REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CIVIL APPEAL NO. 28 OF 2012 AND 9 OF 2013 (CONSOLIDATED)

SOLOMON MUVINGA KITHEKA.....…….APPELLANT

VERSUS

BENARD OYUGI…….....RESPONDENT

(From the ruling and judgment in Mwingi SRMCC No. 64 of 2011

– H. M. Nyaberi PM)

JUDGMENT

The two appeals herein were filed from two decisions of the subordinate court made in Mwingi Senior Resident Magistrate Court Civil Case No. 64 of 2011. The first appeal is Civil Appeal No. 28 of 2012 challenging the ruling delivered on 28/02/2012 in an application for striking out of the case of the respondent, who was the plaintiff in the trial court. The second appeal is Civil Appeal No. 9 of 2013, challenging the decision in the final judgment delivered by the subordinate court. The two appeals were consolidated and heard together as they relate to the same case.

The background to the appeals is that a plaint was filed by the respondent, who was the plaintiff in the subordinate court, seeking enforcement of a friendly contract for a loan advanced by the respondent to the appellant. The respondent filed the plaint dated 16th August 2011 seeking judgment for the sum of Kshs. 650,000/=, with costs and interest. In response, the appellant filed a defence denying liability, and also filed an application seeking that the plaint and subsequent pleadings of the respondent be struck out.

A ruling to the application was delivered on 28th February 2012, in which the court found that the application lacked merit and dismissed the same with costs to the respondent. That decision was the reason for the appellant filing Civil Appeal No. 28 of 2012 on the following grounds:-

1. That the learned principal magistrate erred in law and in fact in finding that the appellant had not denied having executed the friendly loan agreement with the respondent despite the empirical evidence that this was clearly not so.
2. The learned principal magistrate further erred in law in finding that the friendly loan agreement allegedly executed between the appellant and the respondent was not immoral or illegal and or against public policy.
3. The learned principal magistrate failed to find that the respondents cause of action as pleaded in the suit, was founded on an immoral and illegal transactions and thus offends public policy.
4. The learned principal magistrate erred in law and misdirected his mind in facts in finding that the transactions pleaded by the respondent were not in violation of the mandatory provisions of the Banking Act and the Micro Finance Act.
5. The learned principal magistrate erred in law in making final determination at the interlocutory

stage.

6. The learned principal magistrate further erred in law in arriving at a decision that was wholly against the weight of the evidence produced.
7. The learned principal magistrate erred in law in failing to find that the application by the appellant was not opposed by the respondent.
8. The learned principal magistrate misdirected his mind in failing to sufficiently and properly address his mind to the mandatory provisions of Order 3 Rule 2 and 3 and Order 4 rule 2 of the Civil Procedure Rules.
9. The learned principal magistrate misdirected his mind in considering and relying on pleadings which had not been canvassed before him or at all by the parties or their advocates.

The above are the grounds of appeal in Appeal No. 28 of 2012 which was initially filed as Machakos Civil Appeal No. 41 of 2012.

The other appeal arose from final the judgment of the trial court.

On the 26th June 2013 the learned magistrate pronounced judgment in the case. In the judgment the court found that the respondent had proved his case on the balance of probabilities, and entered judgment as prayed in the plaint.

The appellant aggrieved by the decision, filed Civil Appeal No. 9 of 2013, on the following grounds:-

1. The learned trial magistrate erred in law in determining the entire suit without analyzing the facts, evidence and the law as required under Order 21 Rule 4 of the Civil Procedure Rules and hence the judgment is a nullity ab initio.
2. The learned trial magistrate erred in law and in facts in failing to consider and appreciate the appellant's defence on record and further proceeding to treat the respondent's suit as an undefended claim.
3. The learned trial magistrate erred in law and facts in finding that the respondent's evidence was unchallenged despite having on record the appellant's statement of defence and two sworn affidavits all disputing the validity and authenticity of the friendly loan agreements which formed the basis of the respondents suit.
4. The learned trial magistrate erred in law and in fact in failing to consider and or ignoring completely and without any explanation the appellant's written witness statements filed in court on 2nd September 2011 which formed the stratum of the appellant's defence.
5. The learned trial magistrate erred in law and misdirected himself against the weight of the evidence on record in finding that the friendly loan agreements allegedly executed between the appellant and the respondent were not immoral, illegal and or against public policy.
6. The learned trial magistrate misdirected himself in law in failing to find that the respondent's cause of action as pleaded in the suit was founded on an immoral and an illegal transaction and thus offended public policy.
7. The learned trial magistrate erred in law and misdirected his mind in facts in finding that the transactions pleaded by the respondent were not in violation of the mandatory provisions of the Banking Act and the Micro Finance Act.
8. The learned trial magistrate erred in law and misdirected his mind in facts in finding and laying great emphasis on a purported letter of admission of claim by the appellant despite evidence to the contrary.
9. The learned principal magistrate further erred in law in arriving at a decision that was wholly against the weight of the evidence on record.
10. The learned trial magistrate erred and misdirected his mind in facts in finding that the appellant had denied knowing the respondent at all, despite the contrary evidence on record.
11. The learned trial magistrate erred in law and misdirected his mind in facts in failing to find that the claim by the respondent was fraudulent and hinged on illegality.
12. The learned trial magistrate misdirected his mind in failing to sufficiently and properly consider at all, the appellant's defence on record.

