



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(MILIMANI LAW COURTS)
CIV APP 313 OF 98

MURIMI & COMPANYAPPELLANT

VERSUS

ESTATE FINANCE COMPANYRESPONDENT

JUDGMENT

Around 2nd January 1987 the plaintiff now appellant herein, obtained loan facilities amounting to Kshs.1.5 million from Estate Finance Company of Kenya. Later, this company was placed under the management of the Central Bank of Kenya. Subsequently its operations were taken over by the Consolidated Bank Mortgages Limited under an Act of Parliament.

In the meantime the appellant repaid the loan amounting to Kshs.3,350,502/50 on 7th March 1990. But when he asked for a statement relating to this facility from the bank and checked it, the appellant discovered various debits amounting to Kshs.829,560/95 which he queried. The Financial Company explained that these debits were penalties for non-payment of the loans.

The appellant stated that he held various meetings with a Mr. E.K. Mathiu the then Deputy Managing Director of the defendant company wherein it was agreed that a refund of this money be made to the appellant.

The appellant's contention was that the two parties agreed that the appellant would forgo 1/3 of this refund on condition that the same was paid by August 1991. That this refund was not made until 10th December, 1991 when a cheque for Kshs.727,195/= was sent to the appellant – the respondent retaining 1/3.

The appellant did not accept this and went on to demand the retained balance together with interest from 10.12.91 because the condition imposed for the forgone 1/3 was not complied with. This amount was put at Kshs.315,210/95. The respondent contented that there was no commitment on the date of payment and that this was an agreement reached merely to avoid litigation, hence the appellant's demand for payment of Kshs.315,210/95 was an afterthought. The dispute culminated in a suit filed before the court of the Senior Principal Magistrate Nairobi to claim this sum dated 20th July 1992.

A defence dated 26th October 1992 and filed in court on 3rd November 1992 denied the claim and raised a defence of estoppel on the part of the appellant for raising further claims it had conceded or waived and on which the defendant respondent relied in making the payment.

The case was placed before the Nairobi Senior Principal Magistrate (H.M. Okwengu (Mrs) as she then was, on 9th July 1997 when both parties testified. Judgment was delivered on 13th August 1997 in which the learned magistrate dismissed the appellant's main suit save for further interest on the amount which was due to him between 1st September 1991 and 10th December 1991. She put this interest at Kshs.38,710/= for which she entered judgment for the appellant together with interest thereon at court rates from the date of filing suit.

The magistrate also awarded the appellant 50% costs of the suit. Out of this decision this appeal was filed in this court through a memorandum of appeal which listed nine (9) grounds of appeal. They are that the learned magistrate erred in both law and fact in drawing conclusions which were not supported by evidence, thus arriving at an incorrect judgement, that she erred in failing to appreciate the correct evidence and especially failed to acknowledge the evidence of Mr. Mbatia corroborated by Mr. Murimi's evidence that the amount payable to Mr. Murimi was Kshs.829,500/95, she erred in failing to acknowledge that the plaintiff had agreed to forgo 1/3 of the claim provided that payment was to be made in August, 1991.

Ground 5 of the memorandum of appeal averred that the Magistrate erred in failing to appreciate further corroboration of Mr. Murimi's evidence. The respondent's witness Mr. Mbatia concluded that the amount due to the plaintiff was Kshs.829,500/= and payment was due by August 1991 although no payment was made until December 1991; that she erred in concluding that there was no firm commitment from the defendant as to the period of payment

whereas the contents of exhibits 1 and 2 as explicit that payment had to be made in August 1991; that she misguided herself as rejoinder letter by the appellant of 27th August, 1991 and 18th September 1991 to the respondent. That the learned Magistrate's finding that the appellant agreed to forego 1/3 of the claim to avoid litigation was speculative and especially so when the contents of exhibit 1 were explicit, to wit that the agreed amount had to be paid by August 1991.

Grounds 8 and 9 of the Memorandum of appeal were that the learned Magistrate erred in fact and misdirected herself in the assessment of evidence and arriving at an erroneous conclusion and judgement and that she erred in finding that the respondent had proved its claim on a balance of probabilities. In this court on 29th May, 2002, counsel for the parties submitted either to support or oppose the appeal. Counsel for the appellant stated that the respondent's witness who appeared in the lower court did not contradict the evidence of the appellant's witness that the appellant had agreed to forego 1/3 of

the claim if payment was made by August 1991 but that such payment was made in December 1991. That after payment was delayed, the appellant demanded full payment of the whole amount.

