



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CIVIL APPEAL 24 OF 2016**

**PLATINUM CREDIT LIMITED.....APPELLANT**

**VERSUS**

**STEPHEN KINYUA MUCHIRI.....RESPONDENT**

(Being an appeal from the Judgment delivered on 29<sup>th</sup> April, 2016

by Hon. John Aringo, Resident Magistrate

in Nyeri CMCC No. 407 of 2016)

**JUDGMENT**

**FACTS**

1. In December 2013 the respondent herein realized that there were deductions being made on his pay-slip towards a repayment for a loan purportedly advanced to him by the appellant; upon carrying out investigations it was discovered that it was a case of impersonation by one of the subordinate members of staff at his place of employment; he instituted a suit against the appellant for the recovery of the deductions as the same were irregular and unauthorized; on the 29<sup>th</sup> April, 2016 judgment was delivered in his favor;

2. The appellant being aggrieved by the decision of the trial court filed its Memorandum of Appeal and listed six (6) grounds of appeal as summarized hereunder;

- (i) The trial court in its judgment failed to take into consideration the appellant's defence and written submission;
- (ii) The trial court erred in allowing the claim that was based on fraud without receiving any report on investigations from the police;
- (iii) The respondent made no effort to prove impersonation and fraud; the outcome of the criminal case (if any) would have been used to prove impersonation and fraud; yet the trial court held that there was sufficient proof;
- (iv) The trial court made a decision without due regard to the applicable law;
- (v) The trial court took into account extraneous matters when making its decision;

3. At the hearing hereof the appellant was represented by Learned Counsel Mr Ongwae whereas Learned counsel Mr.Nderi represented the respondent; both Counsel made oral presentations and exchanged written submissions; hereunder is a summary of the respective rival submissions;

**APPELLANTS SUBMISSIONS**

- (i) The appellant is a money lending institution; the respondent claims he did not borrow money from the appellant and that someone else did; the appellant continued to get deductions from the respondent's employer (Kirinyaga County Government) and he annexed a copy of his payslip which demonstrated the deductions for October, 2014;
- (ii) The particulars of fraud set out in the plaint were not proven; allegations of fraud must be strictly proved; no direct evidence

produced; the respondent did not prove forgery or any of the allegations; this was brought to the trial court's attention; case law relied on **Raitilal Patel vs Lalji Makanji**; (1957) EAR 314 the standard of proof on allegations of fraud was beyond a balance of probabilities ;

(iii) The loan is not disputed; the application was made and the monies disbursed; but the respondent claims that he never received the money; in his response to the written submissions the respondent confirmed that he knew who took the money; that this person worked with him at the County; the person was known as Eric Ibandu and he worked as a Human Resources Officer at the County; and that the matter was reported to the police;

(iv) That the suit ought never to have been instituted in the first place until the criminal case against one Eric Ibandu was concluded; the said Eric who received the money was never made a party to the suit and the employer who remitted the monies was also not made a party to the suit; that without these witnesses the suit was a non-starter; the subordinate court did not consider this issue; the appellant therefore prayed for the matter to be returned for a retrial;

(v) The agreement was a Civil Servant Loan Agreement which bore the names of the respondent; the respondent was unable to provide this document at the hearing thereof;

(vi) The applicable law was not followed by the trial court; the appellant relied on the submissions made in the lower court; and prayed that the appeal be allowed; and that the judgment of the lower court be dismissed with costs.

### **RESPONDENT'S SUBMISSIONS**

(vii) The appeal was opposed and his submissions were that he was an employee of the Ministry of Public Works; that he received his payslip that had strange deductions of Kshs.2273/- made out in favour of the appellant; upon making enquiries at the appellants Nyeri office he was referred to a lady named Esther who informed him that one Eric Ibandu presented himself on behalf of the respondent under the pretext that the respondent was unwell and was admitted at Nyeri PGH; and that the respondent needed a quick advance to help him settle his hospital bills; the lady told him that she was at first suspicious because of the photograph presented by Eric; but by the time she enlisted the services of another colleague she found that the loan had already been disbursed and the sum of Kshs.20,000/- sent to Eric by way of Mpesa;

(viii) The matter was reported to the police and the respondent was assured that the monies would be refunded and that there would be no further deductions; but come the following month the deductions had been made; he therefore resorted to instituting a suit against the appellant;