The above are the grounds of appeal in Civil Appeal No. 9 of 2013.

The hearing of the appeals, by consent of the advocates for the parties, proceeded by way of filing of written submissions. The appellant's counsel S. M. Mwendwa & Co filed their written submissions on 9th February 2015. The respondent's counsel M/s. Ngala Mulonza & Co filed their written submissions on 10th July 2015. It is of note that the respondent's counsel had on 11th July 2013 filed written submissions to Civil Appeal No. 28 of 2012.

I have perused and considered both sets of written submissions and the authorities cited to me.

The two appeals basically address the same issue, which is whether the suit of the respondent should have been allowed by the subordinate court.

Civil Appeal No. 28 of 2012, is an appeal from the decision in the application by the appellant seeking the striking out of the case of the respondent, as the pleadings were founded on an immoral and illegal transaction which offended public policy.

That application was argued through written submissions, and the court delivered its ruling on 28th of February 2012 and came to the following conclusion-

> "***The defendant has not denied having executed the said agreement. The agreements are worded friendly loan agreement. I cannot see any immorality or illegality where contracting parties entered a friendly loan agreement. There is nothing from the agreement that can be construed that a friendly loan was advanced for an immoral act which offends the public policy. In the premises, the first ground cannot be sustained.***
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> ***Secondly, on the submission that the plaintiff suit offends the mandatory provisions of Order 3 Rule 2 and Order 4 Rule 2 of the Civil Procedure Rules I find that the plaintiffs plaint was filed together with a verifying affidavit copies of documents to be relied upon and a list of witnesses. What is lacking is written statements signed by the witnesses excluding expert witnesses. It is not fatal where a party does not file written statements. Since Order 3 Rule 2 provides an overriding clause that the statements under sub rule C may with leave of the court be furnished at least 15 days prior to the trial conference under Order 11. In this case no retrial conference has been held.***
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> ***Further I find that the plaintiff has not bleached Order 4 Rule 2. I therefore find that the submissions by the defendant on this ground is premature thus lacks merit.***
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> ***Thirdly on the argument whether the plaintiff is subject to the provisions of the Banking Act and Micro Finance Act, I do observe from the definition of banking business or financial business that they mean – "the accepting of money from members of the public on deposits, repayable on demand or at the expiry of a fixed period or after notice, or accepting money on current account and payment on and acceptance of cheques". A careful study of all the definition shows that the plaintiff does not fall in any of the financial statutes. There is no inference from the agreements that the plaintiff was receiving deposits from the defendant nor operating a current account from him.***
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> ***Finally, the issue whether the claim is Kshs. 650,000/= or 2 Million is a question to be determined by way of evidence. The authorities tendered by the defendant are quite different from the instant case."***

I have brought out the findings of the learned magistrate in the ruling deliberately for appreciation of the complaints of the appellant. Though counsel for the appellant has argued that the magistrate did not consider the submission on both sides, it is clear that the magistrate did so in the above ruling to the application.

Counsel for the appellant has also argued on appeal that the learned magistrate erred in making a final decision in the case at a preliminary stage. I do not agree with that contention. The learned magistrate made certain findings from the facts and arguments from both sides, which the court was entitled to do. The court also left the main case to be determined after substantive hearing. As such the court did not make a final decision in the case. Infact if the application of the appellant to strike out the case successful, then the court would have made the final decision in the case.

As to whether the alleged friendly loan agreement contravened the provisions of the Banking Act or the Micro Finance Act, that was an issue before the trial court, and the court was bound to make findings and a decision on the same. I find nothing wrong with the finding and decision of the learned magistrate in the ruling. I also find no contravention of Order 38 and 4 of the Civil Procedure Rules. I thus dismiss Appeal No. 28 of 2012 with costs to the respondent.

I now turn to the appeal from the judgment. The judgment was delivered on 26th June 2013 and the appellant filed Appeal No. 9 of 2013.

The appellant has challenged the said judgment on several grounds. Counsel for the appellant has argued that he was in another court at Garissa when the case was heard in Mwingi. In his view that was wrong and prejudicial to the appellant. I have perused the record. On the 8th of May 2013 the appellants' counsel was not ready to proceed with the case. He stated that he had been served with hearing notice a week earlier. The court considered the request of counsel for the appellant and granted a last adjournment and ordered him to pay costs of Kshs. 3,000/= to the respondent's counsel. During the same proceedings and by consent of counsel for both sides, the suit was fixed for hearing on 5th June 2013.

On the 5th of June 2013, Mr. Musyoki holding brief for Mr. Mwendwa for the appellant informed the court that Mr. Mwendwa was then engaged in Garissa Civil Appeal No. 28 of 2012 and asked for the file to be placed aside till 2pm when Mr. Mwendwa would prosecute the matter. The court thus put off the case to 2.30pm. By 3.30pm however, the advocate for the appellant had not come to court. The case then proceeded to hearing in the absence of counsel for the appellant, and one witness testified. He was the respondent who was the plaintiff in the lower court. He tendered evidence in Chief produced exhibits and was not cross examined. He was the only witness who tendered evidence in the case.

