



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Appeal 147 of 2005

NATIONAL BANK OF KENYA LIMITED.....APPELLANT

VERSUS

MOSES HARRISON MARANGADEFENDANT

(Being an Appeal from the ruling of the Honourable Miss E. Ominde, Senior Resident Magistrate, Nakuru delivered on 12th July 2005 in Nakuru CMCC No.677 of 1995)

JUDGMENT

The appellant, National Bank of Kenya Ltd filed suit against the respondent, Moses Harrison Maranga seeking to be paid a sum of Kshs.73,526.50 which it claimed was lent to the respondent at the respondent's own request. The appellant sought to be paid the said amount plus interest at bank rate calculated a daily balance with effect from the 1st March 1995 until payment in full. The appellant further prayed to be awarded costs of the suit. The respondent was duly served with summons to enter appearance together with a copy of the plaint. The respondent did not enter appearance. Judgment was entered in favour of the appellant in default of appearance. The appellant sought to execute for the decretal amount by applying for the committal of the respondent to civil jail.

The appellant obtained Notice to Show Cause from the court and duly served the same upon the respondent. The respondent did not appear before the subordinate court to show cause. On the appointed date, the trial magistrate issued a warrant for the arrest of the respondent on account of his failure to attend court. The respondent was later arrested and on 9th December 2004, committed to civil jail for a period of two months. While in prison the respondent filed a notice of motion under the provisions of Order XLIV rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking to review the order committing him to civil jail. The respondent alleged that he could not be committed to civil jail because the debt which he owed to the appellant had been written off on account of his poor health, lack of any attachable assets and on account of his poverty.

The respondent annexed a copy of a letter dated 23rd August 2004 which was allegedly written on behalf of the appellant to Messrs. Collinet Investments, a company which had been instructed to investigate whether the respondent had any assets which could be attached to settle the decretal amount. The said letter noted that the appellant had written off the debt owed by the respondent to the appellant. The appellant disputed the claim by the respondent that it had written off the debt. Samuel Odiyo, the Nakuru branch manager of the appellant swore a replying affidavit in opposition to the application. He swore that the said letter which the respondent sought to rely on in support of his application was forgery, because, *inter alia*, the author of the letter had at the material time ceased to be an employee of the

appellant. He further noted that the letter had no reference number and had been written on a letterhead that did not contain the names of the current directors of the appellant.

The application was heard by Miss Ominde, Principal Magistrate and on 12th July 2005, she allowed the respondent's application with costs. At the material part of her ruling, she had this to say:

“All in all, it is my opinion that the circumstances as I have summarized above warrant a review, but before I close, the respondents (appellant) also failed to file an affidavit of means to show that the judgment-debtor/applicant is a man of means and has deliberately refused and or neglected to pay the debt. Accordingly, therefore, I find in favour of the applicant, allow the application in its entirety (sic) and on a balance of probabilities find that the bank had indeed written off the debt owed by the judgment-debtor by whatever term they use. They are to pay the judgment-debtor/applicant the costs of this application”

The appellant was aggrieved by the decision of the trial magistrate. It filed an appeal to this court. It raised several grounds of appeal. The said grounds of appeal may be summarized as hereunder; the appellant faulted the trial magistrate for relying on a forged letter to reach a finding that the appellant had indeed written off the debt owed by the respondent. It was further aggrieved that the trial magistrate had failed to consider the relevant facts of the case, especially the evidence adduced by the bank manager and thus arrived at the erroneous decision that the respondent had made his case that the debt had been written off. The appellant took issue with the trial magistrate's finding that the appellant ought to have filed an affidavit of means establishing that the respondent was a man of means who could satisfy the decretal amount. It was further aggrieved that the trial magistrate had misapprehended the law by allowing the application for review and by further finding that Order XXI rule 35 of the Civil Procedure Rules was not complied with when the respondent was committed to civil appeal.

At the hearing of the appeal, Mr. Kiburi for the appellant submitted that the appellant had investigated the respondent and found that he had capacity to pay. The respondent had even given proposals on how he intended to liquidate the decretal amount. He reiterated that at no time had the appellant made any decision to write off the debt owed by the respondent. He maintained that the letter which the respondent attached in support of his application purportedly written on behalf of the appellant was a forgery. He submitted that the respondent was cross-examined on his affidavit in support of the application. Likewise, the representative of the appellant was cross-examined on the affidavit that he swore in response to the respondent's application. He maintained that the appellant had established to the required standard that the letter in question was a forgery.

Mr. Kiburi submitted that there were insufficient grounds placed before the trial magistrate that would have enabled her review the earlier decision made by the court to commit the respondent to civil jail. He took issue with the trial magistrate's decision in allowing the application to review the earlier order of the court yet the respondent had failed to show cause when he was served to appear in court when the notice to show cause was scheduled for hearing. He reiterated that the letter which the respondent relied in support of its assertion that the debt had been written off was a forgery and could not have been written by the appellant. He submitted that the trial magistrate had erred when she wrongly evaluated the facts of the case and thus reached at an erroneous decision in favour of the respondent. He urged the court to allow the appeal.