(ix) His claim was that he never applied for the loan; that there was no contract between him and the appellant to justify the deductions; the Civil Servant Loan Agreement that was issued by the appellant had the words noted on the top "**FRAUD INVESTIGATIVE ACTION**";

(x) That one of the issues for determination was "**Did the respondent ever apply for a loan?**"

(xi) The appellant only filed a defence but did not annex any witness statements or documents; at the hearing in the lower court the appellant adduced no evidence to controvert that of the respondent; even the matters of fact were not controverted;

(xii) The issue of the trial court shifting the burden of proof is not a ground of appeal in the Memorandum of Appeal; in civil cases the proveable standard of proof is on a balance of probabilities; the trial court analyzed every aspect of the respondent's case and concluded that there had never been any contract between the appellant and the respondent to warrant the deduction from the respondents salary; therefore there is no basis for interfering with trial court's judgment;

(xiii) The trial court made a finding that civil cases do not have to await the outcome of a criminal matter; there is an admission by the appellant as to who had gotten the money; this evidence was not contradicted by the appellant therefore there was no basis for this court to come to a different conclusion;

(xiv) It was for the appellant to enjoin a third party if it felt that it was not fully liable; it never exercised that option even up to the time of determination of the matter;

(xv) In conclusion Counsel reiterated that there was nothing raised in this appeal either factual or legal to warrant interference with the trial courts finding;

(xvi) The respondent prayed that the appeal be dismissed with costs.

### **REJOINDER**

(xvii) The appellant reiterated that the shifting of the burden of proof to the appellant was ground of appeal no.5; the burden of proof never shifts from him who alleges; that there was no admission by the appellant in its pleadings that the loan had been taken by someone else on behalf of the respondent; that it was upon the respondent to enjoin one Eric Ibandu because he was the one who knew this Eric Ibandu;

(xviii) The respondent was put to strict proof in the lower court; and admitted the matter was reported to the police and was still pending and was not followed up; that the report was not as against the appellant; on the allegations of fraud no witness statements

were filed in the lower court; there was no corroboration of evidence;

(xix) The appellant prayed for his appeal to be allowed;

### **ISSUES FOR DETERMINATION**

4. Having perused the trial court's proceedings and read the submissions of the respective parties herein this court finds the following issue for determination;

(i) Whether the trial court evaluated the evidence and the law;

### **ANALYSIS**

5. Being the first appellate court it is incumbent upon this court to reconsider the evidence on record re-evaluate it and draw its own independent conclusion bearing in mind that it did not have the opportunity to hear or see the witnesses. Refer to the case of **Arrow Cars Limited V. Bimomo & 2 Others**, C.A. No. 344 OF 2004.

#### **Whether the trial court evaluated the evidence and the law:**

6. A summary of the respondent's suit is that he alleges that he never applied for a loan facility with the appellant; and that the loan was fraudulently obtained thus making the deductions to his salary irregular and unauthorized;

7. Being aggrieved with the trial court's decision the appellant filed the instant appeal and in one of its grounds of appeal is that the trial court erroneously shifted the burden to it;

8. The provisions of Section 107 of the Evidence Act places the evidential burden of proof of the existence of facts on the party that asserts; thus the legal and evidential burden was upon the respondent who made the assertions of fraud; his evidence was that he notified the appellant of the fraud and even reported it to the police and was given an OB Number for the 30/05/14; at the trial he produced the Civil Servant Loan Agreement Form (**PEXh.6**) to which the appellant had appended the words "**Fraud!!! Investigate Allegations**"; his evidence was that the appellant promised to investigate the matter, refund the monies deducted and also to ensure that there be no further deductions; the respondent also produced all his pay-slips (**PEXh.7-14**) in support of his evidence on the deductions made;

9. The appellant on the other hand filed its defence and denied that the loan was obtained by way of fraud; it is this court's considered view that the respondent discharged his evidential burden by placing before the trial court the Civil Servants Loan Agreement Form with the aforesaid remarks; the evidential burden during the course of the trial then shifted to the appellant to offer rebuttal evidence to displace the respondents claim; that if the application was bona fide the appellant ought to have filed and produced all the loan application documents which were in its possession; it is noted from the record that the appellant did not annex any witness statements nor any list of documents when filing its defence; and at the trial it is noted the appellant did not adduce any evidence nor did it call any witnesses to rebut the respondent's evidence;

