REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 187 OF 2004

LABAN K. KIMONDO.....…….,.,.....…APPELLANT

VERSUS

S.W. MWANIKI.....RESPONDENT

JUDGMENT

1. The Respondent, **S.W Mwaniki,** sued**, Laban K. Kimondo** for a sum of kshs 216,211/= being a sum paid to Jimba Credit Corporation ltd at the request of the appellant. When the matter came up for hearing in the trial court, the Magistrate found that the respondent had proved his case against the appellant and entered judgment for payment of the sum of kshs 216,211/= to the respondent.

2. The Appellant, aggrieved by the Trial Court's decision filed this appeal on the following grounds:

1. ***The Learned Magistrate erred in law and in fact in holding that the consent judgment entered in HCCC No. 758 of 1985 was legally binding on the appellant;***
2. ***The Learned Magistrate erred in law and in fact in failing to appreciate that the notice to act in person having been filed by the first defendant in HCCC 758 OF 1985 thereby removing Machira & Company advocates from acting from the 1st defendant that notice did not affect Machira & Company Advocates representation of the 2nd , 3rd an 4th defendants in HCCC NO. 758 of 1985;***
3. ***The Learned Magistrate erred in law and in fact in assuming that the plaintiff Mr. S.W Mwaniki is the same as S.M. Mwaniki who was the second defendant in HCCC NO. 758 of 1985;***
4. ***The Learned Magistrate erred in law and in fact in filing to find that the instrument being invoked the same being the guarantee was time barred the cause of action having accrued in 1985;***
5. ***The Learned Magistrate erred in law and in fact in finding for the plaintiff who did not prove his case to the extent of the judgment;***
6. ***The Learned Magistrate erred in law and in fact in shutting out the defence case.***
7. ***The record of the lower court in respect of the proceedings is incomplete and/or does not flow and/ or is incomprehensible and/or illegible such that to a large extent there is no relationship between the proceedings and the judgment.***

3. This being the first appeal, this court is bound to re-evaluate the evidence tendered before the trial court and arrive at an independent conclusion but also taking into account the fact that it did not have the advantage of hearing and observing the demeanour of the witnesses. In **Peters v. Sunday Post Limited (1958) EA at Pg. 424,** it was held interalia as follows:

"It is a strong thing that for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: It is not enough that the appellate court might itself have come to a different conclusion."

3. The respondent's case, was that he was an executive director and the appellant was a co-director of Intex service ltd. He stated that the company had borrowed several loans from Jimba Credit Corportion Ltd. He asserted that all was well until the collapse of the company which forced them to sell the motor vehicles and the board of directors decided to settle the debts on priority basis. He claimed that they were sued by the bank and went into liquidation. He averred that they were forced to settle the debts in their personal capacity and he paid kshs 435,094/= to Hamilton Harrisson &Mathews Advocates. He averred further that, the total amount owed by the bank was kshs 648,633/= from which Kshs 216,211 was paid by one Githaka and what remained was a third according to the minutes.

4. The appellant did not testify in court.
5. I have re-evaluated the evidence as adduced in the lower court. The parties

filed their written submissions. I have considered the submissions of the parties as filed in this court.

6. The appellant submitted that her was the executive Director of Intex Services Limited which company applied for a loan from Jimba Credit Corportion Ltd in 1982. The company insisted that the directors , **S.W. Mwaniki, E.C.N Githiaka and L.K Kimondo** must sign a guarantee to ensure repayment of the loan. He stated that the company defaulted in repayment and were sued in **HCCC 758 of 1985**, and they became personally liable. He argued that the respondent in this case was not party in that suit as the person on it was **S.M Mwaniki** and not **S.W Mwaniki**. He averred that, in that case, the parties entered into consent to pay Jimba credit corporation kshs 261,569/= and **S.W Mwaniki** only appeared in the suit as a representative of **Intex Services ltd** that was acting in person and not as a party to the suit. He asserted that the actions of the respondent in paying the loan were gratuitous though he has not shown how much he paid and how much was paid by the company. He further submitted that, the Magistrate proceeded to write a judgment shutting the appellant from testifying instead of a ruling on whether the defence raised triable issues to proceed for defence hearing. He stated that the magistrate erred in holding that the respondent appointed Machira & Company Advocates to represent the company yet the board is the one that decided that. He also claimed that the magistrate erred in holding that the respondent had the authority to file notice to act in person from the rest of the directors. He concluded by stating that the proceedings and judgment are largely incomprehensible since they do not reflect what transpired in the lower court hence great injustice to the parties.

7. The respondent on the other hand submitted that, the typographical error in the name of the respondent was an honest mistake since the respondent is one of the directors on Intex Services Ltd. He argued that the notice to act in person was for all the defendants and the respondent is the one who had instructed the firm of Machira & Company advocates to act for all the defendants. He stated further that the decree in the high court was categorical that consent was recorded between the respondent and the plaintiff meaning that the respondent was a party in the case all along. He argued that the respondent testified in the lower court and produced receipts of the amounts he contributed and that only the respondent and E.C.N. Githiaka paid the debt hence the suit against the appellant who did not pay. He asserted that in the lower court, the appellant's advocate opted not to call evidence but to argue points of law, as such there was no application before the magistrate to require a ruling. He added that the magistrate only had the evidence of the respondent to go by in deciding the matter and cannot therefore be faulted for his decision. He admitted that the proceedings are incomprehensible but added that the evidence of the respondent and the judgment are fairly clear and cannot be said to have caused any injustice to the parties as alleged. He concluded that the guarantees was not time barred and that the magistrate was not

sitting on an appeal of the High Court case, his was only to prove the existence of the consent judgment and that the appellant never paid his 1/3 share hence necessitating this suit.