Counsel stated that the evidence of the appellant was uncontradicted and the court should have accepted it as the truth and prayed that the appeal should be allowed with costs. Counsel for the respondent repeated that there was no firm commitment on the part of the respondent on the period of payment. That in exhibit 2 the appellant extended the period of payment to September and that by 18th November 1991 the appellant was still asking for payment of Kshs.727,195/= plus interest of Kshs.174,195/=.

According to counsel, the agreement was that this money would be paid to avoid litigation so that the matter could be resolved expeditiously and that there was no agreement on interest. That in exhibit 4 the respondent asked the appellant to accept Kshs.727,195/= but that the appellant never replied to this letter. That it was not shown that the intention of the parties was that if no payment was not made by August 1991 the full amount would become due and payable.

That the respondent having paid the amount agreed with interest up to August 1991 it had discharged its liability to the appellant. That the claim brought in the lower court by the appellant was an after thought because the respondent had to pay the amount agreed and that it would be unjust for the appellant to go back on its understanding and to maintain the claim brought to the lower court. Counsel referred to the cross appeal against award of interest of Kshs.38,710/= and 50% costs. He prayed for the dismissal of the appellants' appeal and to allow the cross appeal.

I have heard and recorded submissions of counsel for both parties and also perused the lower court record of proceedings and judgement. I have also perused all the documentary exhibits produced by the plaintiff's witness in the lower court case. www.kenyalaw.org The appellant relies on its exhibit 1 as giving a condition that it would only forego 1/3 of the claim if payment of Kshs.727,195/= was made during August, 1991. However my reading of this letter does not give me this view just as it never did to the learned Senior Principal Magistrate. The last paragraph of that letter went thus:-

“It was agreed that we put our discussion with you in writing. The only matter which we did not raise is the question of interest. Our considered view is that having agreed to undergo 1.3 of what is legally due to us, the claim for interest should be entertained especially when payment will be made in August 1991”.

There is no condition by that statement that the appellant would forego 1/3 of the amount claimed only if the lesser amount is paid in August 1991. In fact one would construe this statement as implying that since the amount would be paid in August 1991 and www.kenyalaw.org

appellant having foregone 1/3 of the amount claimed, their a claim for interest should be entertained.

I also note that even after the letter of 5th July, 1991, there is no other correspondence in this matter to remind the respondent of the alleged condition before the end of August 1991. The letter dated 27th August, 1991 still asks the respondent to pay a sum of Kshs.727,195/= and does not include any reminder that this sum should be paid before the end of August 1991 or else the appellant would not forego 1/3 of the amount claimed initially. Even the letter of 18th November, 1991 did not say anything about the appellant having backed out of the promise to forego 1/3 of the amount claimed due to failure by the respondent to honour its part of the obligation by paying the Kshs.727,195/= during August 1991. And up to 20th January, 1992 when the appellant acknowledged the cheque for Kshs.727,195/= nowhere in it does the appellant say something like www.kenyalaw.org “Since you did not pay the sum of Kshs.727,195/= in August 1991 we are not foregoing 1/3 of the amount claimed as earlier agreed. Please arrange to send us your cheque for the outstanding amount”. Instead the letter beats about the bush by saying in the letter. “Our accountant in re-checking the account as it appears from the correspondence that you owe us more money than has been paid. We shall revert to you shortly”. This part of the letter was too vague it could not put anybody on alert as to what these other monies owed were! And when the learned Senior Principal Magistrate stated in her judgement as to there being no firm commitment as to the period the amount of Kshs.727,195/= was to be paid and she was quite right to make this decision.

I agree that this further claim which gave rise to the case subject to this appeal was an afterthought and was rightly rejected by the lower court. I would dismiss this appeal which I hereby do. As regards the counter appeal, I find it has no merit. To my mind when the sum of Kshs.727,195/= was paid, interest thereon had been calculated up to August 1991 the date unilaterally chosen by the appellant for the payment thereof. Thus, interest thereon from August to December 1991 had not been calculated and added to this amount and when the learned Principal Magistrate had this done in accordance to the amendment made to the plaint in regard to this interest she was right and cannot be faulted for making this decision. She was also right in awarding the appellant 50% of costs since it had partly succeeded in the case. I dismiss the cross appeal too. As to costs I direct each party do bear its own on this appeal.

These shall be the orders of this court.

Delivered this 12th June, 2002.

D.K.S AGANYANYA

JUDGE www.kenyalaw.org