



**First Capital Limited v Zani (Civil Appeal 222 of 2021)
[2024] KEHC 3002 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3002 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 222 OF 2021
DKN MAGARE, J
MARCH 14, 2024**

BETWEEN

FIRST CAPITAL LIMITED APPELLANT

AND

NICHOLAS STEPHEN ZANI RESPONDENT

JUDGMENT

1. This is an appeal from the judgment of the Honourable Francis M. Kyambia given on 22/10/2021 in Mombasa CMCC 980 of 2019. The appellant was the defendant in the lower court.
2. The Respondent contended that they sought a loan of Kshs. 2,100,000. The Appellant gave him only a sum of 1,000,000. The loan was secured by a charge over Mombasa/Ziwa La Ngombe/1252.
3. The respondent contended on the other hand that they found the parcel worthless and decided not to issue the balance. The loan agreement had been signed on 18/3/2019. The appellant filed submissions dated 11/11/2023. They urged the court to allow the appeal with costs. They set out the duty of the court as laid out in the case of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

4. They stated that there are 2 issues that emerge from the appeal, that is;-
 - i. Whether the court erred in holding that the loan agreement was subservient to the charge.



- ii. Whether the court rewrote the agreement between parties.
5. The Appellant had filed a 5 grounds Memorandum of Appeal dated 13/11/2021. They now argue that there are 2 grounds combined. The reality is that the grounds were prolixious and not concise.
6. It should be recalled that Order 42 Rule 1 of the Civil Procedure Rules provides as doth: -

“ 1. Form of appeal –

- 1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
(2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

7. The Court of Appeal had this to say about compliance with Rule 86 of the Court of Appeal Rules (which is *pari materia* with Order 42 Rule 1 of the Civil Procedure Rules) in the case of *Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat* [2020] eKLR: -

“We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See *Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others* [2013] eKLR) and *Nasri Ibrahim v. IEBC & 2 Others* [2018] eKLR. In the latter case, this Court lamented:

“We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs.” The 18 grounds of appeal presented by the appellant, *Robinson Kiplagat Tuwei* against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues...”

8. In the case of *Kenya Ports Authority v Threeways Shipping Services (K) Limited* [2019] eKLR, the Court of Appeal observed that: -

“Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In *William Koross V. Hezekiah Kiptoo Kimue & 4 others*, Civil Appeal No. 223 of 2013, this Court stated:

“The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that



memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better.”

9. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
10. In the case of *Mbogo and Another vs. Shah* [1968] EA 93 where the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
11. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.
12. In the case of *Peters vs Sunday Post Limited* [1958] EA 424, court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”
13. The duty of the first appellate court remains as set out in the *Court of Appeal for Eastern Africa in Pandya -vs- Republic* [1957] EA 336 is as follows:-

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.
14. In *Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd* (2017) eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth:-

“Courts adopt the objective theory of contract interpretation and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document’s meaning should be derived from the document itself,



without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it.

In *Prudential Assurance Company of Kenya Limited V Sukhwender Singh Jutney and Another*, Civil Appeal No. 23 of 2005 the Court citing a passage in *Odgers Construction of Deeds and Statutes* (5th edn.) at p.106 emphasized that in construing the terms of a written contract;

“It is a familiar rule of law that no parol evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well to deeds as to contracts in writing. Although the rule is expressed to relate to parol evidence, it does in fact apply to all forms of extrinsic evidence.”

15. The trial court and this court will similarly construct documents as there are no witnesses required to know the content of a document. Therefore, where the findings of the trial Court are consistent with the evidence generally, this Court should not interfere with the same.

Appellant’s submissions

16. The Appellant argued that the court relied on the case of *Rainbow Acres Ltd –vs- NIC Bank Ltd* [2015] eKLR. They state that they had referred the court to a dearth of authorities including *A.S. Sheik Transporters Ltd –vs- Barclays Bank of Kenya Ltd* [2018] eKLR which quoted a Canadian Court of Appeal decision in *Downey –vs- Ecore International Incorporation* [2012] ONCA 480. They argued either erroneously that the decision of Justice Tuiyott should be preferred over that of Justice Gikonyo. They also elevated the decision of the Canadian Court of Appeal to fetish.