10. The appellant's contention was that Eric Ibandu the author of the mischief and also the recipient of the money was never made a party to the suit; that the respondents employer who remitted the deductions was also not made a party to the suit; that without these witnesses the suit was a non-starter; he submitted that the subordinate court did not consider this issue; and therefore prayed for the matter to be returned for a retrial;

11. The record shows that it was the appellant who revealed to the respondent that the author of the mischief was one Eric Ibandu but the pleadings reflect that the appellant made no attempt to enjoin this person who is alleged to have been the beneficiary of the monies as a Third Party for the purposes of indemnity and or contribution; the trial court indeed considered this point in its judgment and made an observation that this failure was implicit that the appellant was either complicit or reckless;

12. Another contention was that suit was premature as the police and the criminal court were yet to make any findings on fraud or impersonation; the respondent testified that he had filed a complaint with the police and obtained an OB Number; the trial court also considered this and stated that it was not the courts duty to sit back twiddling its hands whilst waiting for the police to take action;

13. This courts considered view is that in this instance the criminal case if instituted would have been for forgery and impersonation and would have been instituted against Eric Ibandu and not the appellant; in the absence of such a case it can only be a matter for speculation as to whether the outcome would have bolstered either the appellant's case or the respondent; the same notwithstanding it is also a common practice that a victim of criminal fraud can also institute a civil claim for damages and both can run concurrently but usually the best practice would be to defer the civil proceedings pending the ultimate outcome of the criminal trial; as the trial magistrate correctly pointed out that the notoriety of the police was well known and since there was nothing forthcoming from the police and the court's hands should therefore not be tied down;

14. In addition to the above the only other aspect that was not considered is that the criminal case (if any) would have probably had no bearing on this case as it would not have been the appellant who would have been charged with the offence of forgery or impersonation; the criminal case would have been as against Eric Ibandu who was in any event never made a party to the suit; and this court concurs with the finding of the trial court that the onus was upon the appellant to enjoin the said Eric as a Third Party;

15. With regard to the threshold of proof for fraud the appellant submitted that it brought it to the trial courts attention that the particulars of fraud as set out in the plaint were not proven; that the allegations of fraud must be strictly proved; no direct evidence was produced by the

respondent to prove forgery or any of the allegations; the case law it relied on was the case of **Raitilal Patel vs Lalji Makanji**; (supra) where it was held that the standard of proof on allegations of fraud was beyond a balance of probabilities;

16. In answer to the issue of threshold the record reflects that the trial court noted in its judgment that;

***“ . . . .In any event it was conceded by the defence that the standard of proof in a criminal trial would be different from the instant civil case.”***

17. The trial court made a finding that the evidence adduced in support of the case was sufficient to establish that the respondent never applied for a loan from the appellant.

18. In this instance this court notes that the matter proceeded in the same manner as a formal proof; this was because the appellant merely filed a defence that was devoid of witness statements and a list of documents; therefore the appellant was unable to call any witnesses or produce any documents to controvert the respondent’s evidence; since it was a civil case all the respondent had to prove is that “on a balance of probabilities” the appellant was complicit to the alleged fraud; as opposed to criminal proceedings where the burden of proof would be on the prosecution to prove “beyond reasonable doubt” that the defendant committed the alleged fraud;

19. This court is satisfied that the trial court evaluated the evidence and the law in arriving at its decision; and finds that there was nothing raised in this appeal either factual or legal to warrant interference with the trial court’s finding;

20. The grounds of appeal are found lacking in merit and are hereby disallowed.

#### **FINDING**

21. For the reasons set out above this court makes the following finding;

(i) This court finds that the trial court evaluated all the evidence and the law presented by the parties in arriving at its decision;

#### **DETERMINATION**

22. The appeal is found lacking in merit and is hereby dismissed in its entirety.

23. The judgment of the trial court is hereby upheld.

24. The appellant shall bear the costs of the appeal.

Orders Accordingly.

**Dated, Signed and Delivered at Nyeri this 25<sup>th</sup> day of October, 2018.**

**HON.A. MSHILA**

**JUDGE**