In my view, the appellant's counsel has no reason to fault the court in proceeding to hear the case in his absence. It is apparent that even the appellant himself did not attend court on that day, which was either the fault of the litigant or the fault of his advocate who did not advise him properly. The appellant had also previously been given a last adjournment and his advocate knew this very well. The hearing date of 5th June 2013 was also taken by consent of all advocates for the parties. There could be no mistake about it. In addition, the appeal No. 28 of 2012, at Garissa, was in respect of the same matter involving the same parties and the same advocates. Counsel for the appellant could not therefore proceed to Garissa court secretly in the absence and without the knowledge of counsel for the respondent to prosecute the appeal on the date of the hearing of the case, which hearing date was taken by consent. Such an excuse is not believable. In my view such was not proper conduct by an advocate. I find nothing irregular or prejudicial in the magistrate proceeding to hear the case in the absence of counsel for the appellant. The record infact shows that the court went out of its way to put off the matter from the morning to enable the counsel to attend but he did not. Counsel for the appellant is squarely to blame if there is any blame at all. I dismiss that complaint.

Coming to the merits of the appeal, the evidence on record was just the evidence of the respondent which was not disputed in any way. The learned trial magistrate could therefore only consider that evidence and make a decision there from.

Counsel for the appellant has argued that the magistrate should have taken into account the defence filed, and witness statements or affidavits of witnesses filed by and on behalf of the appellant. In my view such an action would defeat the purpose of hearing of a case. Pleadings such as a defence are allegations and they remain so unless evidence is tendered in their support. The witness statements were filed for the purpose of making all parties, including the court, to follow the proceedings more easily. They did not

become evidence, unless they are adopted by the makers of the same. Since no witness came to court to adopt any of those witness statements or affidavits, in my view the learned magistrate was correct in not taking those statements into account in the decision. In my view, the learned magistrate was correct in not taking into account both the defence and witness statements and affidavits filed by or on behalf of the appellant, as they were not supported or adopted by any witness, and as such did not become evidence.

Counsel for the appellant has further argued very strongly about the provisions of the Banking Act (Cap 488) and the Microfinance Act. In counsel's view the respondent was doing illegal and immoral business of lending money at an interest contrary to the provisions of the Banking Act and the Microfinance Act. As such, the contract or alleged contracts, being illegal and immoral contracts should not be enforced by the court. Counsel has relied on section 3 (1) of the Banking Act.

Indeed, illegal and immoral contracts cannot be enforced by courts of law.

I have perused the Banking Act. Section 3 (1) (a) of the Act provides as follows – ***"no person shall in Kenya transact any banking business or financial business or the business of a mortgage finance company unless it is an institution or a duly approved agency conducting banking business on behalf of an institution which holds a valid licence".***

I have also perused the definitions under section 2 of the Act. Section 2 defines ***"banking business"*** as follows:-

a. ***"accepting from the members of the public of money on deposits repayable on demand or at the expiry of a fixed period or after notice;-***
b. ***the accepting from the members of the public of money on current account and payment on and acceptance of cheques; and***
c. ***the employing of money held on deposits or on current account, or any part of the money by lending, investment or in any other manner for the account and the risk of the person so employing the money."***

The definition of ***"financial business"*** is given under the same section as follows:-

a. ***"the accepting from members of the public of money or deposit repayable on demand of a fixed period or after notice; and the employing of money held on deposit or any part of the money by lending, investment or in any other manner for the account and the risk of the person so employing the money***."

The appellant's counsel has referred to a number of case authorities on the subject. The ones he has cited are High Court cases which are of persuasive authority to this court. My interpretation of "banking business" and "financial business" is that a person does such business only when he has been collecting money from the public as deposits, and then lending it out or investing it. In this regard I respectfully differ with what was held in the case of ***Samwel Bosire Vs. Gladys M. Omosa & Another [2010] eKLR*** and the case of ***Joel Njema Waruiru & Another Vs. Robert Kibunja [2013] eKLR.***

No evidence was tendered at the trial or in this court, that the respondent and collected any money from the public, which he then lent to the appellant. He thus in my view did not contravene the provisions of the Banking Act or the Microfinance Act. In my view the law does not prohibit a person from using his own resources to lend money to a friend on agreed terms.

In the present case the terms and conditions of the loan were agreed to in writing. They were later reviewed by the same parties under a subsequent agreement. Each of the parties had capacity to enter into legal agreements and were of sound mind. I find nothing illegal or immoral about the lending herein or the agreements entered into between the parties. I find that the arrangements or agreements entered into were legal and enforceable by the court. I thus agree with the finding and decision of the learned trial magistrate that they were valid agreements between contracting parties. I will thus also dismiss Civil Appeal No. 9 of 2013.

To conclude, I find no merits in both appeals. Both appeals are hereby dismissed with costs to the respondent.

Dated and delivered at Garissa this 22nd day of July, 2015

GEORGE DULU

JUDGE