8. Having set out the background of this appeal I now wish to consider the merits or otherwise of this appeal. I will first address grounds 6 and 7 of the appeal, which carries some weight and which will determine whether I should proceed to address the other grounds of appeal. The appellant on this ground claims the record of the lower court in respect of the proceedings is incomplete and/or does not flow and/ or is incomprehensible and/or illegible such that to a large extent there is no relationship between the proceedings and the judgment and further claims that the court shut out his defence case. I have looked at the proceedings of this matter in the lower court, it clear that the same was handled by various magistrates. Up until the respondent adduced his evidence, the court record is clear on what transpired in court. After the respondent testified, Siagi, the appellants advocate informed the court that he does not wish to call the appellant but that he would like to raise matters of law for the court to consider. When the matter came up on 11.12.03, the advocates agree to put in written submissions. On 26.1.2004, the respondent's advocate was present in court and requested for a judgment date. The judgment was delivered on 23.4.04. The magistrate in the matter took the evidence of the respondent into consideration, the submissions and properly analysed the evidence before him. Having looked at the proceedings, I agree with the parties that they are not very clear but are comprehensible on what transpired in court. The appellant's advocate informed the court that he will not be calling the appellant to adduce evidence but he would be raising points of law. He did not file any application on this points of law to prompt the Magistrate to rule on them. Instead, when the matter came up in court days after, the parties consented on filing their submissions. I therefore find the argument by the appellant that he was denied right of hearing to be misconceived.

9. I will proceed on the other grounds of appeal as raised. On ground 3, the appellant claims that the learned magistrate erred in law and in fact in assuming that the plaintiff **Mr. S.W Mwaniki** is the same as **S.M. Mwaniki** who was the second defendant in HCCC NO. 758 of 1985. Looking at the evidence adduced by the respondent in the lower court, which includes the Guarantee, the directors of the Intex Services Company who were 3 in number executed the guarantee. They included the appellant, respondent and one **E.C.N Githiaka**. The guarantee in clause 14 was categorical that where the guarantee is signed by more than one party the liability of each of them shall be joint and several and that what happened in **HCCC NO. 758 of 1985**, where the company and the three directors were sued in their capacity level. The appellant claims that the respondent was not a party in the suit since the party sued was **S.M. Mwaniki** and not **S.W Mwaniki**. He has not however explained who **S.M. Mwaniki** was and why he was sued as a director in that case yet the directors were only 3 in number. I am therefore inclined to agree with the respondent that there was a typographical error in using the 'M' instead of the 'W', and that the respondent was indeed one of the parties in that suit.

10. On the other 2 issues as presented under grounds 1 and 2, which issues include whether the consent judgment entered in **HCCC No. 758 of 1985** was legally binding on the appellant and whether the filed notice to act in person and that the firm of Machira & Company advocates only applied to Intex services ltd and not the other directors; I have looked at the decree. The same reads

"The defendant having appeared to summons and having filed his defence within the time prescribed therein and UPON HEARING the Notice of Motion file on 3rd day of June, 1986 by the counsel for the plaintiff and in the presence of Mr. S.W. Mwaniki for the defendants on 14th Day of October 1986 it is ordered;- by consent of the parties that the defendants o py the plaintiff the sum of kshs 261,569/30....

11. It is clear that the consent was entered on behalf of all the parties including the appellant herein and they were all bound by the decree. If the appellant felt aggrieved by the consent judgment, there were channels that he could have followed to have the decree revoked. He however chose not to appeal against the decision or take any measures to exonerate himself from paying the debt.

He cannot now turn back and claim that the consent judgment was not legally binding on him. Indeed to notice to act in person was specifically for intex Services Limited but the appellant as I have said failed to exercise his rights to ensure that he is not involved in the repayment of the loan. He slept on his rights then and cannot claim that he was not required to pay the loan.

12. The appellant has also claimed that the magistrate erred in failing to find that the guarantee being invoked was time barred since the action was in 1985. Looking at the evidence adduced, the respondent has been making payments to Hamilton, Harrison & Mathews advocates who are the advocates for the decree holder. He adduced receipts which show that he has been making payments since 1996 to 11th May 2000 and this case was filed in 11th December 2002, the matter is most definitely not time barred since the decree required the defendants to pay the decretal amount in monthly installments which installments dragged up until May 2000. I hereby find that the guarantee was not time barred.

13. On the last ground of appeal, ground 5, where the appellant claims that the Learned Magistrate erred in law and in fact in finding for the plaintiff who did not prove his case to the extent of the judgment, I have perused the court record and looked at the exhibits relied on by the trial Magistrate. The receipts illustrate that the respondent has been making the requisite payments in order. He now seeks a sum of Kshs 216,211/= being a third share of the amount paid by him and **E.C Githaka** which totaled to kshs 648,633/= at the request of the appellant. The appellant did not show or adduce evidence to the effect that he paid any monies arising from the decretal amount, yet it is evident that he was required to pay some money since the parties were severally and jointly liable. I am therefore convinced that the appellant ought to have paid his share which is 1/3 of the money totaling to kshs 216,211/=. I find that the respondent proved his case against the appellant.

14. In the end, I find no merit in the appeal. It is dismissed with costs to the respondent.

Dated and delivered in open court this 18th day of March, 2016.

J. K. SERGON

JUDGE

In the presence of:

……. for the Appellant

……..…….for the Respondent