



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO.38 OF 2016

BETWEEN

MURIUKI DUNCAN MUKABURU APPELLANT

AND

KISAO PHARMACY LIMITED RESPONDENT

(Being an appeal from original conviction and sentence in Migori PMCCC No.129'A' of 2007 dated on 8th June, 2009 by Hon. K. Sambu, RM)

JUDGMENT

1. The appellant **DANCUN MUKABURU** has challenged the decision made in favour of **KISAO PHARMACY LIMITED** where his claim for a refund and/or payment of Kshs.220,000/= being the amount shown in Cheque No.000059 dated 29th August, 2002 plus interest at 18% p.a. from 30th September 2002 and costs was dismissed on grounds that he had failed to prove his case against the respondent on a balance of probability.
2. The background to this matter is that on 3rd August 2002, the respondent through its Managing Director, one **FRANCIS JAMA NDARI**, and with the authority of the other director, approached the appellant with a request for financial assistance and/or a loan in the sum of Kshs.220,000= . The respondent promised to refund the money within a month, and at least before 30th August 2002.
3. The appellant obliged and gave the sum to respondent who subsequently drew a cheque No.000059 purporting to refund the sum advanced. However upon presentation, the cheque was returned with the remarks **“Return to Drawer”** – implying lack of sufficient funds in the respondent’s account. The appellant then sought the respondent to return the dishonoured cheque but got no favourable response. The cheque leaf remains in the appellant’s possession to date.
4. The respondent denied owing the sum claimed; saying the cheque drawn was not for settling a loan advanced to it by the appellant. While admitting that it had issued a cheque of Kshs.220,000/= to the appellant in early August 2002, the respondent stated that initially its director had agreed to grant the money to appellant but later declined and it had advised the appellant to return the cheque leaf before its due date of presentation to the bank but this did not happen.
5. At the hearing, the appellant told the trial court that he had known the respondent’s director since 1999 and when he approached him for assistance to bail him out of some financial commitment in the sum of Kshs.220,000/=, he readily agreed.

He gave the sum to **FRANCIS JAMA NDARI** on 3rd August 2002 and the latter issued him with a post dated cheque for the said amount which cheque was to be presented to the bank on 29th August 2002. Needless to say, when the cheque was presented, it was dishonoured. He eventually issued a demand notice on 22nd July 2006 to the respondent since no refund was forthcoming.

6. On cross examination, the appellant insisted that MR. NDARI approached him in his personal capacity and not as the director of **KISAO PHARMACY LIMITED** and he issued him with a Banker's Cheque. However he did not retain a copy of the banker's cheque nor was the agreement reduced into writing. The appellant explained that the arrangement was mutual, so no one witnessed the exchange of money.

The appellant's argument is that evidence of Mr. Ndari acknowledging receipt of the money is demonstrated by the cheque he issued. He also explained that due to the close relationship, he did not issue a notice to the respondent for close to 4 years and in any event; they were pursuing an amicable out of court settlement.

7. **J.S.O. KODONGO** (PW2) confirmed that he received instructions from the appellant to demand the sum claimed.

Oddly enough PW2 explained that the instructions given to him were that the cheque was consideration for value as the parties had exchanged some goods.

8. The respondent's director **JAMA NDARI FRANCIS** (DW1) confirmed that he was the director of the respondent Company and he knew the appellant.

He explained that it is actually the appellant who approached him for a loan and he agreed to lend him the sum of Kshs.220,000/= vide a post dated cheque pending execution of a loan agreement by the appellant and the respondent Company.

9. However the appellant refused to sign the agreement, so the respondent declined to advance to him the money and orally informed him of that decision with instructions that he should return the cheque. However the appellant ignored and presented the cheque to the bank. When the respondent's bank called him as in the usual business practice asking whether they should pay the cheque, the respondent informed the Bank not to do so as in his opinion the agreement was no longer valid. That is why the cheque was dishonoured.