17. It was their case that the Charge expressly incorporates the letter of offer. They submitted that the decision of the lower court was erroneous. Reliance was placed on *Housing Finance Company of Kenya Ltd –vs- Gilbert Kibe Njuguna Nairobi CA 1601 of 1999*. Where, it was held:

“...Courts are not for as where parties indulging in varying terms of their agreements with others will get sanction to enforce the varied contracts. Contracts belong to the parties and they are at liberty to negotiate and even vary the terms as and when they choose and this they must do together and with meeting of the minds. If it appears to the Court that one party varied terms of the contract with another, without the knowledge, consent or otherwise of the other, and that other demonstrates that the contract did not permit such variation, the Court will say no to the enforcement of such contract.”

18. They stated that the Respondent is bound by the contract in force. He stated that the court cannot re-write contract. Reliance was placed on the case of *Pius Kimaiyo Langat –vs- Coop Bank of Kenya Ltd* [2017] eKLR where the Court of Appeal stated as doth;-

“We are alive to the hallowed legal maxim that it is not the business of the courts to rewrite contracts between parties. They are bound by terms of their contract, unless coercion, fraud or undue influence is pleaded and proved.”

19. They stated that the Appellant had a right to cancel a contract for reason that the security was dilapidated and could not have been adequate to cover the loan and the Respondent misrepresented the condition of the charged property. It is the case that factors may dictate that it is suicidal to continue to lend. Clause 10.2 of the agreement allows the lender to recall without giving reason or notice any money advanced. They urged the court to allow the appeal.



Respondent's Submissions

20. The respondent filed submissions dated 2/11/2023. He states that he signed for a loan of Kshs. 2,100,000. Only Kshs. 1,000,000 was disbursed. They stated that the first installment was due 30 days after crediting the money. That this installment is to fall due once the Kshs. 2,100,000 is disbursed. The loan period was 12 months and instalment of Kshs. 136,500/=.
21. They stated that a condition precedent was that there was to be valuation of the property secured by professional valuers. It was their case that the same advocates who prepared the charge are the same ones who prepared the loan agreement. The charge was registered as a security for Kshs. 2,100,000/= and not 1,000,000/=.
22. It was their case that they moved the court to enforce the balance. They state that they cannot be called upon to pay before the entire loan is released. They set out the defence.
23. They set out 4 issues for determination.
 - i. Did the loan agreement give directors the right to unilaterally review the loan agreement and cancel the same after approval?
 - ii. Did the Appellant cancel the loan unlawfully or alter it.
 - iii. The capacity to unilaterally alter.
 - iv. Did the charge document override the terms of loan agreement.
24. They proceeded to deal with the same verbatim. They stated that clause 10.2 does not expressly refer to the charge documents. The contents of the loan agreement were overridden by the charge documents. It was his humble submissions that the Appellant could only alter terms of the agreement before registration of charge. It was their submission that the Appellant lacked capacity to alter the agreement.
25. It was their case that the charge was a confidential document. The charge does not have terms that incorporated the loan agreement hence it is a standalone document, whose terms are not subject to the loan agreement.
26. They stated that to execute the Power of Sale, the Appellant must perform its obligation, which they are yet to perform. They state that the issue of the value of the subject matter is without basis as it was valued by the Appellant's valuer. They dissuade the court from relying on the naked eyes.

Analysis

27. The appeal is fairly straight forward. Three aspects are not disputed:
 - a. There was a loan agreement between parties for Kshs. 2,100,000/=.
 - b. There was in situ a Charge over Land Parcel No. Mombasa/Ziwa la Ngombe/1252.
 - c. The Appellant disbursed Kshs. 1,000,000/=.
28. The dispute was whether the Appellant could cancel the loan and recall the amounts disbursed. The issues pointed out by the Respondent do not emanate from the appeal. The Grounds of Appeal are as follows: -
 - a. The learned magistrate erred in law and in fact by holding that the loan agreement was subservient to the charge and the letter of offer signed by the same parties for same financial facility.



