Fincredit Limited v Waithanji (Commercial Appeal E133 of 2023)
[2024] KEHC 3855 (KLR) (Commercial and Tax) (12 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3855 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL APPEAL E133 OF 2023

MN MWANGI, J

APRIL 12, 2024

BETWEEN

FINCREDIT LIMITED ..... APPELLANT

AND

ELIAS KARANJA WAITHANJI ..... RESPONDENT

JUDGMENT

1. The claim against the respondent in the lower Court was that on 17th November, 2021, the respondent applied for a mobile cash loan worth Kenya Shillings Fifty Thousand (Kshs.50,000/-) which was to be repaid by way of six monthly instalments. That after the respondent accepted the terms and conditions, the appellant accepted the loan request and disbursed the loan amount on 24th November, 2021. It is alleged that the respondent did not make any repayment, causing the loan account to fall into arrears. That despite demand for payment of the outstanding loan amount being made by the appellant, the respondent persisted with default, prompting the appellant to file a claim in the Small Claims Court.

2. In the impugned judgment, the Trial Court dismissed the appellant's claim with no orders as to costs. The Trial Court found that the loan statement (payment 28106 EMFLX Details) alone was not enough to show liability on the part of the respondent without any other independent evidence of proof of disbursement of the loan such as an Mpesa statement, cash deposit slip or a bank statements. The Trial Court also noted that the respondent did not file any response to the claim.

3. Being dissatisfied with the said judgment, the appellant filed a Memorandum of Appeal dated 22nd June, 2023 raising the following grounds of appeal-

    (i) That the Learned Magistrate erred in law and fact by dismissing the suit despite the respondent admitting the whole claim; and

ii. Such further and other grounds as may be raised at the hearing of the appeal.

4. The appellant's prayer is for this Court to allow the appeal with costs and to set aside the judgment dated 24th May, 2023 and that SCC Comm. No. E1881 of 2023 Fincredit Limited v Elias Karanja Waithanji be set down for hearing before any Magistrate other than Hon. J. W. Munene, RM.

5. Although the appellant served the Record of Appeal on the respondent, he did not participate in this appeal. The appellant filed written submissions dated 6th October, 2023.

6. In the appellant's submissions, Ms Ngui, learned Counsel for the appellant stated that despite service of the statement of claim, the respondent failed to enter appearance or file a response and that the Trial Court directed the appellant to file its submissions and the Court would set a date for judgment. The appellant stated that before it filed its submissions as directed by the Trial Court, the respondent served it with his response in which he admitted the entire claim. The appellant therefore blamed the Trial Court for failing to appreciate the pleadings before the Court and for failure to consider the respondent's response.

7. Ms Ngui relied on the Court of Appeal decision in Global Vehicles Kenya Limited v Lenana Road Motors [2015] eKLR on the crucial role of pleadings in the legal process. She submitted that since the claim was admitted, the most appropriate remedy would have been entry of judgment on admission. The appellant's Counsel cited the High Court decision in Express Automobile Kenya Limited v Kenya Farmers Association Limited & another [2020] eKLR, to support the argument that the respondent's admission was binding since it was made consciously and deliberately. Counsel contended that the respondent did not dispute the terms of the lending, disbursement of the loan and/or the amount owing and did not controvert the debt by any documents. That the respondent only sought the Court's indulgence for a suitable payment structure.

Analysis And Determination

8. I have re-examined the Record of Appeal and given due consideration to the appellant's submissions. The issue for determination is whether the Trial Court erred by dismissing the suit despite the respondent's alleged admission of the whole claim.

9. As the first appellate Court, this Court's duty is to revaluate the evidence adduced before the Trial Court and draw its own conclusions, while bearing in mind that it neither saw nor heard the witnesses testify. This principle was addressed by the Court of Appeal in Selle & Another vs Associated Motor Boat Co. Limited & others [1968] EA 123 as follows-

> "I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this from a trial by the High 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. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Saif vs Ali Mohamed Sholan [1955], 22 EACA 270."