Mr. Nyamwange for the respondent opposed the appeal. He submitted that the respondent was not given sufficient notice to show cause why execution should be levied against him. He maintained that the appellant had written off the debt owed to it by the respondent. Mr. Nyamwange explained that the letter in question was sent to the respondent through his postal address. He insisted that the letter was genuine and authentic. He submitted that before the respondent was committed to civil jail, the trial magistrate had noted that the appellant had not complied with the requirements under Order XXI rule 35 of the Civil Procedure Rules. He maintained that the respondent was within his rights to raise the issue of the writing off of the debt when he was called upon to show cause why he should not be committed to civil jail. He reiterated that the trial magistrate had considered all the facts of the case before arriving at the correct decision reaching a finding that the appellant had written off the debt owed to it by the respondent. He

urged the court to dismiss the appeal.

This being a first appeal, it is the duty of this court to reconsider and re-evaluate the facts that were placed before the trial magistrate's court so as to arrive at its independent decision whether or not to uphold the decision of the said trial magistrate. In reaching its determination, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified and cannot therefore be expected to make any determination as to the demeanour of witnesses. (see Selle - vs – Associated Motor Boat Co. & Another [1968] EA 23). In the present appeal, the issues for determination by the court are as follows:

- (i) whether the procedure adopted by the respondent in seeking to challenge a judgment of the court was proper.
- (ii) whether the trial magistrate considered the applicable law before she allowed the application by the respondent to review an earlier order of the court which committed the respondent to civil jail.
- (iii) whether the respondent had established to the required standard of proof that the debt he owed to the appellant had been written off by virtue of the letter dated 23rd August 2004.

On the first issue, as stated earlier in this judgment, the respondent was served with summons to enter appearance together with a copy of the plaint. The respondent failed to enter appearance within the requisite period. Judgment was entered against the respondent in default of appearance. After entry of judgment, the respondent made proposals to the appellant on how he intended to liquidate the decretal amount. He did not honour his undertaking. The appellant instructed an investigator, Messrs. Collinet Investments to investigate whether the respondent had any attachable assets. According to the appellant, their investigations revealed that the respondent had means to pay off the debt hence their decision to apply for notice to show cause against the respondent.

Although the respondent was served with the notice to show cause, he failed to attend court. The court issued a warrant for his arrest. The respondent was arrested, taken to court, and committed to civil jail for a period of two months. It is at this stage of the proceedings, that the respondent made the application to review the decision and further sought a declaration from the court that he be released from civil jail. He further sought from the court a finding in his favour that the debt that he owed the appellant had been written off. Having re-evaluated the facts of this case, it was evident that the respondent could not challenge the entry of judgment by the subordinate court by making an application for review. The respondent was required to make an application to set aside the ex parte judgment which was entered against him. He could not purport to escape civil liability at the stage when the appellant had sought to execute against him.

I therefore hold that the trial magistrate erred in entertaining an application for review under circumstances which were not warranted. There was only one way by which the respondent could have impugned a regularly entered judgment; and that is by making an appropriate application to set aside the said judgment. By making allegations that the said debt had been written off, the respondent was raising a defence after judgment had already been entered. The application for review was therefore made in abuse of the due process of the court.

It is therefore clear, in answer to issue (ii), that the trial magistrate did not consider the applicable law before she entertained and later erroneously allowed the application by the respondent to review an order by the court committing him to civil jail. In answer to issue (iii), it was evident that once the appellant disputed the letter which the respondent alleged had written off his debt, it was not available for the trial magistrate to investigate whether such letter had indeed been written. Upon re-evaluation of the evidence adduced in regard to the said letter, and further upon scrutiny of the letter in question, it was clear that the trial magistrate erred when she reached the determination that the same was a valid letter which had discharged the respondent from liability from the debt.

The letter was not addressed to the respondent. It was addressed to Messrs. Collinet Investments. It was therefore strange and inconceivable that the appellant could have written a letter concerning the

respondent to a third party regarding a particular decision that had been made to write off the debt. The appellant was not obliged to notify its agent that it had made a decision after considering the report that had been prepared by such agent. The respondent did not give satisfactory explanation how he came into possession of the said letter. The tone of the letter suggests that it was addressed to the respondent yet the same was addressed to Messrs. Collinet Investments. It was clear to this court that once the appellant disowned the letter, the same became inadmissible in evidence. It could only be produced by the maker or by the person to whom it was addressed to. The respondent was not a competent person to produce the document. The submission by the appellant to the effect that the said letter could be in fact a forgery therefore has merit in the circumstances.

I have taken into consideration the totality of the evidence before court and the submissions made during the hearing of the appeal. This appeal is for allowing. The same is allowed. The order of the trial magistrate of the 12th July 2005 is hereby set aside and substituted by an order of this court dismissing with costs the respondent's application dated 14th December 2004. The appellant shall have the costs of the appeal.

DATED at NAIROBI this 16th day of SEPTEMBER 2008.

L. KIMARU

JUDGE