- b. The learned magistrate erred in law and in fact in that it failed to hold that all documents that were signed by the aforesaid parties with regard to the said loan facility created terms and conditions that were not dependent on the cumulative documents
 - c. The learned magistrate erred in law and in fact in that it failed to give effect to the clear terms set out in clause 10.2 of the loan agreement dated 18/3/2019 signed by the Appellant and respondent.
 - d. The learned magistrate erred in law and in fact in that the trial court wrongly re-wrote clause 10.2 of the aforesaid loan agreement in a manner that was not in tandem of what the Appellant and Respondent had expressly agreed upon.
 - e. The learned magistrate erred in law and in fact in arriving at a decision that was wholly against the weight of evidence.
29. The issue in this appeal is whether, the Appellant was entitled to cancel the loan and recall the amounts so far disbursed. In that context it will also answer the subtext whether the Respondent is bound to repay Kshs. 1,000,000/= together with interest before disbursement of the balance of Kshs.1,100,000/= . These questions will be answered on two particular aspects;-
- a. The relationship between the letter of offer and the Charge.
 - b. Remedies available from each document.
30. To understand the Respondent’s case, the question the court will ask in reverse. If after registration of the charge before disbursement, the borrower runs into a windfall or the purpose for which the loan was being sought disappears, is the lender still bound to collect the money. Can the bank force the borrower to take a loan?
31. The answer to this imbroglio depends on the purpose and definition of each document.
32. A Charge is defined in Section 59 and 2 of the *Land Registration Act* No. 3 of 2012. Under Section 3 a charge means:
- i. An interest in land or a lease securing money or money’s worth or the fulfilment of a condition.
 - ii. A sub charge.
 - iii. Instrument creating a mortgage or other charge.
33. Section 59 *Land Registration Act* No. 3 of 2012 provides as follows;
- “Lender’s consent to transfer. 59. If a charge contains a condition, express or implied by the borrower that the borrower will not, without the consent of the lender, transfer, assign or lease the land or in the case of a lease, sublease, no transfer, assignment, lease or sublease shall be registered until the written consent of the lender has been produced to the Registrar.”
34. Section 56 of the provides as follows:-
- “Form and effect of Charges. 56.
- 1. A proprietor may by an instrument, in the prescribed form, charge any land or lease to secure the payment of an existing, future or a contingent debt, other money or money’s worth, or the fulfilment of a condition and, unless the chargee’s remedies have been by instrument, expressly excluded,



the instrument shall, contain a special acknowledgement that the chargor understands the effect of that section, and the acknowledgement shall be signed by the chargor or, where the chargor is a corporation, the persons attesting the affixation of the common seal.

2. A date for the repayment of the money secured by a charge may be specified in the charge instrument, and if no such date is specified or repayment is not demanded by the charge on the date specified, the money shall be deemed to be repayable three months after the service of a demand, a written, by the charge.

35. It is crucial that 2 aspects relate to the Charge, that is: -

- a. A charge is security for the money and repayment is on date specified or 3 months after service of a demand if no date is agreed.

36. A charge secures only future liability and debt due. It does not provide how the liabilities are incurred. Once registered, as per the Respondent's submission, it cannot be unilaterally cancelled unless discharged. The validity or otherwise of the charge is therefore not in issue.

37. What was in issue, was the adequacy of the security provided by Land Parcel No. Mombasa/Ziwa La Ngombe/1252.

38. The charge operates by dint of Section 56(5) as security, that is: -

“ 5) A charge shall have effect as a security only and shall not operate as a transfer.”

39. The description is important. Being security, therefore the same must be fit for purpose at all times. That is why it is also known as a Continuing Security. The charge does not come into play until there is default or demand. I therefore agree with the Respondent that the two contracts were complete contracts on their own.