10. Irrespective of the fact that the respondent did not participate in this appeal, it is the duty of this Court to satisfy itself that the appellant proved its case before the Trial Court on a balance of probabilities. Section 107 of the *Evidence Act* provides as follows on the burden of proof

> " 107.
>
> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

11. The Court of Appeal in Wareham t/a A.F. Wareham and 2 others v Kenya Post Office Savings Bank [2004] 2 KLR 91 elaborated on the plaintiff's duty to prove its case, in the following words-

> " [W]e are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings and the issues of fact or law framed by the parties or the curst on the basis of those pleadings pursuant to order XIV of the Civil Procedure Rules. And the burden of proof is on the plaintiff and the degree there of is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden should fail".

12. In this matter, the Trial Court dismissed the appellant's claim upon finding that though served, the respondent did not file any response to the claim and that the loan statement produced was not sufficient to show liability without any other independent evidence of proof of disbursement of the loan.

13. In the impugned judgment, the Trial Court found that there was no response filed by the respondent despite service of the statement of claim. The appellant's contention however was that the respondent put in a response to the statement of claim and that it was an unequivocal admission of the entire claim warranting judgment on admission.

14. Having looked at pages 37 and 38 of the Record of Appeal, I am not persuaded that the response to the statement of the claim was made by the respondent as the said response was not signed or initialled by him. For the that reason, I am also not persuaded that there was an unequivocal admission of the appellant's claim from the alleged response to the statement of claim where the respondent purportedly expressed his willingness to pay the loan in instalments and requested for a lenient payment plan, because he had lost his job and he has a family to take care of.

15. I am guided by Section 35(4) of the *Evidence Act* which provides that-

> " For the purposes of this section, a statement in a document shall not be deemed to have been made by a person unless the document or the material part thereof was written, made or produced by him with his own hand, or was signed or initialled by him or otherwise recognized by him in writing as one for the accuracy of which he is responsible."

16. In Guardian Bank Limited v Jambo Biscuits Kenya Limited [2014] eKLR, the Court held as follows on judgment on admission-

> " The principle applicable in judgment on admission is that the admission must be very clear and unequivocal on a plain perusal of the admission. The admission in the sense of Order 13 Rule 2 of the Civil Procedure Rules is not one which requires copious interpretations or material to discern. It must be plainly and readily discernible."

17. Bearing in mind the holding in the above authority, the provisions of Section 35(4) of the *Evidence Act* and the circumstances of this case where the purported respondent's witness statement and the response to the statement of claim were not signed by the respondent, the Trial Court cannot be faulted for not entering judgment in the appellant's favour.

18. In addition, from the Record of Appeal, the loan statement (payment 28106 EMFLX Details) shows that Kshs.50,000/- was disbursed. The loan application form produced indicates that the applicant sought a loan of Kshs.150,000/- to be repaid in 12 instalments. The Trial Court found that there was no proof of disbursement of the loan amount and the respondent's indebtedness to buttress the loan statement (payment 28106 EMFLX Details), which on its own, was not sufficient to establish the respondent's liability.

19. Having considered the evidence in its totality, it is my finding that the Trial Court correctly relied on and appreciated the effect of Section 37 of the *Evidence Act* which provides that-

> " Entries in books of account regularly kept in the course of business are admissible whenever they refer to a matter into which the Court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability."

20. The Court also properly applied the decision of the Court in Five Continents Limited v Mpata Investments Ltd [2003] KLR 443, cited in his judgment, to the facts before him.

21. The upshot is that the appeal herein is dismissed for want of merits. There shall be no orders as to costs as the respondent did not participate in this appeal and the lower Court case.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12TH DAY OF APRIL, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Ms Onsare for the appellant

No appearance for the respondent

Ms B. Wokabi – Court Assistant.