10. When the Respondent confronted the Appellant regarding his conduct, the appellant pleaded oversight on his part saying the action was inadvertent and agreed to return the cheque. However this did not happen and the appellant kept saying the cheque got lost and the respondent assumed the matter had been closed. The respondent denied receiving any demand notices from the appellant and maintains that this was a fraudulent claim as the appellant had not lent him any money.

11. On cross examination the respondent explained that he had issued the cheque pending drawing up of an agreement on how the money was to be repaid. He explained that the appellant wanted to start some business which was why he had sought for a loan. He did not consider reporting the appellant to police since the latter claimed that the cheque was lost he assumed that closed the matter.

12. In his judgment, the trial magistrate crystallized the issues into two:-

1. Whether the cheque giving rise to the claim was payment towards settlement of a debt owed or money advanced to the appellant.

2. Whether the cheque and the parties were governed by the Bills of Exchange Act (Cap 27). Further whether the statutory notice issued for the dishonoured cheque fell within the stipulated period.

13. On the issue in part (b) the trial magistrate held that the claim was governed by provisions of **Section**

73 (1) of the **Bills of Exchange Act** as the claim was founded on a dishonoured cheque. He also held that the appellant did not comply with provisions of **Section 48** and **49** of the same Act in so far as issuing of the notice of the dishonoured cheque is concerned because it took a total of 4 years before demand was made. He pointed out that the delay was inordinate and no explanation had been given for such delay.

14. Secondly the trial magistrate observed that the approach for financial assistance was made to DW1 in his personal capacity and not as a director of the respondent. The Trial magistrate doubted the appellant's story about issuing a banker's cheque to respondent saying no copy of the same was presented in court as exhibit and no one else seemed aware of the transaction – pointing out that the appellant did not even call his wife whom he claimed to have been aware of the transaction, as a witness to give credence to his claim.

15. It is on this basis that trial magistrate found that the respondent's version was plausible and credible, and dismissed the claim.

16. These findings have been challenged by the appellant on grounds that the trial magistrate erred in law in finding that the appellant had not proved the existence of a valid loan agreement. Further, that the trial magistrate misapprehended the meaning of the provisions of the Bills of Exchange Act regarding the purport and efficacy of a duly executed Promissory Note.

17. The trial magistrate is accused of taking into account extraneous issues and leaving out the relevant issues.

The appeal was argued by way of written submissions and Mr. Oguttu Mboya argued on behalf of the appellant saying the fact that the cheque belonged to the respondent Company and was executed by the director in favour of the appellant, means that the respondent company permitted or authorized the execution.

18. Mr. Mboya concedes that a duly drawn and executed cheque is a Promissory Notice in terms of **Section 3 (1)** of the **Bills of Exchange Act (Cap 27 Laws of Kenya)**, and therefore constitutes a valid contract between the parties. It is on this account that counsel argues that the respondent cannot bring forth extraneous issues to explain the circumstances under which the cheque was executed. It is contended that the handing over of the cheque in favour of the appellant was a clear indication that it was to be encashed on the due date especially because on the face of it there was no restriction or limitation imposed upon the appellant as a condition upon presentation.

19. It is also submitted that since the cheque bore the name of the Company, that was evidence of the nexus between the appellant and the respondent Company, and the trial magistrate misconceived the meaning and purport of a duly executed cheque and the trial magistrate is faulted for applying a narrow and restrictive interpretation thereby improperly discharging the respondent of its contractual obligations.

20. Counsel's argument is that the trial magistrate attempted to re-write the contract between the parties, and he cited the case of **NATIONAL BANK OF KENYA LIMITED –VS- PIPEPLASTIC SAMKALIT (K) LIMITED AND ANOTHER, CA NO.95 OF 1999** (unreported) pg 7 where the Court of Appeal stated that:-

“A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud and/or undue influence are pleaded and proved.”

21. The appellant's counsel also poked holes at the trial magistrate's finding that the Notice of Dishonour was invalid and void as the Agent who had been retained by the appellant to issue the notice was not qualified to act and/or conduct the business of an advocate. Mr. Mboya argues that the Notice of Dishonour could by law be issued by the Appellant and/or the appellant's agents as contemplated by **Section 8** of the **Bills of Exchange Act**, so it is sufficient that the notice was issued by an agent.

