



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 338 OF 2014

PETER GACHOGU MBURU

T/A COINAGE INVESTMENTS.....APPELLANT

- V E R S U S -

JAMES KWAME SIMWA.....RESPONDENT

(An appeal against the judgement and orders of the Hon. Roselyn Oganyo delivered on 4th July, 2014 in Milimani Chief Magistrate's Court Civil Case no. 8868 of 2005)

JUDGEMENT

1) Peter Gachogu Mburu T/A Coinage Investments, the appellant is said to have advanced to James Kwame Simwa the respondent herein, a sum of ksh.15,000/= which amount was payable within three(3) equal monthly instalment and the debt would attract a penalty of 10% per month from the date of default until full payment. It would appear the respondent defaulted, therefore the outstanding amount attracted interest. The appellant was prompted to file Nairobi C.M.C.C.C. no. 8864 of 2005 seeking for judgment in the sum of ksh.51,188/= as of 23rd June 2005. The record shows that the appellant obtained a default judgment giving rise to the decree which was given to M/s Dollar Auctioneers to execute. The aforesaid auctioneer went ahead to proclaim goods said to belong to the respondent. Objection proceedings were filed giving rise to the issuance of an order for stay of execution. The respondent was eventually given conditional leave to defend the suit. The appellant amended his plaint in which he now claimed kshs.51,188/= from the respondent. The respondent filed an amended defence too in which he admitted receiving the money from the appellant but he counterclaimed for the return of the goods attached and sold pursuant to the impugned exparte judgment. The respondent also asked for damages for pecuniary embarrassment, loss and damages. Upon being served, the appellant filed a defence with a counter-claim and further went ahead to seek for summary judgment against the respondent. Hon. Oganyo heard the case on its merits and on 28.8.2014 she gave judgment in favour of the appellant. She found that the appellant had advanced ksh.19,965/= to the respondent and that he was to be paid in 3 equal monthly instalments with a penalty of 10% until full payment. She also found that interest was on a reducing balance and not compound interest. Arising from the judgement, ksh.41,926/= was found outstanding. The learned Chief Magistrate went ahead to state that the respondent had presented evidence which was to the effect that the auctioneer M/s Dollar Auctioneers attached and sold the respondent's parents goods and remitted a sum of kshs.20,500/= and therefore if the aforesaid amount is deducted by way of set off from ksh.41,926/= a balance of ksh.21,426/= would be left outstanding. Consequently, judgment was entered in favour of the appellant.

2) The truth is that part of the award given to the appellant settled the respondent's counter-claim. Being dissatisfied the appellant preferred this appeal.

3) On appeal, the appellant put forward the following grounds in his memorandum;

1. The learned trial magistrate erred in law and fact by failing to enter judgement for the plaintiff for kshs.45,222 or the sum found due and owing from the defendant as at 23rd June 2005 plus interest at the contractual rate and costs.

2. The learned trial magistrate erred in law and fact by failing to award interest on the judgment sum and costs of the suit to the plaintiff.

3. The learned trial magistrate erred in allowing the defendant's counter-claim when the amount of the counter claim was not particularized, pleaded nor proved.

4. The learned trial magistrate erred in offsetting the plaintiff's proved claim against the defendant's unspecified counter claim.

5. The learned trial magistrate erred in law in awarding costs of the suit to the defendant.

6. The learned trial magistrate is not supported by the evidence and the applicable law.

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

5) I have re-evaluated the case that was before the trial court. I have also considered the oral rival written submissions. The 1st, 3rd, 4th and 6th grounds of appeal were argued together. It is the submission of the appellant that the trial magistrate erred when she allowed the respondent's counter-claim when the amount of the counter-claim was not particularised nor proved, therefore there was no justification to make an order to offset the amount from the appellant's claim. It is also argued that the trial Chief Magistrate erred when she applied interest at court rates yet the agreement entered between the parties show that the rate of interest was fixed at 10% per month. It was further pointed out that the learned Chief Magistrate did not illustrate how she arrived mathematically at the figure she awarded of ksh.41,928/=. The respondent on the other hand is of the view that the learned Chief Magistrate was clear on the formulae she applied in arriving at the above figure based on the agreed rate of interest on a reducing balance. With respect, I am convinced by the respondent's argument. It is evident from the record that the learned Chief Magistrate clearly explained herself on how she arrived at the figure complained of. The decision to allow interest on a reducing balance scale in my view was reasonable hence that decision cannot be faulted. On the question as to how the counter-claim was assessed, it is clear from the record that the schedule of the goods attached and sold plus the value together with expenses were provided by the respondent to the trial court. Those documents were admitted in evidence without any objection therefore, the appellant cannot turn around on appeal to challenge documentary evidence which he let go at the trial.

6) In grounds 2 and 5, the appellant has complained that he was unfairly denied costs. It was pointed out that costs always follow the event. It was also argued that costs was awarded to the respondent with no reasons attached to the decision. The respondent urged this court not to disturb the award. There is no doubt that the appellant succeeded in establishing the counter-claim. The learned Chief Magistrate awarded the respondent costs while denying the appellant. With respect, I agree with the appellant that the trial magistrate did not assign reasons for her decision.

7) Consequently, I find the decision unjustified. In the circumstances of the case before the trial court, a fair order on costs should be that each party bears his own costs.

8) In the end, the appeal substantially fails save for the appeal as against the order on costs. For the avoidance of doubt this court makes the following orders;

i. The appeal as against the merits of the suit is dismissed.

ii. The appeal as against the order awarding costs to the respondent is set aside and is substituted with an order directing that each party meets its own costs.

iii. Each party to meet its own costs of the appeal.

Dated, Signed and Delivered in open court this 22nd day of September, 2017.

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent