



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 839 of 2001

LARRY OKUMU.....APPELLANT
VERSUS
CHARLES OOKO.....RESPONDENT

(An appeal against the judgment of Hon. Mrs. Owino, Senior Resident Magistrate delivered on the 8th day of November, 2001 in CMCC No.9136 of 2001 at Milimani Commercial Courts, Nairobi.)

J U D G M E N T

1. This is an appeal arising from a suit which was brought by Larry Okumu (hereinafter referred to as the appellant). The suit was against Charles Ooko (hereinafter referred to as the respondent). The appellant claimed judgment against the respondent for Kshs.168,000/= being interest at the rate of 30% from April, 1996 to August, 2000 on the principal sum of Kshs.140,000/= paid by the appellant to the respondent.
2. The appellant claimed that he paid the money to the respondent pursuant to an agreement entered into between them, for a joint business venture for importation of motor vehicles for sale. The appellant claimed that despite his contribution to the business, the respondent did not share any proceeds of the business with him. The respondent only refunded to the appellant the principal sum of Kshs.140,000/= in August, 2000 after persistent demands.
3. The respondent filed a defence in which he admitted that there was a partnership agreement entered into between the respondent and the appellant, for the importation of one motor vehicle a Nissan Sunny. The respondent maintained that the agreement provided for the profits and losses to be shared equally and that there was no provision for refund of capital with interest at 30% or at all.
4. The respondent stated that the proceeds of sale of the vehicle which was imported, was invested in the importation of another motor vehicle. The second vehicle developed mechanical defects before it was sold. The cost of repairs of the second motor vehicle wiped out the expected profits and capital. The respondent contended that the partnership ceased as a result of that loss. The respondent therefore maintained that no interest was earned or payable to the plaintiff.
5. During the trial the appellant testified that he gave the respondent a sum of Kshs.140,000/= for the business venture in April, 1996. He produced a copy of the partnership agreement signed by both parties and explained that the agreement was that the profits of the sale was to be shared out. The appellant testified that the respondent later informed the appellant that he had sold the motor vehicle which he had imported. The respondent did not however share any profits with the appellant.
6. The appellant demanded his capital back as he realized that the respondent was continuing with the importation and sale of motor vehicles although the appellant was not getting any profits. The respondent gave

the appellant several cheques which were dishonoured, before finally refunding the appellant the principal sum of Kshs.140,000/= in August, 2000. The appellant therefore urged the court to order the respondent to pay interest on the principal sum at commercial rate.

7. The respondent on his part explained that he entered into a partnership agreement with the appellant for the importation and sale of a Nissan Sunny. The respondent explained that upon the importation and sale of the motor vehicle, there was a profit of Kshs.49,577 which was shared out in the ratio of the parties' contribution. The appellant was to get Kshs.17,120/= whilst the respondent was to get Kshs.32,457/=. It was however agreed that the profit be ploughed back into the business so as to import another motor vehicle. Another motor vehicle was subsequently imported.
8. However in December 1997, before the vehicle was sold, it was involved in an accident. The motor vehicle was repaired at a cost of Kshs.317,000/=. The appellant had no money so the respondent had to use his own funds for repairs. The respondent eventually sold the motor vehicle at a cost of Kshs.663,000/= incurring a loss of Kshs.166,235/=. The appellant however refused to share the loss and demanded full refund of his money. The appellant reported the matter to the police and the respondent was forced to refund the money to the appellant. The respondent maintained that there was no agreement for payment of interest.
9. Each party's counsel filed written submissions each urging the court to find in favour of his client. In her judgment, the trial magistrate found that the appellant did not know how much the motor vehicle was sold at, but that he sanctioned the importation of the second motor vehicle, and must therefore have been satisfied with the transaction on the 1st motor vehicle which was imported. The trial magistrate noted that the disagreement came about because of the accident involving the second vehicle and the appellant's reluctance to share the losses.
10. The trial magistrate further found that the appellant had not shown what profits if any, that the respondent made from the sale of the motor vehicle. Nor had the appellant proved that he was entitled to the interest of 30% as claimed. The trial magistrate therefore found the appellant's case not proved and dismissed the same with costs.
11. Being aggrieved by that judgment, the appellant has lodged this appeal raising 9 grounds as follows:
 - (i) The learned magistrate erred in law and fact by failing to find that the defendant had been doing business to the exclusion of the plaintiff and that the plaintiff deserved a refund of his money put in the partnership business together with interest since the partnership had been frustrated by the defendant who continued to reap profits to the exclusion of the plaintiff.
 - (ii) The learned magistrate erred in law and fact by finding that the plaintiff received Kshs.53,195/= from the partnership when there was no evidence to prove the same.
 - (iii) The learned magistrate erred in law and fact by relying on an agreement, which was for purposes of running a partnership business, which was already, frustrated by the defendant thereby rendering the agreement of no consequence.
 - (iv) The learned magistrate erred in law and fact by holding that the plaintiff was satisfied with the transaction on the 1st motor vehicle.
 - (v) The learned magistrate erred in law and fact by failing to find that the plaintiff would not be able to establish whatever interest the defendant made in the business for the reasons that he excluded the plaintiff from all the transactions contrary to the agreement and the plaintiff's only remedy lied in recovering interest on the principal sum paid to the defendant in the partnership business.
 - (vi) The learned magistrate erred in law and fact by not finding that the defendant by himself having refunded the plaintiff the principal sum, admitted owing the plaintiff money after duping him to go into a partnership business that never took off.

- (vii) The learned magistrate erred in law and fact by holding that the plaintiff did not prove that he was entitled to 30% interest when it was clear that the defendant had been doing business with the plaintiff's money since 1996 and had even refunded him the principal sum and the interest thereto at commercial market rates would just be as good as automatic.
- (viii) The learned magistrate erred in law and fact by finding that the 2nd vehicle imported by the plaintiff was involved in an accident when there was not even a police abstract produced to prove the same.
- (ix) The learned magistrate erred in law and fact by admitting receipts for repair of the 2nd vehicle involved in an accident as produced by the defendant when the receipts did not even indicate which particular vehicle was repaired in the first place.

12. Following an agreement agreed to by the parties counsel, written submissions were duly exchanged and filed. For the appellant, it was submitted that the only matter in issue, was whether the trial magistrate was right in dismissing the appellant's suit. It was noted that the respondent did not provide any evidence to show that he shared profits from the sale of the 1st vehicle with the appellant. Nor did he adduce any evidence such as a police abstract report to prove the accident alleged in respect of the second vehicle. It was further pointed out that the receipts produced in respect to the alleged repairs, did not identify the motor vehicle which was repaired.
13. It was submitted that the respondent breached the contract as soon as it was signed, and therefore, whether there was a provision for payment of interest or not, the respondent held the appellant's money and was all along trading with it. The respondent should therefore automatically pay interest.
14. For the respondent it was submitted that the appellant's case was based on the partnership agreement. It was maintained that the appellant was repaid Kshs.140,000/= which was an overpayment by Kshs.36,075/=. It was further submitted that the accident vehicle was sold in August, 1999 and therefore, any interest payable would have to be from August 1999. It was argued that taking into account the overpayment the balance would only be Kshs.47,925/=. The court was however urged to dismiss the appeal as the appellant had failed to prove his case.
15. I have carefully reconsidered and evaluated the evidence which was adduced before the trial magistrate. I have also considered the submissions made before the trial court, and before me as well as the authorities cited. I find that it is not disputed that there was a partnership agreement between the appellant and the respondent, pursuant to which the appellant paid the respondent Kshs.140,000/= as his contribution towards the business venture. The agreement was in writing and a copy was duly produced in evidence.
16. The agreement provided that the business venture was initially in respect to the importation of a specific Nissan Sunny, whose engine number was identified. It was further agreed that the partnership could be extended to other business undertakings by mutual agreement. It was clear from the evidence that the Nissan Sunny was imported and sold as per the initial partnership agreement. The appellant did concede that it was mutually agreed that the partnership venture be extended to the importation of another vehicle. The appellant however felt aggrieved because the respondent did not keep him properly informed about the transactions, nor did he account to the appellant for the proceeds of sale. It was for that reason that the appellant opted out of the agreement and demanded refund of the principal amount which he had paid as contribution.
17. It is not disputed that the respondent finally refunded the principal amount to the appellant in August, 2000. The dispute now relates to whether the appellant is entitled to recover the sum of Kshs.168,000/= which he claims to be interest due on the principal sum from April, 1996 when he gave the money to the respondent to August, 2000 when the respondent refunded the money to the appellant.
18. I have examined the written partnership agreement which was produced in evidence. I do note that the agreement does not provide for the payment of interest on the principal amount by either party. The agreement

only provides for recovery of the principal amount as a civil debt. Therefore, the appellant's claim for interest has no base as it is not anchored on the parties' agreement. Secondly, the appellant claimed interest at the rate of 30% per year. The appellant argued that that was the market rate. Nonetheless, no evidence was produced before the trial court to show the interest rates which were prevailing during the period claimed or the basis of that figure.

19. I find therefore, that the trial magistrate cannot be faulted for dismissing the appellant's claim as the appellant did not discharge the burden of proof. Accordingly, I find no merit in this appeal and do therefore dismiss it. Given the circumstances of this case, I order that each party shall bear his own costs to this appeal.

Dated and delivered this 15th day of April, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Momanyi H/B for Jumba for the appellant

Advocate for the respondent absent

Eric - Court clerk