22. Further that in any event the only fault captured under **Section 34 & 35** relating to an advocate who does not have a valid practising certificate are documents relating to conveyance and/or for commencement of and relating to legal proceedings and not a notice of dishonour which is merely a procedural issue which does not vitiate the contract and does not override substantial justice – in this regard he refers to **Act 159 (2) (d)** of the **Constitution of Kenya 2010**.

23. In response Mr. Mureithi in opposing the appeal submitted that the appellant's case was doomed to fail as it did not comply with the mandatory provisions of **Sections 48 and 49** of the **Bills of Exchange Act** and he urged the court to be guided by the decision in **GOVIND UKEDA PATEL –VS- DHANJI NAJI [1960] EA 410**. He further pointed out that the cheque was not a contract whether in law or in fact.

24. He also submitted that there was no privity of contract between the appellant and the respondent company and the trial magistrate rightly found so, because the evidence showed the money was given to the respondent's director as an individual and not the respondent which is a limited liability company with legal status separate and distinct from the share holders and directors.

25. I have considered the arguments presented and re-evaluated the evidence presented at the trial. The issue which arise for consideration in this appeal are:-

i. Whether there was a contract or any transaction between the Appellant and the Respondent Company?

ii. What was the purpose of the cheque – who was given/advanced the sum of Kshs.220,000/= ?

*iii. Who issued the Notice of Dishonour? Did the appellant comply with provisions of **Section 48 & 49 of the Bills of Exchange Act**?*

iv. Did that agent have legal capacity to issue such notice?

v. Did the trial magistrate allow and take either consideration extrinsic evidence and in the process re-write the contract between the parties.

26. I will marry issues No.(i) and (ii) and address them together.

Was there a contract or any transaction between the Appellant and the Respondent Company and Purpose

Each party claimed to be the one that was advancing the sum of Kshs.220,000/= to the other. The appellant stated that the person who borrowed the money from him was one **JAMA NDARI FRANCIS** a director of the Respondent. He stated that the payment to this individual was made by a banker's cheque. The trial magistrate properly noted that no copy of the banker's cheque was produced to confirm that such money was ever advanced. It is instructive that this alleged agreement was not reduced in writing nor was it witnessed by anyone.

27. The respondent's advocate on the other hand maintained that it was the appellant who was borrowing money from him and he discussed with his co-director who insisted that the whole arrangement be reduced in writing. By then he had already issued the post dated cheque in favour of the appellant. When the appellant declined to have the same reduced in writing, DW1 advised his bank not to honour the cheque – which is why upon presentation the cheque was dishonoured with remarks **“Refer to Drawer.”**

28. It is not denied that the respondent is a Limited Liability Company capable of even entering into a contract and being sued. PW1 confirmed that the agreement was between him and DW1 in his individual capacity and not on behalf of the company. The mere fact that the cheque issued was in the company's names did not make the company a party to the purported arrangement.

29. In the absence of any written agreement or independent witness, then I do not see what other conclusion the trial magistrate could have arrived at other than that the evidence did not absorb the

respondent in the mix of things.

30. Unfortunately on the face of the post dated cheque the purpose for which the cheque was drawn was not stated. Was it repayment of a debt owed or advancement of money borrowed? It was a question of PW1's word against DW1's word. Neither of them had any agreement to support the positions taken. The fact that the cheque was returned with remarks "**Refer to drawer**" did not necessarily mean that there were no funds in the Respondent's account. Indeed it could well mean that the drawer had given instructions to stop encashment. See **GOVIND UKEDA PATEL –VS- DHANJI NANJI [1960] EA 410 –**

"... the words "refer to drawer" may be used in a variety of circumstances; it may, and frequently do mean that the drawer has no funds available and has made no arrangements to meet the cheque, but that is not the only meaning...."

