



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 285 OF 2003

MOHAMED MUIN AHMAD MALIK.....PLAINTIFF

VERSUS

JOSEPH MUIRURI GITHONGO.....DEFENDANT

RULING

SETTLING OF ISSUES

1. The parties before me were unable to agree on the List of Issues which they ought to place before the trial court for determination.
2. The defendnat has listed the following Issues;

“1. *Did the Plaintiff have any locus standi to institute these proceedigns?*

2. *If he did not, are these proceedings a nullity?*

3. *If they are a nullity, should the suit be struck out, with costs to the Defendant?*

4. *If the suit is not a nullity, is the Plaintiff’s claim for interest on the principal sum extravagant and unconscionable, and in the nature of a penalty, and accordingly, unenforcdable?*

5. *Is the Plaintiff’s claim for interest from 1 December 1996 barred by agreement?”*

3. On the other hand, the Plaintiff expressed the view that there was only one Issue which ought to proceed to trial. The said Issue was in relation to the claim for interest on the principal sum together with the balance of the said principal sum.

4. As far as the plaintiff was concerned, the issue regarding the plaintiff’s locus standi, had already been determined by the court. Therefore, the plaintiff believed that it was no longer open to the defendant to revisit a matter which had already been determined by the court.

5. The proceedings were commenced by way of a plaint which was filed in court on 19th May 2003.

6. The plaintiff described himself as an agent of a principal whose details were known to the defendant.

7. It was the contention of the plaintiff that in August 1995, the defendant borrowed Kshs. 30,000,000/- from the principal.

8. The plaintiff's pleading indicated that;

a) *The defendant would repay the loan by 30th September 1995;*

b) *If the loan was not repaid on due date, the defendant would pay Kshs. 37,500,000/-.*

c) *The defendant paid Kshs. 5,500,000/- only.*

d) *On 30th November 1996 and again on 22nd*

October 2002, the defendant acknowledged owing Kshs. 32,000,000/-. The acknowledgments were in writing.

e) *The suit was filed after the defendant failed to pay the debt, even after he had been given a Demand Notice.*

f) *The plaintiff now claimed the sum of Kshs. 32,000,000/- plus interest at 14% per annum from 1st December 1996, until payment in full.*

g) *The plaintiff also claimed the costs of the suit.*

9. In answer to the Plaint, there was no defence which was filed within the time prescribed by law. Consequently, the plaintiff applied for and the court granted judgment in favour of the plaintiff.

10. The defendant later applied to set aside the Judgment.

11. On 15th May 2008 Warsame J. expressed himself thus on the matter;

"Now taking into consideration the circumstances of this matter, I am reminded to give the defendant a chance on the issue of interest. Therefore, I direct the defendant to pay a sum of Kshs. 17 million to the plaintiff within the next 7 days, failure of which the defendant's Advocates would be required to release the sums held by them to the plaintiff. The issue of interest and other issues shall await full trial of the suit".

12. Prior to the court's said pronouncement, the plaintiff had told the court that the issue of the interest could go to trial, provided that the principal sum was paid.

13. On his part, the learned Judge started off by saying;

"The only issue in dispute is the rate of interest which was charged the amount borrowed by the defendant".

14. For that reason, the plaintiff has submitted that the court should be deemed to have rejected the defence which had asserted that the plaintiff lacked the requisite *locus standi*.

15. Had not the court rejected the said line of defence, the plaintiff thinks that the court would have said that that too would have been an issue to be determined at the trial.

16. But the defendant takes a contrary view. His said view was that the court had given him unconditional leave to defend himself. It was for that reason that the defendant incorporated into his defence, the following issues, which he now wishes to place before the trial court;

- a) *Whether or not the plaintiff had locus standi to institute these proceedings;*
- b) *If the plaintiff had locus standi, was the claim for interest extravagant, unconscionable, and in the nature of a penalty, which would render it unenforceable.*

17. To my mind, if there had been no further applications prior to this stage, I would have found the defendant's arguments to be compelling.

18. I say so because the learned Judge expressly talked about "*The issue of interest and other issues....*"

That cannot have meant that the only issue to be determined by the trial court was that relating to the rate of interest.

19. The plaintiff all along held the view that Warsame J. had limited the remaining issue to that of the rate of interest. Therefore, when the defence filed by the defendant incorporated other matters, the plaintiff applied to the court to strike out the said defence.