40. They must however be read in context. Where contracts form part of a service, it is not prudent to ignore the interrelatedness. In this case, a sum of Kshs. 2,100,000 was the value of the charge. At the time it was registered no money had been disbursed. If no money had been discharged, the charge remains 'valid' till discharged. If all the money or part thereof are disbursed, then the charge remains. If in any case, sums over 2,100,000/= are disbursed, the charge remains valid for only 2,100,000/= and its attendant interest.

41. It is therefore unnecessary to find, which contract supersedes the other as both serve different purposes. If the entire amount were disbursed, the Respondent pays and leaves only 200,000/= then definitely can he argue that the Appellant cannot recover the 200,000/= because, it is not 2,100,000/= ? I don't fathom so.

42. The Court of Appeal in *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR, the court of Appeal was of the considered position that: -

“In our view, is a serious misdirection on the part of the learned judge. A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.



As was stated by Shah JA in the case of Fina Bank Limited vs Spares & Industries Limited (Civil Appeal No 51 of 2000) (unreported):

“It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity’s function to allow a party to escape from a bad bargain”.

43. It is not the duty of this court to release a party of a bad bargain. The letter of offer provides what remedies parties could exercise. This includes cancellation or recalling the loan. The Appellant was justified in not disbursing any further. Once security ceases to be security, then the Respondent cannot force the Appellant to throw good money after bad. The duty to pay arose, within 30 days the first coin was disbursed.
44. There was no obligation to postpone till happening or another event or disbursement of further sums. The Respondent is not bound to pay more. It has not received the amounts disbursed, however, is another ball game. The Respondent was under duty to repay.
45. The Respondent in this proceeding have proved that they were right in cancelling the loan. Why did they not repay the money already owed. If they were under impression that they were to be given 2,100,000/= and nothing less, they should not have accepted 1,000,000/=. The Respondent must remember that it is the duty of the debtor to search for the creditors and pay them. They cannot refuse to refund money paid partly or in full on a valid contract.
46. Creditors have no duty to seek the creditors. Their obligation is to be available to be paid. The court erred in predicating prepayment on the Appellant paying more money. It makes no sense to throw good money after bad. In Bank of Africa Limited v Juja Coffe Exporters Limited & 4 others [2018] eKLR. The court of Appeal, WAKI, KARANJA & KOOME, JJ.A) stated as doth: -

“The Court observed in the process, that 'a bank has no money of its own and it is axiomatic that it uses public funds to trade with. The applicant obtained a large amount of those funds and had full benefit of it.' And so it is in this case.”

47. I therefore find that the Appellant’s appeal is merited. The court fell into error when it descended into the arena, to resolve a nonexistent conflict. It is irrelevant to determine what between the Letter of Credit and the Charge. The loan offer deals with the money before default occurs. If no default ever occurs, the charge may never be in play.
48. However, if default occurs, the charge enters into the room, and sitting on a high pedestal. In the circumstances, I find the Appellant’s case merited. I allow the same, set aside the decision of the Chief Magistrate F. Kyambia and in lieu thereof, I substitute with an order dismissing the suit in the lower court.
49. This is informed by the decision of the Supreme Court, where they set guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

“(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating



the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

50. Therefore costs follow the event. The event is dismissal of the suit and the Appeal. The Appellant shall have costs both in the court below and in this court.

Determination

51. The upshot of the foregoing is that I make the following orders;-
- a. The appeal is merited, and is consequently allowed. The judgment of the Hon. F. Kyambia given on 22/10/2021 in Mombasa CMCC 980 of 2019 is set aside in toto. It is substituted with an order dismissing CMCC 980 of 2019 with costs to the Appellant herein.
 - b. The Appellant to have costs of Kshs. 120,000/= in this appeal.
 - c. The file be closed.

**DELIVERED, DATED AND SIGNED VIRTUALLY ON THIS 14TH DAY OF MARCH, 2024.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

Appearances

M/s Gikandi and company advocates for the Appellant

M/s for Wameyo Onyango and company advocates for the Respondent

Court Assistant – Millicent Thaithi