31. He who alleges must prove is a well known refrain in legal proceedings. The appellant alleged he had advanced money to the respondent but had nothing to support his claim. The respondent admitted writing the cheque but explained that it was for a purpose other than what the appellant stated. In the absence of proof of purpose by the appellant then indeed the explanation given by the respondent was plausible and credible and the appellant failed to prove his claim on a balance of probabilities. I cannot fault the trial magistrate's findings on that.

Did the appellant fail to comply with **section 48 & 49** of the **Bills of Exchange Act**?

32. In addressing this issue I will also examine the content under which the Notice was issued and whether the issuer had legal capacity to do so. It is common ground that the cheque issued constituted a Bill of Exchange and fell within the definition given under **Section 73 (1)** of the **Bills of Exchange Act**.

33. It is a mandatory requirement that where such bill is dishonoured a notice must issue to the drawer before a cause of action can be founded on such dishonour. **Section 48** of the **Bill of Exchange Act** provides:-

"48: Subject to the provisions of this Act, when a bill is dishonoured by non-acceptance or by non-payment, notice of dishonour must be given to the drawer and each endorser, and any drawer or endorser to whom such note is not given is discharged."

34. For the notice of dishonour to be valid and have effect **Section 49** of the same Act provides for rules to be observed.

"49. Notice of dishonour in order to be valid and effectual must be given in accordance with the following –

a. The notice must be given by or on behalf of the holder; or by or on behalf of the endorser who, at the time of giving it, is himself liable on the bill.

b. Notice of the dishonour may be given by an agent either in his own name, or in the name of any party entitled to give notice whether the party be his principal or not."

35. The notice is also required to be given within reasonable time but where there is delay, **Section 50** provides that it can be excused where it is caused by circumstances beyond the control of the party giving notice. The evidence on record clearly demonstrated that the appellant did not personally issue the notice. The same was issued on his behalf by his then advocate Mr. Odongo J.S. – which does not offend provisions of the Bills of Exchange Act, except that this advocate did not have a practising certificate at that time. What's more the notice was issued almost 4 years after the dishonour of the bill. Certainly that is not a short period and the only explanation given is that due to the social relations existing between the parties there was always hope for an out of court settlement. There was no evidence presented to demonstrate that such negotiations were on going.

36. However of greater significance is whether the agent issuing notice had capacity to do so when he did not have his current practising certificate which would allow him to conduct his law business. **Section 9 (c)** of the **Advocate's Act** provides that for one to act as an advocate he must have a current practising certificate. **Section 34** of the same Act provides:-

“34. No unqualified person shall either directly or indirectly take instructions to draw or prepare any document or instrument (e) for which a file is prescribed by an order of the Chief Justice ... or (f) relating to any legal proceedings.”

37. This goes beyond just a procedural requirement, as it touches on the professional integrity of members of the noble profession. I doubt that **Article 159 (2) (d)** of the **Constitution** intended for courts to cast a blind eye to misdeeds by advocates simply in the name of ensuring substantive justice is achieved. In my mind failure by a member of the legal profession to observe such a statutory requirement must not be massaged with lyrics about procedures versus substance. I concur with the trial magistrate's findings on the issue.

Extraneous Issues or Explanation to the defence

38. I understand the appellant's counsel to be saying that the explanation given by the respondent as to why he issued the cheque should not have been taken into account as it was an extraneous matter. That the court should simply have held the respondent liable purely upon the existence and contents of the cheque. Was the court expected to reject an explanation given by the respondent about circumstances surrounding issues of the cheque? That was not an extraneous issue but arose directly from the pleadings by the respondent at paragraph 5 and 6 of the statement of defence dated 16th July 2007 and filed in court on 17th July 2007.

39. The upshot is that the trial magistrate duly considered and analysed the evidence presented before him and arrived at a proper conclusion – there would be basis whatsoever to interfere with his findings. Consequently the appeal has no merit and is dismissed with costs to the respondent.

Written and dated this 18th day of January, 2017 at Homa Bay

H.A. OMONDI

JUDGE

Delivered and dated this 31st day of January, 2017 at Migori

A.C. MRIMA

JUDGE