E N T

1. Indra Vaden Son T/a CBD Property Construction, the Respondent herein filed an action against Dipak Tank T/a Bombay Chowparty, the Appellant herein before the Chief Magistrate's court vide the plaint dated 1st September, 2014 and prayed for judgment in the sum of Ksh.200,000/- plus interest and costs. The Appellants filed a defence to deny the Plaintiff's claim. Hon. Chesang, learned Resident Magistrate heard the case and gave judgment in favour of the Respondent.

2. Being aggrieved, the Appellant preferred this appeal and put forward the following grounds: -

(i) That the Honourable Magistrate erred in law and in fact by finding that on a balance of probabilities, the Plaintiff proved his claim against the defendant.

(ii) That the learned Magistrate erred in law and in fact by entering judgment for the Plaintiff against the Defendant as per the Plaintiff.

(iii) That the said Judgment and orders were manifestly unfair to the Appellants.

(iv) That the Honourable magistrate erred in law and in fact by failing to take into consideration the fact that the Appellants and Respondent had an existing relationship that was characterized by occasionally lending each other money.

(v) That the honourable magistrate erred by equating the said relationship as an oral agreement that subsequently gave rise to evidence of indebtedness.

(vi) That the Honourable magistrate erred in law and in fact by ignoring and disregarding evidence adduced by the Appellants at trial to demonstrate the non-existence of any alleged

monies owed to the Defendant on account of a commission for sale of land.

(vii) That the Honourable magistrate erred in law by disregarding objections by the Appellants to the authenticity of the cheque that is the basis of the Respondents claim and that no further documentation was produced evidencing any agreement for commissions.

(viii) That the Honourable magistrate erred in law and fact by finding that Appellant's action of cancelling the cheque in question was on the basis of Respondent exceeding the amount agreed upon between the parties and not that the said act should be conceived as proof of debt.

(ix) That the honourable magistrate erred in law and in fact by failing to acknowledge that the said cheque cannot be held to create any contract and be deemed to create a relationship between the appellant and Respondent and further be deemed to be payment for unsubstantiated commission accruing from sale of non-existent properties to unknown person.

(x) That the honourable Magistrate erred in law and in fact by failing to put weight and consider the Respondent claim to have brought the alleged properties for clients, but the Respondent did not provide the purchase price or the percentage he was to earn from the said sales.

(xi) That the Honourable magistrate erred in law and in fact by failing to consider that the Respondent was unable to provide evidence of the existence of the said clients and that he was also unable to provide the description and location of the properties.

(xii) That the honourable magistrate erred in law and fact by imposing terms on the parties while there was no express words that the parties intended there exist any sort of contract or agency agreement.

(xiii) That the Honourable magistrate erred in law in its judgment and orders by going against well-laid and long established principles that apply in establishing a Contract and Agency Agreements.

(xiv) That the honourable magistrate erred in law and in its judgment and orders by going against well-laid and long established principles and statute that apply in a Right of Appeal Under Section 79G, of the Civil Procedure Act, Cap 21 of the laws of Kenya, by stating in her judgment that the Appellant only had 14 days to appeal to the decision.

(xv) That, further the Honourable magistrate erred by dating the said judgment 5th October, 2015 while the date given to the parties was 5 November, 2015 when the said judgment was actually delivered.

(xvi) That in all instances, the judgment and orders of the court are unsupportable by law and facts.

3. When the appeal came up for hearing, learned counsels appearing in the matter recorded a consent order to have the appeal disposed of by written submissions.

4. I have re-evaluated the case that was before the trial court and further considered the rival written submissions. The record shows that when this suit came up for hearing, both the Plaintiff (Respondent) and the Defendant (Appellant) each testified in support of their respective cases.

5. The Plaintiff (PW 1) told the trial court that he entered into a sale agreement with the Defendant where he was to look for buyers of properties which were being sold by the Defendant's clients and would earn him a commission.

6. PW 1 said that he presented two persons who were interested in buying the property and went ahead to

buy them.

7. PW 1 also said that it was the understanding between them that after the successful purchase of their properties the Defendant would pay him commission on the agreed terms.

8. PW 1 further stated that pursuant to the forgoing the Appellant made part payment of the commission to the Respondent vide cheque No. 000202 which cheque was returned unpaid for lack of funds.

9. The Respondent immediately contacted the Appellant to inform him of the unpaid cheque and that the Appellant promised to issue another cheque. The Respondent stated that he was forced to file the suit before the Chief Magistrate's Court which the Appellant failed to honour his promise.

10. The Appellant (DW 1) on the other hand testified to deny the Respondent's claim. He told the trial court that on countless occasions the Respondent has asked him to lend him money and that he has also borrowed and repaid money from him on several occasions to.

11. DW 1 said that he borrowed Ksh.100,000/- from the Respondent with a promise to repay. He said that he repaid the aforesaid amount by instalments of Ksh.50,000/-, Ksh.20,000/- and by surrendering an equipment from his restaurant valued at Ksh.30,000/- thus settling the entire debt.

12. The Appellant further stated that the Respondent asked him to lend him Ksh.100,000/- and being a friend whom he trusted he gave him a signed blank cheque and authorized him to fill the amount on the cheque.

13. DW 1 also claimed that he instructed the bank to stop payment of the cheque when he discovered that the Respondent had written a figure of Ksh.200,000/- instead of the agreed sum of Ksh.100,000/-.

14. The learned Resident Magistrate considered the evidence presented before her and came to the conclusion that the copy of the cheque annexed to the Respondent's list of documents was drawn in favour of the Respondent by the Appellant was clear evidence of indebtedness. The learned Resident Magistrate also found that the Respondent proved his case on a balance of probabilities.

15. I have already enumerated the 16 grounds of appeal put forward by the Appellant. Those grounds may be narrowed to one substantive issue that is whether or not the cheque was issued to the Respondent to settle a debt due to the Appellant. The Appellant in his evidence admitted issuing the cheque to the Respondent. He stated that he issued a signed blank cheque and authorized the Respondent to fill in the figures

16. I am not convinced that the explanation given by the Respondent is believable. After a careful re-evaluation of the evidence I am convinced that the Appellant issued the cheque to the Respondent to settle an outstanding debt he owed. With respect, the learned Resident Magistrate came to the correct decision that the dishonoured cheque was sufficient evidence showing that the Appellant was truly indebted to the Respondent to the tune of Ksh.200,000/- and that the explanation given by the Appellant for issuing the cheque is not believable.

17. In the end, I find no merit in this appeal. The same is dismissed in its entirety with costs to the Respondent.

Dated, signed and delivered in Nairobi this 16th day of August, 2018.

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J K SERGON

JUDGE

In the presence of

..... ***for the Appellant***

..... ***for the Respondent***