20. After giving consideration to the plaintiff's application, Lesiit J. held as follows;

"Having considered the said ruling (of Warsame J.), I agree with the submissions by Mr. Osmond for the Plaintiff, that the learned Warsame J. gave the Defendants leave to pursue only the issue of interest because in the learned Judge's view, it was clear that the principal sum owing to the plaintiff, by the Defendant, was Kshs. 17 million, after deducting Kshs. 5 million which had been paid earlier, and that the balance of the claim which was shooting the plaintiff's claim to over Kshs. 65 million was interest loaded on to the principal sum. In other words, the learned Judge concluded that after the Defendants paid to the plaintiff the sum of Kshs. 17 million, the only issue that would be left for determination would be the issue of interest, which the two parties could argue at the trial".

21. In the light of that finding, Lesiit J. struck out the Defence.

22. That Ruling provoked the defendant into filing an appeal to the Court of Appeal.

23. On 21st December 2012, the defence was reinstated.

24. Once the Defence was back on track, the defendant sought to have the plaint struck out. The defendant's application was determined by Kimondo J. The learned Judge observed that the defendant was advancing the same arguments as he had previously made before Warsame J., when the defendant had applied to set aside the interlocutory judgment.

25. Kimondo J. went on to make the following observations;

"There is more: in paragraph 7 of the deposition in support of the application to set aside the Judgment, the defendant conceded that he took a loan of Kshs. 22,500,000/- from the plaintiff's principal and had repaid Kshs. 5,500,000/-. That explains why the Court, in the ruling I set out earlier, directed the defendant to pay the balance of Kshs. 17,000,000/- within 7 days. The issue of interest or any other issue was to go to trial. It is also instructive that the defendant did not appeal that decision".

26. Clearly, Kimondo J. picked out the words from the ruling of Warsame J., when he made reference to "*the issue of interest or any other issue was to go to trial*".

27. Did that open up the issues beyond that relating to the rate of interest?

28. On 18th March 2011, the Court of Appeal said the following, in its Ruling on the defendant's application for stay of the proceedings at the High Court, pending the intended appeal to the Court of

Appeal;

“As Mr. Osmond concedes that the intended appeal is arguable and in fact says the learned Judge (Lesiit J.) made a mistake in striking out the entire defence, including the parts we have cited above which were raising issues of interest and which issues Warsame J. had allowed to go to trial, we do not see the need to go into the first principle as we also agree that indeed there is an arguable point, namely, whether the entire defence should have been struck out or not”.

29. I understand the learned Judges of Appeal to have been pointing out that, because Warsame J. had already allowed the issue of interest to proceed to trial, it was wrong for Lesiit J. to have struck out the entire defence. By necessary implication, I understand the Court of Appeal to be saying that the only parts of the defence which should have been struck out, are those that went beyond the line of the defence that Warsame J. had earlier permitted the defendant to raise.

30. If what the defendant has said in his submissions is accurate, it means that on 21st December 2012, the appeal against the decision of Lesiit J. was allowed, by the consent of both parties. In effect, the ruling delivered on 20th March 2009 was set aside.

31. That means that the defence was reinstated.

32. Yet, if all the issues raised in the defence were to be placed before the trial court, that would imply that the findings of Warsame J., which have never been challenged by an appeal or by review, would be re-opened for a fresh consideration. If that happened, there would be a possibility of the trial court arriving at a decision which was not consistent with the unchallenged decision of Warsame J. The nett result could be that the court may, in the same case, before the same High Court, arrive at decisions which were either contradictory or inconsistent. Such a situation must be frowned upon as it would erode confidence in the judicial process.

33. If the decision of Warsame J. was or was not in error, I cannot sit in an appeal over it. I therefore accept it because the defendant never challenged it through an appeal or an application for review.

34. But I also appreciate that matters of law can arise at any stage of the proceedings. Nonetheless, if any such a matter of law had already been considered by the court, it would not be open to another Judge of concurrent jurisdiction to re-visit it.

35. Accordingly, I find that the only issue that the trial court can now inquire into and thereafter adjudicate upon, is that which relates to the interest which the plaintiff has claimed. The said issue is worded as follows;

Is the plaintiff's claim for interest on the principal amount justifiable or is the claim so extravagant and unconscionable, as it is in the nature of a penalty, which therefore renders it unenforceable?

36. Apart from that central issue, there would arise the question of the date from when such interest would be recoverable, if the court were to hold that the plaintiff was entitled to interest on the principal sum.

37. Finally, the court will need to determine the party or parties who should pay the costs of the suit.

38. Meanwhile, in relation to the settling of the Issues herein, the

costs shall be in the cause.

DATED, SIGNED and DELIVERED at NAIROBI this 27th day of May 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Orina for A.B. Shah for the Plaintiff

No appearance for the Defendant.

Collins Odhiambo – Court clerk.